

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**  
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



**A comparative study on  
the regime of surrogacy  
in EU Member States**

STUDY





**DIRECTORATE GENERAL FOR INTERNAL POLICIES**  
**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND**  
**CONSTITUTIONAL AFFAIRS**

**LEGAL AFFAIRS**

# **A Comparative Study on the Regime of Surrogacy in EU Member States**

## **STUDY**

### **Abstract**

This study provides a preliminary overview of the wide range of policy concerns relating to surrogacy as a practice at national, European and global level. It undertakes an extensive examination of national legal approaches to surrogacy. It also analyses existing European Union law and the law of the European Convention of Human Rights to determine what obligations and possibilities surround national and transnational surrogacy. The study concludes that it is impossible to indicate a particular legal trend across the EU, however all Member States appear to agree on the need for a child to have clearly defined legal parents and civil status.

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## LIST OF ABBREVIATIONS

<b>1980 HC</b>	Hague Convention on the Civil Aspects of International Child Abduction
<b>ABGB</b>	Allgemeinen bürgerlichen Gesetzbuch (Austrian Civil Code)
<b>AHPC</b>	Ad Hoc Parliamentary Committee (South Africa)
<b>ART</b>	Assisted reproductive technique
<b>BGN</b>	Bürgerliches Gesetzbuch (German Civil Code)
<b>C.civ</b>	Civil Code of Romania
<b>C. civ. Q</b>	Civil Code of Quebec
<b>CJEU</b>	Court of Justice of the European Union
<b>DI</b>	Donor insemination
<b>DCC</b>	Dutch Civil Code
<b>EGBGB</b>	Einführungsgesetz zum Bürgerlichen Gesetzbuch (German Introductory Law of the Civil Code)
<b>EC</b>	European Community/ Treaty of the European Community
<b>ECHR</b>	European Convention of Human Rights
<b>ESHRE</b>	European Society of Human Reproduction and Embryology
<b>EU</b>	European Union
<b>FC</b>	Family Code (Russia)
<b>FLA</b>	Family Law Act 1975 (Australia)
<b>GCC</b>	Greek Civil Code
<b>GBP</b>	Great British Pounds
<b>GSA</b>	Gestational Surrogacy Act 2004 (Illinois)
<b>HFEA 1990</b>	Human Fertilisation and Embryology Act 1990
<b>HFEA 2008</b>	Human Fertilisation and Embryology Act 2008

<b>ICCS</b>	International Commission on Civil Status
<b>ICSI</b>	Intracytoplasmic sperm injection
<b>IP</b>	Intended parent
<b>IVF</b>	In vitro fertilisation
<b>LTRA</b>	Ley sobre técnicas de reproducción humana asistida (Spanish law on the techniques of medically assisted reproduction)
<b>MP</b>	Member of Parliament
<b>MS</b>	Member State
<b>NAMAR</b>	National Authority of Medically Assisted Reproduction
<b>NCTC</b>	National Committee for Tripartite Cooperation
<b>PO</b>	Parental Order
<b>PIL</b>	Private International Law
<b>RF</b>	Russian Federation
<b>RT</b>	Reproductive technology
<b>SA</b>	South Africa
<b>SAA</b>	Surrogacy Arrangements Act 1985 (UK)
<b>SM</b>	Surrogate mother
<b>StAG</b>	Staatsangehörigkeitsgesetz (German Citizenship Act)
<b>TEU</b>	Treaty of the European Union
<b>TFEU</b>	Treaty on the functioning of the European Union
<b>UK</b>	United Kingdom
<b>UN</b>	United Nations
<b>UNCRC</b>	United Nations Convention on the Rights of the Child
<b>US</b>	United States
<b>VARTA</b>	Victorian Assisted Reproductive Treatment Authority
<b>WHO</b>	World Health Organisation



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## INTRODUCTION

### CONTEXT

While surrogacy is not a new reproductive practice, it is commonly accepted that it is an increasingly prevalent phenomenon. Recent reports have documented a rise in the practice of surrogacy, to include arrangements that cross national borders.<sup>1</sup> Precise statistics relating to surrogacy are, however, hard to estimate. This is for a number of key reasons. First, traditional surrogacy<sup>2</sup> does not necessarily require medical intervention and can thus be arranged on an informal basis between the parties concerned. Second, although gestational surrogacy does require medical intervention, officially reported statistics do not necessarily record the surrogacy arrangement but often only the IVF procedure.<sup>3</sup> Third, in many countries there is simply no legal provision, regulation or licensing regime for either fertility treatment and/or surrogacy, to include commercial surrogacy in countries where such is not otherwise legally prohibited. This means that there are no formal reporting mechanisms, which can lead to a rather *ad hoc* collection of statistics by individual organisations, if indeed they are available at all. Finally, in countries where surrogacy is legally prohibited, those involved could potentially face criminal prosecution, thus exacerbating the difficulties of collecting relevant and accurate data.

Despite these problems, we can still point to a number of factors which signal a rise in the practice of surrogacy. First, a simple internet search reveals a plethora of agencies and clinics that very explicitly seek to facilitate surrogacy arrangements. Sometimes these are voluntary organisations, which seek to match willing surrogate mothers and hopeful parents on a non-commercial basis;<sup>4</sup> while others operate on a commercial basis either as part of a fertility clinic or in partnership with fertility clinics.<sup>5</sup>

Second, there are also increasingly frequent stories in the media about surrogacy arrangements – whether positive or negative, successful or unsuccessful – as well as references to surrogacy in popular culture arenas, such as television shows.<sup>6</sup>

Finally, there has been a recent surge in reported case law relating to surrogacy across a number of jurisdictions. Interestingly, while some of this case law does involve private disputes between the parties to the arrangement,<sup>7</sup> the primary thematic trend relates to difficulties in formal state recognition of the wishes of the parties to the arrangement with respect to the legal status and legal parenthood of the children involved. This category of case law can emerge in two main ways.

The first scenario is where a country either prohibits surrogacy, or makes no express provision for it. When a child is born following a surrogacy arrangement, the general rules of attributing legal parenthood apply and often a child ends up being cared for by someone with whom they have no legal connection.<sup>8</sup> This can create a number of

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<sup>1</sup> Hague Conference on Private International Law (2012) A Preliminary Report on the Issues Arising from International Surrogacy Arrangements, pp. 6-8.

<sup>2</sup> Please see Table 1 below for a summary of the definitions used in this Report.

<sup>3</sup> E.G. Human Fertilisation and Embryology Authority (2012) Fertility Treatment in 2011: Trends and Figures. Available at: <http://www.hfea.gov.uk/104.html>.

<sup>4</sup> E.G. The UK organisation Childlessness Overcome Through Surrogacy (COTS): <http://www.surrogacy.org.uk/>.

<sup>5</sup> E.G. Surrogacy Cyprus: <http://www.cyprus-surrogacy.com/index.html>.

<sup>6</sup> E.G. see storylines in the recent US sitcom, 'The New Normal': <http://www.nbc.com/the-new-normal/>; and the popular British Soap, 'Coronation Street': <http://www.itv.com/coronationstreet/news/tinassurrogacy/> h.

<sup>7</sup> E.G. in the UK see: Matter of TT (A Minor) [2011] EWHC 33 (Fam) and Matter of N (a child) [2007] EWCA Civ 1053.

<sup>8</sup> Jackson, E (2006) 'What is a Parent?' in Diduck A and K O'Donovan (eds) *Feminist Perspectives on Family Law* (Abingdon: Routledge-Cavendish) pp 59-74 and S. Dermout, H. van de Wiel, P. Heintz, K. Jansen and W.

difficulties, not least in relation to acquiring and exercising parental responsibility, maintenance provision and inheritance law. Formal adoption – if permitted in the circumstances – must take place, or the courts must rely – if available – on other less permanent family law measures in order to secure some legal certainty for the child and the parent(s).<sup>9</sup> While the courts in some Member States have been willing to evoke adoption or other family law measures subsequent to a surrogacy arrangement,<sup>10</sup> others have refused to do so, on the basis of public policy.<sup>11</sup>

The second, and arguably more complicated scenario, involves formal recognition following a cross-border surrogacy. Here, the intended parent(s) travel/s to another country where surrogacy arrangements are more readily facilitated and/or available at less expense, either because the fertility treatment (i.e. IVF for a gestational surrogacy) is cheaper or because the fee paid to the surrogate mother is lower. While similar difficulties apply in relation to legal parenthood, the situation can be further exacerbated when the rules on legal parenthood in the two countries are mismatched. For example, under Ukrainian,<sup>12</sup> Russian<sup>13</sup> and Californian<sup>14</sup> law the intended mother can be automatically regarded as the legal mother, while for most Member States legal motherhood is attributed on the basis of parturition, irrespective of where the birth took place.<sup>15</sup> Similar difficulties can arise in relation to legal fatherhood, as well as the recognition of two parents of the same sex. This can potentially leave a child not only legally parentless, but also stateless and without citizenship given that their birth registration documentation is not recognised beyond the country of birth. This scenario is particularly problematic when the child needs not just civil status travel documentation (i.e. a passport), but also a visa to gain entry into the home country of the intended parent(s). While some Member States have worked towards accommodating the difficult consequences of such scenarios, whether through judicial deliberations and/or through the publication of pre-emptive governmental advice,<sup>16</sup> others have refused to do so, again on the basis of public policy.<sup>17</sup>

While surrogacy has been a legal concern for over three decades,<sup>18</sup> there has been a recent surge of reports and research in the area of private international law on the particular legal difficulties associated with cross-border surrogacy arrangements.<sup>19</sup> This

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Ankum, 'Non-commercial surrogacy: an account of patient management in the first Dutch Centre for IVF Surrogacy from 1997 to 2004', *Human Reproduction*, 2010, vol. 25, n° 2, p. 448.

<sup>9</sup> E.G. the English courts may grant a non-parent a 'residence order' under the Children Act 1989 if they satisfy certain requirements. A residence order will automatically confer parental responsibility, but not legal parenthood. In a number of recent cases in Australia, 'parental responsibility orders' have been granted to intending parents to attribute them with the ability to make day-to-day decisions concerning the child. However, legal parenthood has not been conferred in these cases: *Dudley and Chedi* [2011] FamCA 502; *Hubert and Juntas* [2011] FamCA 504; *Findlay and Punyawong* [2011] FamCA 503; and *Johnson and Anor & Chompunut* [2011] FamCA 505. See further Millbank J (2011) "The New surrogacy Parentage Laws in Australia: Cautious Regulation or '25 brick walls'?", 35(2) *Melbourne University Law Review* 1-44.

<sup>10</sup> E.G. Austria, Belgium, Denmark, Italy, Ireland, the Netherlands, Sweden and UK.

<sup>11</sup> E.G. France.

<sup>12</sup> Family Code of Ukraine, article 123(2).

<sup>13</sup> Family Code of Russia, articles 51-52.

<sup>14</sup> *Matter of Baby M* (1988) 537 A.2d 1227; as reinforced by *Johnson v Calvert* [1993] 5 Cal 4<sup>th</sup> 84 and *Buzzanca v. Buzzanca* [1998] 72 Cal. Rptr.2d 280.

<sup>15</sup> E.G. as per the UK's Human Fertilisation and Embryology Act, s 33(3).

<sup>16</sup> E.G. Belgium, Ireland and UK.

<sup>17</sup> E.G. France. However, as this Report indicates, the executive branch of the French Government have seemingly been prepared to give *ex poste* recognition of foreign birth certificates in order to "smooth over" some of these difficulties and the precarious position of children born following cross-border surrogacy agreements. See section 2, Part B below.

<sup>18</sup> E.G. the first litigated surrogacy cases in the UK and US where in the early 1980s: *Re C (A Minor)* (wardship: surrogacy) [1985] FLR 846 and *Matter of Baby M* (1988) 537 A.2d 1227.

<sup>19</sup> E.G. Trimmings, K and P Beaumont (2011) 'International Surrogacy Arrangements: An Urgent Need for Legal regulation at the International Level' 7 *Journal of Private International Law* 627-647; Hague Conference of Private International Law (2011) *Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Agreements* (Prel. Doc. No 10 of March 2012); Hague Conference

work has offered insights into emerging surrogacy practices at a global level by tracking patterns in cross-border arrangements and cataloguing various national legal regimes.<sup>20</sup> Some of this work has also suggested solutions relating to the possible harmonisation of private international law principles and/or facilitating cross-border co-operation between countries with particular reference to issues such as parental status and the determination of the nationality and citizenship of the child.<sup>21</sup>

This work is clearly of importance for this study and will be used throughout. However, its private international law focus has meant an inevitable steer towards the resolution of cross-border legal disputes and a concentration on managing the legal *consequences* of cross-border surrogacy arrangements, rather than the legal – and policy – management of the practice of surrogacy *per se*. This is not to say that proposed models of legal regulation for surrogacy at the international level do not seek to encourage acceptable international standards for surrogacy, but rather that the existing private international law work does not provide a sustained engagement with a number of important policy considerations that the legal regulation of surrogacy must ultimately be informed by.<sup>22</sup> Although a concern for child welfare is clearly evident in this work, other crucial policy concerns are less visible; for example, issues of gender equality, reproductive freedom, exploitation, globalisation, health policy and regulation. While an important function of the law is to react to particular events that have happened and manage disputes, it is also clear that the role of law in society is much broader. It can be used as a preventative, normative or regulatory tool. When controversial issues such as surrogacy are addressed by law, it is crucial to reflect on the ultimate purpose of any legal approach and the broader consequences that may ensue. While it is beyond the auspices of this study to make concrete policy recommendations, section 1 outlines the key policy concerns that any legal approach would have to consider before it is taken forward.

To date, no research has specifically considered the possibility of a European Union ('EU') level response to the legal difficulties raised by surrogacy. One of the main aims of this study has been to consider the potential remit of the EU in this area (see below). In recent years, various EU directives pertaining to reproductive healthcare provision and the management of bio-medical material have been instigated.<sup>23</sup> However, when it comes to the regulation of matters relating to family relations, the role of the EU is much less visible. This, in part, pertains to the limited competence of the EU legislator in the domain of family law.<sup>24</sup> Therefore, while examples of EU law being used to facilitate access to reproductive health services across Member States can be identified,<sup>25</sup> rarely do these examples extend to subsequent family status; one of the key legal issues in the context of surrogacy. This study is therefore the first to investigate the potential remit of

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on Private International Law (2012) A Preliminary Report on the Issues Arising from International Surrogacy Arrangements (Prel. Doc No 11 of March 2011).

<sup>20</sup> A forthcoming book publication will provide National Reports on a significant number of countries worldwide: Trimmings, K and P Beaumont (eds) (forthcoming 2013) *International surrogacy Arrangements: Legal Regulation at the International Level* (Oxford, Hart Publishing).

<sup>21</sup> See Trimmings, K and P Beaumont (2011) 'International Surrogacy Arrangements: An Urgent Need for Legal regulation at the International Level' 7 *Journal of Private International Law* 627-647 and Trimmings, K and P Beaumont (eds) (forthcoming 2013) *International surrogacy Arrangements: Legal Regulation at the International Level* (Oxford, Hart Publishing), Part 3.

<sup>22</sup> Note, however, the acknowledgment of a range of vulnerabilities relating to surrogacy in: Hague Conference on Private International Law (2011) *Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Agreements* (Prel. Doc. No 10 of March 2012), pp 1-2, 26-27. The Hague Conference on Private International Law has not yet made any formal proposals in relation to any international instruments relating to surrogacy. The Permanent Bureau is, however, currently conducting research in this area and may ultimately provide more of a focus for private international law work on the various vulnerabilities that surrogacy presents.

<sup>23</sup> E.G. Tissue and Cells Directive 2004/23/EC.

<sup>24</sup> See Article 81 of the Treaty of the Functioning of the European Union ('TEU'), which permits the Council to establish measures addressing the cross-border implications of family law when such implications are the subject of acts adopted by the ordinary legislative procedure.

<sup>25</sup> E.G. *R v Human Fertilisation and Embryology Authority, ex parte Blood* [1997] 2 All ER 687, on the release of posthumously stored sperm for use in Belgium in a procedure that was otherwise illegal in the UK.

the EU in relation to surrogacy; a reproductive practice which may or may not involve medical intervention.

## DEFINITIONS

The following table defines the terminology used by this Report, given the unfamiliar and often contested nature of surrogacy-related terminology. While we have adapted the terms below, we accept that terms such as "surrogate mother" and "altruistic" continue to prove problematic in sufficiently capturing the both empirical realities and the subjectivities of the persons involved in surrogacy arrangements.<sup>26</sup> For example, a woman who bears a child for another person may never perceive of herself as a mother.

**Table 1. Summary of definitions**

Term	Definition
Surrogacy	A practice whereby a woman will become pregnant with the intention of giving the child to someone else upon birth.
Surrogate mother	The woman who carries and gives birth to the child.
Intended parent	The person who intends to raise the child. Sometimes the term 'commissioning parent' is used. However, this study will use only the term 'intended parent' given that not all surrogacy arrangements are commercial, which is what the term 'commissioning parent' seems to allure to.
Traditional surrogacy arrangement	A surrogacy arrangement where the surrogate mother's eggs are used and she is the genetic mother of the child. The pregnancy comes about either through an insemination procedure with the sperm of the intended father or donated sperm, or through sexual intercourse with the intended father or another man. Traditional surrogacy is sometimes also known as 'partial' or 'low-technology' surrogacy.
Gestational surrogacy arrangement	A surrogacy arrangement in which the surrogate mother's eggs are not used and someone else is the genetic mother of the child. The pregnancy comes about through an IVF procedure using either the intended mother's eggs or donated eggs. Gestational surrogacy is sometimes also known as 'full' 'IVF' or 'high-technology' surrogacy.
Altruistic surrogacy arrangement	A surrogacy arrangement where the surrogate mother is paid nothing, or only remunerated for her expenses associated with the surrogacy. Usually, the intended parent(s) cover such expenses.
Commercial surrogacy	A surrogacy arrangement where the surrogate mother is remunerated beyond expenses associated with the surrogacy. This may be termed a 'fee' or 'compensation' for pain and suffering. Again, usually the intended parent(s) cover such a payment.
Cross-border surrogacy	A surrogacy arrangement involving a surrogate mother and an intended parent or parents from different countries. An intermediary

<sup>26</sup> For an interesting critical discussion of terminology in the context of surrogacy see: Morgan, D (1989) 'Surrogacy: An Introductory Essay' in Lee, R and D Morgan (eds) Birth Rights: Law and Ethics at the Beginnings of Life (London: Routledge), pp.55-84.

arrangement	<p>may further add to the cross-border dimension. Often, more than two countries may be involved. Sometimes the term 'international surrogacy agreement' is used. We have not used this term in an effort to avoid giving the impression that such agreements are attended to by international legal measures. Moreover, the term 'cross-border' emphasises that typically the parties involved must cross borders in order for the surrogacy to take place, and that typically the intended parent(s) seeks to cross borders 'back' to their home country.</p>
Legal parenthood	<p>The attribution of legal status to someone as the parent of a child. The term legal parenthood is preferred to 'legal parentage' given the association of the word 'parentage' with physical lineage. Legal parenthood can be attributed on a number of grounds other than bio-genetic affinity.</p>
Parentage	<p>While technically this term can mean the same as parenthood, it is also commonly used to refer to a parent-child relationship based on bio-genetic affinity. When used in this study, it will mean only the latter.</p>
Reproductive technology	<p>The use of medical or other technology to help a person or persons reproduce.</p>
Fertility treatment	<p>The use of some sort of medical intervention and/or reproductive technology that enables a person or a couple to have a child. Fertility treatment interventions range from the use of hormone stimulating drugs, to high-technology interventions such as in vitro fertilisation (IVF) and its variants (e.g. intracytoplasmic sperm injection, ICSI). While surrogacy per se is not a treatment for infertility (like donor insemination and the use of donated gametes more generally, it bypasses the infertility condition), it may entail the use of one of these reproductive techniques.</p>
Collaborative reproduction	<p>Reproduction involving the use of reproductive bodily material and/or capacity from a person or persons who do not intend to raise the child with his/her intended parent(s). For example, donor insemination (DI); the use of donated eggs; and surrogacy.</p>
Assisted reproduction	<p>Reproduction involving either medical assistance and/or the use of reproductive bodily material and/or capacity from a person or persons who do not intend to raise the child with his/her intended parent(s).</p>



## **AIMS OF THE STUDY**

The underlying motivation for this study is to assess whether the EU should, or indeed could, adopt uniform rules relating to surrogacy. In order to help make such an assessment, the study has the following key aims:

1. To empirically investigate and analyse trends in the practices and attitudes towards surrogacy across the EU Member States through a number of indicative case-studies.
2. To identify and analyse policy issues relating to surrogacy that any process of EU harmonisation of laws, or indeed any legislative measure aimed at surrogacy, would need to be informed by.
3. To investigate and analyse different legislative models and other express provisions for surrogacy (e.g. professional organisation guidelines), to include how judges have interpreted these provisions in cases that have come before the courts. The analytical focus will be comparative and will evaluate both the benefits and difficulties that arise with different approaches and subsequent legal disputes. Given that only a few Member States have any explicit legislation for surrogacy, the legal regimes and case law in a number of indicative jurisdictions beyond the EU will also be examined, in order to shed greater light on the format that legislation might take in this area and the difficulties that may ensue.
4. To investigate and analyse the role of the courts in solving the disputes and problematic legal issues that arise when a legal vacuum exists in relation to surrogacy, or where all forms of surrogacy are legally prohibited. The analytical focus will be to suitably categorise the different types of case law that have arisen across the EU Member States that do not expressly provide for surrogacy, or where surrogacy in all forms is legally prohibited, and to evaluate the legal concepts and techniques that have been used by the judiciary; from e.g. the 'best interests of the child', to reference to constitutional and human rights provisions, or principles emerging from private international law.
5. To investigate and analyse the private international law issues emerging from cross-border surrogacy agreements and to provide an evaluation of what form legal regulation in this area could usefully take.
6. To investigate and analyse the potential remit of the EU in the area of surrogacy and to provide an evaluation of whether the EU should and/or could adopt uniform rules in this field.
7. To provide the European Parliament with a significant research report from which future research studies in the area of surrogacy may emerge.



**Table 2 Overview of the legal approaches of EU Member States**

Country	General prohibition	Prohibition on commercial surrogacy	*Expressly facilitated	No special law on surrogacy
Austria	Prohibition of egg donation; gestational surrogacy thus prohibited	No specific prohibition in relation to traditional surrogacy	No	No special law for traditional surrogacy
Belgium	No	Commercial surrogacy prohibited on public policy grounds	Some provision in one fertility clinic, subject to conditions; there are currently legislative proposals before Parliament	No special law for altruistic surrogacy: contracts are not enforceable and adoption is required to transfer legal parenthood
Bulgaria	Yes	n/a	No: however, draft legislation currently under consideration	n/a
Cyprus	No	No	No	Yes
Czech Republic	No	No	No	Yes
Denmark	No	Yes	No	No special law for altruistic surrogacy; contracts are not enforceable and adoption is required to transfer legal parenthood
Estonia	No	No	No	Yes
Finland	Prohibition on surrogacy arrangements using fertility treatment	No specific prohibition in relation to traditional surrogacy	No	No special law for traditional surrogacy
France	Yes	n/a	n/a	n/a
Germany	Yes	n/a	n/a	n/a
Greece	No	Yes	Yes: altruistic gestational surrogacy subject to restrictions	n/a
Hungary	No	Yes	No	No special law for altruistic surrogacy.
Ireland	No	Yes	No: however, there are some formal guidelines relating to cross-border surrogacy agreements	No special law for altruistic surrogacy: contracts are not enforceable and adoption is required to transfer parenthood. However, the courts recently gave permission for genetic intended parents to be named as the legal parents on the birth registrar.
Italy	Yes	n/a	n/a	n/a
Latvia	No	Yes	No	No special law for altruistic

				surrogacy.
Lithuania	No	No	No	Yes
Luxembourg	No	No	No	Yes
Malta	Yes	n/a	n/a	n/a
Netherlands	No	Yes	Yes: altruistic gestational surrogacy is required by law to abide by professional guidelines	No special law for parenthood: adoption required
Poland	No	No	No	Yes
Portugal	Yes	n/a	n/a	n/a
Romania	No	No	No	Yes
Slovakia	No	No	No	Yes
Slovenia	No	No	No	Yes
Spain	Yes	n/a	No	n/a
Sweden	Illegal for fertility clinics to make surrogacy arrangements	No	No: the Swedish Council on Medical Ethics recently published a report on assisted reproduction, in which it suggested that altruistic surrogacy should be permitted in Sweden.	No special law for privately arranged surrogacy: adoption required to transfer parenthood
UK	No	Yes	Legislation providing for the transfer of parenthood in certain conditions	No special law for altruistic surrogacy: contracts are not enforceable and parenthood will only be transferred in certain circumstances

## **1. EMPIRICAL ANALYSIS**

### **1.1. QUANTITATIVE DATA COLLECTION**

Detailed data relating to surrogacy in the EU was sought from two sources. Firstly, a rapid review of the literature was conducted to locate official data reported in published studies set in the EU. Secondly the research team designed and conducted a survey of clinics and associations involved in surrogacy. These two sources of data were complimentary as the published data both helped inform the questions asked in survey and complemented the data returned to us.

#### **1.1.1. Surrogacy survey**

As to the empirical data collection, the study team developed a survey to solicit data on current arrangements regarding surrogacy in the EU Member States. The data from the survey was used to provide an empirical context for the remaining aspects of the study.

Our survey on the current state of surrogacy legislation has been developed and translated into Dutch and Greek. The survey sets out to determine, in each of the countries the prevalence of childlessness and use of surrogacy, and shed light on some of the practical processes by which surrogacy takes place.

The survey, along with the Letter of Support from the European Parliament and a cover letter was initially sent via e-mail to 13 clinics/Organisations across four countries – six in Greece, three in Belgium, one in the Netherlands and three in the UK. A contact in France facilitated receipt of data on France also. Contact was made by telephone with a number of these clinics to make them aware of the questionnaire before it was sent. In an attempt to expand our sample we asked respondents to identify other clinics and organisations in their country that may have relevant data. It was hoped that this would allow us to reach a wider sample of respondents. Five clinics/associations were contacted by email subsequent to the initial mailout.

We anticipated that responses to the request to complete the Surrogacy Questionnaire would be limited due to the timing of when the requests were sent out – around the Christmas break. In order to boost the response rate we tried a range of methods to contact those clinics/organisations that did not return the questionnaire. Each was sent a reminder e-mail which was then followed-up with telephone calls and/or faxes. Table 2 below details our survey responses and attempts to follow-up in cases where the survey was not returned.

Disappointingly, only six questionnaires were returned, even after follow-up contacts were made. We did receive at least one response from each of our representative countries. These data were supplemented with data derived from our review of the literature. There may be several reasons why the questionnaires were not returned. The nature of the topic may have generated some apprehension to participate, despite the Letter of Support from the European Parliament sent to all potential respondents and our assurances of anonymity given to all respondents. Also, more than one respondent commented on the complexity of the topic and the ability to provide data on parts of the surrogacy situation in their country and not on others (e.g. having data pertaining to local surrogate mothers only and not having any data or knowledge as to surrogacy arrangements involving surrogate mothers from other countries).

**Table 3 Summary of the surrogacy questionnaire responses**

<b>Country</b>	<b>Stakeholder</b>	<b>Completed questionnaire (Y/N)</b>	<b>Type (number) of reminder</b>
<b>Belgium</b>	Clinic 1	N	email (1); telephone (1); fax (1)
	Clinic 2	Y	
	Clinic 3	N	email (1); telephone (1); fax (1)
	Clinic 4	N	email (2); telephone (1); fax (1)
<b>France</b>	Association 1	Y	
<b>Greece</b>	Clinic 1	Y	
	Clinic 2	N	email (2); telephone (1)
	Clinic 3	N	email (2); telephone (2)
	Association 2	N	email (2); telephone (1)
	Association 3	Y	
<b>The Netherlands</b>	Clinic 1	Y	
<b>United Kingdom</b>	Association 1	Y	
	Association 2	N	email (2); telephone (1); fax (1)
	Clinic 1	N	email (3); telephone (3); fax (1)
	Clinic 2	N	email (2); telephone (2)
	Clinic 3	N	email (2); telephone (2)
	Association 1	N	email (2)
	Association 2	N	email (2); telephone (2)

### 1.1.2. Results

The data from the survey, supplemented from data reported in the literature, is summarised in Table 3. The number of children born to surrogate mothers varies considerable across Europe. As some respondents were only able to provide data from their own clinic, and because in most cases official data is not recorded, the more accurate estimate of the national figures are those from the UK as intended parents in the UK are required to obtain a Parental Order (PO) to give them legal parental responsibility. During the period from 1995 to 2007, between 33 and 50 POs were granted each year in the UK (Crawshaw 2013). The Human Fertilisation and Embryology Authority introduced its Eighth Code of Practice in 2009 which removed the guidance that licensed treatment centres only offer surrogacy when a woman seeking surrogacy was not physically able to get pregnant or if pregnancy was highly undesirable for medical reasons (Human Fertilisation and Embryology Authority 2009). This change came into force in 2010. Eligibility has also been extended from only married heterosexual couple to unmarried heterosexual couples and same-sex couples.

The number of POs resulting from surrogacy has risen (Crawshaw 2013). In 2008, 75 were granted; 79 in 2009, and 83 in 2010, and 149 in 2011. This rise is likely to continue as clinics target a wider group of potential parents (Crawshaw 2013). For example, the British Surrogacy Centre has opened a UK office aimed especially at gay couples.

**Table 4 : Summary of surrogacy arrangements**

Country	Number of children born to surrogate mothers per year	Countries from which surrogate mothers are found	Time from after birth to child handed to intended parents	Costs (average or range)
Belgium <sup>i</sup>	2	Belgium	Child handed over immediately	Not available
Greece	Not available	EU; mostly Greece	Child handed over immediately <sup>ii</sup>	€14000 - 50000
The Netherlands <sup>i</sup>	2	The Netherlands	Child handed over immediately <sup>iii</sup>	€7500
United Kingdom	149 <sup>iv</sup>	India, US, Ukraine <sup>iv</sup>	Child handed over immediately	€11780 <sup>v</sup>
France	200 <sup>vi</sup>	EU: Belgium, UK and Greece Non-EU: US, Canada, Ukraine, India and Russia	Within 1 day	€70000

<sup>i</sup> Data pertains to respondents' clinic only.

<sup>ii</sup> Provided that a relevant permission from the court has been attained and the child has been registered (to the National Registry) as the legal child of the intended parents.

<sup>iii</sup> The intended parents are deemed to be foster parents for the first year and can adopt the child after 365 days.

<sup>iv</sup> Crawshaw M, Blyth E, van den Akker O. (2013) The changing profile of surrogacy in the UK – Implications for national and international policy and practice. *Journal of Social Welfare and Family Law*, DOI:10.1080/09649069.2012.750478.]

<sup>v</sup> Median; £10000 converted at exchange rate on 5<sup>th</sup> April 2013.

<sup>v</sup> Relates only to cases where surrogate mother resides outside of France.

There is the potential, however, that even the data from the UK may not be entirely accurate. Comparing data from surrogacy agencies with official figures on the number of POs granted between 1995 and 1998 suggests that only about 50% of Intended Parents obtained a Parental Order during this period (Crawshaw 2013). Since 2008, however, there are now more Parental Orders in the official figures as compared to the number reported by UK surrogacy agencies. This may reflect births to surrogate mothers who reside outside of the UK. The UK General Register Offices for England and Wales reported that approximately 26% of POs granted in the year to October 2011 involved births outside the UK (up from 2% in 2008, 4% in 2009, and 13% in 2010 (Crawshaw 2013). In Scotland the 2011 figure for POs granted after overseas birth was 13%.

With regards to the number of parents unwillingly without children, a WHO study from 1991 estimated that 8 to 12% of couples with women of childbearing age are infertile (World Health Organization 1991). Note that the definition of fertility may vary depending on the length of time after a couple having regular unprotected sexual intercourse and not getting pregnant are deemed infertile. The UK Human Fertilisation Embryology Authority estimated that 16% of couples in the UK who are trying to get pregnant will not have done so after one year and 8% will not become pregnant after two years of trying (Human Fertilisation & Embryology Authority 2011). A study by Klemetti (2003) in Finland determined that 9% of women were infertile. From our survey, an estimate from one source was that 15% of couples are infertile. Another estimate was provided by our French respondent who estimated that 50000 French couples are infertile (gestational infertility). These figures, however, do not include same sex couples. In the UK, 32 POs (approximately 21% of total) were granted to same sex couples (Crawshaw 2013). This may actually be an underestimate of the frequency of same sex couple intended parents as the information on sexuality of intended parents by the Child and Family Court Advisory and Support Service for England is regarded as patchy.

The number of couples who seek assisted reproductive technique (ART) was estimated by survey respondents as 139300 in France (in 2010) - up from 122100 in 2007 (a 14% increase in 4 years), while 20000 couples in Belgium sought IVF in 2010 - up from 16700 in 2006 (a 20% increase in 5 years). In the UK, in 2011, a total of 50230 women received fertility treatment (In Vitro Fertilisation, Intra-Cytoplasmic Sperm Injection or Donor Insemination) (Human Fertilisation & Embryology Authority 2011). The estimate number of women resident in the UK, between the ages of 20 and 50 years, at the time of the 2011 census was 13164000 (Office of National Statistics 2012). Thus it can be estimated that 0.4% of women of childbearing age received fertility treatment in the UK in 2011. Shenfield *et al.* (2010) cautiously estimated that as of 2009 there were 24000 to 30000 cycles of cross-border treatment each year involving 11000 to 14000 patients.

Funding arrangements for ART differs across countries. Sorenson detailed the funding arrangements for ART in the European Union (Sorenson 2006).

Data on the number of parents who look into surrogacy as an option and begin the process to become surrogate parents comes largely from the literature. In data from Belgium collected over a 13 year period at one clinic facilitating surrogacy, 52 of 87

(60%) cases where interest was expressed led to a request to be considered for surrogacy. Of these 33 (63%) resulted in commencement of clinical procedures for a surrogate pregnancy (Austin et al. 2011). A study by Dermout *et al.* (2010) reported data on all non-commercial surrogacy that took place in the Netherlands between 1997 and 2004. During this period, 500 couples enquired about surrogacy. The French survey respondent reported that the number of parents deciding to use surrogacy between 2007 and 2011 were as follows: 300 in 2007, 300 in 2008, 400 in 2009, 500 in 2010 and 700 in 2011.

Good data was received on the country of residence of surrogate mothers in the surveyed countries (see Table 3). The clinics in Belgium and the Netherlands considered women resident in the country as potential surrogates. In the case of the Netherlands, they were required to be Dutch citizens. India, the US and Ukraine were mentioned as non-EU countries from which surrogate mothers were sought by intended parents in the UK and France. Crawshaw et al (2013) reported that in data from the Child and Family Court Advisory and Support Service for England for 2010-2011, where country of residence of the surrogate mother was known, 27% came from non-UK countries including 22% from India, US and Ukraine. In France, 200 children were born to surrogate mothers who resided outside of the country. There has been a steady increase in these cases: 120 in 2007, 125 in 2008, 150 in 2009, and 170 in 2010.

In the countries surveyed, the child is effectively handed over to the intended parents at or shortly after birth. In the UK the child is handed over immediately, and the intended parents must obtain a Parental Order after the first six weeks of the birth but within the first six months (Human Fertilisation and Embryology Act 2008). In Greece, the child is handed over (to the intended parents) immediately after his/her birth, if a relevant permission from the court has been attained and the child has been registered (to the National Registry) as the legal child of the intended parents.

In the Netherlands, intended parents are given the baby directly after delivery but the child is deemed to be a foster child until they are legally adopted exactly 1 year after birth. In France the child is handed over within one day.

Despite the fact that surrogacy was arranged on a non-commercial bases in each of the countries, the costs involved for the intended parents to obtain a surrogate child vary widely. In part this may be due to differences in clinical costs across countries but this is unlikely to explain the degree of variation in the reported estimates of costs. Indeed, within Greece, two sources provided estimates of €14000 and €50000. The costs reported were highest in France, perhaps reflecting the fact that this estimate related to international arrangements only. In the UK the median cost was estimated as €11780. This cost estimate was confirmed in the literature (Crawshaw 2013). Cases have been reported of costs as high as €27,120 (Horseley & Sheldon 2012).

Costs are intended to cover expenses relating to childbirth including the cost of IVF, agency fees, transportation, and legal expenses. In Greece, the surrogate mother is also compensated for lost earnings, while in the UK this can be claimed in some cases. In The UK respondents also reported covered costs to include the cost of meetings between the surrogate mother and the intended parents, food (e.g. if the intended parents ask the surrogate mother to eat organic food only before and during pregnancy), support group visits, and in some cases the cost of a short holiday for the surrogate mother after the birth (deemed necessary to allow surrogate mother to adjust after the birth). In each country the surrogate mother receives standard ante-natal care during pregnancy. In Belgium, surrogate mothers also receive psychological support.

As can be seen from our results as well those of others (Crawshaw 2013), it is clear that only very limited data are available across the EU and improved systems need to be put in place to routinely record relevant information across all countries.

## **1.2. POLICY MATTERS**

### **1.2.1. Introduction**

The EU landscape is extremely varied when it comes to surrogacy policies and legislation. Despite general similarities related to whether states adopt prohibiting or permissive policies, each case is unique and any attempt at generalisation would obscure significant aspects of diverse legislative and policy itineraries.

Since ART matters generate heated political debate, politicians are reluctant to take a clear stance, as the impact this may have on the electorate is uncertain. Policy design in different countries is the product of the interplay of various factors on many levels, including the influence of institutional arrangements, medical professional communities and the claims of women's movements on the one hand and of pro-life actors on the other. Feminist approaches also vary. In the UK and Italy, for instance, women's movements pushed for the liberalisation of abortion through permissive positions on ART contrary to pro-life views prioritising the human embryo; by contrast, in Germany and Switzerland they demanded a restrictive policy to protect women from scientific and patriarchal abuse (Engeli 2009).<sup>27</sup>

Political parties, institutions, associations of medical professionals, religious groups, social movements, party systems, private and public interests, all contribute to particular policy designs and legislation. Varone et al. (2006) refer to five distinguishing variables, namely policy goals, tools, target groups, final beneficiaries and implementers. The constellation of power of all groups involved and the choice of instruments make each country a separate case and a multi-causal approach seems to be the most pertinent, as similar outcomes may be the result of different policy paths. Analysing different approaches to ART they broadly distinguish between countries that 'design by non-decisions' which results in adoption of substantial policy content, 'designing by élites' which leads to intermediate policy design and finally 'design by mobilisation and consultation' whose outcome are restrictive policies.

Other important parameters are culture and kinship structures, attitudes toward new technologies and ethical dilemmas which in combination with the aforementioned factors lead to various state responses.

The following sections intend to provide the common themes expressed in the literature regarding ethical issues, health policy, children's welfare, globalisation, attitudes to surrogacy and regulation. Finally a section is dedicated to surrogacy as experience, because any gendered approach takes interest in both the public and the private spheres and drawing on ethnographic studies narratives of surrogates from different parts of the world will reveal differences in status, culture and ways of making sense of the situation, as well as identification of the regulatory gaps that exist. The list is certainly not exhaustive and dealing with each one separately could be the topic of numerous studies. Given the limited scope for policy analysis in this study, the aforementioned framework and the most salient and relevant of the themes that follow will be discussed with the purpose of better comprehending the different national approaches and possible

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<sup>27</sup> In the case of Germany, in particular, the fascination of the Third Reich with biotechnology and eugenics and their appalling consequences for humanity, help explaining the current aversion towards reproductive technologies, even by feminists and parties of the Left.



legislative and policy responses to existing challenges and dilemmas as well as exploring the possibility of common responses on the EU level.

### **1.2.2. The ethical debate: parenthood, commodification, autonomy**

On an ethical basis, there are different viewpoints on surrogacy, genetic (traditional) or gestational, altruistic or commercial. Most religions and relevant organisations are against surrogacy, particularly its commercial aspects, since they see it as immoral, against the unity of marriage and procreation, or against the dignity or the child to be carried by their biological mother; as a result, they call upon the law to maintain surrogacy as illegal. Liberal approaches, however, emphasise the need for the state and the law to stay neutral towards competing moral standards, drawing, among else, on John Stuart Mill's principle that only harmful practices should be prohibited by law and that one is ultimately sovereign over one's body and mind (Hatzis 2003). Legal arrangements seem to be struggling to cope with on the one hand these various moral views, and on the other a number of ethical issues involved in the idea and the procedures of surrogacy, which touch upon family structure and welfare of children, the nature of motherhood, and opposing views of politicians, feminists and pro-life activists.

Gestation is usually considered as part of the biological process of reproduction. In surrogacy, where it is unclear who the parent is, deciding who will bear legal responsibility for the child is complex and calls for a broader approach which focuses on both biological and social parenthood, a normative concept (Ettinger 2011). There are common elements in both biological and social parenthood, such as intentions, actions and emotional bonds. Biological parenthood presupposes a genetic link between parent and child and the parent must be causally responsible, whereas social parenting is defined and constrained by social norms. IVF has introduced other parties in what used to be a bipartite relationship, namely the doctor and, in some cases, the sperm donor and finally, in surrogacy, the surrogate mother. The gestational mother's bond with the child is a physical one and cannot be ignored. Some have argued that the law might account for parental duties and responsibilities, but still this is not enough: a re-conception of motherhood or mere self-deception is required on the part of the surrogate in order to be able to relinquish the child. One must depersonalise the whole process and treat the surrogate as an object and commodity, or a 'womb for rent' in order to make the breaking of the biological bond more palatable; but this entails making a surrogate susceptible to exploitation and coercion (Tieu 2009).

This seems to be the case increasingly among legal scholars and surrogacy agencies through the argument that parenthood should be established on the basis of intentions, rather than biology or genetics. In this respect, only the intended parents can be considered as parents, since the surrogate does not have the intention to become a mother when she conceives the child. In any case, a broad approach to social parenthood is essential in our attempt to make sense of new developments.

An important moral objection to commercial surrogacy derives from the commodification argument which targets the idea of compensation for relinquishing the surrogate's parental right to the child she has borne. For Burr (2000), this argument reinforces the public/private divide, where private is the feminine sphere, characterised by nurturing and loving, while public is the masculine terrain which is defined by commercialisation of the labour power. By contrast, others view the commodification that emerges when families are constructed through the marketplace as disruptive of the dichotomy between private and public spheres, or between reproduction and production (Pande 2011).

Surrogacy has also divided feminists. Since the mid-1980s, with the case of 'Baby M', liberal feminists took a positive stance, stressing the right of women to determine their

reproductive rights and be perfectly capable of entering legal contracts as they please, whereas socialist and radical feminists were against surrogacy using the commodification argument. What made feminists uncomfortable with the whole debate was that on the one hand some of the arguments against surrogacy were overlapping with conservative approaches to the 'unique experience of motherhood' (e.g. of Catholics and pro-life activists), while on the other the arguments in favour seemed to be endorsing market arrangements (Scott 2009).

Some feminists view gestational surrogacy as a form of prostitution or slavery and compare it to organ transplant marketing. They argue that to denounce the commercial exploitation of a kidney and accept the exploitation of the womb constitutes a moral dichotomy of patriarchal society. The mere fact that a woman rents her body opens the road to exploitation, particularly since the logic of surrogacy is to fulfil the desire of a couple at any cost. Kimbrell (1993) draws parallels between surrogacy and slavery, since slave women were often used as birth mothers without any legal rights. Fears are expressed that poor women might be transformed into an army of surrogate labour or a caste of pregnancy carriers. Berend (2012) considers surrogacy as the extreme form of alienated labour which is more about generating profits and reproducing sexism, rather than about generating life.

In the words of Anderson, 'when market norms are applied to the ways we allocate and understand parental rights and responsibilities over children, children are reduced from subjects of love to objects of use. When market norms are applied to the ways we treat and understand women's reproductive labour women are reduced from subjects of respect and consideration to objects of use' (Anderson 1993, p.189).

Moreover, surrogacy raises ethical issues about the dignity of the child as it turns it into the product of a market relation. A well-known feminist argument condemns 'baby-selling', referring mainly to traditional surrogacy, which involves relinquishing not only the babies surrogates carry, but also their genetic material (McDermott 2012). This negative stance has, however, been mitigated since the 1990s with technological developments enabling gestational surrogacy. The lack of genetic link between the surrogate and the baby, together with the shift of emphasis to surrogacy as service, have rendered surrogacy more socially acceptable, but have also paved the way to new risks. As commissioning couples are often wealthy and prepared to spend large amounts of money their high expectations might include good appearance or specific physical attributes (designer babies), raising thus serious bio-ethical issues. Such high expectations have also an impact on the autonomy of the surrogate, as they may involve asking for detailed and often private information about herself and her family in an attempt to create as full a profile as possible. They might also generate segmentation in the surrogate market, with respect to caste, skin colour, appearance etc., with younger, higher educated, attract or brighter surrogates being in higher demand (Iowa Institute 2012).

Others also see payment for reproductive services as problematic, since ova retrieval and pregnancy are physically invasive and involve significant health risks. Concerns are more serious when women in financial need resort to these practices for financial compensation, in which cases there is no real autonomy in their decision-making. These are enhanced when practices go beyond national borders and into a global market where consumers are wealthy people from developed countries and providers are poor women in the third world (Crozier 2010).

Globalisation enhances commodification and increases risks of human trafficking and sales of women's reproductive capacity in a global surrogacy marketplace (Iowa Institute 2012). It increases the risk of undue coercion, when the remuneration of the surrogate is very high for the salary standards of the destination (Crozier 2010).

According to liberal legal views, the parties involved in surrogacy arrangements are the best judges of their own welfare; therefore a contract that makes all parties better off should be enforced, rather than prohibited by law (Hatzis 2003). In the feminist debate on women's reproductive function 'autonomy' is a key concept. The ideology of motherhood constrains both motherhood and maternity. The former as biological phenomenon prevents some women from living a fully autonomous life, while the latter defines the social aspect of being a mother. Real choice would mean that they could transcend both the social and the physical impediments and opt out of becoming mothers (Marshall 2008). Choice can be seen as a dynamic navigation through a net of social, physical and psychological factors. In this way some women decide to go for abortion, to remain childless, or to bear children they will not keep, either because they will act as surrogates or because they will give them up for adoption.

The concept of *informed consent* is relevant to better understand the parties' position in a surrogacy contract. Informed consent can be used for vitiation of legal responsibility, which might also include moral responsibility. It is presumed that a woman who decides to become a surrogate mother is autonomous, but economic pressures in commercial surrogacy or emotional pressures in altruistic surrogacy should not be underestimated (Ber 2000). In such cases, the Western liberal ethical framework emphasising the individual right to choice, comes up against the risk that this 'choice' might be emotionally or financially 'imposed'. Conversely, it is an ethical question whether one should be denied the opportunity to act altruistically or alleviate one's family poverty through surrogacy (Deonandan et al. 2012).

But the issue of informed consent is also problematic due to the fact that long-term health outcomes, complexities that might arise in the relationship between the parties contracting, or social implications cannot be known in advance. The ideal of 'informed consent' in becoming a surrogate is, therefore, compromised by coercion (e.g. by family), uncertainty as to the emotional and psychological impact on the surrogate and her surroundings, lack of knowledge about pregnancy complications, the complexity of a surrogacy contract and the uncertain ethical implications for the wider community (Tieu 2009).

The autonomy of the surrogate mother can also be compromised throughout the process by her being forced by the genetic parents and/or physicians to undergo sampling tests, amniocentesis or vaginal ultra-sound, to receive pressures to change her diet or lifestyle, or to terminate the pregnancy in case of a defective foetus.

### **1.2.3. Cross-border surrogacy**

Cross-border reproductive care is seen as a consequence of a multitude of moral, ethical and religious views (a key ingredient of a postmodern society), which produce a mosaic of legal arrangements in different countries, even those with similar cultures (e.g. in the EU). It is also the outcome of limited public services for the treatment of infertility, which encourage the privatisation of reproductive care (Ferraretti et al. 2010). This is a multi-million industry. Seeking surrogate mothers in low-income countries, notably India, presents ethical challenges hitherto non-dealt with. When clients are from high-income countries and the jurisdiction providing maternal surrogacy is a low- or middle-income country the opportunity (or risk) for exploitation is great and carries implications for female autonomy and reproductive rights (Deonandan et al. 2012).

Cross-border reproductive care or as some call it 'reproductive tourism' has been defined as 'the travelling by candidate service recipients from one institution, jurisdiction or country, where treatment is not available to another institution, jurisdiction or country where they can obtain the kind of medically assisted reproduction they desire (Pennings 2002, quoted in Inhorn and Patrizio 2009, p.904). Other motives include lower costs,

illegal character of the treatment in their own countries, faster procedure, higher success rates, higher standards of care or protection of privacy (Pallatyiil et al. 2010). The term reproductive tourism portrays as positive an experience which for some is often particularly painful, time-consuming, frustrating, even life-threatening for infertile people and can feel more like exile in an attempt to find safe, affordable and legal treatment (Inhorn and Patrizio 2009).

One hundred and sixty million European citizens have no full access to donor procedures in their own country; in terms of demand, 80,000 couples would need treatment forbidden by national law but available elsewhere (Ferraretti et al. 2010). Though no solid data on a pan-European basis are available, it has been estimated that there could be 24-30 thousand cycles of cross-border treatment annually, involving 11-14 thousand patients in Europe. A steady increase in foreign nationals treated in Belgium between 2003 and 2007 has also been reported. Within Europe there seems to be a clear trend for transfer of fewer embryos (Culley et al. 2011).

The main reasons behind such cross-border movements are evading legislation, access to care and quality of care, as well as cost. Other reasons leading people to seek reproductive care elsewhere are that a treatment may be clinically unavailable because it is not considered adequately safe, waiting lists may be too long or costs too high.<sup>28</sup> Finally, psychological reasons might be at play, such as the desire to have treatment in a relaxing environment away from everyday life stress (Culley et al. 2011).

Little empirical research has dealt with this topic and it was recently that ESHRE (the main European professional and scientific association in infertility) has financed a study in six EU countries to collect information on the motives behind couples' seeking treatment abroad (Shenfield et al 2010). The respondents stated a number of reasons, such as restricted access due to age or limited number of IVF treatments that had failed, high cost, vicinity of treatment, legal barriers, donors' anonymity policies and the fact that treatments available only to couples (heterosexual or homosexual) and not to single people. Other studies have indicated similar reasons, such as prohibition for religious or ethical reasons, unavailability of the service because of lack of technology or personnel, inadequate safety guarantees, as well as the presence of significant risks, exclusion on the basis of sexual orientation, age, or marital status, high demand that cannot be met, in addition to privacy issues and high costs (Blyth and Farrand 2005, Pennings et al. 2008, Deech 2003).

The most important risks for patients seeking cross-border reproductive care are: money venture, difficulty in choosing the destination centre (given that there is an abundance of alternatives on offer), limited ability to evaluate the quality standard of the centres, unsatisfactory counselling due to language differences, lack of psychological assistance, and limited recourse to local courts in case of malpractice (Ferraretti et al. 2010).

The internet plays a crucial role in cross-border reproductive care. Apart from providing information it makes ART accessible to a broader audience, (homosexual couples, single men) and also facilitates medical tourism. This symbiotic relationship between the internet and ART has radically changed the field of human reproduction (Swink and Reich 2011).

For those managing their own treatment, the Internet has become a key resource of information and peer-support. Relevant websites include *Fertility Friends* and *IVF World*, but the websites of overseas clinics are also used, albeit with a bit of scepticism as to the

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<sup>28</sup> This seems to apply to the UK, for instance, as local NHS funding bodies apply a range of criteria, such as age or number of children, to exclude patients from public fertility treatment, despite the National Institute of Clinical Excellence guidelines (Culley et al. 2011).

success rates reported there (Culley et al. 2011); often clinics attempt to deceive potential clients (Centre for Social Research 2012).

Destination countries selected for reproductive treatment permit the operation of markets in human bodily resources. They provide little regulation to protect surrogates, patients and children, while they lack adequate transparency that would expose unprofessional, unethical or illegal practices (Crozier 2010).

Globalisation and the pervasiveness of information and communication technologies have enhanced cross-border surrogacy, with fertility clinics in abundance in India and the US advertising their services and facilitating the increasing phenomenon of fertility tourism (Gamble and Ghevaert 2009).<sup>29</sup> Proliferation of agencies, fertility centres and law firms have increased competition and have eroded the monopoly of old hegemonic intermediaries (Berend 2012). At the same time, it has highlighted the profound inequalities between buyers and sellers of surrogate services (Martin 2009; Pande 2011).

The motivation for surrogate mothers in low- or middle-income countries has not been adequately studied, but it seems to be predominantly of a pecuniary nature; Indian surrogates, for instance, can make up to \$6000 and they are led to their decision because of poverty, unemployment, or the need to finance the education of their children (Centre for Social Research 2012). Thus, there is tension between individual rights of both the surrogate and the client to enter a commercial relationship, while it is the responsibility of policymakers and clinicians to ensure that there is no exploitation. Colonial heritage and lack of education make informed consent problematic (e.g. in Africa or India); medical informed consent presupposes clarity, quality and adequate consent in communication of risks and the avoidance of coercion. Social risks which are culture-specific also have to be taken into account (Deonandan 2013).

The use of reproductive technologies has become an act of consumption in a global market. It offers a way out to the privileged who can implement their plans on the global stage. Reproductive tourism is a stratified practice, although infertility and its psychological effects afflict all social strata equally (Martin 2009).

An unregulated fertility industry has been compared to sex tourism, since 'egg donation, like prostitution, will be especially attractive in regions of the world where large numbers of women with few choices want to improve their economic circumstances by any means available (Storrow 2005).

Legislation in countries like the UK seeks to prevent the creation of a surrogacy market for foreigners, e.g. by placing as one surrogacy condition that at least one of the commissioning parents resides in the UK (Gamble and Ghevaert 2009).

#### **1.2.4. Health Policy**

The fact that in most EU countries surrogacy is not allowed and that EU legislation is conducive to patients' seeking treatment in other Member States has given rise to flows of people with infertility problems seeking cross-border reproductive care. This is a serious public health issue which requires attention and is of great concern to policy-makers. It puts at risk the health of individuals and from the point of view of policy-makers in the destination country, it affects the provision of local health services.

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<sup>29</sup> In India there are over 600 fertility clinics and the reproductive tourism market is valued at more than \$500 million a year. India is a popular destination not only for Western clients, but also for medical tourists from South East Asia (Centre for Social Research 2012).



The subjects at the receiving end of health care in the destination country are the surrogate mother and the baby. Health issues regarding the surrogate mother are of significance, as her preparation and the period after insemination involve injections of hormones, oestrogen and progesterone, taking pills, as well as adopting a particular lifestyle (Hatzis 2003, Centre for Social Research 2012). Other risks related to in vitro fertilisation are relevant (de Montgolfier and Mirkovic 2009). Usual pregnancy risks also apply which often are accentuated by the effects of ART resulting in multiple births or need for selective reduction abortion. There have been cases of surrogate mothers dying because of pregnancy complications, something that accentuates the issue of post-partum risks. In the case of traditional surrogacy, procedures such as collecting an egg carry a certain risk and might involve physical and psychological suffering (Chaves 2011).

Neglected psychological dimensions involve the bonding of the surrogate mother with the child, which might be linked with feelings of guilt when the child is given away and which can have impact on the psychological wellbeing or mental health of the surrogate (Jadva et al. 2003). It has been well documented that important biological bonds are developed during pregnancy. The odour of an infant is attractive to the mother, while sight and skin to skin contact further promote psychological and physiological bonding as important hormones like oxytocin are in operation. Surrogacy interrupts the process of bonding that starts during gestation and continues after birth and this is a very important reason why many surrogates refuse to relinquish the child (Tieu 2009).

Other issues are related to the impact of surrogacy on the surrogate mother's family members (partner, parents or children) whose support is expected during the surrogacy arrangements. Understanding of the circumstances by the surrogate's own children, for instance, might be quite challenging (de Montgolfier and Mirkovic 2009). Husbands in India, for example, often have problems with surrogacy, including managing home affairs and children; some might change their behaviour towards their wives (Centre for Social Research 2012). In addition, the risks of social stigma and shunning by acquaintances and friends will upset family balance and might have psychological implications (Jadva et al. 2003).

In cases of commercial surrogacy, available only outside the EU, health and safety issues are very important. Regulation on EU level is required. Medical advances are faster than legal ones and some balance needs to be achieved.

Conditions of financial need compromise the freedom of surrogate mothers: Indian women, for instance, are badly paid and run considerable health risks in a country where there is a high maternal mortality rate. This is not surprising, taking into consideration that drugs used are not standardised, procedures are not documented, information about side effects is not sufficient, while there is often no limit to the number of IVF treatments a woman might undergo. Recent research on surrogates has demonstrated preoccupations related to leaving their children during their stay in sheltered accommodation for nine months, together with exhaustion and considerable pain after each IVF treatment (Centre for Social Research 2012). Lack of regulation raises increasing concerns, not least because surrogates are often destitute and illiterate. They are kept enclosed in clinics, they do not enjoy counselling or legal services, they are subjected to decisions taken by the doctors involved and they also undergo tests and operations, including often unnecessary caesarean sections for quick delivery (Iowa Institute 2012). Other health issues are to do with contingencies often associated with pregnancies, namely early termination (before two months into the pregnancy), or early abortion and are accentuated by the need to have a contract to account for them. Research has shown that doctors are uncomfortable with such contingencies, while it is claimed that delays in signing a contract entails dangers of exploitation by doctors, clinics, or intended parents (Centre for Social Research 2012).

The aftercare of the surrogates is an important issue, particularly in developing countries. Long-term harmful effects caused by fertility drugs, surgery-related complications are frequent and might be more acceptable in a developing country context. Serious conditions like cancer or sterility can also be related to surrogacy. The question remains as to who bears the responsibility for treating health problems deriving from surrogacy pregnancies? (Iowa Institute 2012).

The issue of lower cost in less developed countries is one of the main motives behind the decision of infertile couples to seek cross-border reproductive care. The impact this may have in the local provision of health services is of increasing importance. Proponents of medical tourism argue that private health care services to foreigners keep the highly-skilled personnel in the country and make the same services available to the local population at lower rates. The counter-argument is that there is internal migration to the urban centres where the private clinics are and the public system does not benefit financially (Pallatiyil et al 2010). Medical professionals who would be serving the taxpayers whose funds have been invested in those facilities are losing out, what Deonandan (2013) calls 'misdirection of medical resources' (p. 155). Nevertheless, much more empirical research is required to allow for estimates of repercussion that private arrangements have on the host countries' health systems and also to ensure that surrogate mothers' health is monitored and safeguarded.

#### **1.2.5. Welfare of children**

The sudden rupture of the (surrogate) mother-child bond at a very early stage is in itself a consideration for the welfare of the children. As surrogacy involves both in vitro fertilisation and relinquishing a child in a similar manner like in adoption, long-term consequences for the children can be inferred from these (Iowa Institute 2012).

In case the intended parents need to legally adopt the child, the matter becomes more complex. The fact that custody disputes might arise is also something that cannot be prevented by legal arrangements and can have impact on children's wellbeing, as they are involved in unusual circumstances (more than one family group).

One might argue that such conditions are also encountered in the case of adopted children. However, the difference lies in the fact that, unlike adoption, which is a conscious decision to serve the best interests of the child, surrogacy is about a mutual decision between the surrogate and the commissioning parents taken before the birth of the child and having as primary objective not the welfare of the child, but the utility (fulfilment) of an infertile couple (Tieu 2009).

The significant matter of whom the legal system acknowledges as mother of the born child varies in different national contexts and with respect to different family arrangements. In Portugal, for instance, in the case of single gay men, the surrogate mother (genetic surrogate) is legally recognised as the mother of the infant. This raises issues that can potentially affect the welfare of the child, particularly if it imposes responsibility on the surrogate (Chaves 2011).

There are a number of circumstances and contingencies that might create friction in the contractual agreement between the parties and might impact on the future welfare of children. The risk of opportunistic behaviour by either the parents or the surrogate is quite relevant. This is often related to asymmetric information, with one of the parties having access to more or withholding information from the other (Galbraith et al. 2005). A further problem is that the contractual parties do not always know what their best interests are. Information uncertainty might contribute to this and can lead to wrong decisions. As in any contractual arrangement, also, it is more than conceivable that one's circumstances might change in the course of surrogacy. If, for example, the child suffers

from some disability or other condition, in which case serious problems with the surrogacy arrangement might arise: options such as abortion can be considered but might also lead to deadlocks due to different perspectives on abortion, the surrogate mother might want to act contrary to the wishes of the intended parents and so on (Tieu 2009).

As ART is involved in surrogacy, the higher risk of multiple births and prematurity, with increased chance of death of a child, is a significant health issue for the children and might also create complications, as the intention of the commissioning parents is often to have only one child.

#### **1.2.6. Attitudes to surrogacy by the public and the parties involved**

Surrogacy remains a very controversial topic and the role of the media contributes to its negative image, as they only highlight the cases where things have gone wrong. It is only very recently that surrogacy became a method chosen by both gay and straight celebrities and has thus received positive media coverage. Yet most intended parents initially got the idea through television documentaries or magazines (MacCallum et al. 2003). Their overall experience is positive and would recommend surrogacy to friends with infertility problems.

Not much empirical research has been done in the field of public attitudes towards surrogacy, but the few studies that have been conducted show that most people are not in favour for different social and cultural reasons. Religion plays an important role in shaping negative attitudes. Poote and van den Akker (2009) have found that a very small proportion of the women who took part in their study showed willingness to act as surrogate mothers and they did not differentiate between genetic and gestational surrogacy. They scored high in parenthood scale and upheld traditional values. In many cases negative attitude or scepticism towards surrogacy seems to be following distrust in reproductive technologies.

Surrogacy is of particular importance to gay couples in civil unions or marriage, as it allows them to become parents with a genetic link to their offspring. Significantly, for gay and lesbian couples parentage is, generally speaking, a conscious decision (Chaves 2011). Studies regarding children born to gay parents (Golombok et al. 2006) and their development compared to children in traditional families have shown that the quality of parenting is higher and gay parents enjoy their role more and they are more emotionally involved. Empirical evidence of this sort might contribute to a shift of attitudes towards surrogacy, as non-traditional households seem to be increasingly part of the social picture.

Growing evidence of successful parenting by gay parents will eventually influence public opinion. Recent research in the US (Bergman et al. 2010) has also shown that gay couples opting for surrogacy are usually of a particular demographic profile, namely of very high socio-economic status which can be explained by the high cost of surrogacy. Nevertheless, they give up their job totally or partially to fulfil their roles as parents, which has considerable financial implications that worse-off people could not afford. Their new identity as parents has improved their relationship with their own parents and family. Another conclusion is that having children through surrogacy is still a matter of socio-economic status among gay people.

Surrogate mothers' attitudes remain under-researched. As most countries prohibit surrogacy, it is very important to conduct research on the views of the experience by surrogate mothers, especially because they are the most vulnerable parties in terms of psychological strain.



### 1.2.7. Regulation

To evaluate state responses to surrogacy, one should not conflate lack of regulation with freedom and choice, while viewing regulation as a restricting factor. As Martin (2009) says the 'choice' framework is problematic for reproductive technologies and so is the human rights one, as definitions of choice and rights tend to vary from state to state. Whatever the national context, there is a growing market in countries with more permissive regimes to serve a specific clientele.

Surrogacy is becoming an ever more frequent alternative to adoption. Yet despite its enormous complexity and its involving up to five different parties (intended parents, biological mother, biological father, surrogate mother, sperm/egg donors), very little has been done to regulate it and safeguard their interests.

In the UK surrogacy arrangements are lawful, although they cannot be commercial, brokered or advertised for commercial exploitation. Surrogacy is facilitated by a number of non-profit agencies which have sprung and which help establishing contact between the parties involved. The 2008 Act has permitted advertising by such organisations. It has also promoted equality between heterosexual and same sex couples regarding surrogacy, but not for single parents (Fenton et al. 2010). However, the arrangements involve complex rules on legal parenthood and presuppose the consent of the surrogate mother and her husband. English law supports surrogacy but seeks to control the form that it takes (altruistic, consenting, privately-arranged). The underlying logic is one of preventing women from entering commercial contractual agreements which they might not be able to fulfil later on and which might thus lead to their exploitation. However, the counter-argument is that by not allowing enforceable contracts and commercial agencies surrogacy arrangements are made risky unless of course there is already trust between the parties involved (Galbraith et al. 2005).

Consequently, looking for surrogacy abroad is much more attractive for British fertility treatment seekers, as the process is better organised, faster, involving a foreign clinic or agency and providing an enforceable contract. However, the limitations of the UK law are bound to affect such parents upon their return (Gamble and Ghevaert 2009).

Those seeking help abroad are faced with challenges such as lack of accurate information and advice on what is involved, language barriers in the host country and legal impediments at home after the birth of a child, such as rigid interpretation of domestic law and parental order procedures, as in the case of the UK, which could affect the welfare of children and of surrogates and intended parents (Bednall 2011).

Cost is another significant factor in commercial surrogate arrangements. Data are scarce and rates are different in the different countries which are popular surrogacy destinations. In the US, for instance, the compensation to the surrogate mother can range from \$15,000 to \$25,000, depending on her experience, but the overall cost to the parents, taking into account that more than one IVF attempts might be needed, might be as high as \$120,000 (Hatzis 2003).

A consequence in the asymmetry of power present in commercial surrogacy arrangements is that it often induces surrogates to enter into agreements, whose risks they are not fully aware of. Galbraith et al. (2005) have studied a random sample of commercial Californian surrogate agencies and they have found that 90% regulate disbursement of fees to the surrogate mother so as to avoid risks of renegotiation after the surrogate has become pregnant. Further, they conduct extensive screening to minimise potential surrogate mothers and commissioning parents with undesirable behaviour patterns. To reduce the chance that surrogates renege on the contract or are forced into these arrangements due to poverty pressures, 80% of these agencies make

sure that surrogates have already a child and they do not receive any kind of financial support. Moreover, all agency websites contain message boards for sharing lessons learned by the experience of others. They also organise health and life insurance for the surrogate mothers, which are necessary conditions of the agreement.

Research on Indian surrogates, however, indicates that their remuneration is not fixed and is usually determined by the clinic, while it can be delayed for months. Very often it is not sufficient to make a substantial difference in their lives; it might provide for more meals for their children, or for their entry level fees in higher education, or enable some repairs in their home, but not much more.

The need to safeguard their payment, which can be also appropriated by husbands for drinking or for some unsuccessful enterprise endeavour is imminent, particularly because of the patriarchal structure of Indian society. Payments to surrogate mothers need to be harmonised on a global scale in order to prevent exploitation of women in more disadvantaged positions than that of intended parents, especially in cases of cross-border arrangements, which can easily lead to benefiting wealthy Westerners at the expense of destitute women in developing countries (Welstead, 2010; Smolar 2013). Likewise, surrogates need to be protected from appropriation of their fees by agencies or doctors (Centre for Social Research 2012). There is a constantly expanding market and companies operating in developing countries need to be regulated in terms of level of compensation offered (McEwen, 1999).

Furthermore, increasing commercialisation calls for quality control. It is important that an international system of clinic accreditation be established so that patients know that the clinics they use abide by good clinical practice principles. Monitoring the travelling of patients, highlighting the problems and engaging in public discussion are necessary actions to enhance the benefit of patients. It is very hard to estimate how many babies are born to surrogate mothers per year, as quite a lot of data are inaccessible. It seems that about 750 live births occur per year in the USA alone, out of double number of surrogate pregnancies (McDermott 2012). Half of live births worldwide occur in the two countries with permissive regulation and the possibility for compensation of the surrogate mother, namely India and the USA (Ferraretti et al. 2010).

Other issues to be examined include questions such as who bears the financial burden in cases of failed pregnancies when surrogate mothers' health is affected? How can the health of surrogates be monitored when they live in India or in the Ukraine?<sup>30</sup> Issues of health of the surrogate are taken into account by clinics only as far as the health of the baby is concerned; the commercial logic seldom allocates to the surrogate resources beyond what is necessary for the production of a healthy child (Deonandan et al. 2012). Another unsolved problem is that of 'imperfect' children; if they are the product of a commercial relationship what is their fate and to whom responsibility are they placed under? (Ber 2000).

Evidence from the US (McEwen 1999; Spar 2012) shows that commercialisation eventually leads to exploitation of surrogates on low income, while some nations risk becoming breeding grounds. Race is irrelevant in gestational surrogacy which means that increasing numbers of women of colour will be offering their services to well-off white couples. The social divide created due to socio-economic status cleavage between the contracting parties needs to be addressed by policy-makers and legislators as social inequalities are not of interest to market forces. As Spar (2012) claims 'babies are a good with a totally inelastic demand' (p. 300) and restricted supply.

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<sup>30</sup> These two countries are the most popular destinations of EU couples seeking surrogacy abroad

Commodification arguments about using women's bodies as rented wombs are valid but banning a practice in a particular state on ethical grounds, when parties are prepared to sign contracts elsewhere and evade strict legislation, leaves the road open to exploitation of vulnerable social groups who are at the mercy of market interests and lack protection.

Wherever commercial surrogacy is allowed, regulating a fee corresponding to a 9 month 24-hour job could offer a minimum protection for surrogate mothers. Non-negligible sums would make intended parents more responsible and would provide some safety to third-world women, whose 'freedom of choice' to enter such agreements is highly debatable. At the same time the pitfall is that the level of payment could act as a factor boosting supply.

### **1.2.8. Surrogacy as experience**

The aim of this section is to shed light to the personal experience of women involved in surrogacy arrangements and the way they perceive them. The reason is that there have only been a limited number of studies addressing the experience of surrogacy which show that it is conditioned by a host of factors: geographical proximity of intended parents and surrogates, level of contact or bonding. Nevertheless, the three countries we have such evidence from, namely the US, the UK and India show remarkable differences. Surrogates are not a uniform category. Those of the developed world are well-informed, professionals, parts of networks, and often perfectly capable of negotiating the terms of contracts. By contrast, their counterparts in developing countries are much more prone to exploitation, usually very poor and of low educational background.

The psychological impact that relinquishing the child has on the surrogate mother has been a popular topic of empirical research. What such studies show is how surrogates deal with it and the ways in which they 're-invent' themselves to cope. It has been suggested that surrogates deploy 'cognitive dissonance reduction strategies' to mitigate this effect (Tieu 2009). One of the most significant studies has identified that the perception of the surrogate that the child is not hers is crucial when support services are removed after birth and surrogates have to give the child away. They experience feelings of despair, loss and pain (Ragoné 1994). Other studies have indicated that the experience of relinquishing the child was an unhappy one in the short term, but a good relationship with the commissioning parents alleviated this feeling, though in one or two cases the impact was more significant and even led to post-natal depression and feelings of guilt (Baslington 2002, Palattiyil et al. 2010). Most of the above focus on a European or US context (e.g. Ragoné 1994), with the exception of a recent study conducted in Israel (Teman 2010), where surrogacy is tightly controlled by the state and restricted to Jewish citizens. In this study Israeli gestational surrogates use metaphors of love to speak of their relationship with the commissioning mother, though they recognise that they need the fee involved.

An investigation using semi-structured interviews found that surrogacy was a positive experience, contradicting the potentially negative impact on surrogates. Psychological consequences were not significant, though some surrogates experienced some problems immediately after the handover. Genetic surrogates did not seem to feel a special bond towards the child vis-à-vis gestational ones. The majority of the mothers did not experience major problems with the intended parents during the process and the quality of the relationship was not dependent on whether they were previously known to the commissioning parents. However, the possibility of bias from socially desirable answers or non-representativeness was pointed out as a limitation of the study (Jadva et al. 2003).

As surrogacy is a very personal, intimate and invasive relationship, it is only natural that it involves altruistic motives. Ragoné (1994) found about US surrogates she studied that payment was not important as motivation and women identified altruistic reasons. A theme that emerges is that women involved in surrogacy (surrogates and clients) use notions such as 'gift-giving' or 'sisterhood' to counterbalance the commercial nature of the relationship with each other. This discourse focuses either on the child as a gift, or as motherhood as something that one woman offers to another through developing a strong bond (Pande 2011). Indeed for many surrogates the relationship with the intended parents is stronger than with the baby (Berend 2012).

Contract surrogacy is part of a whole culture of commoditisation; however, surrogates do not see receiving compensation as contradictory to the creation of a personal bond with intended mothers. If anything, remuneration is seen as a measurement of worth. They see the relationship with the intended parents as one of mutual benefit, in contrast to the liberal legal scholars' approach of viewing it as something giving a net surplus value for both parties (Berend 2012).

Indian surrogates have different experiences. Surrogacy in India is not regulated by the state and is supported by the government's championing of 'medical tourism'. Commercial surrogacy was legalised in 2002 but there is no regulation of clinics as yet (Pande 2011).<sup>31</sup> Ethnographic studies are thus of importance also because they expose the conditions of surrogates in certain clinics: 'All the surrogates live together, in a room lined with iron beds and nothing else. Husbands and family members are allowed to visit but not stay overnight. The women have nothing to do except walk around the hostel and share their woes, experiences and gossip with the other surrogates while they wait for the next injection' (Pande 2011, p.620).

In contrast to their US counterparts, Indian surrogates claimed kinship with the baby while recognising the right of biological father over the child. There is again deployment of the gift metaphor but this time by the surrogacy clinic counsellors who indoctrinate the surrogates into seeing their status as God's gift which enables them to generate some income for their families, without becoming too greedy. The perceptions of the surrogates demonstrated their altruistic nature towards their own children, rather than towards those of their clients. They also seemed to resist the commercial nature of surrogacy by establishing relationships with the commissioning mothers, whom they perceived as hope for a better future out of poverty. Remarkably, the narratives used by the intended mothers were informed by the rhetoric of 'mission'; while they accepted that issues like relaxed laws and control over surrogates were incentives for choosing India as destination, they emphasised their wish to help a family out of poverty as being their main motive (Pande 2011). Both interpretations are demonstrative of unequal power dynamics and status. What is obvious is that all parties try to redefine the relationship on non-commercial grounds, attributing more a more noble character to a relationship which starts and usually ends as a transaction.

Other interesting themes emerge from the narratives of all surrogates. The importance of support from their husbands/partners which is essential for family life at home cuts across cultures and boundaries. American surrogates appear strong-willed and well-informed, independent and indifferent to attitudes of others (Ragoné 1994), whereas their Indian counterparts felt that the surrogacy arrangement had alienated them from their families and friends. They had been confronted by enmity due to the social stigma attached to surrogacy in rural India, while clinics did not take any responsibility of their well-being and re-integration in their community (Centre for Social Research 2012).

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<sup>31</sup> The finalized version of draft Assisted Reproductive Technology (Regulation) Bill – 2010 has now been revised by the Ministry of Law & Justice as Assisted Reproductive Technology (Regulation) Bill 2013.

The Internet has democratised information access for surrogates in the US, who are less dependent on agencies and can organise support online by sharing information through joining virtual communities. Using message boards, for instance, women offer each other advice, share their stories and portray themselves as strong and well-informed, but also as loving and warm (Berend 2012). Interpretation of their online message boards and their narratives show that they negotiate meaning in the process. The language of surrogacy as a 'labour of love' and the emphasis on the closeness of the relationship with the intended parents seem to be dominant and runs against commodification. Indeed, payment seems to be a sensitive issue and there is awareness that it might be contradictory with the emotional dimensions involved. Many sad stories have also been reported about intended parents disappearing or excluding surrogates, emphasising the commercial side of the relationship and generating obvious feelings of disappointment. Such experiences are counteracted by collective lessons learned about the purposes of surrogacy, namely to create a family, rather than build friendships. Sharing meanings by the communities of surrogates, notably in the online world, enables them to retain a moral code and feminine values, such as empathy, generosity, autonomy, intelligence and self-control (Berend 2012).

Evidence from the UK (Jadva et al. 2012), where commercial surrogacy is banned, shows that often contact between the surrogate and the parents continues after the birth but it becomes less frequent as time passes, unless the parents had known the surrogate before. Though such studies suggested a positive relationship between surrogate and intended parents, this is far from straightforward and might involve prolonged psychological burden on the surrogate, fear of the parents that the surrogate will interfere with upbringing, or tensions regarding the frequency of contact (Iowa Institute 2012).

Moreover, children's views on surrogacy remain an unexplored area. Research from the UK involving intended parents who had disclosed to their children aged 7-10 that they had been born by surrogate mothers, whom they already knew, shows that most of them were either indifferent or positive to surrogacy (Jadva et al. 2012). They saw surrogates as women who helped their mothers have them and praised their altruism. This attitude may change when they are teenagers and will be in a position to fully understand what surrogacy means. The same study showed that parents had no problem to reveal the link with the surrogate mother when it was a case of gestational surrogacy. It was not the same when it came to traditional surrogacy; almost half of the parents did not disclose the information.

### **1.2.9. Concluding remarks**

Despite prohibition and often negative attitudes and moral reservations, surrogacy practices persist. The desire for perpetuating their genes will make infertile people cross boundaries in search of ways to fulfil their procreation aspirations (Gamble and Ghevaert 2009). Countries have ethical obligations to consider the effects of their own restrictive reproductive policies. Prohibiting surrogate practices in the West leads to the expansion of a foreign market for such practices and opens up exploitation dynamics (Crozier 2010).

Regulating the surrogate practice towards mutually beneficial ends is a key direction (Deonandan 2013). Lack of adequate regulation will contribute to the maintenance of a global black market of surrogacy services, with considerable risks and exposure of women to trafficking, exploitation, coercion. Legal contracts need to evolve as to safeguard the interests of surrogate mothers, taking into consideration the inescapable fact that surrogacy decisions are taken under certain personal circumstances, which might change over time. Surrogacy contracts should include clauses on medical insurance and emergency needs of the surrogate mother. Provisions as to coverage of

her medical needs in case of failed pregnancy and compensation for her family and children in case she dies during pregnancy or labour must also be included (Palattiyil 2010). Entitlement to counselling services are often under-estimated, as many cases for post-surrogacy disputes demonstrate the lack of psychological preparation of the parties involved for what surrogacy entails (McDermott 2012). In any case, the legality of contracts should not be compromised by the involvement of agents with profit and other non-altruistic motives, whose only interest is to serve their clients and provide them with children, disregarding the need for emotional fulfilment and alleviation of the often harsh circumstances dominating the life of surrogate mothers (Centre for Social Research 2012).

Various feminist arguments for and against surrogacy might shift as surrogacy arrangements change. Liberal approaches will continue to emphasise autonomy and free will as pivotal in one's decision to resort in surrogacy. For these reasons, regulatory steps need to be taken, so as to leave room for autonomy and self-determination, necessary ingredients of a democratic society. Exploitation and coercion, hitherto unpleasant realities for surrogate mothers, notably in the developing world, will need to be prevented through relevant policies.

Globalisation, the main driving force behind the growing surrogacy market ought to be coupled with the aspiration of globalising norms determining surrogacy arrangements so that a global regime of surrogacy emerges, in which negative dimensions are mitigated and the North/South divide as to income, education and power is not mirrored in the surrogacy arena. Cross-border reproductive care needs to combine business ethics with medical ethics: 'to find a comfortable space between medicine and commerce, utilising a hybrid ethical framework that refuses to compromise the essential role of a clinician, which is to always act in the best interests of the person under care, with respect to her health' (Deonandan 2013, p.170).

What is seen as law evasion in certain national contexts which leads people to cross borders, may be a deliberate safety valve to national policy-makers and legislators which reduces pressure for domestic law reforms. This makes the need for regulation on EU level imperative to safeguard health and safety. Issues such as lack of reimbursement for treatments received in other countries, differences in procedure such as psychological screening of all parties involved, are matters that need to be looked into. Legalising non-commercial gestational surrogacy in a strict regulatory framework is seen by some (Dermout et al. 2010, McDermott 2012) as the pragmatic way forward.

As very little empirical research has been done in the area of surrogacy, there is a growing need for studies which will focus on surrogates, their concerns, experience and attitudes. Such findings will shed light on a world hitherto unfamiliar to policy-makers and medical tourists and will hopefully lead to more ethical and fair future policies.



## 2. LEGAL ANALYSIS – NATIONAL LEGISLATION AND CASE LAW

### 2.1. OVERVIEW

This section presents an analysis of national legal regimes pertaining to surrogacy. This legal focus of the study will be divided into two parts:

#### Part A

- i) Legislation, draft legislation and other formal provisions (e.g. professional organisations and foreign office guidelines) in EU Member States and an indicative number of non-EU jurisdictions, which operate to facilitate surrogacy agreements, whether fully or partially.
- ii) Case law interpreting the above provisions and/or dealing with subsequent legal disputes that have appeared before the courts.

Given the time and budgetary confines of this study, we have not attempted to provide a complete catalogue of all national legislative approaches to surrogacy agreements.<sup>32</sup> Instead, we have confined the parameters of this study to a detailed analysis of all relevant legislation and draft legislation in EU Member States and an **indicative** number of legislative case studies from non-EU jurisdictions, which provide useful comparisons. In relation to EU Member States, we have also included reference to non-legal, but otherwise formal guidelines that concern surrogacy agreements. The selection of our legislative case studies is explained below and the analysis is organised according to the different legislative approaches that we have identified.

#### Part B

- iii) Case law in EU Member States where there is a legal vacuum in relation to surrogacy.
- iv) Case law in EU Member States where surrogacy in all forms is legally prohibited.

The purpose of this part is to investigate the role of the courts in EU Member States where there is either no express legal provision for surrogacy, or where surrogacy in all forms is legally prohibited. In the preliminary work for this study, all relevant case law was identified and organised according to the legal issues being addressed. This schematic organisation of the case law has been refined and developed for presentation in the Final Report.

Before moving to a fuller consideration of the substantive legal issues addressed by this section we first provide a justification for our selected case studies.

#### 2.1.1. Selection of case studies

In the preparatory work for this study, we investigated whether any EU Member States had a legislative framework that operated to regulate, facilitate and enforce surrogacy arrangements. It soon became apparent that Greece was the only Member State to have such a legislative regime in place. As a consequence, we took the decision to give the term 'express provision' a wide interpretation, in order to further capture:

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<sup>32</sup> This is being attempted elsewhere, at least in relation to the domestic legal approach of different countries to cross-border surrogacy agreements: Katarina Trimmings and Paul Beaumont (eds) *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing: forthcoming May 2013).

- partial legislative frameworks relating to the transfer of legal parenthood after birth to the intended parent(s);
- draft legislation;
- professional or regulatory guidelines relating to the facilitation of surrogacy by a fertility clinic; and
- formal guidelines on citizenship acquisition following a cross-border surrogacy arrangement.

On this interpretation, seven Member States were indicated in the Inception Report for further investigation (Belgium, Bulgaria, Greece, Ireland, Netherlands, Romania, UK). Further country specific research confirmed the suitability of all-but-one of these Member States for this component of the study (the draft legislation proposals in Romania were not taken forward - see country report on Romania, Annex). The justifications for including each Member State in this component of the research are presented in the following table.

**Table 5 : Member States with 'express provision' for surrogacy**

Member State	Reason
Belgium	There is no express provision in Belgian law for surrogacy. However, four legislative proposals have been tabled for discussion at parliamentary assemblies.
Bulgaria	There is a general legal prohibition against surrogacy in Bulgaria. However, draft legislation has recently been considered by parliament. <sup>33</sup>
Greece	Greece has a legislative framework for altruistic gestational surrogacy involving judicial pre-approval of the surrogacy agreement, which is then enforceable. While a number of restrictions apply, the aim of the Greek legislation was to provide a comprehensive and facilitative framework for altruistic gestational surrogacy.
Ireland	There is no express provision in Irish law for surrogacy. However, formal guidelines relating to citizenship and cross-border surrogacy arrangements have recently been published by the Minister for Justice, Equality and Defence.
Netherlands	There is no express provision in Dutch law for surrogacy. However, fertility clinics that provide IVF for surrogacy arrangements have, since 1998, been legally required to abide by the professional regulations of the Dutch Society for Obstetrics and Gynaecology.
UK	The UK has two pieces of legislation on surrogacy. The Surrogacy Arrangements Act 1985 makes it clear that surrogacy contracts are not enforceable and criminalises certain activities relating to commercial surrogacy. The 'Parental Order' provisions in the Human Fertilisation and Embryology Act 2008 allow for the transfer of legal parenthood from the surrogate mother (and father) to the intended parents. Finally, the Home Office has published guidelines on immigration and cross-border surrogacy.

<sup>33</sup> Note that during the life-time of this study, many key personnel in the Bulgarian government resigned, resulting in parliament initiating a 'state of emergency', whereby only essential issues and measures are currently being addressed. This has meant a significant delay with the progress of the draft legislation relating to surrogacy.



Given that one of the key aims of the study is to analyse different legislative approaches to surrogacy, it would be limiting to have restricted this component of the research to Member State case studies. We have therefore included a small number of indicative case studies from non-EU jurisdictions, to allow for a more thorough consideration of the models of legislation that are possible.

The justifications for including each case study in this component of the research are presented in the following table.

**Table 6 : Non-EU jurisdictions that will be examined**

Country	Reason
Australia	Surrogacy is legally regulated at the state rather than federal level in Australia. Most states have recently enacted legislation which places restrictions on the practice of surrogacy and facilitates the post-birth transfer of legal parenthood to the intended parent(s), subject to certain conditions. Despite such explicit legal regimes, difficulties persist, particularly in relation to intra-state surrogacy arrangements across Australia and cross-border surrogacy arrangements. In addition, the Family Law Council has commenced work on a Research Reference from the Attorney-General's office into family formation and the law, to include an inquiry into legal issues associated with surrogacy, such as cross-border and civil status issues.
Russia	Russia is regarded as having one of the most permissive surrogacy regimes. This is due to the eligibility requirements being fairly relaxed (the main restriction being that the intended mother has to have some sort of medical condition which prevents her from carrying a pregnancy to term) and the fact that the intended parent(s) can be registered as the child's legal parents from birth. Also, both altruistic and commercial surrogacies are permitted under the Family Code of Russia (articles 51-54). However, there are two other important restrictions in the Russian legal framework: the surrogate mother must not also be the genetic mother of the child (i.e. only gestational surrogacy agreements fall under the legal framework) and she must give her consent to the registration of the intended parent(s) as the legal parent(s) of the child. It will be useful for the study to detail the specifics of the Russian legal framework, given that it is so commonly perceived as particularly permissive.
South Africa	South Africa has recently instigated a court approval procedure for surrogacy agreements. As such, it is similar to the legal framework in Greece and will act as a useful comparator regime. There are various restrictions (e.g. arrangements should be altruistic rather than commercial, domicile requirements, eligibility criteria for the surrogate mother, and sometimes a genetic connection is required between the intended parent(s) and the child) but in some circumstances the intended parent(s) can be recognised as the child's legal parent(s) from the moment of birth and single persons and same-sex couples are not excluded. The High Court has also issued guidance on when surrogacy agreements will be validated. In this guidance, the court was particularly concerned with the socio-economic context in which surrogacy operates. It will therefore be extremely useful for the study to

analyse the legal framework and court guidance in order to better assess how certain social justice issues may be countenanced by law.

US

Several states in the US expressly regulate surrogacy, to include permitting commercial surrogacy and providing for the intended parent(s) to be the legal parent(s) from the moment of birth. Rather than provide an overview of the different legislative approach in these states, we have provided a detailed case study of a state with an established legislative framework.

Illinois: has legislation which sets out the terms of legally valid gestational surrogacy agreements. Under the Illinois legislation, legal parenthood can be framed prior to the child's birth, so that the intended parent(s) are the legal parents upon the child's birth. This makes the Illinois legislation similar to the legal frameworks in Greece and South Africa. However, unlike Greece and South Africa, the court does not have a pre-approval role; instead, lawyers are charged with ensuring that all the terms of legislation are satisfied in the particular surrogacy agreement. Illinois therefore provides a further comparative dimension to the legislative case studies.

## **2.2. PART A: EXPRESS PROVISION FOR SURROGACY AND ASSOCIATED CASE LAW**

### **2.2.1. Legislation and draft legislation**

The following sections examine models of legislation and draft legislation relating to the facilitation, or sometimes partial facilitation, of surrogacy agreements. The analysis is organised by categories of legislative model, beginning with legislative examples which provide an *ex-ante* facilitation of the surrogacy agreement, its formal approval and the automatic attribution of legal parenthood to the intended parent(s) upon the birth of the child. Legislative examples which provide for the *ex-post facto* transfer of legal parenthood to the intended parent(s) following the birth of the child are then considered, followed by some examples of non-legal, but otherwise formal guidance relating to surrogacy. Finally, some concluding analysis of the different legislative models is offered.

#### *2.2.1.1. Ex-ante: judicial supervision of the surrogacy agreement*

This section focuses on the legal frameworks for surrogacy in **Greece** and **South Africa**. Both countries have introduced comprehensive legislation for the *ex-ante* facilitation of altruistic surrogacy arrangements. A key requirement of the legislation in both countries is that a judge must pre-approve the surrogacy agreement before the surrogate mother is impregnated in order for it to be legally valid and enforceable. In the case of legally valid surrogacy agreements, legal parenthood for the intended parent(s) can be framed prior to the child's birth. This means that it is not necessary for legal parenthood to be transferred from the surrogate mother (and her partner) to the intended parent(s) following the child's birth.

It is important to note that the legislation in both countries places restrictions on the types of surrogacy agreements that will be facilitated. For example, only altruistic surrogacy agreements involving the medically assisted impregnation of the surrogate mother are countenanced. The legislation also imposes requirements that must be met

before a judge can authorize an agreement. For example, medical infertility must be the reason for the surrogacy arrangement and all the parties involved must give informed consent to the terms of the agreement. In addition, although many aspects of the Greek and South African legislation are strikingly similar, very significant differences do exist. For example, the Greek legislation is limited to gestational surrogacy and heterosexual couples and single women only, while the South African legislation countenances also traditional surrogacy (when it involves a medically assisted impregnation) and same-sex couples and single men. The precise task of the judge is also subtly different: in Greece, the judicial role is primarily administrative, in sense that they are restricted to formally approving that the legal requirements have been met; while in South Africa, the judicial role is more investigative and discretionary, in the sense that the judge must question the motivations behind the surrogacy agreement in addition to ensuring that the legal requirements and restrictions have been met.

Detailed country reports on the Greek and South African legal frameworks are provided in the Annex of this Report. These reports provide background detail to the introduction of the legislation, a detailed overview of its provisions, as well as an analysis of case law to have emerged since the enactment of the legislation. What we provide below is a brief outline of how the law in each country was changed and then a table detailing the points of similarity and difference between the two legal frameworks. This summary is followed by a concluding analysis of this model of legislation.

### **Details of the legislation**

In 2002 the Greek legislature introduced Law 3089/2002 for the regulation of medically assisted human reproduction. Law 3089/2002 provided for a radical reform of the Greek Civil Code (GCC), particularly in relation to the family law provisions. In legislating for advances in fertility treatment and reproductive technology, provisions for the permissibility and *ex-ante* facilitation of surrogacy were also included.<sup>34</sup> In 2005, Law 3305/2005 provided further detail on the permissibility of surrogacy, by stipulating the concept and meaning of 'reasonable expenses' that may be paid to a surrogate mother and introducing criminal and civil sanctions for violations of the legislation. In the summary table which follows, references are made to either Law 3089/2002 or 3305/2005, or the GCC as appropriate.

In South Africa, the National Health Act 2003 introduced a legal framework for advances in fertility treatment and reproductive technology. Although surrogacy was not expressly regulated by this legislation, it would appear that surrogacy (or more precisely, surrogacy involving a medicalised fertility treatment) was thought to be legally permissible under sections 12(2) (a)-(b) of the South African Constitution, which provide for the right of self-determination and the right to make decisions concerning reproduction. In 2005, the legislature passed the Children's Act [No. 38 of 2005], where it was declared that surrogacy was to be seen as a form of fertility treatment. However, it was not until 2010 that a legal framework for the permissibility of surrogacy was enacted. This came in the form of an amendment to chapter 19 of the Children's Act. In

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<sup>34</sup> This is in contrast to e.g. the Human Fertilisation and Embryology legislation in the UK. This legislation was originally enacted in 1990, with a major reform process leading to the enactment of amending legislation in 2008. As is detailed later in this Report, the UK legislation does not include *ex-ante* provisions for surrogacy, but only for the *ex-post facto* transfer of legal parenthood when certain conditions are met.

the summary table which follows, references are made to the Children's Act and the South African Constitution as appropriate.

**Table 7 : Similarities and differences in the Greek and South African legislative models**

Similarities
<ul style="list-style-type: none"> <li>The legislations of both countries facilitate surrogacy and regulate its practice under strict provisions.</li> </ul>
<ul style="list-style-type: none"> <li><b><u>The facilitation of surrogacy is based on the constitutional recognition of a right to have a child: art. 5 para. 1 of the Greek Constitution; s.12 (2) (a) of the SA Constitution.</u></b></li> <li>In both countries this includes cases where conception can only be accomplished with the help of fertility treatment and/or the collaborative involvement of the reproductive bodily material and/or capacity of persons other than the intended parent(s).</li> </ul>
<ul style="list-style-type: none"> <li><b><u>Surrogacy contracts are valid and enforceable: art. 1458 GCC; s. 292 Ch. 19 of the SA Children's Act.</u></b></li> <li>Both the Greek and SA legislation allow for the drafting of a surrogacy agreement between the individuals involved (intending parent(s), surrogate mother and her husband/wife/partner, in case she has one).</li> <li>The agreement must be in writing, and must be made at a time before the impregnation of the surrogate mother.</li> <li>Furthermore, in order for the terms of the agreement to be enforced three other prerequisites must be fulfilled: i) the provision of (informed) consent by all those involved in the arrangement; ii) the pre-conception authorisation of the surrogacy agreement by the court; and iii) the altruistic nature of the surrogacy agreement and evident (by the specific clauses of the contract) lack of financial gain. These prerequisites are discussed in turn below.</li> </ul>
<ul style="list-style-type: none"> <li><b><u>Consent to the surrogacy agreement: art. 1456 GCC and art. 5 of Law 3305/2005; s. 293 Ch. 19 of the SA Children's Act.</u></b></li> <li>The surrogacy agreement must be created by consensual individuals, who were not coerced into participating in the surrogacy,</li> <li>The individuals must understand and accept the legal consequences of the arrangement, as well as their rights and obligations related to the nature of the arrangement, for example: the costs of the medical and legal procedures; the lack of payments; the right of the surrogate mother to a legal abortion; the obligation to hand over the child after his/her birth; the terms and conditions of the right to parent and contact the child etc. The Greek law also states that the parties must assert that they have been informed about the risks of the fertility treatment, as well as the dangers associated with the pregnancy and childbirth.</li> <li>The parties should also consider the psychological impact that the relinquishment of a child may have on the surrogate mother's life (art. 5 of Law 3305/2005, and s. 11 (b) of the SA National Health Act 2006, as amended in 2 March, 2012).</li> </ul>

- **The pre-conception confirmation of the surrogacy agreement by the court: art. 1458 GCC and art. 6 of Law 3089/2002; s. 295 Ch. 19 of the SA Children's Act.**

- The upper guardian of the rights of the contracting parties and of the interests of the child, as well as the upper authority to deem the agreement valid is the Court.
- The judges in both countries must examine the contract and decide whether the provisions of the law have been followed, and more specifically whether the parties have entered into the agreement in good faith and only for altruistic reasons, whether payments have been made to any existent intermediaries, whether there is a medical necessity on behalf of the individual who wants the child to proceed to the practice of surrogacy in order to have his/her desire for parenthood fulfilled, whether the intending parent(s) and the surrogate mother have been assessed as suitable to execute the terms of the agreement, among other issues.
- The confirmation of the surrogacy arrangement must take place **before** the surrogate's impregnation. However, due to the significance of the child's best interests, it seems likely that a judge would authorise a surrogacy arrangement in retrospect, if the parties failed to ask for the court's permission before the surrogate's impregnation, particularly if all parties are in agreement about the surrogacy arrangement.<sup>35</sup>

- **Altruistic nature of the surrogacy arrangement: art. 1458 GCC; s. 295 (c) and (v) and s. 301 Ch. 19 of the SA Children's Act.**

- Any payments in relation to surrogacy are prohibited in both countries, including payments towards the donor, the clinic, any surrogacy agencies that brought the intending parent(s) into contact with the surrogate mother, or any third parties involved.
- The woman who offers her gestational services must not aim to benefit financially from the surrogacy arrangement.
- An exception to the prohibition against payments in both countries is the coverage of 'reasonable expenses', namely any costs directly linked to the impregnation of the surrogate, the pregnancy, and childbirth costs (art. 13 para. 4 of Law 3305/2005; s.301 (2) Children's Act).
- More specifically, the intending parent(s) should provide for the medical care of the surrogate, her clothing, her transportation to and from the medical clinic, the costs of the childbirth and after-birth treatment, the legal costs for the application for the approval of the surrogacy agreement by the court, the medical and psychological assessment of the surrogate mother, as well as the loss of wages due to her inability to present herself to work during the last months of the pregnancy.
- The SA law goes a step further and accepts additional payments for the insurance coverage of the surrogate (death and disability insurance). Also, the SA law requires agreements to be managed by specialised lawyers and the costs for their services are covered by the intending parent(s) (s. 301 (3) Children's Act no. 38 of 2005).

<sup>35</sup> In Greece, there is a legal precedent for the retrospective court approval of a surrogacy agreement after the surrogate mother was impregnated (One Member Court of First Instance of Thessaloniki (case no. 27035/2003). See the country report on Greece in the Annex for further details.

- Both in SA and in Greece the court must be satisfied – based on affidavits that must be submitted to the court – that no payments other than for reasonable expenses have been made to the surrogate or any agencies involved.
- **The best interests of the child are a fundamental consideration in the decision relating to the approval of the surrogacy agreement and in dealing with any issues arising from the arrangement:** art. 1 para. 2 of Law 3305/2005, art. 21 para. 1 of the Greek Constitution (protection of the family); s. 295 (e) and 296 (1) (a) Ch. 19 of the SA Children's Act.
- **The rule of medical necessity: art. 1458 and 1455 of GCC; s.295 (a) Ch. 19 of the SA Children's Act.**
  - Surrogate motherhood in both countries is only available to persons who are unable to have a child for medical reasons.
  - The SA law considers homosexuality as a biological inability to procreate, and, hence, same-sex couples may use a surrogate in order to have a child. A provision similar to this one is non-existent in the Greek law.
- **Single parenting is acceptable: art. 1458 GCC;s.292 (1) (c) Ch. 19 of the SA Children's Act.**
  - The marital and/or relationship status of the person who wants to have a child through surrogacy is irrelevant.
  - On the face of the Greek legislation, it would appear that a single man's application to the court requesting the authorisation of a surrogacy agreement would not be accepted. This is because the legislation requires for the judicial approval process to be instigated by the intended mother. However, two recent legal cases defined this provision as unconstitutional and discriminatory towards single men (cf: arts. 5(1) and 4(1) of the Constitution) and the judge did authorise the surrogacy agreement.<sup>36</sup> It is important to note that under the Greek legal system, First Instance cases are not necessarily binding for future First Instance cases in other courts. However, if a similar application was presented by a single man in the future, the judicial reasoning would have to make clear why the application did not similarly relate to the man's constitutional rights.
- **Domicile requirement: art. 8 of Law 3089/2002;s. 292 (c) and (d) Ch. 19 of the SA Children's Act.**
  - Both the intending parent(s) and the surrogate mother must be domiciled in the country.
  - However, there is a provision in the SA law which states that the court is entitled to allow – on good cause shown – for a woman to become a surrogate even if she is not domiciled in SA (s. 292 (2) Ch. 19 of the SA Children's Act). Such flexibility to the court's powers is not recognised by the Greek Law.
- **Requirement for the psychological assessment of the surrogate: art. 13 para. 2 of Law 3305/2005; s. 7 (j) (ii) of the National Health Act of 2003**

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<sup>36</sup> See: the One Member Court of First Instance of Athens no. 2827/2008 and the One Member Court of First Instance of Thessaloniki no. 13707/2009. Further details are provided in the Greek country report in the Annex.

**(as amended in 2012) and WH and Others (29935/11) [2011], para. 67.**

- Before applying to the court for its authorisation of a surrogacy agreement, the intending parent(s) should make sure that the good emotional state of the surrogate and her intention to comply with the terms and conditions of the surrogacy arrangement and the law have been evaluated by an experienced psychologist and have been deemed satisfactory.
- **No right to terminate the agreement after the fertilisation of the surrogate mother:** art. 1456 para.2 GCC; s. 297 (1) (e) Ch. 19 of the SA Children's Act.
- **The fully medicalised fertilisation procedure:** art. 16 of Law 3305/2005; s. 9 (1) National Health Act of 2003.
- The fertilisation of the woman who acts as a surrogate on behalf of the intending parent(s) must be performed in medical institutions which are authorised to provide fertility treatments and IVF and by medical practitioners/gynaecologists specialised in human reproduction and reproductive technology.
- **Anonymity of the donor, if donated gametes are used:** art. 1460 GCC; s. 8 (2) (d) of National Health Act 2003 and WH and Others (29935/11) [2011], para. 68.
- In cases where the gametes of another person are used, the identity of the donor will remain undisclosed. Only access to the donor's medical files is allowed by law.
- **Surrogate mother's right to terminate the pregnancy:** art. 179 and 181 of the GCC (legal principal of fairness) and art. 304 of the Greek Criminal Code (right to a legal abortion); s.300 Ch. 19 of the SA Children's Act.
- **Automatic transfer of the legal parenthood to the intending parent(s):** art. 1458 and 1464 GCC; s. 297 (1) (a) Ch. 19 of the SA Children's Act.
- The child that is born after the drafting and the confirmation by the court of a surrogacy arrangement is considered as the child of the intending parent(s) from his/her birth. No adoption, or court proceedings (such as those of the 'parental order' in the UK<sup>37</sup>) is needed. The surrogate and her husband/wife/partner have absolutely no parental rights towards the child. Moreover, the SA law includes an express provision for the lack of a right of the surrogate, and her husband/wife/partner, as well as their relatives, to contact with the child born through surrogacy, unless there is a different agreement between the parties found in the surrogacy agreement. Such a rule does not exist in the Greek Law.

<sup>37</sup> As provided for by section 54 of the Human Fertilisation and Embryology Act 2008. See further details below.



## Differences

- **Genetic link with intended parent(s):**

- The SA law requires for the child to have a genetic relationship with his/her parent(s) (s.294 Ch. 19 of the SA Children's Act no. 38 of 2005).,
- In contrast, the Greek law does not require a genetic relationships between the child and the intended parent(s), permitting the framing of social legal parenthood in the context of surrogacy (cf: art. 1458 GCC).

- **Type of surrogacy:**

- Both gestational (s. 294 of the Children's Act) and traditional surrogacy is recognised in SA (stemming from s. 294 in conjunction with s. 298 (1) of the Children's Act).
- In Greece only the case of gestational surrogacy is allowed, since the law requires for the egg not to belong to the surrogate mother (art. 1458 GCC). Hence, the fertilised egg will either come from the intending mother, if she is able to produce one, or a third donor.

- **Same-sex parenthood:**

- The SA law makes surrogacy available to same-sex parents (S. 295 (a) of Ch. 19, Children's Act 2005).
- A legally authorised surrogacy agreement is currently not available to Greek same-sex couples.
- However, as with the aforementioned cases involving single men, it is possible that a judge may authorise a future surrogacy arrangement presented by a same-sex couple, on the basis of the general constitutional principle of equality and non-discrimination (art.4 of the Greek Constitution). However, same-sex relationship recognitions remains a controversial issue in Greece, so the same willingness to approve a surrogacy agreement presented by a same-sex couple may not transpire.

- **Making the application to the court:**

- According to the SA law, the application to the court for the authorisation of the surrogacy agreement may be made by either of the intending parents, whereas in Greece this right is only appointed to the intending mother (art. 1458 GCC).

- **Age limits:**

- The Greek law sets an upper limit to the age of the intending mother, which is the age of fifty (from the combination of the art. 1455 of the GCC and art. 4 paragraph 1 of Law 3305/2005), although no requirement is in existence with regards to the age of the surrogate mother.
- Recent case law<sup>38</sup>, however, indicates that the most significant criterion for a woman to be allowed to act as a surrogate mother in Greece is not her biological age, but her general good health and her ability to endure the difficulties of pregnancy and childbirth.

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<sup>38</sup> In 2006 a woman aged 52 was allowed to bear the child of her daughter and her husband (One Member Court of First Instance of Korinthos no. 224/2006). See further the Greek report in the Annex.



- A similar rule is not to be found in the SA legal framework.
- **The need for a surrogate to have had a previous pregnancy:**
  - The surrogate mother in SA must have already had a viable pregnancy and delivery and a child of her own: s. 295 (c) (vi) and (vii) of the Children's Act of 2005, respectively.
  - The Greek law does not require the woman who acts as a surrogate to have had the experience of pregnancy, childbirth, and motherhood before she agrees to enter into a surrogacy contract.
- **Death and disability insurance:**
  - In SA the payment of a death and disability insurance to the surrogate mother is included in the "reasonable expenses" of a surrogacy arrangement (s. 301 (2) (c) of the Children's Act of 2005).
  - No such rule is adopted by the Greek law.
- **Consent of the surrogate's partner:**
  - In SA the impregnation of the surrogate mother may take place, if the judge deems it necessary, even when the husband/wife/partner of the woman who wants to act as a surrogate does not consent to it (s. 293 (3) of the Children's Act). The court will decide whether the person withholds his/her consent for no apparent and justifiable reason, and if it finds it correct and fair to do so, it will order the performance of the impregnation of the surrogate without worrying about the lack of consent from all parties involved.
  - Such an action is prohibited by the Greek law, where there is a legal prohibition against the indirect attainment of legal parenthood through the legal recognition of the man's wife/civil partner as a parent (art. 1456 GCC, art. 5 of Law 3305/2005, arts. 1464 and 1475 GCC).
- **Time period for fertilisation:**
  - The SA law states that the fertilisation of the surrogate must take place before the lapse of a period of time of 18 months after the court's permission to proceed with the surrogacy (s. 296 (1) (b) of the Children's Act).
  - The reason for this is the fear that the consent of the parties will not be valid after the time specified by the law, which could render the agreement unethical and coerced.
  - The Greek law pertaining to surrogacy includes no similar rule.
- **"Cooling-off period":**
  - The SA law allows, in certain circumstances, for a "cooling-off period" and the right of the surrogate mother to change her mind.
  - In Greece this is only possible *before* the attainment of pregnancy. After this point the surrogate mother must adhere to the regulations of the surrogacy arrangement and relinquish her parental rights along with the child after his/her birth.
  - In SA, s. 298 (1) of the Children's Act stipulates that **the surrogate mother who is also the genetic mother** can terminate the agreement at any time, as long as this is done before the lapse of a period of 60 days after the birth of the child.

- The process is simple: she just has to file a written notice to the court informing the judge about it. She may then be considered as the exclusive legal mother of the child and not be forced to hand it over to the intended parent(s).
- However, the law states that she may have to compensate the intended parent(s) for any payments for reasonable expenses that have been made up to that point as a penalty for a breach of contractual obligations.
- Such a right for a change of heart is not available to the gestational surrogate mother according to the SA law. Her position as an altruistically motivated 'service provider' is not deemed strong enough for her to be given the right to seek the recognition of legal motherhood. Any attempt to keep the baby for herself would be against the law (s. 297 (1) (b) of the Children's Act), as it is also in Greece.

- **The role of the court:**

- In practical terms, the role of the judge in approving surrogacy agreement applications in Greece is limited. There is little or no discretionary power, and the court procedure of the authorisation is more of a formal bureaucratic procedure than a discretionary assessment of the motivations behind the surrogacy agreement.
- The case is different in SA. The court is more than a 'rubber stamp' for the endorsement of the individual's desire to have a child through surrogacy. The judge is the protector of the law and of the interests and rights of all the parties involved in the surrogacy arrangement. He/she will investigate and confirm the lack of financial gain, the respect of all the legal prerequisites, and the suitability of the intended parent(s) and the surrogate mother to comply with the terms and conditions of the contract. The judge will ask about the true reasons for choosing the method of surrogacy in order to have a child, and search for a close relationship of mutual respect and appreciation among the parties.
- In theory, these are also the responsibilities of the Greek judge, but the research conducted for this study on the recent case-law indicated that the courts in Greece merely check if the paperwork submitted to the court is sufficient to declare the specific agreement as valid and in accordance with the national laws and the Constitution.
- In a recent High Court case in SA, which offered important guidance to the judiciary for the approval of surrogacy agreement, it was made clear that an aspect of the role of the judge was to investigate the motivation of the parties involved (WH and Others (29935/11) [2011]).

- **Criminal sanctions:**

- No criminal sanctions are threatened against the violators of the SA law on surrogacy, as is done by article 26 paragraph 8 of Law 3305/2005 in Greece. The penalties stipulated are harsh: personal imprisonment of all the actors to the crime for two years at least, and a payment of damages of at least 1,500 Euros.

### 2.2.1.2. *Ex-ante: lawyer supervision of the surrogacy agreement*

**Illinois** is often described as one of the most 'surrogacy-friendly' states in the US, along with California.<sup>39</sup> In 2004, Illinois enacted the Gestational Surrogacy Act ('GSA'), which came into force in 2005. As the name suggests, the GSA pertains to gestational surrogacy agreements only, with traditional surrogacy agreements falling outside the auspices of the legal framework. The primary motivation for introducing this legislation appears to have been to provide legal certainty about parenthood for children born through gestational surrogacy arrangements.<sup>40</sup>

While the GSA has much in common with the Greek and South African surrogacy legislation, in that they all operate to provide an *ex-ante* facilitation of surrogacy agreements and framing of legal parenthood, there are important differences. Most significantly, the GSA does not provide for a judicial pre-conception approval process, with lawyers and legal advice playing the key role in ensuring that the terms of the legislation are satisfied.<sup>41</sup> Indeed, in Illinois, independent legal advice and lawyers play a key role in "sealing" the terms and obligations of the surrogacy agreement, and in ensuring that all parties give formal consent. It would be very interesting to have an empirical study investigating the effectiveness of legal advice in this context and whether it is a sufficient means of protecting the interests of all the parties involved.<sup>42</sup> This *ex-ante* supervisory role for lawyers is not as evident in other *ex-ante* legal models that are detailed below.

When the stipulations of the GSA are satisfied, the surrogacy agreement is presumed to be enforceable and it is possible for the intended parent(s) to be attributed with legal parenthood from the child's birth.

The other key difference with the Greek and South African legal frameworks is that the GSA does not prohibit payments other than 'reasonable expenses'. In addition to 'reasonable expenses' the surrogate mother can also be paid 'reasonable compensation', where compensation is defined in section of the GSA as: "payment of any valuable consideration for services in excess of reasonable medical and ancillary costs". Illinois

<sup>39</sup> Note that the law in California has been developed through case law interpretations of the Uniform Parentage Act, in order to give legal force to the role of intent in the attribution of legal parenthood following a surrogacy agreement: see the landmark case of *Johnson v Calvert* [1993] 5 Cal.4th 84, 851 P.2d 776. This use of this principle has not been restricted to the heterosexual family form, or indeed to couples. California recently codified this approach with the signing in of California Assembly Bill 1217, which alters the definition of who a legal parent is in the California Family Code. Section 7690 of the Code now provides that an intended parent is "an individual, married or unmarried, who manifests the intent to be legally bound as the parent of a child resulting from assisted reproduction". While this seems like a fairly benign phrase, it is highly significant in providing a legislative statement of parenthood that is both gender and relationship neutral. While many commentators have argued for parenthood in the context of assisted reproduction to be framed around intent, most legislative statements include other criteria, with a person's intent forming only part of the schema. For academic discussions of the possible role of intent, see for example: Horsey K. (2010) 'Challenging presumptions: legal parenthood and surrogacy arrangements.' 22(4) *Child and Family Law Quarterly* pp 449-474 and Shultz, M (1990) 'Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality' *Wis. L.Rev.* 297.

<sup>40</sup> Richey, J (2005) 'The troublesome good idea: An analysis of the Illinois Gestational Surrogacy Act' 30 *Southern Illinois University Law Journal* 169-194, pp 178-9.

<sup>41</sup> An example of a US state which does provide for judicial involvement in the approval of the surrogacy agreement is Virginia. However, the procedure in Virginia appears to be much more invasive than either Greece or South Africa as the court is required, for example, to appoint a guardian ad litem for the child once the agreement has been filed with the court and to order a social services study of the home of the intended parent(s). Such requirements are clearly modelled on adoption laws. See further H. Joseph Gitlin (2010) 'Illinois becomes surrogacy friendly', comment paper published on the American Academy of Matrimonial Lawyers website (<http://www.aaml.org>).

<sup>42</sup> We did not come across any such studies in the course of this research. However, studies investigating the role of independent legal advice in the context of pre-marital agreements have questioned the efficacy of independent legal advice in such emotionally charged contexts. See for example: Sharon Thompson (2011) 'Levelling the prenuptial playing field: Is independent legal advice the answer?' 4 *International Family Law* 327-331.

therefore permits commercial surrogacy agreements, while Greece and South Africa permit only altruistic surrogacy agreements.

The table below details the various requirements and restrictions in the GSA.

**Table 8 : The provisions of the Gestational Surrogacy Act 2004 (Illinois)**

### **Gestational Surrogacy Act 2005**

#### **Eligibility requirements for the surrogate mother (section 5):**

- The surrogate mother must be at least 21 years of age and have already given birth to at least one child; there is no upper age limit or no requirement for the child to still be alive, or for the surrogate mother to consider her family to be 'complete'.
- She must complete a medical and mental health evaluation and have obtained a health insurance policy that extends to at least eight weeks after the birth of the child. The intended parent(s) may procure this health policy for the surrogate in advance of the surrogacy agreement.
- She must have had independent legal advice about the agreement and the potential legal consequences of the agreement.

#### **Eligibility requirements for the intended parent(s) (section 5):**

- They must contribute their gametes to the in vitro embryo that will be implanted in the surrogate mother. In the case of a couple, it is permissible for there to be a partial genetic connection to the child i.e. only one intended parent needs to contribute a gamete.
- The intended parent(s) must have a medical need for gestational surrogacy and this must be evidenced by a signed affidavit from a qualified medical professional. This affidavit must be attached to the surrogacy agreement. It has not yet been clarified in Illinois whether a single man or same-sex couple would satisfy this requirement. However, there is nothing on the face of the legislation which makes them ineligible.
- Must complete a mental health evaluation.
- Must have had independent legal advice about the agreement and the potential legal consequences of the agreement.
- There is no requirement for intended parents to be in a marital relationship.

#### **Requirements for the surrogacy contract in order for it to be presumed enforceable (section 6):**

- Must be in writing and must be executed prior to the impregnation of the surrogate mother. It must also be signed by two competent adult witnesses.
- If the surrogate mother has a husband, he must also be party to the agreement, as must any spouse of an intended parent.
- The surrogate mother (and her husband) and the intended parent(s) must have separate legal advice and sign a written acknowledgement that they have received such advice.
- If the surrogacy agreement provides for compensation to the surrogate mother, this compensation must be placed with an escrow agent prior to the surrogate mother's impregnation.
- The contract must include the express written agreement of the surrogate mother to: undergo the necessary fertility treatment and to attempt any resulting pregnancy and give birth to the child; to surrender the child to the intended

parent(s) upon birth. Her husband must also provide his express written agreement for her to undertake these obligations.

- The express written agreement of the intended parent(s) to accept custody<sup>43</sup> of the child and assume responsibility for child support must also be included.

#### **Control of the pregnancy (section 6):**

- Under the terms of the surrogacy agreement, the surrogate mother must have the right to utilise the services of a medical professional of her choosing.
- It is permissible for the surrogacy agreement to contain provisions relating to the surrogate mother's agreement to undergo particular medical examinations and foetal monitoring procedures, as well as her abstention from activities that the intended parent(s) and/or the physician reasonably believe to be harmful to the pregnancy and future health of the child.
- The surrogate does not have to agree to such conditions for an agreement to be deemed valid and enforceable. However, if she does agree to such terms, she may be considered to be in breach of contract (section 11) with the intended parent(s) entitled to available legal remedies (section 12). The legislation makes clear that a specific performance remedy of impregnation is not available (section 11).
- There is no specific mention as to whether the surrogate mother maintains her right to a legal termination of the pregnancy.

#### **Payments to the surrogate (section 2 and section 6):**

- It is permissible for the surrogacy agreement to make provision for the surrogate mother to be paid reasonable compensation. Compensation is defined as: "payment of any valuable consideration for services in excess of reasonable medical and ancillary costs". This indicates that commercial surrogacy agreements will be considered valid and enforceable in Illinois.
- It is also permissible for the surrogacy agreement to make provision for the intended parent(s) to pay for or reimburse the surrogate for reasonable expenses such as medical, legal, insurance or other professional expenses relating to the agreement and the pregnancy.
- Unlike the legislation in Greece and South Africa, which are more proscriptive in detailing what costs must be met by the intended parent(s) in relation to health insurance, fertility treatment etc, it would appear that the Illinois legislation permits much more of a negotiation between the parties involved, relying on legal advice and the role of the 'reasonable physician' to supervise the negotiations.

#### **The role of the court when the formal requirements of the GSA are not met (section 6(e)):**

- If the requirements of section 6 of the GSA are not met and the surrogacy agreement not considered enforceable, the court is instructed to determine legal parenthood based on evidence of the intent of the parties' to the agreement.
- Rather than advocating a major role for the court, this provision seems to have been inserted as a way of safe-guarding the intent of the parties' involved when the formalities of the GSA have not been satisfied.

#### **Legal parenthood (section 4, 8 and 17):**

- The GSA makes it possible to frame legal parenthood prior to the birth of the child.

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<sup>43</sup> While the term 'custody' is no longer used by many legal jurisdictions, it is still common in the US.

- The effect of the legislation is to disrupt the presumption of legal motherhood to the birth mother in gestational surrogacy agreements which accord with the requirements in the GSA.
- Instead, when a gestational surrogacy agreement satisfies the terms of the GSA, the intended parent(s) shall be regarded as the legal parent(s) of the child at birth and have sole custody of the child.
- It is the lawyers involved who must certify that the formal requirements of section 6 of the GSA have been satisfied. The certification process is through the filing of prescribed documentation with the Illinois Department of Public Health.
- A medical practitioner licensed in Illinois must also certify that the child is not the 'biological' (meaning 'genetic') child of the surrogate mother (and her husband).
- Legal parenthood is acknowledged through the signing of the birth register; there is no need to make any further applications to the court.
- Section 4(6)(d) also stipulates that even if the wrong embryo is implanted during the fertility treatment, resulting in the child not being genetically related to the intended parent (or either intended parent in the case of a couple), the intended parent(s) will still be the legal parents of the child unless a court determines otherwise. With this provision we see the determined focus of the GSA to provide legal certainty about the parenthood of the child in favour of the intended parent(s), even in exceptional circumstances.
- No challenges to legal parenthood or the validity of the surrogacy agreement can be filed once the period of one year after the child's birth has passed (section 15).

#### **Child support obligations (section 7):**

- The legal parent(s) will be responsible for child support obligations.
- The legislation makes it clear that any breach of the surrogacy agreement by the intended parent(s) does not relieve them of child support obligations.
- Where a donated gamete is used, the legislation makes clear that they are only responsible for child support obligations when he or she fails to enter into a legal agreement with the intended parent(s) in which he or she relinquishes all their parental rights and entitlements.

#### **Birth must take place in Illinois:**

- Although there are no residence or domicile requirements in relation to either the surrogate mother or the intended parent(s), the birth must take place in Illinois for the legislation to have effect.

#### **Role of the Department of Public Health (section 13):**

- The Department of Health is empowered by the GSA to adopt rules pertaining to the medical and mental health evaluations required for a surrogacy agreement under the legislation.

#### **2.2.1.3. *Ex-ante: legal management of surrogacy agreements***

This section details a number of *ex-ante* legal models which aim to facilitate certain surrogacy agreements and either the pre-birth framing of legal parenthood, or the framing of legal parenthood at the formal registration of the child's birth. Unlike Greece, South Africa and Illinois, these models do not stipulate either judicial or lawyer supervision and/or approval of the surrogacy agreement. This is not to say that legal professionals may not be involved in giving advice to persons who may wish to enter into a surrogacy agreement; indeed, this may often be the case. Rather, what it means is



that they have no formally mandated legal role in the approval of the surrogacy agreement. While certain pieces of medical evidence or documentation may have to be provided before the registration of the child's birth can occur, the legal models turn more on administrative procedures than either judicial or lawyer supervision.

### **i. Commercial**

#### **RUSSIA**

Russia is commonly described as having a permissive legal framework for surrogacy. This is due to a combination of three main factors. First, the eligibility criteria is quite relaxed in the sense that other than the indication of a medical need for surrogacy, most adults are entitled to avail of the legal provisions: a genetic connection to the child is not necessary; intended parents need not be married; nor do they need to satisfy residence, domicile or citizenship requirements. For a woman to act as a surrogate mother in Russia she must be between 20 and 35 years old, have at least one healthy child and have a medical certificate which indicates her to be in a satisfactory state of health. Second, the legal framework does not place limitations on the compensation that may be paid to the surrogate mother: commercial surrogacy is therefore not legally prohibited. Third, it is possible for the intended parent(s) to be named as the child's legal parent(s) on the birth certificate and the surrogate mother does not have to be registered as the child's legal mother. Also, there are no formal stipulations for presumptively valid surrogacy agreements.

However, despite these arguably permissive factors, it is also important to be aware of the restrictions and limitations that the Russian legal framework presents. Crucially, not all types of surrogacy are countenanced by the legal framework. It is only in the context of gestational surrogacy agreements, where the surrogate mother is not the genetic mother of the child, that the provisions permitting the intended parent(s) to register as the legal parent(s) of the child are relevant. If the surrogate mother is the genetic mother, the usual rules of legal parenthood are applied and she will be regarded as the legal mother. Second, the registration of the intended parent(s) as the child's legal parent(s) is contingent upon the consent of the surrogate mother. In other words, under the Russian legal framework, a surrogate mother maintains the right to change her mind about giving the child to the intended parent(s). The constitutionality of this provision was recently challenged in an application to the Russian Federation Constitutional Court by the intended parents in a surrogacy agreement where the surrogate mother registered herself as the child's legal parent.<sup>44</sup> The challenge was not successful and the surrogate mother's status as the child's legal mother was maintained and the constitutionality of the provision confirmed.

As was indicated above, the South African legal framework provides for a "cooling off" period in the context of traditional surrogacy agreements, whereby the surrogate mother is also the genetic mother of the child. However, this "cooling off" period is not available in the context of gestational surrogacy in South Africa.

That the surrogate mother maintains the right to register herself as the legal parent of the child and deny the intended parent(s) the opportunity to do so, makes the Russian legal framework more analogous to jurisdictions where surrogacy arrangements are only facilitated *ex-post facto*, in the sense that legal parenthood can potentially be transferred at some stage after the child's birth from the surrogate mother (and her partner) to the intended parent(s) (see below). That the consent of the gestational surrogate mother is needed before the intended parent(s) can be attributed with legal parenthood makes the Russian *ex-ante* legal framework somewhat unique. It could be argued that the Russian

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<sup>44</sup> Constitutional Court ruling of 15.05.2012 No. 88-O).



legal framework provides an important protection for the surrogate mother, without *requiring* her to be the legally recognised mother upon the child's birth (as is common in *ex-post facto* models). In other words, if she is happy to continue with the surrogacy arrangement once she has given birth to the child, the intended parent(s) can automatically be registered as the child's legal parent(s) through a straightforward administrative procedure, without the surrogate mother (and her husband) being initially registered as the child's legal parent(s).

On the other hand, of course, it can be argued that the Russian legal framework puts intended parents in a very precarious position, to include surrogacy arrangements where they may well be the genetic parents.

The country report on Russia in the Annex provides full details of the legal sources that govern surrogacy in Russia, as well as an elaboration of all the relevant provisions.

## **ii. Non-commercial**

### **BULGARIA**

There is currently a general legal prohibition against all forms of surrogacy in Bulgaria. However, in 2009, plans to instigate legislation that would provide for the *ex-ante* facilitation of altruistic gestational surrogacy agreements for heterosexual married couples were introduced. This led to the introduction of a number of Draft Bills before the legislative assembly, with the aim of amending and supplementing existing Bulgarian legislation, namely: the Family code; the Social Security Act; the Employment Code; and the Health Act.<sup>45</sup> These Draft Bills have been considered by preliminary committees and have been debated in the Bulgarian National Assembly. In advance of the second plenary debate in the National Assembly, further recommendation on the Draft Bills were made by a lawyer specialised in medical and family law. While it appeared likely that these Draft Bills would soon be passed in the Bulgarian National Assembly, many key personnel in the Bulgarian government resigned at the end of 2012. This resulted in the National Assembly initiating a 'state of emergency', whereby only essential matters of legislation are currently being considered. The Draft Bills have therefore not yet been passed, nor did the second reading in the National Assembly take place, which would have allowed us to report on what aspects of the scrutiny of the draft legislation were incorporated by the sponsors of the Draft Bills.

However, the country report on Bulgaria in the Annex provides a detailed account of the background to the introduction of the draft legislation and full details of the original content of the various Bills. It also includes detailed reportage on the main points raised in the committee-stage, National Assembly and specialised legal scrutiny of the legislation. Finally, some of the main arguments for and against surrogacy, as made by various Bulgarian special interest groups are outlined.

The Bulgarian proposals and debates represent the most recent attempt by any Member State to initiate an *ex-ante* legal framework for surrogacy. They also represent a very thorough attempt at doing so, with not only family and health law provisions being considered, but also employment and social security. Beyond the specifics of the proposed legal framework, a number of particularly interesting points of discussion emerged in the legislative process:

- i) The need to legalise surrogacy was contextualised within the demographic crisis in Bulgaria and the decreasing number of Bulgarian citizens, particularly young Bulgarian citizens given the increasing immigration of young people and the

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<sup>45</sup> A Draft Bill relating to the Citizen Registration Act was also introduced, but subsequently withdrawn.

increasing numbers of people with fertility problems. While this proposition did not go unchallenged – on the basis that surrogacy would only be an option for a small number of people and was therefore hardly an adequate response to much larger-scale demographic problems – it is interesting to see a controversial reproductive technique framed in this way.

ii) There was a perception that Bulgarian law was lagging behind Western European countries and that reform was needed to keep Bulgaria 'in sync' with Western Europe. Interestingly, Greece was not explicitly referred to in the public documentation that we were able to access, despite it being the only country with a comprehensive ex-ante legal framework for surrogacy. Instead, Western European countries with an ex-post facto facilitation of legal parenthood to the intended parent(s), or where adoption procedures have been used to achieve the same, were cited as examples (e.g. UK, Netherlands and Denmark). This is an interesting finding, in light of the fact that the legal framework proposed in Bulgaria is much more comprehensive than any of these Western European countries and aims to frame legal parenthood in favour of the intended parents prior to the birth of the child. Of course, not everyone agreed with this perceived need to 'sync' with Western European countries, with some commentators referring to the legal position in other Balkan countries and the need for Bulgaria to keep in tandem with their more prohibitive legal stance towards surrogacy.

iii) The support for any legal framework was overwhelmingly limited to altruistic surrogacy. While the ex-ante facilitation of surrogacy agreements in the draft legislation has many aspects in common with e.g. the Russian legal framework, the draft legislation was repeatedly distinguished from the legal framework of Russia, and also Ukraine, on the basis that the Bulgarian legal framework would continue to prohibit commercial surrogacy

iv) There appeared to be strong support from the medical professional associations and the medical profession generally for the draft legislation, as well as a strong public sympathy for infertile heterosexual (married) couples. Given that the draft legislation relates only to gestational surrogacy agreements, it very much prioritises the medical model of surrogacy, whereby surrogacy is seen as an extension of fertility treatment involving high-tech reproductive technology. The limitation of the legal framework to married couples also means that surrogacy will be used more as a means of replicating the traditional family, not least because the intended parents must have at least a partial genetic link to the child in order to be attributed with legal parenthood.

v) There were some interesting discussions around terminology in the context of surrogacy. The draft legislation refers to the intended mother as the 'biological mother' and the surrogate mother as the 'substitute mother'. As detailed in the country report, the word 'surrogate' has negative connotations in the Bulgarian language, so 'substitute' was deemed preferable. The use of 'biological' for the intended mother is problematic, not least because a donated ovum can be used to create the embryo that is implanted into the surrogate mother. Moreover, as was questioned by the specialised lawyer who scrutinised the draft legislation, there is also a biological relationship between the surrogate mother and the child, given the highly biological process of bearing and giving birth to a child. It is refreshing to see such a discussion of terminology take place, particularly in relation to the increasingly exclusive implication of genetics with 'biology' in the context of reproduction.

## BELGIUM

There is currently no express legislative provision for surrogacy in Belgium. In light of this legislative gap, legislative proposals have been tabled at the parliamentary assemblies with the objective of either expressly forbidding for-profit surrogacy agreements, or for legally permitting surrogacy agreements under certain conditions. The table below presents the core ideas of the four proposals which aim to legally frame and permit certain types of surrogacy under certain conditions. The country report on Belgium in the Annex provides a detailed consideration of these legislative proposals, followed by an analysis of surrogacy case-law in Belgium.

As can be seen in the table below, there are differences in the types of surrogacy that are permitted under the four proposals, as well as different eligibility requirements for the intended parent(s) and the surrogate mother; different framings of legal parenthood upon the birth of the child (two of which provide that this surrogate mother is the legal parent at birth, two of which attribute the intended parent(s) with legal parenthood at birth); different formalities for the execution of a surrogacy agreement; and different roles for the judiciary. However, a number of common features to all the Belgium proposals which seek to legally frame surrogacy can be identified: the surrogacy agreement must be altruistic; there must be a medical need that indicates the use of surrogacy; and there must be a genetic link between the child and the intended parent, or at least a partial genetic link to intended parents who are a couple. In light of this wide range of legislative proposals in Belgium, it will be interesting to monitor development in the country over the next few years.

**Table 9 : Summary Belgium legislative proposals**

		<b>DRAFT LAW submitted by Mr B. TOMMELEIN and associates (Open VLD)</b>	<b>DRAFT LAW submitted by Mrs C. DEFRAIGNE (MR)</b>	<b>DRAFT LAW submitted by Mr P. MAHOUX (PS)</b>	<b>DRAFT LAW submitted by Mrs M. TEMMERMAN and Mr G. SWENNEN (SPA)</b>
<b>TYPE OF SURROGACY</b>		Altruistic, traditional or gestational surrogacy arrangement	Altruistic, traditional or gestational surrogacy arrangement	Altruistic, traditional or gestational surrogacy arrangement	Altruistic and gestational surrogacy arrangement
<b>ACCESS</b>	<b>Intended parent(s) (IP)</b>	Medical indications (precis.) Heterosexual couple, married or not, and single women + able to provide at least half of the genetic makeup of the child (possibly SM) + age requirement + Belgian nationality or stable residence in Belgium	Medical indications Heterosexual couple, married or not + able to provide full genetic makeup, but ambiguity + evaluation by doctor No condition of nationality and/or residency	Medical indications No restriction + able to provide at least half of the genetic makeup of the child (possibly SM) + age requirement + 2 year residency	Medical indications "Stable" couple, hetero-or homosexual, married or not, but ambiguity + able to provide at least half of the genetic makeup of the child (not SM or SM partner) + age requirement + Belgian nationality (both) and 2 year residency in Belgium (at least 1 of the 2)

	<b>Surrogate mother (SM)</b>	Possibly in a relationship + implicitly contemplates family connections + must already have been through pregnancy  + age requirement  + Belgian nationality or stable residence in Belgium	Single, widow or divorced + no family connections (but exceptions)  No requirement of a previous pregnancy  + age requirement  No condition of nationality and/or residency	Possibly in a relationship + no indication regarding possibility of family ties + must have given birth to a living child  + age requirement  No condition of nationality and/or residency	Possibly in a relationship + implicitly contemplates family connections + must have given birth to a living child  + age requirement  + Belgian nationality
	<b>Validity</b>	Null in principle, but conditional derogation	Null in principle, but conditional derogation		
<b>RIGHTS AND DUTIES</b>	<b>Formalisation</b>	Authentic certificate	Authentic certificate	Private agreement	2 private agreements (with and without centre)
	<b>Content</b>	Legal indications:  Financial aspects  Medical and psychological aspects. Prenatal diagnosis, IVF	Legal indications: Aspects relative to costs	Legal indications:  Financial aspects  Medical and psychological aspects. Prenatal diagnosis, IVF	Model convention (see legal document n. 5-929/1): Financial aspects  Medical and psychological aspects. Prenatal diagnosis, IVF Behavioural, informational relational aspects
	<b>Execution</b>	PI and MP: compensation in case of non-fulfillment	PI and MP: compensation in case of non-fulfillment	PI: nothing / MP: right to withdraw, even after birth	PI / MP: unilat. before pregnancy; and MP: right to withdraw (90 after implant)
<b>FILIATION</b>	<b>Surrogate mother</b>	Filiation with the child (of whom she is the parent)	No filiation with the child (of whom she a priori never is the parent, but ambiguity of the proposition)	Filiation with the child (of whom she is the parent)	Never filiation with the child (of whom she never is the parent)
	<b>Intended parent(s)</b>	Filiation established through adoption (with modifications). The agreement applied as "prior declaration of adoption" ( ? )  Downstream judicial control, via the adoption procedure	Maternal and paternal filiation found as a matter of law subsequent to the naming, in the birth certificate, of the parents mentioned in the agreement  No judicial control	Filiation established through adoption (without modification – consent two months after the birth)  Downstream judicial control, via the adoption procedure	Filiation as a matter of law subsequent to the mentioning of the "requesting parent" referred to in the agreement (ambiguity)  No judicial control

#### 2.2.1.4. *Ex- post facto: transfer of legal parenthood*

##### **UK**

While the UK is widely cited as having a comprehensive legal regime for the facilitation of surrogacy agreements, it in fact only provides for the post-birth transfer of legal parenthood in certain circumstances and when certain conditions have been met. The perception that the UK fully legalises surrogacy may be due, in part, to the fact that since the mid-1980s, the UK has had a piece of legislation specific to surrogacy: the Surrogacy Arrangements Act 1985 (SAA 1985). However, the primary purpose of the SAA 1985 was to prohibit and criminalise certain commercial activities in relation to surrogacy agreements, such as advertising, brokering and profit-making by third party intermediaries to a surrogacy agreement. The SAA 1985 did not prohibit surrogacy outright, with section 2(2) making it clear that it is not a criminal offence for a woman to enter into an agreement with a view to being a surrogate mother, or for someone else to enter into an agreement with a view to a woman having a child for them. Nor did it provide for any *ex-ante* framework for surrogacy arrangements or legal parenthood.

The motivation for the legislation came from two main sources. The first was the response to a high profile surrogacy case known as 'the Baby Cotton case', whereby a woman called Kim Cotton agreed to be a surrogate mother for a married couple in return for the payment of a fee.<sup>46</sup> This was around the same time as the publication of the Warnock Committee's Report into the regulation of human fertilisation and embryology.<sup>47</sup> Although the Warnock Report was generally supportive of emerging treatments for infertility involving emerging reproductive technology (e.g. donor insemination, IVF, donation and storage of gametes), surrogacy as a reproductive technique found disapproval. Although the Warnock Report did not recommend the prohibition of surrogacy, it did recommend that regulation should discourage people from entering into surrogacy agreements. The legislative framework that emerged from the Warnock Report, the Human Fertilisation and Embryology Act 1990 (HFEA 1990), inserted section 1B into the SRA 1985. This provision codified the unenforceability of surrogacy agreements in UK law. This was the only provision relating to surrogacy that the original version of the HFEA 1990 contained.

However, in 1992, the 'Parental Order' provisions, providing for the post-birth transfer of legal parenthood when certain conditions have been met, were inserted following a campaign by an MP on behalf of married couple in his constituency who were in the position of having to adopt their genetic children following a surrogacy agreement in order to establish legal parenthood. A Parental Order is effectively a type of fast-track adoption procedure, providing for the *ex-post facto* transfer of legal parenthood to the intended parents of a child born following surrogacy agreements. A formal application must be made to the court and the judge will consider whether all the criteria have been met. Until a Parental Order has been applied for and approved, the surrogate mother will be the legal mother,<sup>48</sup> and her partner, if she has one, may well be the second legal

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<sup>46</sup> The question of wardship in relation to this case was addressed by the court in: *Re C (A Minor) (Wardship: Surrogacy)* [1985] FLR 846.

<sup>47</sup> Department of Health and Social Security (1984) Report of the Committee of Inquiry into Human Fertilisation and Embryology (London: HMSO, Cmnd. 9314). Available at: [http://www.hfea.gov.uk/docs/Warnock\\_Report\\_of\\_the\\_Committee\\_of\\_Inquiry\\_into\\_Human\\_Fertilisation\\_and\\_Embryology\\_1984.pdf](http://www.hfea.gov.uk/docs/Warnock_Report_of_the_Committee_of_Inquiry_into_Human_Fertilisation_and_Embryology_1984.pdf)

<sup>48</sup> As per either section 33 of the HFEA 2008, or the common law presumption, depending on the type of surrogacy arrangement, how the baby was conceived and the relationship status of the legal mother. For a more detailed elaboration of legal parenthood in the UK in the context of assisted reproduction and surrogacy respectively see: McCandless J and S Sheldon (2010) 'Human Fertilisation and Embryology Act 2008 and the Tenacity of the Sexual Family' 73(2) *Modern Law Review* 175-207 and Horsey K. (2010) 'Challenging presumptions: legal parenthood and surrogacy arrangements.' 22(4) *Child and Family Law Quarterly* pp 449-474.

parent. The consent of the birth parent(s) is needed before a Parental Order can be approved.

Despite the UK government commissioning a specific report in 1998 to examine the regulation of surrogacy,<sup>49</sup> no further changes were made to the UK legal framework until the Human Fertilisation and Embryology Act 2008 (HFEA 2008) amended the eligibility criteria for applying for a Parental Order. Under the HFEA 1990, the ability to apply for a Parental Order was limited to married couples (section 30). The HFEA 2008 relaxed the eligibility criteria relating to intended parents (section 54), so that unmarried and same sex couples could apply for a parental order following certain surrogacy arrangements. Single persons are still not eligible to apply for a Parental Order, and can only acquire legal parenthood through formal adoption procedures.<sup>50</sup>

As Section 1 of this Report makes clear, there has been a steady rise in the number of Parental Order applications to the courts in the UK, a significant proportion of which relate to cross-border surrogacy agreements. There may of course also be surrogacy arrangements whereby the intended parent(s) do not/cannot apply for a parental order (either because they don't appreciate the need to do so, or because they don't meet the eligibility criteria), or where formal adoption takes place in order to affect the *ex-post facto* transfer of legal parenthood. In relation to Parental Order applications that do come to the attention of a judge, it is interesting to note that since 2007 the High Court in England has been publishing significant rulings relating to the criteria of section 54. Two cases involving residence applications under the Children Act 1989 following surrogacy arrangements whereby the surrogate mother refused to hand over the child to the intended parents have also been published by the High Court and the Court of Appeal. How these cases interpret and clarify the legislative framework in the UK is detailed below in the exposition of the eligibility criteria for Parental Order applications. However, what is also interesting to note from these cases is the very clear appeal from the judiciary for better *ex-ante* regulation of surrogacy in the UK.<sup>51</sup>

The table below details the criteria that must be met so that two persons can apply to the court for a Parent Order under section 54 of the HFEA 2008, in order to be attributed with legal parenthood.

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<sup>49</sup> Margaret Brazier, Alastair Campbell and Susan Golombok (1998) *Surrogacy: Review for health ministers of current arrangements for payments and regulation* (London: HMSO, Cmnd. 4068).

<sup>50</sup> A recent case, involving the death of the intended father after the application for the Parental Order was submitted, but before it was granted, could be regarded as paving the way for an application from a single intended parent. However, the case makes clear that the Parental Order was granted in order to ensure that parental status was conferred to both the intended mother and the now deceased intended father. It was reasoned that to do so did not frustrate the intention behind section 54 and that as no other legal order could declare the intended father as the legal father of the child, to not grant the order would be a disproportionate interference with the Article 8 rights of the parties involved. See: *A v P* [2011] EWHC 1738 (Fam).

<sup>51</sup> Similar calls have been made by academic commentators: Horsey, K and Sheldon, S (2012) 'Still Hazy After All These Years: The Law Regulating Surrogacy' 20(1) *Medical Law Review* pp 67-89.



**Table 10 : Requirements for the *ex-post facto* transfer of legal parenthood in UK**

### Parental Order requirements

#### Must be two applicants:

- Applicants can be married, in a civil partnership or be two persons who are living together in an “enduring family relationship”; so long as they are not within prohibited degrees of relationship.
- Single persons are not entitled to apply for a Parental Order.

#### Mode of conception:

- The surrogate mother’s pregnancy must have been brought about through means other than sexual intercourse.
- Part 2 of the HFEA 2008 provides for a statutory schema for the attribution of parenthood for a child born through licensed fertility treatment, including the use of donated gametes. The schema extends to unlicensed ‘artificial insemination’ when the woman who is inseminated is married or in a civil partnership.
- Under these provisions, the woman who gives birth is regarded as the legal mother, irrespective of whether she is the genetic mother.
- The second legal parent may be her husband/civil partner or a person who meets the ‘agreed parenthood provisions’ in the legislation.
- This legislative schema was not designed to countenance surrogacy agreements and in most arrangements, the intended parents will not be considered as the child’s legal parent at the moment of birth.
- There is some scope for either the intended mother, or more commonly, the intended father (especially if he is the genetic father and the surrogate mother is single) to be considered as the child’s second legal parent from birth. However, this status will be shared with the surrogate mother.
- If these provisions do not apply, or the child was conceived through sexual intercourse, the common law rules attributing legal parenthood will apply. Again, the surrogate mother. If she has a husband, he is the presumed legal father; but this presumption can be rebutted by evidence from the genetic father.
- **It is interesting that the specific mode of conception is more significant than the distinctions between traditional/gestational surrogacy.**<sup>52</sup>

#### The intended parents must have at least a partial genetic connection to the child:

- This genetic connection can of course be with both of the intended parents, but at least one must contribute genetic material to the pregnancy.
- There is nothing on the face of the legislation which requires the intended mother to be medically incapable of a successful pregnancy and childbirth. However, it is possible that in the context of licensed medical fertility treatment, a medical professional may require this before agreeing to provide the surrogate mother with fertility treatment.
- The Human Fertilisation and Embryology Authority does not regulate surrogacy, so no guidance on this issue is provided in their Code of Practice guidance for medical professionals.

#### The intended parents must apply for the order within six months of the child’s birth:

- Importantly, the child’s home must be with the applicants at the time of the application.
- This means that a child is legally required to live with persons who are not his/her legal parents. Indeed, they may have no legal relationship with the child at all, given the practicalities of a non-legal parents obtaining e.g. a parental responsibility order or a residence order<sup>53</sup>

<sup>52</sup> Note, however, that when it comes to nationality purposes, section 50(9) of the British Nationality Act 1981 does not distinguish between different modes of conception. This means that if a surrogate mother is married, her husband will be the presumed legal father irrespective of the details of conception.

<sup>53</sup> These orders are provided for under the Children Act 1989, which is applicable in England, Wales and Northern Ireland. Scotland has a separate statute governing child law. The Human Fertilisation and Embryology legislation applies to all of the UK.



**Domicile:**

- At the time of the application at least one of the intended parents must be domiciled in the UK.
- Domicile means more than simply residing in the UK at the time of the application, or indeed, for a substantive time prior to the application.
- In 2007, a Turkish couple entered into a surrogacy arrangement with a UK surrogate. They moved to the UK towards the end of the pregnancy and the child was living with them at the time of the application to the court. It was, however, their desire to return to Turkey, where they considered their permanent home to be. The court made clear that this did not satisfy the requirement of domicile, and thus the court had no jurisdiction in relation to Parental Orders. Measures other than a Parental Order had to be used in order to facilitate the ability of the Turkish couple to take the child out of the UK and return to Turkey.<sup>54</sup>
- The mandatory requirement of domicile has been addressed by two further High Court cases.<sup>55</sup> Both cases involved male same-sex couples who had moved to the UK from other countries (US/Poland and Israel) in 2008 and who engaged in a gestational surrogacy agreement in India using the gametes of one of the men.
- Upon return to the UK, timely applications for Parental Orders were made, with the High Court confirming in both cases that the burden of proof in establishing the domicile requirement rested with the applicants.
- What had to be established was that at least one of the applicants had abandoned their domicile of origin, along with the acquisition of their domicile of choice in the UK. Part of establishing this would be to show that they had a fixed intention to remain in the UK indefinitely.

**Age:**

- Both intended parents must be over 18 at the time of the application.
- There is no upper age limit mentioned in the legislation.  
As surrogacy is not regulated *ex-ante*, there are no legal age limits with respect to the surrogate mother. However, age limits with respect to licensed fertility treatment may be otherwise applicable, as per guidance from the Human Fertilisation and Embryology Authority.

**Consent of the surrogate mother and other legal parent:**

- The surrogate mother must consent to the transfer of legal parenthood.
- She cannot provide this consent any earlier than six weeks after the child's birth. This is similar to adoption law in the UK.
- If there is a second legal parent at the time of the child's birth, their consent is also required.
- If the surrogate mother and/or the second legal parent cannot be found, or are deemed incapable of giving consent, their consent will not be required.
- The courts have made clear that this consent is required to be documented even if the surrogacy arrangement took place in a country where there is an *ex-ante* framing of legal parenthood in favour of the intended parent(s).<sup>56</sup>
- In a recent case involving a surrogacy arrangement in India, the surrogate mother disappeared shortly after the birth of the child.<sup>57</sup> The appropriate consent six weeks after the birth could therefore not be provided. However, the court proceeded to grant the Parental Order application as they were satisfied that all had been done to find the surrogate mother and acquire her consent. In other words, this was a genuine case of where the surrogate mother could not be found. In light of this, it was deemed to be in the children's best interest to grant the Parental Order application (see below on the paramountcy principle).
- However, the court warned against utilising this provision as a means of avoiding the need to take all reasonable steps to obtain the surrogate mother's consent.

<sup>54</sup> *Re G (Foreign Domicile)* [2007] EWHC 2814 (Fam). The solution of the court was to use section 84 of the Adoption and Children Act 2002 to terminate the parental responsibility of the surrogate mother and her husband and attribute the intended parents with parental responsibility. Note, however, that parental responsibility does not establish parental status and legal parenthood. What this court solution facilitated was the ability of the intended parents to return to Turkey with the child, with a view to initiating adoptions proceedings in Turkey.

<sup>55</sup> *Z v C* [2011] EWHC 3181 (Fam); *Re A and B (surrogacy: domicile)* [2013] EWHC 426 (Fam).

<sup>56</sup> *Re X and Y (foreign surrogacy)* [2008] EWHC 3030 (Fam); *Re IJ (a child)* [2011] EWHC 921 (Fam); *Z v C* [2011] EWHC 3181 (Fam); *Re A and B (surrogacy: domicile)* [2013] EWHC 426 (Fam).

**Payments:**

- The court must be satisfied that no money or benefit, other than for “reasonable expenses”, has been exchanged in relation to the surrogacy agreement.
- The court assesses the reasonableness of these expenses retrospectively and has expressed its discomfort as doing so, not least because often the surrogacy arrangement is a *fait accompli* once the Parental Order application has been made.<sup>58</sup> This puts the court in the difficult position of refusing an order that might otherwise be deemed to be in the child’s best interests, on the basis of a payment that has already taken place.
- To date, no Parental Order application has been refused on the basis of unreasonable costs, to include arrangements which might otherwise be classed as ‘commercial’. In 2008, the High Court retrospectively approved payments to a Ukrainian surrogate mother of €27,000. However, it was clear that the court felt under considerable pressure to approve the payment, as otherwise the children would be left ‘stateless and parentless’.
- In 2010, the High Court considered an application for a Parental Order following a surrogacy arrangement in Illinois, where compensation beyond ‘reasonable expenses’ had been paid to the surrogate mother (the precise amount was not disclosed in the case report).<sup>59</sup> In this case, the judge made clear that it would only be in the more extreme cases of an abuse of public policy that the refusal of an application for a Parental Order would be justified if the child welfare considerations indicated that the application should otherwise be granted. The fact that the surrogacy agreement was legally permissible in Illinois also steered towards approving the payment, which was regarded as being made in ‘good faith’.
- Similar sentiments have been repeated in subsequent cases: “Where the Applicants for a Parental Order are acting in good faith, with no attempt to defraud the authorities, and the payments are not so disproportionate that the granting of Parental Orders would be an affront to public policy, it will ordinarily be appropriate to give retrospective authorisation, having paramount regard to the children’s welfare.”<sup>60</sup>

**The child’s welfare is paramount:**

- The Human Fertilisation and Embryology (Parental Order) Regulations 2010 indicate the child’s welfare as the paramount consideration. Previously it has been the primary, as opposed to the paramount, consideration.
- Subsequent case law has emphasised this change in the regulations.

As can be seen, section 54 of the HFEA 2008 stipulates a mandatory gateway to the court’s jurisdiction in relation to Parental Orders, with various requirements relating to age; domicile; living arrangements; relationship status of the intended parents; and the consent of the birth parent(s). However, once this jurisdiction is unlocked, the court’s paramount consideration is the child’s welfare.

What can also be seen is that the UK legal framework is deemed to apply, even when the surrogacy agreement has taken place elsewhere. In other words, foreign birth certificates and court orders will not be recognised and the intended parents will have to apply for a Parental Order in order to establish legal parenthood. If the jurisdiction of the court is not ‘unlocked’, full adoption must take place, which may be far from straightforward particularly if payments have been involved, or in the context of cross-border surrogacy arrangements. Although the UK government has published some guidelines relating to immigration following cross-border surrogacy agreements (see below), these do not relate to parental legal status, which will still need to be established upon return of a child to the UK.

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<sup>57</sup> *Re D and L (minors) (surrogacy)* [2012] EWHC 2631.

<sup>58</sup> See: *Re X and Y (foreign surrogacy)* [2008] EWHC 3030 (Fam).

<sup>59</sup> *Re L (a minor)* [2010] EWHC 3146 (Fam).

<sup>60</sup> *Re D and L (minors) (surrogacy)* [2012] EWHC 2631.

## **AUSTRALIA**

Although there are no legal provisions relating to the practice of surrogacy on a federal level, the vast majority of the Australian states have recently introduced legislation that allows for and expressly regulates surrogacy.

The individual state legislatures are free to impose their own specific conditions that set limits, ban, or impose (sometimes severe) hurdles to the legal acknowledgement of the family relationships stemming from a surrogacy contract. Commercial surrogacy is prohibited in all states, and a criminal conviction is more than a mere possibility. Surrogacy services for the provision of which no money exchange is arranged, namely the form of altruistic surrogacy, is allowed by all state legislations, with the exception of the Tasmanian Surrogacy Contracts Act 1993, which unequivocally renders all surrogacy arrangements void and unenforceable as contrary to the social ethos and policy (paragraph 7).<sup>61</sup>

A series of major reforms in 2008 to the federal-level Family Law Act 1975 (FLA) brought the issue of surrogacy and legal parenthood to the fore of public debate. In its previous form, the FLA did not deal with the matter of legal parenthood in cases of collaborative reproduction involving same-sex lesbian couples or surrogacy.

Under the 2008 amendments of subsection 60HB of the FLA, the definitions of “parent” and “child” in federal law have been extended to include lesbian parents who have a child through collaborative reproduction and/or fertility treatment, and to some parents who have children through surrogacy arrangements. The effect of subsection 60HB FLA is to clarify that any transfer of legal parenthood by state and territory courts for surrogacy families alters legal parental status under the FLA.

Up until 2010, surrogacy laws in Australia varied significantly from state to state. However, some uniformity was accomplished when all states – except Tasmania – adopted laws that prohibited commercial surrogacy and accepted the occurrence of (gestational) surrogacy in limited circumstances.

The legal regimes in most states now currently present the option of a court-based issuance of a ‘parentage order’ that leads to the transfer of legal parenthood to the commissioning couple. This possibility is generally available to all opposite and same-sex couples in legal or ‘de facto’ relationships. The above mentioned legal process was deemed to be in accordance with the ‘best interests of the child’ because it ensures that the child will not be left stateless or parentless, as well as protecting the surrogate mother from a coerced consent when offering her gestational services.

The following table illustrates the different pieces of legislation that cover the issue of surrogacy in each Australian state and briefly explains the basic content of the legal provisions.

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<sup>61</sup> However, note that more facilitative legislative proposals have been introduced in Tasmania. See table below for details of the Bill.

**Table 11 : Australian legislative provisions**

State	Legal response	Content of legal provisions
Australia	<p>No express federal legal response to surrogacy other than the Family Law Act 1975, 60HB, which allows for federal-level recognition of any transfer of legal parenthood in the context of surrogacy by state or territory courts.</p> <p>Most states have express legislation permitting some form of surrogacy.</p>	<p>Summary of generally applicable legal provisions:</p> <ul style="list-style-type: none"> <li>• Commercial type of surrogacy is a criminal offence.</li> <li>• The rule of medical necessity exists. The commissioning couple should provide sufficient evidence of their inability to produce a child or carry a pregnancy to term.</li> <li>• The surrogate mother must be over 25 years old, able to carry a pregnancy, and have a history of a previous live childbirth.</li> <li>• Only gestational surrogacy arrangements are accepted. The eggs should not come from the surrogate.</li> <li>• Criminal records check to all participants in the arrangement.</li> <li>• The parties must undergo counselling.</li> <li>• Informed consent free from coercion is a prerequisite in some states.</li> <li>• Legal advice prior to the drafting of a surrogacy contract should be sought.</li> <li>• If state laws do not provide otherwise, it is accepted that the person(s) who have parental responsibilities towards the child is/are the intended parent(s). Parentage is acquired through adoption.</li> <li>• Surrogacy contracts are unenforceable.</li> <li>• The best interests of the child are paramount.</li> </ul>
	Parentage Act 2004	<ul style="list-style-type: none"> <li>• This legislation was closely based upon s. 30 of the UK HFEA 1990<sup>62</sup>, but its scope is arguably more limited. Only altruistic <u>gestational</u> surrogacy is acceptable, and <u>the courts have no power on the authorisation of any payments made or to be made.</u></li> <li>• Commercial surrogacy is prohibited (para. 41).</li> <li>• Parental recognition under strict requirements (par. 24-25):             <ol style="list-style-type: none"> <li>a) the child should be conceived via IVF performed in a fertility clinic based in the Australian Central Territory;</li> <li>b) the surrogate mother and/or her potential partner should not have offered their genetic material;</li> <li>c) the parties have come to an agreement for substitute parenthood;</li> <li>d) the child is the product of the genetic material of at least one of the intended parents;</li> <li>e) intended parents' residence in the Australian Central Territory.</li> </ol> </li> </ul>

<sup>62</sup> Read further Millbank, J., 'De facto Relationships, Same-Sex and Surrogate Parents: Exploring the Scope and Effects of the 2008 Federal Relationship Reforms', (2009) 23(3) *Australian Journal of Family Law* 160.

- Surrogacy Act 2010 No 102
- Assisted Reproductive Technology Act 2007
- Assisted Reproductive Technology Regulations 2009
- Status of Children Act 1996
- Births, Deaths and Marriage Registration Act 2010

(See also New South Wales Legislative Council Standing Committee on Law and Justice, 'Legislation on Altruistic Surrogacy in New South Wales', May 2009).

- Altruistic surrogacy allowed.
- Presumption of motherhood for the birth mother. It is difficult for the intended mother to gain legal rights to parenthood.
- Any surrogacy agreements must be drafted prior to the pregnancy, but they are unenforceable.
- Transfer of legal parentage through parental orders.
- Single and same-sex parenting is acceptable.
- Age limit for the surrogate (she must be over 25) and the intended parent(s) (he/she/they must be over 18)
- Payment of reasonable expenses is allowed.

## Queensland

Surrogacy Act 2010

- This state's laws regarding surrogacy have been criticised as harsh. Under the previous regime (Surrogate Parenthood Act 1988) all forms of surrogacy were prohibited and criminal sanctions were in force. The maximum penalty was 100 penalty units<sup>63</sup> or three years of imprisonment for entering into or offering to enter into a surrogacy arrangement.
- The change came in 2008, after the Queensland's Parliamentary Select Committee's recommendation for the legalisation of altruistic surrogacy (see also Queensland Parliament, 'Investigation into Altruistic Surrogacy', Report 2008). Queensland's law is said to be the most controversial one, as it allows for state intervention in matters relating to private contracting and intimate personal relationships.
- Altruistic surrogacy.
- No requirement of a genetic link between the intended parents and the child.
- Conception can be accomplished by any means, not necessarily through the use of ARTs.
- Same-sex and single parenting acceptable.
- No residence requirements: the court has discretion to grant parenthood orders even in cases where the intended parents do not live in Queensland (Surrogacy Act 2010, s. 23 (2)).
- Payment for reasonable expenses allowed.

**During the lifetime of this study, restrictive reform to the Queensland Surrogacy Act 2010, relating to access to the legislation by single and same-sex couples was proposed.<sup>64</sup> This proposal has now been dropped.**

<sup>63</sup> The value of a penalty unit differs from state to state in Australia, and may be regularly reviewed by the state authorities. In Queensland, a penalty unit is currently 110 Australian Dollars. 100 penalty units would therefore be 1,100 Australian Dollars, which is approximately 847 EURO (calculated on 13<sup>th</sup> May 2013).

<sup>64</sup> See Smith, Malcolm K., Willmott, Lindy, Trowse, Pip, & White, Benjamin P. 'Back to the future: prohibiting surrogacy for singles, same-sex and shorter-term heterosexual couples in Queensland', (2013) 20(3) *Journal of Law and Medicine* 638-654.

<b>South Australia</b>	Family Relationships Act 1975, as amended.	<ul style="list-style-type: none"> <li>• Altruistic surrogacy.</li> <li>• Criminal penalties for intermediaries.</li> <li>• Automatic transfer of legal parentage (s. 10 (c)). The intended mother's husband is considered to be the legal father of the child (s. 10 (d)).</li> <li>• Surrogacy is only available to heterosexual married couples or couples in a de facto relationship for a period of 3 years or more.</li> </ul> <p>The intending couple must reside within the state's jurisdiction. Pregnancy must be accomplished through the use of fertility treatment, which will take place in a licensed fertility clinic based in South Australia.</p>
<b>Tasmania</b>	<p>Surrogacy Contracts Act 1993</p> <p>See also Department of Justice 'Proposed Tasmanian Surrogacy Bill: Exposure Bill', 1 (2011).</p>	<ul style="list-style-type: none"> <li>• <b>ALL</b> types of surrogacy are prohibited for reasons of public policy.</li> <li>• Surrogacy contracts are void and unenforceable (par. 7)</li> <li>• Third-party intervention in a surrogacy agreement is a criminal offence (par. 5-6).</li> </ul>
<b>Western Australia</b>	<p>- Surrogacy Act 2008</p> <p>- Human Reproductive Technology Act 1991</p>	<ul style="list-style-type: none"> <li>• The Surrogacy Act came into force in 2009.</li> <li>• Surrogacy for commercial reasons is prohibited (par. 8-9).</li> <li>• Payments for reasonable expenses related to the pregnancy and insurance claims are allowed (par. 6 (3)).</li> <li>• A court authorisation process for parental orders and transfer of legal parentage to the intended parents is provided by law, and the child's best interests are paramount to this decision.</li> <li>• The intended parents must persuade the court for their fitness to parent the child (par. 13 (2)).</li> <li>• A plan of communication and contact between the parties must be submitted to the court.</li> <li>• The surrogate mother must be at least 25 years old and have a child of her own.</li> <li>• The progressiveness and innovation of this piece of legislation can be found in the <u>availability of surrogacy also to a single man or a male couple</u>.</li> <li>• At the same time, however, there are limitations which point to the requirement for the residence of the intended parent/couple within the state's jurisdiction; the requirement of a pre-conceptual written surrogacy agreement; as well as that of a "cooling-off" period of 3 months for the surrogate mother to decide whether she would like to relinquish the child or not.</li> <li>• The request for a parental order can be reviewed by a government appointed Tribunal court.</li> </ul>
<b>Victoria</b>	<p>Assisted Reproductive Treatment Act 2008, no. 76. (see also the Assisted Reproduction Regulations of 2009)</p> <p>Status of Children Act 1974 (for those cases where conception was not accomplished through fertility</p>	<ul style="list-style-type: none"> <li>• The state of Victoria was the first to adopt a law on surrogacy.</li> <li>• In 1995 the legislature introduced the Infertility Treatment Act, which classified commercial surrogacy as a criminal offence. Altruistic surrogacy was passively accepted, but in some cases it was practically impossible for intended parents to be allowed to perform fertilisation with the purpose of surrogacy, as under the Act the woman who would be treated (i.e. the surrogate mother) must have been infertile (para 20).</li> <li>• In 2008, the Assisted Reproductive Treatment Act was passed (it came into force on 1 January 2010), and rendered surrogacy contracts void and unenforceable (par. 44).</li> </ul>

- However, the practice of surrogacy was not illegal if the IVF treatment of the surrogate occurred within the Victorian jurisdiction.
- The law states an age limit for the surrogate (she must be over 25), as well as the precondition of a previous live birth and experience of motherhood, and requires prior consultation of all the participants with a legal professional, as well as counselling (dictated by the Assisted Reproduction Regulations of 2009).
- With regards to the intending mother, she must be infertile, and she and her partner must undergo and succeed in a criminal record and child protection check.
- Moreover, a number of organisations, such as the Victorian Assisted Reproductive Treatment Authority (VARTA) function in this state.
- More specifically, VARTA is responsible for the administrative matters of the ART Act 2008 and ensures that the participants have complied with the state law requirements.
- The Act refers to a Parent Review Panel, before which the parties of the surrogacy arrangement must present their case and provide evidence for their altruistic motives, their need for surrogacy in order to procreate, and their suitability to become parents. The decisions of this Panel are reviewable by the Victorian Civil and Administrative Tribunal.
- The Victorian Supreme Court holds the ultimate decisive power for the authorisation of individual requests for the acknowledgement of any substitute parental orders, which will then lead to the transfer of legal parentage.



## 2.2.2. Non-legal guidelines

### 2.2.2.1. Fertility clinic and professional organisation guidelines

#### **NETHERLANDS**

Commercial surrogacy is prohibited by the Criminal Code and although there is no specific legal regulation of non-commercial surrogacy, legislation was adopted in 1998 that requires institutions providing IVF services in the context of surrogacy agreements to comply with a number of criteria, including the guidelines established by the Society for Obstetrics and Gynaecology. Institutions must also ensure that the intended parents provide all the necessary genetic material for the pregnancy, thus limiting the provision of gestational surrogacy to heterosexual couples with functioning gametes. The country report on the Netherlands in the Annex provides a detailed consideration of the general legal regime in the Netherlands. A summary of the relevant provisions for this component of the research is presented in the table below.

**Table 12 : Summary of the Dutch Society for Obstetrics and Gynaecology guidelines**

<b>Age of the surrogate mother</b>	The surrogate mother should be no older than 44 (aligned to the age limit for an IVF with egg donation)
<b>Surrogate mother's previous fertility</b>	The surrogate mother should already have given birth to a healthy child and should consider that her family is complete.
<b>Informed consent</b>	All parties involved – that is the intended parents, the surrogate mother as well as her partner, if appropriate – must be informed orally and in writing of all the potential consequences of this undertaking, be it on the medical, psychological or judicial fronts, which should allow for a verification of the free and informed consent of the surrogate mother.
<b>Medical and psychological examination and support</b>	The parties involved should benefit from psychological support during and after the procedure. Moreover, on a medical level, the guidelines stipulate that the number of embryos implanted into the surrogate mother should be limited to two in order to avoid the risks of multiple pregnancy.
<b>Age of the intended parents</b>	The intended mother should be no older than 40. This age limit is based on the expected results of the ovarian stimulation and the small chance of success of a pregnancy through IVF for women aged over 40, due to the aging of their ovula.
<b>Withdrawal of the intended parents' consent</b>	There does not seem to be any specific provision to make sure that the parents do not withdraw their consent. However, the procedure to be followed by the intended parents and the conditions imposed on them seem to be so strict that it seems very unlikely that intended parents would withdraw their consent;

**Conditions linked to the place of residence, home and/or nationality of the intended parents and/or of the surrogate mother**

The guidelines of the Dutch Society for Obstetrics and Gynaecology don't formulate any requirements in terms of place of residence, home or nationality. However, certain surrogacy centres lay down additional requirements to those stipulated in the guidelines and require for example that the parties hold Dutch nationality and residency in the Netherlands.

**Counselling requirement**

The guidelines of the Dutch Society for Obstetrics and Gynaecology dedicate a paragraph to the requirement of counselling. It provides that all parties, that is both the intended parents and the surrogate mother and her partner, should be informed in writing and orally of all aspects, risks and disadvantages of the treatment, be on the medical, psychological or legal levels. The counselling is carried out by a psycho-medical team who tries to bring out an informed consent, which will be recorded in an agreement bringing together all parties involved, but also separately consulting with, on the one hand, the intended parents, and on the other hand, the surrogate mother and her partner. The agreement among others stipulates the number of IVF attempts accepted by the surrogate mother as well as the moment and manner in which the child will be handed over to the intended parents.

*2.2.2.2. Government guidelines for cross-border surrogacy agreements*

Both the UK and Irish governments have published formal guidance in relation to cross-border surrogacy agreements and immigrations and citizenship rules.<sup>65</sup> It is important to realise that these guidelines do not provide a schema for the attribution of legal parenthood in cases of cross-border surrogacy; they merely provide guidance as to the principles which will be considered in the approval of applications for travel documentation and immigration status. In relation to parental legal status, both documents make clear that national law is applicable to the parties concerned, and that foreign birth certificates and/or court orders are not binding on the national authorities.

The rules pertaining to immigration and citizenship in both jurisdictions are complex, and it is beyond the scope of this section to analyse these documents in full. However, a number of observations can be made.

**First**, the process of returning with a child is likely to be more straightforward if:

- 1) the intended father is the genetic father of the child; and
- 2) the surrogate mother is single/not married.

If the intended father's genetic connection can be evidenced by an independent third party, this provides scope for him to be regarded as the child's legal parent or guardian, and thus eligible to apply for the necessary travel documentation. However, much

<sup>65</sup> Irish Department of Justice and Equality (2012) 'Citizenship, parentage, guardianship and travel document issues in relation to children born as a result of surrogacy arrangements entered into outside the state' (available at: <http://www.justice.ie/en/JELR/Pages/PR12000035>); Home Office, UK Border Agency (2009) 'Inter-country surrogacy and the immigration rules' (available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/residency/Intercountry-surrogacy-leaflet>).

depends on the surrogate mother's marital status as both UK and Irish law will initially regard her husband as the legal father.<sup>66</sup> It may be possible in Irish law to rebut this presumption through a declaration of parentage under the Children Act 1987.<sup>67</sup> Under UK law, the situation is complex due to somewhat conflicting terms of the HFEA 2008 and the British Nationality Act 1981 as to when the marital presumption of paternity can be rebutted. In light of this, intended parents are advised:

that they must not rely on any future rebuttal of the surrogate mothers' husband being the child's father as a means of establishing that the child has British citizenship, and should expect to have to apply for an Entry Clearance in order to bring the child into the United Kingdom under the Immigration Rules, not by way of the child automatically acquiring British citizenship and coming in on a British passport (section 27).

In the UK, male same-sex couples can apply for a Parental Order (see above). So long as one of the men have a genetic connection to the child, their position would be regarded as the same as a genetic father in a heterosexual relationship. Given the framing of the rules around the male genetic link, a female same-sex couple would not be similarly positioned, even if one of the women was genetically related to the child. A single man would be in a similar position with respect to the immigration rules, but he would not be eligible to apply for a Parental Order upon returning to the UK. Full adoption would be needed to ensure that the man acquired full parental responsibility for the child and to extinguish the parental legal status, rights and entitlements of the surrogate mother.

A significant difference between the Irish and UK guidance is that no reference is made in the Irish guidance to surrogacy agreements whereby the intended father is not also the genetic father. In other words, there is no mechanism to facilitate the bringing of a child to Ireland following a cross-border surrogacy agreement when donor sperm has been used: the intended father must be the genetic father. In the UK guidance, intended parents are directed to apply for an Entry Clearance in order to bring the child to the UK under the immigration rules. This application will of course have to be successful before the child can travel to the UK.

**Second**, as both jurisdictions have hitherto regarded the surrogate mother as the legal mother, there is little scope for the intended mother to establish herself as a parent or guardian for the purpose of applying for travel documentation after the child's birth. Even if the surrogate mother relinquishes her status as the legal mother, this will only be relevant for the later purpose of transferring legal parenthood according to the national legislation. This means that even if the intended mother is the genetic mother, she has no official standing with respect to applying for the child's travel documentation, or establishing their citizenship status.

A recent Irish case, however, may make this aspect of the guidance in Ireland untenable. The current guidance currently states that:

Under Irish law the woman who gives birth to the child – in this case, the surrogate mother – is the **legal mother** of the child, even if the ovum from which the child was produced was provided by one of the commissioning adults, or by a donor.

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<sup>66</sup> See sections 33 and 35 of the Human Fertilisation and Embryology Act 2008 and section 50(9) of the British Nationality Act 1981; and section 46 of the Status of Children Act 1987.

<sup>67</sup> Note, however, that the intended father will also have to apply for a guardianship order to be considered as the child's legal guardian. This is because under the Guardianship of Infants Act 1964 the mother of a child born outside of marriage is considered to be the child's sole legal guardian.

In March 2013, the Irish High Court ruled that the intended mother in a domestic surrogacy agreement should be named as the legal mother of the children born subsequent to the surrogacy agreement and that the birth register should be amended accordingly.<sup>68</sup> The original entry in the birth register recorded the surrogate mother and the intended genetic father as the legal parents. When the intended parents subsequently asked for the entry to be amended to name the intended mother, the Chief Registrar refused to do so on the basis of the *mater semper certa est* principle. The intended parents then applied for a declaration of parentage under the Children Act 1987, presenting evidence of the intended mother's genetic relationship with the child. The application was supported by the surrogate mother and ultimately by the High Court.

The court concluded that there was nothing in Irish law affirming the principle that the birth mother is the legal mother. The court also dismissed the respondent's arguments relating to the significance of pregnancy and gestation for maternity in light of developments in epigenetics. The respondents argued that these factors distinguished maternity from paternity, which was based on genetics and nuclear DNA alone. The purpose of this argument was to unsettle claims of symmetry in relation to the significance of DNA evidence for a declaration of parentage under the Children Act 1987. However, the court found that the significance of epigenetics did not trump the significance attached to nuclear DNA, from which characteristics are deemed to be inherited. This, the court argued, was supported by the focus on the 'blood tie' in Irish case law.

This important case certainly paves the way in Ireland for intended parents with a genetic link to a child to be regarded as their legal parent. However, given the focus of the High Court's reasoning on the genetic link, this case is unlikely to have any broader application to surrogacy agreements where the intended parents are not also the genetic parents of the child. Although the intent of the intended mother was acknowledged by the court, this was very much a secondary consideration to the main focus on genetics in the case.

The Minister for Justice, Equality and Defence in Ireland, Alan Shatter TD, has announced his intention to introduce legislation relating to surrogacy and assisted reproduction. The Family Relationships and Children Bill is scheduled to be published later in 2013. In 2004, a report on assisted human reproduction was commissioned by the Irish government, with the Commission publishing their report in 2005.<sup>69</sup> In this Report, the majority of the Commission recommended that the intended parents should be the presumed legal parents. The presumption could be rebutted if there was evidence of a fundamental change in circumstances under which the surrogate mother agreed to the arrangement. It is interesting to note that this recommendation was not limited to cases whereby the intended parents had a genetic link to the child,<sup>70</sup> suggesting that the intent behind the arrangement may have been considered as more crucial. Legislative developments in Ireland may therefore prove very interesting, and possibly in significant contrast to the *ex-post facto* position in the UK, at least in relation to legal parenthood. Whether full *ex-ante* regulation is proposed remains to be seen.

**Third**, while Ireland and the UK have both published guidelines relating to travel documentation, immigration and citizenship after cross-border surrogacy, it must be remembered that these are merely guidelines on the existing law: no special legal measures have been put in place and parties who plan to engage in a cross-border surrogacy agreement are still strongly advised to obtain legal advice relating to their

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<sup>68</sup> *MR & Anor v An tArd Chlaraitheoir & Ors* [2013] IEHC 91.

<sup>69</sup> Department of Health (2005) Report of the Commission on Assisted Human Reproduction (available at: <http://www.dohc.ie/publications/cahr.html>).

<sup>70</sup> Note that some members of the commission thought that if the surrogate mother was also the genetic mother, she should be the presumed legal mother.

specific circumstances. However, the rules continue to be complex and incredibly difficult to navigate, with the English High Court observing incorrect advice in some of their published cases.<sup>71</sup> In other words, despite the attempt by national governments to raise awareness of the relevant legal issues, cross-border surrogacy remains a difficult practice to navigate in light of national legislative frameworks that were not designed to countenance their existence.

## **2.3. PART B: CASE LAW**

### **2.3.1. MEMBER STATES WITH NO EXPRESS PROVISION FOR SURROGACY**

#### *2.3.1.1. Protection of the child*

#### **Placement of the child**

##### **BELGIUM**

- **Ghent (15<sup>th</sup> ch.), 18<sup>th</sup> of May 2009, reforming Youth court. Ghent (27<sup>th</sup> ch.), 31<sup>st</sup> of March 2009**: after an agreement concluded between the biological parents and the intended mother before childbirth, the child was given to the intended mother so that she could adopt him/her (traditional surrogacy). The circumstances of the case did not suggest a for-profit surrogacy. In first instance, the Youth court considered that it was not necessary to pronounce an enforceable pedagogical measure with regards to the child. The Court of Appeal reformed this decision and granted the child to an adoption family for a period of six months, considering it necessary to take an urgent enforceable pedagogical measure applying article 37, 2<sup>o</sup> of the decree on the special assistance to the youth. The child was then placed in a centre for child care and family assistance. While this placement was first extended by request of the public prosecutor (Youth court. Ghent (27<sup>th</sup> ch.), 4<sup>th</sup> of November 2009, inedited), the Youth court settled in favour of the request of the social services, requesting the attribution of the child to the intended mother, in whose household the child currently lives (Youth court. Ghent (27<sup>th</sup> ch.), 4<sup>th</sup> of November 2009, unpublished).

##### **THE NETHERLANDS**

**Rechtbank Groningen, 20 July 2004, Rechtbank Utrecht, 26 October 2005, Rechtbank Utrecht, 24 October 2007, Rechtbank Utrecht, 7 May 2008, Gerechtshof Amsterdam, 25 November 2008, Rechtbank Utrecht, 10 June 2009, Gerechtshof Amsterdam, February 2, 2010: case *Donna***: surrogacy was carried out in Belgium between a Belgian surrogate mother and a Belgian couple of intent. The surrogate mother was inseminated with sperm from the father of intent (traditional surrogacy). As a result of the deterioration of the relationship between the surrogate mother and the couple, the surrogate mother pretended that she had a miscarriage. After the birth, the surrogate mother entrusted baby Donna to a Dutch couple, in return of payment. The Dutch couple informed the Dutch authorities that a new-born would soon arrive in their family and that they would like to adopt it, without specifying that the child is coming from abroad. The case was referred to the Court of Utrecht, which has had to decide whether the child could stay with the Dutch couple despite the fact that they had not honoured the rules applicable to the adoption procedure when the child to be adopted is foreign. Noting that there was a "family life" between the child and the couple insofar as Donna had been living in the home of the Dutch couple since her birth, the Court allowed the couple to keep Donna. Meanwhile, the Belgian parents of intent had realised that the surrogate mother had lied to them and had given birth to 'their' child. More than two years after the birth of the child, a DNA test showed that the

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<sup>71</sup> E.G *Re X and Y (foreign surrogacy)* [2008] EWHC 3030 (Fam)*Re A and B (surrogacy: domicile)* [2013] EWHC 426 (Fam).

Belgian father of intent was the biological father of the child. Following this test, the Belgian father of intent started various procedures before the Dutch courts to get the child back and to be granted visitation rights. The courts however felt that it was not in Donna's interest to leave the home in which she had been growing up since birth, nor to grant her biological father a right of access (see below for the procedure in Belgium).

## **Criminal law**

### **BELGIUM**

- **Ghent, 5<sup>th</sup> of September 2005: case *Donna***: the surrogacy took place in Belgium with a Belgian surrogate mother and Belgian intended parents. Following the deterioration of the relations between the surrogate mother and the Belgian couple of intended parents, the surrogate mother pretended a stillbirth and sold Donna to a Dutch couple. At first instance, the youth court of Oudenaarde placed Donna under the provisional tutelage of the social service of the Flemish Community after requesting the youth court of Utrecht (Netherlands) to transfer the case to it. In appeal, the Court of Ghent nullified the decision of the youth court of Oudenaarde on the basis of the territorial incompetence of the Belgian courts. Indeed, the transfer of the Dutch courts to the Belgian courts was not in conformity with the article 15, § 2 of the regulation Brussels n° 2201/2003 of the Council of the 27<sup>th</sup> of November on the competence, the recognition and the execution of decisions in matters of wedlock and in matters of parentage, abrogating regulation (CE) n° 1347/2000, so-called Regulation Brussels II bis. The case was transferred to the tribunal of Utrecht (see above).

However, on 12 October 2012, the criminal court of Oudenaarde sentenced the surrogate mother and her husband to a year of deferred imprisonment and a fine of 1,650 EUR for having inflicted "inhumane and degrading treatment" to the little Donna. The Dutch couple who bought the child was also sentenced to a 1,650 EUR fine, whilst the Belgian couple of intent benefitted of a suspended sentence.

- **Civ. Ghent, 24<sup>th</sup> of December 2009: case *J***: the surrogacy took place in Belgium with a Belgian surrogate mother and Dutch intended parents to whom the child was sold beforehand via Internet. The surrogate mother and her spouse are the genetic parents of the child. At the moment of birth, the Belgian surrogate mother pretends to be the Dutch intended mother and, for this reason, the identity of the Dutch intended mother is registered on the birth certificate instead of the identity of the Belgian surrogate mother. Parentage in relation to the child of the intended father is established by presumption of paternity, him being married to the intended mother. When the fraud is revealed, a penal enquiry takes place in Belgium and the Netherlands and, as a result, the child is withdrawn from the Dutch intended parents and placed with a host family in Belgium. The results of the penal enquiry clearly demonstrate that the Belgian woman gave birth to the child. The action undertaken by the Belgian surrogate mother before the tribunal of first instance of Ghent contests the parentage of the Dutch intended parents. The Belgian courts are competent as the child has habitual residence on the Belgian territory (article 61 of the Code of international private law, on the rules of international competence in matters of parentage). The applicable law in the case of the contestation of paternity and maternity is the Dutch law as designed by the rule of conflict of laws in matters of parentage (article 62 of the Code of Private international law). Indeed, it is the law of the State from which the intended parents – whose parentage is contested – are citizens of. According to article 209 of the Dutch Civil code, parentage as established in a birth certificate cannot be contested if there is a de facto parent-child relation between the child and the person mentioned in the birth certificate. The tribunal considered that in the current case this was not the case for the Dutch parents to the extent that the child had not lived but only a few months with the Dutch family and was soon placed in a Belgian host family. In the absence of a de facto parent-child relation between the child and the parents mentioned in the birth certificate, the action of



contestation is open to a third party. In conformity with the article 209 of the Dutch Civil code, the surrogate mother was, thus, capable of undertaking an action contesting the parentage as there was no de facto parent-child relation between the child and the Dutch parents. The maternal parentage of the intended mother was, then, easily revoked by proving that she did not give birth do the child and the parentage of the husband was revoked by domino effect, as the parentage of his wife was revoked. The parentage of the surrogate mother was, thus, re-established.

Before the Dutch courts, the case produced a penal conviction of the Dutch parents for forgery and illegal adoption (Rechtbank Zwolle, 14<sup>th</sup> of July 2011, LJN: BR1608 (sentence condemning the woman) et LJN: BR1615 (sentence condemning the man) (See report on the Netherlands). The surrogate mother and her partner (biological parents) were also the subject of penal conviction before Belgian courts of degrading treatment of a child (art. 417 bis, 3<sup>o</sup> Penal code), declaring themselves guilty of substitution of a child through a commercial exchange, a situation that the tribunal analysed as the sale of a child as well as a for-profit surrogacy, both contrary to the human dignity of the child. The correctional court of Ghent condemned them to a year of suspended imprisonment, imposed them a fine of 550 EUR and an amount of 7.500 EUR to be paid to the child for damages (Corr. Ghent, 14<sup>th</sup> of May 2012, inedited. An account of the facts can be found in this site: [www.jeugdenkinderrechten.be](http://www.jeugdenkinderrechten.be)).

### 2.3.1.2. *Ex-post facto: legal parenthood framework*

## **Internal case law**

### **BELGIUM**

#### **1) Applicable rules**

##### ***Establishing the maternal bond***

As there is no legislation enacted on matters on surrogacy, the rules determining the establishment of maternal parentage follow the traditional adage *mater semper certa est* by establishing that the legal mother is the mother giving birth<sup>72</sup>. In other words, the surrogate mother is the legal mother of the child, even if she has no genetic relation to the child, while the intended mother has no legal relation to the child, even if she is the genetic mother. In order to establish a parentage relationship with the child, the intended mother has to engage an adoption procedure either through a joint adoption with her spouse/cohabitant, if he could recognise the child, or adopting the child on her own if she is single. Belgium authorises the adoption by a single parent as well as by same-sex persons. Moreover, the law does not require that the candidates seeking to adopt are married. It is sufficient to be "cohabitants", for example, having made a declaration of legal cohabitation or of permanent and affective life together for at least the last three years when the adoption request takes place (art. 343, Civil code).

##### ***Establishing the paternal bond***

In the absence of modifications to the rules related to paternal parentage, the husband of the surrogate mother is considered as the legal father of the child, in compliance to the rule relating to the presumption of paternity<sup>73</sup>. The intended father will have to either engage an adoption procedure to establish parentage to the child or contest the paternal parentage of the husband of the surrogate mother to establish his own paternity. If the surrogate mother is not married, the intended father can acknowledge the child with the

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<sup>72</sup> Art. 312 Civil code: "The child's mother is the person designated as such on its birth certificate" (editor's translation).

<sup>73</sup> Art. 315 Civil code: "The child born in wedlock or within the 300 days following the marriage's dissolution or annulment, has the husband as a father" (editor's translation).



consent of the surrogate mother<sup>74</sup>, which allows him to establish parentage without engaging an adoption procedure. If there is no consent from the surrogate mother, a court tries to conciliate the parties and can reject the claim by the intended father in case an agreement is not attained and with the condition that it is proven that the intended father is not the biological father of the child. Moreover, the court can reject the acknowledgment if the child is a year or older and the acknowledgement is obviously against the child's best interests.

### **Adoption**

If the intended parents engage an adoption procedure aiming at establishing parentage to the child, it will be organised according to the classic rules governing adoptions aiming at establishing parentage in Belgium. As a result, no genetic relation is required between the child and the intended parents for these to be eligible for the adoption procedure.

## **2) Analysis of the decisions**

In the domestic cases of surrogacy, the legal action is almost systematically undertaken by the intended parents seeking to establish parentage in relation to the child, either through a procedure of adoption, undertaken by the intended mother<sup>75</sup> or by both of the intended parents<sup>76</sup>, or by a procedure of approval of the acknowledgement of paternity by the intended father<sup>77</sup>. One of the published cases concerns, however, a different hypothesis; that of the contestation of paternity, introduced by the husband of the surrogate mother, on the basis of the absence of his consent to the insemination of his wife by the sperm of the intended father<sup>78</sup>. As, by definition, the surrogacy contract is illegal, no action has been undertaken, until today, with the purpose of requesting the enforcement of an eventual contract concluded between the parties.

Of the eleven decisions taken into account, relating to cases of domestic surrogacy, seven concern the approval of adoption procedures; five decisions concede it and two refuse to sentence on it. Only one decision has been taken on the subject of the protection of childhood.

### **Let's start with the decisions granting the adoption:**

- **Antwerp (16<sup>th</sup> ch. bis), 14<sup>th</sup> of January 2008, reforming Youth court Antwerp (7<sup>th</sup> ch.), 11<sup>th</sup> of October 2007:** the surrogacy took place with the gametes of the intended parents implanted through IVF, the woman being the mother of the intended mother (gestational surrogacy). The intended father's parentage is established by the acknowledgment of paternity, the surrogate (grand-)mother not being married<sup>79</sup>. The action introduced before the Youth court of Antwerp seeks the approval of the adoption

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<sup>74</sup> Art. 319 and 329bis Civil code: "When the paternity is not established in relation to articles 315 or 317, the father can recognise the child within the conditions fixed in article 329bis".

<sup>75</sup> Youth court Brussels, 4<sup>th</sup> of June 1996, *Jurisprudence de Liège, Mons et Brussels*, 1996, p. 1182 ; Antwerp (16<sup>th</sup> ch. bis), 14<sup>th</sup> of January 2008, *RechtskundigWeekblad*, 2007-2008, p. 1774, note F. SWENNEN, « Adoptie na draagmoederschap revisited » ; Youth court Brussels, 6<sup>th</sup> of May 2009, *J.L.M.B.*, 2009, p. 1083 ; Ghent (15<sup>th</sup> ch.), 30<sup>th</sup> of April 2012, *Tijdschrift voor Belgisch Burgelijk Recht*, 2012, p. 261, note L. PLUYM reforming Youth court Bruges, 19<sup>th</sup> of January 2012 and Youth court Ghent, 13<sup>th</sup> of June 2012, 590.B.2011/57, unpublished.

<sup>76</sup> Ghent (15<sup>th</sup> ch.), 16<sup>th</sup> of January 1989, *T.G.R.*, 1989, p. 52 ; Youth court Turnhout, 4<sup>th</sup> of October 2000, *RechtskundigWeekblad*, 2001-2002, p. 206, note F. SWENNEN, « Volle adoptie na draagmoederschap: nihil obstat ? ».

<sup>77</sup> Brussels (3<sup>rd</sup> ch.), 1<sup>st</sup> of March 2007, *Revue trimestrielle de droit familial*, 2007, p. 754 et Civ. Hasselt (1<sup>st</sup> ch.), 27<sup>th</sup> of March 2001, *Limb. Rechtsl.*, 2001, p. 323.

<sup>78</sup> Civ. Ghent (3<sup>rd</sup> ch.), 31<sup>st</sup> of May 2001, *Revue générale de droit civil*, 2002, p. 27, note G. VERSCHULDEN.

<sup>79</sup> At first instance, the acknowledgement of paternity by the intended father in relation to the child born from his mother-in-law was problematic in view of the article 321 of the Civil code that forbids the acknowledgement of paternity when it crates between the mother and the father an absolute obstacle to marriage. Following a reform of the law on parentage, the intended father could acknowledge his child, the obstacle becoming relative and not absolute anymore. See F. SWENNEN, « Adoptie na draagmoederschap revisited », note on Antwerp (16<sup>th</sup> ch. bis), 14<sup>th</sup> of January 2008, *RechtskundigWeekblad*, 2007-2008, p. 1775,

requested by the intended mother. In first instance, the Youth court refuses to concede the adoption on the basis that a surrogacy convention is illegal and that it cannot be used as a fair basis framing the adoption unless it is accepted and framed by the law. The tribunal considers, thus, that the full adoption resulting from an intra-familial surrogacy is not in conformity with the best interests of the child or his/her fundamental rights. The Court of Appeal of Antwerp reforms the sentence pronounced by the Youth court and concedes the adoption underscoring the fact that an altruistic surrogacy by a surrogate mother, whose only objective is to satisfy the desire to have a child by her daughter, is not contrary to the public order.

- **Youth court. Brussels, 4<sup>th</sup> of June 1996:** the surrogacy took place with the gametes of the intended parents implanted through IVF, the surrogate mother being the sister of the intended mother (gestational surrogacy). The parental parentage is established by acknowledgement of paternity. The action undertaken before the tribunal of first instance of Brussels aims to obtain an approval of the adoption requested by the intended mother. The tribunal settles in favour of her request highlighting that it is in the best interests of the child that his/her legal situation corresponds to the social reality, the child being reared in the household by the intended mother.

- **Youth court. Turnhout, 4<sup>th</sup> of October 2000:** surrogacy took place with the gametes of the intended parents implanted through IVF, the surrogate mother being the sister of the intended mother (gestational surrogacy). The action undertaken aims to obtain the approval of the adoption requested by both intended parents, the surrogate mother being married. The tribunal settles in favour of their request after observing that the surrogate mother and her spouse (legal parents) consent to the adoption and on the basis that a surrogacy not for profit is not against public order.

- **Youth court. Brussels, 6<sup>th</sup> of May 2009:** the surrogacy took place with the gametes of the intended parents implanted through IVF, the surrogate mother not being related to the intended parents (gestational surrogacy). The parentage of the intended father is established by acknowledgement of paternity. The action undertaken aims to obtain the approval of the adoption requested by the intended mother. The tribunal settles in favour of her request on the basis that the request is substantiated on a fair basis and that it responds to the best interests of the child as it allows to match the law with the facts as the intended mother is the genetic mother of the child and considered by everyone as the child's mother.

- **Youth court. Ghent, 13<sup>th</sup> of June 2012:** the surrogacy took place with the gametes of the intended parents implanted through IVF (gestational surrogacy). The parentage of the intended father is established by acknowledgement of paternity. The action undertaken aims to obtain the approval of the adoption requested by the intended mother. The tribunal settles in favour of her request, considering that the adoption is based on a fair basis as the twins are, from the moment that they were born, a part of the household of the intended parents.

**The two decisions that refuse adoption are the following:**

- **Ghent (15<sup>th</sup> ch.), 16<sup>th</sup> of January 1989:** the surrogate mother was inseminated with the sperm of the intended father. Thus, it was a case of "traditional" surrogacy, the surrogate mother being also the genetic mother of the child. The legal action undertaken by the intended parents seeks to approve a full adoption with regards to the child conceived by the surrogate mother. The Court of appeal refuses to settle the case, considering that it was not the intention of the legislator that a couple could request a child from a surrogate mother to integrate the child into their household after childbirth through an adoption procedure.

- **Ghent (15<sup>th</sup> ch.), 30<sup>th</sup> of April 2012, reforming Youth court. Bruges, 19<sup>th</sup> of January 2012:** the surrogate mother was inseminated with the sperm of the intended father. It is, thus, a "traditional" surrogacy, the surrogate mother being also the genetic mother of the child. In addition to the costs linked to the pregnancy, the intended parents paid an amount of 1.600 euros per month to the surrogate. The action undertaken seeks to obtain the approval of the adoption requested by the intended mother. In first instance, the Youth court settles in favour of her request, considering that it is not within the responsibility of the tribunal to carry out, within the framework of an adoption procedure, an exam of the content, the scope and the legal (in)validity of a surrogacy contract concluded between the surrogate mother and the adopting mother. The tribunal considers that only the basis of the adoption requires analysis without taking into consideration the illegality of the surrogacy contract. In appeal, the Court of Ghent reforms the sentence pronounced and refuses the full adoption requested by the intended mother on the basis that the dissimulation, through an adoption, of buying-selling a child is an illegal basis that makes the adoption illegal. The Court affirms that the human individual cannot be lowered to the level of a monetarily quantifiable object, which makes a for-profit surrogacy contrary to human dignity. To verify if the adoption was based on a fair basis, the Court has to analyse the information preceding the procedure of adoption, based on article 351 of the Civil code, according to which the sale of a child can lead to a revision of the adoption sentence. This analysis cannot be thwarted by the circumstance that there is a de facto parent-child relation between the child and the adoption candidate and that, in social relations, the child is considered the child of the adoption candidate.

**In yet other two decisions published, the tribunals settle in favour of the approval of the acknowledgement of paternity of the intended father<sup>80</sup>:**

- **Brussels (3rd ch.), 1<sup>st</sup> of March 2007:** the surrogacy took place with the gametes of the intended parents implanted through IVF, the surrogate mother not being related to the intended parents (gestational surrogacy). The action undertaken aims at obtaining the approval of the act of acknowledgement made by the intended father in relation to the child to be born of the surrogate mother. This action is founded on the old article 319*bis* of the Civil code, according to which "if the father is married and acknowledges a child conceived by a woman who is not his spouse, the act of acknowledgement has to be presented through a request of approval before the tribunal of first instance where the child is domiciled". In this case, the Court tried to determine if by use the terms "child conceived by a woman who is not his spouse", the legislator had aimed at distinguishing between the different modes of conception, responding in different ways to requests of acknowledgement on the basis of whether the child born and given birth to by a woman who is not a spouse was conceived with the gametes of the spouse or not. The Court responded negatively considering that the surrogate mother could equally "conceive" a child even if she was not the genetic mother. The Court of Appeal of Brussels settles in favour of the applicant and approves the acknowledgement made by the biological father with regards to the child who was given birth to by the surrogate mother.

A procedure of approval of full adoption was then introduced by the intended mother, equally the genetic mother, before the Youth court, which settled in favour of her request.

- **Civ. Hasselt (1<sup>st</sup> ch.), 27<sup>th</sup> of March 2001:** the surrogacy took place with the gametes of the intended parents implanted through IVF, the surrogate mother being anonymous (gestational surrogacy). The child was born through anonymous childbirth in

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<sup>80</sup> Ever since a reform on the laws of parentage came into force on the 1<sup>st</sup> of July 2007, a married man who acknowledges a child conceived by a woman who is not his spouse does not have to request an approval of the act of acknowledgement from the tribunal of first instance. See Law of the 1<sup>st</sup> of July 2006 modifying the dispositions of the Civil code on the establishment of parentage and the effects of it, *M.B.*, 29<sup>th</sup> of December 2006.

France ('accouchement sous x'). The action undertaken aims at obtaining the approval of the act of acknowledgement made by the intended father in relation to the child to be born of the surrogate mother. The tribunal settles in favour of the request of the intended father after verifying that the conditions of the old article 319*bis* of the Civil code, on the acknowledgement of paternity of a child conceived by a woman who is not his spouse, were fulfilled. The tribunal considers that this disposition applies equally to a situation in which the woman, other than the spouse, gives birth to a child even if she is not genetically related to the child.

A procedure of approval of full adoption was then introduced by the intended mother, equally the genetic mother, before the Youth court, which settled in favour of her request.

**Finally, the last decision concerns an action to contest paternity, introduced by the husband of the surrogate mother, claiming not consenting the insemination of his wife:**

- **Civ. Ghent (3<sup>rd</sup> ch.), 31<sup>st</sup> of May 2001:** the surrogate mother was inseminated with the sperm of the intended father. This is, thus, a "traditional surrogacy", the surrogate mother being also the genetic mother of the child. Paternal parentage was established in relation to her husband, in accordance with the presumption of paternity. The action undertaken by the husband of the surrogate mother before the tribunal of first instance of Ghent aims at contesting his paternity on the basis that he had not consented to the artificial insemination of his wife. The tribunal declares the action admissible and well-founded, after ascertaining the absence of consent from the husband to the artificial insemination of his wife as well as the absence of genetic relation between the husband and the child given birth to by his wife.

This decision is situated at the start of the procedure that could lead to link the child to his father – and thereafter potentially mother – of intent, after having removed the child from the surrogate's husband. But nothing can be concluded.

The eight other decisions go beyond this and result in the establishment of the parentage of the child with his father of intent as well as with his mother of intent.

Two decisions have on the contrary refused the adoption (either by the mother of intent or by both intended parents). What is the impact of these decisions? Do they invalidate the favourable case law tendency to establish the parentage of child with his parents of intent?

Two features differentiate these decisions from the case law trend that favours the integration of the child into the family of intent:

- in the two decisions that refused to deliver the adoption of the child by the intended mother, the surrogate mother was the genetic mother of the child (traditional surrogacy). It seems that the genetic reality strongly influences the outcome of the dispute and that the judges consider that it is in the child's interest to have his parentage confirmed with the surrogate if she is his genetic mother;

- besides, the surrogacy concerned by the decision of the Appeal Court of Ghent (30 April 2012) was of commercial character. The Court refused to grant the adoption after recording that the parents of intent monthly paid the amount of 1,600 EUR to the surrogate, on the grounds that an adoption based on a commercial surrogacy could not be based on the right motivations, no matter what the de facto link was between the child and the mother of intent. The Court considers that a commercial surrogacy

agreement is contrary to human dignity and that an adoption trying to hide the buying/selling of a child is illegal<sup>81</sup>.

It looks like we can conclude that the Belgian jurisprudence shows benevolence in the event of an altruistic surrogacy by recognising the double parentage of the couple of intended parents.

The concept of superior interest of the child tends to occupy a major space in the motivation of the judges. In Youth court Brussels, 4<sup>th</sup> of June 1996, the interest of the child was hence put forward by the magistrate to justify the ratification of the adoption request by the mother of intent with the aim of having the judicial reality match the social reality, since the child was being brought up by the mother of intent and not by the surrogate<sup>82</sup>. But in more general terms, the control of the superior interest of the child is used as the basis of the judicial decision granting the adoption, insofar as the tribunal seized of the request must check whether the adoption is based on "just motives", which include the best interest of the child<sup>83</sup>.

## **THE NETHERLANDS**

### **1) Applicable rules**

In the absence of regulation governing the civil aspects of surrogacy, common law rules apply.

#### ***Establishing the maternal bond***

Maternal filiation is therefore established for the surrogate mother, as she is the woman who gave birth to the child, no matter whether she is genetically related to the child or not (art. 1:198 DCC) while the paternal filiation is established if she is married.

#### ***Establishing the paternal bond***

If the surrogate mother is married, the paternal filiation is established with respect to her husband (art. 1:199(a) DCC). If the surrogate mother is not married, the father of intent can recognize the child with the consent of the surrogate mother and provided that there is a close personal relationship between the child and the father of intent (art. 1:204(1)(e) DCC).

#### ***Adoption***

To establish parenthood of the child, the intended parents must turn to the adoption procedure after the "surrogate parents" have been deprived of parental authority over the child. In practice, the intended parents must report the situation to their municipality, which then refers the case to the Child Protection Council (*Raad voor Kinderbescherming*; authority from whom permission to adopt must be requested) so that a social investigation can be performed. If the Council validates the parents' request, the latter can initiate an adoption procedure under the condition that they have been living together for 3 years and that they have been raising and taking care of the

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<sup>81</sup> Ghent (15<sup>ième</sup> ch.), 30 avril 2012, *Tijdschrift voor Belgisch Burgelijk Recht*, 2012, p. 261, note L. PLUYM ; *Tijdschrift voor Belgisch Burgelijk Recht*, 2012, p. 372, note G. VERSCHULDEN.

<sup>82</sup> Civ. Bruxelles (jeun.), 4 juin 1996, *Jurisprudence de Liège, Mons et Bruxelles*, 1996, p. 1182 : « Génétiquement, Ivo est le fils de la requérante et il est considéré comme tel dans la vie sociale. Il paraît dès lors de son *intérêt* que le droit rejoigne ici le fait. La rupture du lien de filiation avec la mère porteuse constitue un élément de sécurité juridique, en particulier pour le cas où la mère porteuse souhaiterait un jour faire valoir des droits à l'égard de l'enfant ».

<sup>83</sup> Art. 344.1 C. civ. : « Toute adoption doit se fonder sur de justes motifs et, si elle porte sur un enfant, ne peut avoir lieu que dans son *intérêt supérieur* et dans le respect des droits fondamentaux qui lui sont reconnus en droit international ».

child for at least one year, period during which they exercise joint guardianship (*gezamenlijke voogdij*) with respect to the child (art. 1:228 DCC). No genetic link is required between the child and the parents who want to adopt it. Moreover, a single person can also adopt a child.

In concrete terms, in situations involving surrogacy, the Child Protection Council refers to the competent courts to seek the forfeiture of parental authority of legal parents ('surrogate parents') and the designation of the parents of intent as tutors. The request for revocation of the parental authority of the 'surrogate parents' can only be introduced by the Child Protection Council and not by the parents of intent (art. 1:267 DCC). Most courts revoke the parental authority of 'surrogate parents' because of their inability to care for the child as they did not intend to have it for themselves<sup>84</sup>. After caring for the child for a year, the parents of intent can then introduce an adoption procedure<sup>85</sup>. According to a study, this period is inappropriate as it subjects parents of intent and surrogate mother alike to uncertainty for a year. This study therefore recommends the abolishment of this period to allow the parents of intent to adopt the child at birth<sup>86</sup>.

## 2) Analysis of the decisions

In some of the internal cases of surrogacy, the father of intent files a paternity claim in which he seeks to establish parentage through proof of a close personal relationship with the child.

- **Rechtbank Almelo, 24 October 2000**, FJR, 2001 (3) 91, cited by M.J. Vonk<sup>87</sup>: acknowledgment of paternity of a child born to a surrogate mother by a married father of intent. The tribunal granted demand as soon as it appeared that there was a close personal relationship between the father of intent and the child established by the fact that the child was living in the home of the parents of intent since birth.

- **Rechtbank Assen, 15 June 2006**, LJN AY7247 cited by M.J. Vonk<sup>88</sup>: filing of a prenatal recognition of paternity of a child carried by a surrogate mother (sister of the mother of intent) by a married father of intent (biological father). The tribunal refused to grant his application on the ground that there can be no close personal relationship between a man and an unborn child.

In other situations, the Dutch courts were seized of cases designed to challenge paternity of the husband of the surrogate mother to establish filiation from the father of intent.

- **Rechtbank 's-Gravenhage, 21 June 2010**, LJN: BN1309: surrogacy was carried out in the Netherlands between parents of intent of Dutch nationality and a surrogate mother of Dutch nationality who is related to the parents of intent (sister of the mother

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<sup>84</sup> M. J. VONK, « Netherlands: Maternity for another : a double Dutch approach », in *Gestation pour autrui : Surrogate motherhood* (dir. F. MONÉGER), coll. Colloques, vol. 14, Proceedings of the 8<sup>th</sup> Congress of international comparative law, held in Washington DC from 25 to 31 July 2010, Paris, Society of Comparative Legislation, 2011, p. 212.

<sup>85</sup> M. ANDRE, A. MILON, H. DE RICHEMONT, *Contribution à la réflexion sur la maternité pour autrui*, Information Report n° 421, 25 June 2008, French Senate, p. 27, available online: [www.senat.fr/rap/r07-421/r07-4211.pdf](http://www.senat.fr/rap/r07-421/r07-4211.pdf).

<sup>86</sup> S. DERMOUT, H. VAN DE WIEL, P. HEINTZ, K. JANSEN and W. ANKUM, « Non-commercial surrogacy : an account of patient management in the first Dutch Centre for IVF Surrogacy from 1997 to 2004 », *Human Reproduction*, 2010, vol. 25, n° 2, p. 448.

<sup>87</sup> M. J. VONK, « Netherlands: Maternity for another : a double dutch approach », in *Gestation pour autrui : Surrogate motherhood* (dir. F. MONÉGER), coll. Colloques, vol. 14, Proceedings of the 8<sup>th</sup> Congress of international comparative law, held in Washington DC from 25 to 31 July 2010, Paris, Society of Comparative Legislation, 2011, p. 210.

<sup>88</sup> M. J. VONK, « Netherlands: Maternity for another : a double dutch approach », in *Gestation pour autrui : Surrogate motherhood* (dir. F. MONÉGER), coll. Colloques, vol. 14, Proceedings of the 8<sup>th</sup> Congress of international comparative law, held in Washington DC from 25 to 31 July 2010, Paris, Society of Comparative Legislation, 2011, p. 210.



of intent). The surrogate mother was inseminated with sperm from the father of intent. She is therefore the genetic mother of the child (traditional or low-technology surrogacy). The filiation of the child is established with the surrogate mother and her husband. The case initiated on behalf of the child (by a *guardian* or *bijzonder curator*) aims to challenge the paternal filiation of the husband of the surrogate mother and to establish the paternity of the child's father of intent. In accordance with the rule of conflict of laws on filiation (art. 2, al. 1 and art. 1 WCA), the action in contestation of paternity is governed by Dutch law as soon as it comes to the common nationality of the legal parents (*i.e.* the surrogate mother and her husband). Dutch law is also applicable to the issue of the establishment of paternal filiation of the biological father whenever it comes to the law of the common nationality of the mother and biological father having validly challenged the legal father's filiation (art. 6 WCA). As a consequence, the Court refers to article 1:207, al. 1 of the Dutch Civil Code according to which the father of a child is the one that has "created it". Having established that a "sperm donor" cannot be described as "progenitor" within the remit of the Dutch law, the tribunal refers to the case-law of the European Court of Human Rights relating to article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms and notes that the European Court ignores the distinction made by the Dutch legislator between a "progenitor father" and a "sperm donor father". What matters is the combination of blood ties and the concrete circumstances of a family life. Therefore, the Court accepts the relationship of filiation of the biological father on the grounds that, under the circumstances of the case, the latter maintains a "family life" with the child. This is the reason why he is entitled to the protection afforded by article 8 of the ECHR. The tribunal grants the request and establishes the filiation of the biological father to the child.

As explained above, to establish their parentage with respect to the child, the parents of intent will have to wait until the legal parents or 'surrogate parents' to be deprived of parental authority over the child, and until they are themselves appointed as guardians. Providing they have lived together for at least three years, the parents of intent will be able to introduce a procedure for adoption after having raised and cared for the child for a year. The Child Protection Council will initiate the case for the revocation of the legal parents' parental authority.

- **Rechtbank 's-Hertogenbosch, 18 August 2011**, LJN: 5334 BR: surrogacy was carried out in the Netherlands between a surrogate mother and a married same-sex couple. A friend of one of the fathers of intent gave the egg that was fertilized by the sperm of the other father of intent to then be implanted in a surrogate mother (gestational surrogacy with egg donation). The action is brought by the Child Protection Council in order to withdraw parental authority from the surrogate mother and her husband (legal parents) and to place the children under the joint custody of the parents of intent (homosexual couple). The Court granted the application and nominated the parents of intent guardians with regard to different elements: the interest of the children, the absence of financial stakes, the excellent relationship between the parents of intent and the "surrogate parents", the emotional bonding between the parents of intent and the children, the biological link between the children and one of the two fathers of intent, the parents of intent's desire for a child and the absence of pressure on the surrogate mother.

Some decisions classified under the heading of International Affairs (because the surrogacy was carried out abroad) actually concern questions of internal law as the action does concern the recognition of a foreign birth certificate but the revocation of the



legal parents' parental authority to entrust the guardianship of the children to the parents of intent<sup>89</sup>.

- **Rechtbank Alkmaar, 29 October 2008** LJN: BG8903: surrogacy was carried out in Belgium with the gametes of intended parents implanted via IVF in the surrogate, who is the sister-in-law (brother's wife) of the mother of intent (gestational surrogacy). Surrogacy has been carried out in Belgium and not in the Netherlands because of the age limit that the Dutch legislation subjects the mother of intent to. The proceedings are instituted by the Child Protection Council in order to remove parental authority of the surrogate mother and her husband (legal parents) and to place the child under the joint custody of the parents of intent so that they can adopt the children in one year's time, in accordance with Dutch law. The Court granted the application on the ground that it is in the interest of the children that the parents of intent be appointed as their guardians.

- **Rechtbank Arnhem, 20 February 2008**, LJN: BC8012 and **Rechtbank Arnhem, 19 May 2009**, LJN: BI5039: surrogacy was carried out in Russia with the gametes of the intended parents implanted via IVF into the surrogate, who is the mother of the mother of intent (gestational surrogacy). The proceedings are instituted by the Child Protection Council in order to remove parental authority of the surrogate mother and her husband (legal parents) and to place the child under the joint custody of the parents of intent. The Court granted the application on the ground that it is in the interest of the children that the parents of intent be appointed as their guardians. In accordance with Dutch law, the genetic parents filed an application to adopt the children one year after having been designated as guardians. The Court granted their request and orders the adoption of the children by the parents of intent, on the grounds that it is in the best interest of the children to have their filiation established with their genetic parents. During the adoption procedure, the (unmarried) parents of intent agreed to give the children the surname of their father of intent.

It is hence clear that the absence of specific legislation governing the civil aspects of surrogacy in domestic law has led judges to "tinker" legal solutions from laws that were not quite suitable for surrogacy. Thus, the procedure for revocation of parental authority is used to remove parental authority from the "surrogate parents" in order to be able to vest the parents of intent with the guardianship of a child born out of surrogacy, which is a necessary step before starting an adoption procedure. Like the Belgian judges, the Dutch judges have a benevolent approach to surrogacy and try hard to find solutions that are favourable to linking the child with his parents of intent, despite the red-tape and the complexities of the rules applicable in Dutch substantive law.

With regards to that, the notion of best of interest of the child should be highlighted in cases concerning revocation of custody of the surrogate mother and her husband and the designation of the parents of intent as tutors. On several occasions, the Dutch courts thus felt that it was in the interest of the children to be entrusted to the parents of intent's joint guardianship to then be able to be adopted by the latter<sup>90</sup>. In principle, this procedure for revocation of parental authority is a measure for the protection of children when parents are no longer able to care properly for their children, which is the reason why only the Child Protection Council may initiate the legal action, and not the parents of

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<sup>89</sup> See for example: **Rechtbank Alkmaar, 29 October, 2008** LJN: BG8903 (surrogate motherhood in Belgium), **Rechtbank Arnhem, 20 February 2008**, LJN: BC8012 and **Rechtbank Arnhem, 19 May 2009**, LJN: BI5039 (surrogacy carried out in Russia).

<sup>90</sup> **Rechtbank Arnhem, 20 February 2008**, LJN: BC8012 and **Rechtbank Arnhem, 19 May 2009**, LJN: BI5039: "The Court grants the adoption in the apparent interest of the minors. It is in the interest of the minors that they are allowed a family relationship with their biological parents"; and **Rechtbank Alkmaar, 29 October 2008**: "The Court considers that seeing the particular circumstances in which the [child] finds itself, and the associated inaptitude and/or incapacity of the surrogate parents, the appointment of the parents of intent as guardians of the [child] will be the best guarantee of upholding the interests of [child]. The Court considers that the following provision is in the best interest of the child [child]". See also **Rechtbank 's-Hertogenbosch, 18 August 2011**, LJN: BR 5334.

intent<sup>91</sup>. In the absence of a more suitable procedure for these special situations, the procedure is also used in surrogacy cases. In these cases, the Courts deprive the surrogate parents of parental authority on the ground that they are not able to care properly for the child, whom they did not conceive for themselves.

In parallel, it should also be noted that, in a decision of the Rechtbank 's-Gravenhage, 21 June 2010, Dutch judges refer to the concept of "family life" to accept to establish filiation towards a child born out of surrogacy on the grounds that a biological father is entitled to the protection of the "family life" he has with his child under article 8 of the ECHR, no matter the circumstances of the pregnancy. In other words, the Dutch jurisprudence refers to article 8 of the ECHR and the concept of "family life" to disregard the distinction made in Dutch law between a "progenitor father" and a "sperm donor father", according to which the paternal filiation may only be established with the man who "created" the child (art. 1:207 DCC) and not with the man who only gave his semen. The Dutch courts have found that the European Court was unaware of this distinction. What matters is the combination of blood ties and concrete circumstances that there is a family life<sup>92</sup>.

Both concepts – the "best interest of the child" and "family life" – support each other. It is further interesting to note an isolated decision on social issues: the mother of intent was seeking to receive maternal leave.

- **Centrale Raad van Beroep, 7 December 2011**, LJN: BU7192: surrogacy was carried out in the Netherlands between parents of intent of Dutch nationality and a surrogate mother of Dutch nationality who is related to the parents of intent (sister-in-law of the mother of intent). The action brought by the mother of intent is to be awarded compensation during maternity leave ("zwangerschaps- en bevallingsuitkering"). The Court refused to grant her application on the ground that the right to these allowances is only open to the legal mother, or to woman who has given birth. The legislation on work and health (*Wet arbeid en zorg - Wazo*) does not have formal legal effect on surrogate motherhood.

## **ROMANIA**

### **1) Applicable rules**

Presently, the regime of surrogacy is not expressly regulated by the Romanian legislation in force. The Civil Code in force doesn't forbid, neither allows this kind of agreement. Still, the systemic interpretation of all provisions related to the medically assisted human reproduction doesn't offer consistent legal solutions for the surrogacy related issues.

Although it is allowed in theory, this kind of agreement doesn't produce legal effects as long as the surrogate mother cannot be forced to forego the legally presumed maternal bond.

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<sup>91</sup> M. J. VONK, « Netherlands: Maternity for another : a double Dutch approach », in *Gestation pour autrui : Surrogate motherhood* (dir. F. MONÉGER), coll. Colloques, vol. 14, Proceedings of the 8<sup>th</sup> Congress of international comparative law, held in Washington DC from 25 to 31 July 2010, Paris, Society of Comparative Legislation, 2011, p. 212.

<sup>92</sup> Rechtbank 's-Gravenhage, 14 September 2009, LJN: BK1197: "Under this article [art. 8 ECHR], the biological father who has a "family life" with his child has the right on the "right to protection of family life", irrespective of the way in which the pregnancy was incurred. The Court must thus determine whether in the present case there are sufficient concrete circumstances on the basis of which the existence of "family life" can be assumed. Considering that the minor was included in the family of the man and [Mr C] after his birth and that they have since then taken on the care and upbringing of the minor, the Court considers that it is established that there is a "family life" between the man and the minor. Considering that the man is the biological father and that there is "family life", the Court is of the opinion that the man in this case should be equated with the parent, so that the request of the "particular guardian" ("bijzondere curator") can be received".

### ***Establishing the paternal bond***

Art. 414 (1) C.civ adopts the presumption of paternity for the husband of the child's mother if the child is conceived or born during their marriage. A genetic father who is not married with the mother can either recognise the paternity bond (if the mother is not married), or contest the legal paternity presumption if the mother is married to another man (Art. 434 C.civ.). A new legal presumption of paternity is established by the New Civil Code for the man who usually lived together with the mother during the period of the conception (Art. 426). He must formally recognise paternity of the child; if he refuses, the mother can file a claim to establish his paternity – which is where the presumption of paternity rule intervenes.

### ***Establishing the maternal bond***

Romanian legislation provides that the maternal bond is established by the fact of giving birth to a child - Art. 408 (1). This fact is proved through the medical certificate provided by the medical unity where the child was born. In theory, the presumption of maternity is absolute and cannot be contested.

If the child is not born in a medical establishment and the birth is not declared in due time, Art. 415 (1) C.civ provides that the genetic mother can declare the maternal bond to the authorities. In practice, the birth certificate for the child is not delivered in the first year after the birth, unless the mother provides a medical certificate. After one year, the maternal bond can be proven by any means (testifying witnesses in front of the Court, DNA tests, etc), according to Art. 422 C.civ. Nevertheless, the parties involved in a surrogacy agreement have no interest in avoiding the medical unity for the child's birth; moreover, the child would have no legal status unless he has a birth certificate.

Art. 416 (1) C.civ provides that the genetic mother can recognise the maternal bond in an authentic declaration or, post mortem, in a testament. In practice, this declaration of maternity is used only if the child already has a birth certificate and has been lost or abandoned by the parents. The parentage recognition by the mother (stipulated in art. 416 C.civ) cannot result in the creation or modification of a birth certificate. The aim of the article is for the mother mentioned in the birth certificate to be able to confirm the identity of the minor who has been lost and found by the authorities. Such a procedure could therefore only serve to establish the parentage of the mother of intent, who didn't give birth to the child but would be the genetic mother of the child carried by another woman.

### ***Adoption***

A possible solution for the intended (genetic) parents would be to adopt their own child from his legal parent(s). The father of intent admits paternity of the child and, with the consent of the surrogate mother (legally presumed to be the child's mother), the mother of intent can adopt the child of her partner (not immediately but under more flexible conditions than a normal adoption). Nevertheless, the adoption procedure is very long and difficult, and there is always a risk that the Court could reject the adoption request<sup>93</sup>. Moreover, the paradox of this solution exists in the obligation for the genetic mother to adopt her own "natural" child.

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<sup>93</sup> Since the 2000s, the adoption procedure in Romania has become very cumbersome due to public scandals of organ trafficking through international adoptions in the 1990s, when the law on adoptions was very liberal.

## 2) Analysis of case n° 7874/302/2009

Taking into account that medically assisted reproduction generally remains a very sensitive issue, Romanian judges usually impose a strict privacy policy in this kind of affaires. Many decisions are not published, except those of the Supreme Court. No decisions on surrogacy can be found on the websites of the Bucharest Courts; the case cited below was extracted from a specialised trimestral magazine. The Case No 7874/302/2009 submitted to the Sector 5 Bucharest Court<sup>94</sup> is a perfect example of two different solutions to the same legal problems, made possible by the complete lack of legislation for surrogacy issues.

In contradiction with the Custody Authority (defendant), **the genetic mother** claimed that the surrogate mother (defendant) is not the genetic mother of the child, so that the Court should recognise the effects of:

- the maternal bond between the child and his real genetic mother (the claimant)
- the lack of paternal bond between the surrogate mother's husband and the child
- the paternal bond between the genetic mother's husband and the child

Consequently, the Court was asked to authorise the corrections in the child's birth certificate, so as to allow the child to have the name of his genetic parents.

Also in contradiction with the Custody Authority, **the genetic father** brought to justice both the surrogate mother and her husband by a separate application later merged with the first one. He asked the judge to recognise his paternal bond with the child and to authorise the modifications in the child's birth certificate. With regard to the same application, **the legally presumed father** (the surrogate mother's husband, also defendant) formulated a counterclaim of paternity contest.

### State of facts

In this decision all parties were Romanian.

The medical report issued by the Department for Assisted Reproduction of a Hospital from Bucharest confirmed that the child was born as a result of *in vitro* fertilisation. The genetic mother had already had two spontaneous abortions and six failed attempts of insemination with the sperm of her husband. The medical report shows her physical incapacity to be inseminated and to give birth to a child. After the failure of the insemination with three *in vitro* embryos, the other 9 embryos obtained were congealed.

After having given her written consent, the surrogate mother, a married woman, was inseminated with 3 of the 9 embryos obtained following the *in vitro* fertilisation of the two claimant's genetic material. A girl was born.

The defendant (the surrogate mother) had previously signed a standard "Declaration" provided by the Hospital, in which she was giving up any rights on the child to be born. She also declared that she had received a sum of money and an additional sum was to be paid after the child's birth. It is indeed worth specifying that some private clinics accept to inseminate surrogate mothers. This remains however a solution of last resort, when the mother of intent has already been unsuccessfully inseminated several times

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<sup>94</sup> Unpublished; extract from Veronica DOBOZI, *Curierul Judiciar* 10/2011. These Court decisions were anterior to the *New Civil Code* enforcement, which now includes the former *Family Code* as amended and completed. The legal situation of the parties would have been mostly the same under the *New Civil Code* regime, as long as surrogacy issues are not at all regulated. Except the case of the reproduction with a third-party donor (which doesn't include surrogacy), filiation rules essentially didn't change under the *New Civil Code*.

and/or has had several miscarriages – as is the case of the mother of intent in the present case. The practice of declarations is common in hospitals; it seems to be their way of waiving any responsibility and reassuring the parents of intent who paid for the procedures.

The DNA test confirmed the genetic bond between the claimants and the child.

After the birth, the child had been taken in charge and stayed with his genetic parents.

The surrogate mother and her husband had no claims with regard to the child, neither before, nor during the trial.

### **Legal arguments**

Regarding the maternal bond: the claimants first invoked *the Family Code*<sup>95</sup> in order to contest the parentage that doesn't correspond to the reality. They also cited a Constitutional Court decision<sup>96</sup> observing that some of the *Family Code* provisions seriously affect the possibility to give legal effects to the genetic reality. Cumulating the above-mentioned arguments with Art. 8 of the ECHR, the claimants sustained that the maternity presumption could be overthrown if the genetic reality is different.<sup>97</sup>

It should be noted that decision 349/2001 of the Constitutional Court referred to the genetic father's impossibility to contest the presumed parentage links (between the child and his mother's husband); this affected the possibility of giving legal effect to the genetic reality and was therefore judged to be unconstitutional. This decision was relevant at the time because the New Civil Code was not yet in effect (the New Civil Code allows the genetic father the possibility of having his paternity established). We shouldn't forget however that at the time, the Constitutional Court's decision 349/2001 did not target assisted procreation and only concerned paternity.

Regarding the paternal bond: the same arguments prevail (the *Family Code* should be interpreted according to the ECHR, in order to give legal effects to the social and genetic reality, even against legal presumptions).

- The First Court's decision: strict application of the national legislation to give limited legal effects to the reality

By the decision no 1405/2010<sup>98</sup> the Court rejected the application of the genetic mother and the application of the genetic father but accepted the counterclaim of the presumed father (the only legal application expressly regulated by the Romanian legislation in force at that moment) who contested the paternal bond between himself and the child.

Regarding the paternal bond: the Court mentioned that the genetic father cannot claim the recognition of parentage between himself and his genetic child if the latter already has a legally presumed father<sup>99</sup>. The only one who could claim the cancellation of the paternal bond between himself and the child was the legally presumed father. Under the legislation in force at that moment, as long as the legally presumed father (surrogate mother's husband) didn't contest his paternity, the genetic father had no means to give legal effect to the genetic reality. Only after the legal presumption of paternity was overthrown (by the DNA test result), the genetic father had the possibility to prove his

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<sup>95</sup> At present, the *Family Code* was modified, completed and included in the *New Civil Code*.

<sup>96</sup> Constitutional Court, Decision 349/2001.

<sup>97</sup> The genetic reality is a fact and it can be proven by any means of evidence.

<sup>98</sup> Unpublished.

<sup>99</sup> The situation changed, the New Civil Code gives the genetic father the possibility to claim the recognition of the real parental bond even if the child has a legally presumed father. The solution would nowadays substantially be the same, except that the genetic father would now be able to file a case to have his rights recognised.

paternity and recognise the child. In this case, the paternal link between the legally presumed father (surrogate mother's husband) and the child was annihilated and the paternal bond between the genetic father and the child was recognised. The Court authorised the modifications in the child's birth certificate in order to allow her to have the genetic father's name.

Regarding the maternal bond, the Court mentioned that in the absence of derogatory legislation, the medical reproduction techniques couldn't generate a different parentage regime. As long as Romanian legislation doesn't make a difference between "genetic mother" and "surrogate mother who gives birth to the child", the judge has no power to do it.

Regarding the discrimination between man and woman (both genetic parents) the Court mentioned a fundamental difference: maternity is closely related to the capacity of giving birth, while paternity can potentially be limited exclusively to the participation with genetic material.

Regarding the surrogacy convention: the above-mentioned "Declaration" was annulled. Not only did this declaration contravene to the public order, but it also represented an onerous title whose object (the surrogate mother's body) is not in the civil circuit and cannot be rented.

#### **- The Bucharest Court of Appeal's decision: application of the national and international law in order to give the maximum of legal effects to the reality**

By the decision 1309 A/2010<sup>100</sup>, the Appeal Court admitted the appeal and partially modified the First Court's decision, by also recognising the legal effects of the maternal bond between the claimant (genetic mother) and the child. The genetic filiations' legal effects become thereby complete. To reach that result, the judges rely on the compatibility of Romanian legislation with *Art. 8 ECHR*.

The Court of Appeal decided that the bond between the child and the legally presumed parents didn't fit within *Art. 8 ECHR*'s meaning of "family", as the child did not live with these people, nor had a close relationship with them.

All the evidence showed that the claimants had always considered themselves the child's parents and acted accordingly; thus, the relationship between the claimants and their genetic child correspond to the meaning of "family" as provided by *Art. 8 ECHR*.

The protection conferred by *Art. 8 ECHR* is not absolute; nevertheless, the superior interest of the child must overrule the strict application of the national law, in order to guarantee the child's right to an identity and his other **personal rights** provided by *Art. 8 ECHR*. By ignoring the genetic and social reality for a formalist application of national legislation, the First Court violated *Art. 8 ECHR*.

With regards to the scope of this decision, we would like to remind the reader that it was not pronounced by the Supreme Court and that the practice varies significantly across Romanian courts of law. This decision wasn't much talked about, even though the debate on surrogate motherhood remains topical; the debate focuses mainly on arguments of social and religious and not so much on the legal aspects of surrogacy, which are too technical for the majority of people.

Because of the complete legislative void, the Courts can choose between adhering strictly to the law (inadequate with the modern living conditions and medical techniques) or to interpret the law more liberally (in particular by applying the principle of the ECHR

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<sup>100</sup> Final decision (no other appeal was made), unpublished.



case-law). For that reason, the solution of adoption should not be side-lined, even though it doesn't coincide with the biological reality. Both procedures (recognition of genetic parentage and adoption) are equally heavy and unpredictable.

## International case law

### **BELGIUM: PARTIAL RECOGNITION OF FOREIGN BIRTH CERTIFICATES**

#### **1) Applicable rules**

It should be noted that a birth certificate established abroad following a case of surrogacy is recognised in Belgium if its validity is established in conformity with the *national law* of the persons in relation to whom parentage is being established. This solution results from the combined application of articles 27 and 62 of the Code of international private law, dealing respectively with the recognition of foreign authentic certificates<sup>101</sup> and with the law applicable to parentage<sup>102</sup>. In other words, in order to recognise parentage as established by a foreign birth certificate, the validity of the parentage has to be verified in relation to the *national law of the intended parents*.

In the current state of the case law on the question, if the intended parents are Belgian, parentage is established in relation to the intended father if the latter is also the biological father<sup>103</sup>, while his spouse (homosexual or heterosexual) should have to engage an adoption procedure.

Belgian embassies seem however to categorically refuse to recognise birth certificates established as a result of surrogacy, without distinguishing between the father and the intended mother and without analysing the certificate under the light of the principles currently resulting from the case law<sup>104</sup>.

#### **2) Analysis of the decisions**

In the disputes implicating a surrogacy taking place abroad, the action undertaken can aim to condemn the Belgian State into delivering the travel documents to the child<sup>105</sup>, or

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<sup>101</sup> Art. 27, § 1<sup>st</sup>, al. 1 Code of IPL: "An authentic foreign certificate is recognised in Belgium by any authority without it being necessary to engage in a procedure if its validity is established in conformity to the applicable law established by the current law, taking especially into account articles 18 [fraudulent evasion of the law] and 21 [public order]".

<sup>102</sup> Art. 62. § 1<sup>st</sup> Code of IPL: "The establishment and the contestation of paternity or maternity of a person are ruled by the law of the state from which the person is a citizen of at the moment of birth of the child or, if this establishment result from a voluntary act, at the moment of the act".

<sup>103</sup> Liège, 6<sup>th</sup> of September 2010, *Revue trimestrielle de droit familial*, 2010, n° 4, p. 1139 ; Civ. Brussels, 15<sup>th</sup> of February 2011, *Revue@dipr.be*, 2011, p. 125 et Civ. Nivelles, 6<sup>th</sup> of April 2011, *Rev. trim. dr. fam.*, 2011, p. 695.

<sup>104</sup> See the warning that can be read on the website of the Belgium embassy in Kiev: "In the current state of texts, the Belgian legislation does not treat the question of surrogacy or of children born to a surrogate mother. Facing this legal gap, our services are obliged not to recognise any effect to foreign documents produced in this frame (birth certificates, sentences,...). This position is adopted even if the legal procedure as provided for locally has been scrupulously followed. The effects produced abroad by this do not produce any effects in our domestic legal order. If a Belgian citizen decides to engage a procedure of surrogacy in Ukraine, even if following the local law, there is no assurance that his/her paternity/maternity will be recognised by the Belgian law, or that the child will be delivered a document of travel. The services of the Public Federal Service of Foreign Affairs will refuse to recognise their paternity/maternity, will not deliver any travel documents and will invite applicants to go before the competent court of first instance (ref. articles 23 and 27 of the Belgian Code of international private law). In light of the aforementioned and faced with the difficulties to which a Belgian citizen will be confronted if he/she decides to engage a procedure of surrogacy, we would like to remind you that adoption is provided for by the Belgian law and constitutes, thus, a possible alternative". The same warning is found on the sites of the embassies of Belgium in New Delhi, Atlanta, New York and Los Angeles, a situation that raised questions by some parliamentarians. See Written question n° 5-2661 of the 1<sup>st</sup> of July 2011, *Parl. doc.*, Sen., n° 5-2661 (question asked by Mrs S. de Bethune).

<sup>105</sup> Civ. Brussels (interim), 4<sup>th</sup> of February 2010, RR 09/1694/C, unpublished (birth certificate established in Ukraine); Civ. Brussels (interim), 9<sup>th</sup> of July 2010, RG 10/830/C, unpublished (birth certificate established in



to obtain the recognition of a birth certificate established in a foreign country (State non-member of the EU)<sup>106</sup>.

Of the three sentences concerning the deliverance of a travel document to the child, only one succeeds, allowing the child born from surrogacy to join his/her intended father.

When it comes to actions undertaken to obtain the recognition of birth certificates, the courts indeed accept to recognise these not as *birth certificates* (on the basis that these certificates mention either the name of the intended mother or do not indicate any name, which is contrary to Belgian law according to which the name of the woman giving birth has to be mentioned in the birth certificate), but as *authentic and legally valid certificates*, from which results the recognition of the paternity in relation to the child born from the surrogate mother<sup>107</sup>. However, the courts refuse to consider that a foreign birth certificate could establish the maternal parentage of the intended mother when her name is mentioned, as it is the case in Ukrainian law<sup>108</sup>, or a double paternal filiation with regards to the spouse of the intended father, as the Californian law allows it<sup>109</sup>. The partner (homosexual or heterosexual) will have to follow an adoption procedure.

It would furthermore seem that after the partial recognition of the foreign certificate establishing the parentage of the intended father, the Ministry of Foreign Affairs accepts to deliver a passport to the child allowing him/her to travel to Belgium. As a consequence, the child can always, it would seem, join his/her intended parents either at the state of the procedure of interim relief through the conviction of the Belgian State into delivering urgently the travel documents, or at the state of the main proceedings through the partial recognition of the foreign certificate establishing the parentage of the intended father.

#### ***In connection with Ukraine:***

- **Civ. Antwerp, 19<sup>th</sup> of December 2008 and Youth Court Antwerp, 22<sup>nd</sup> of April 2010: case Hanne and Elke:** the surrogacy took place in Ukraine between an Ukrainian surrogate mother and heterosexual Belgian intended parents. The intended parents are also the genetic parents of the children (gestational surrogacy). The birth certificates mention the intended parents as the legal parents of the children given birth to by the surrogate mother. The Embassy of Belgium in Kiev refuses to acknowledge the birth certificates and, thus, refuses to deliver a passport to the children in order to allow them to travel to Belgium. The intended parents undertake an action before the tribunal of first instance of Antwerp on the basis of articles 23 and 27 of the Belgian Code of Private International Law so as to request the recognition of the birth certificates. The tribunal acknowledges the certificates but not as birth certificates (on the basis that the mention of the name of the intended mother in the Ukrainian birth certificate is contrary

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Ukraine) ; Civ. Brussels (interim), 6<sup>th</sup> of April 2010, *Revue trimestrielle de droit familial*, 2010, p. 1164 (birth certificate established in India)

<sup>106</sup> Civ. Antwerp, 19<sup>th</sup> of December 2008, *Revue@dipr.be*, 2010, liv. 4, p. 140 (birth certificate established in Ukraine); Civ. Brussels, 15<sup>th</sup> of February 2011, *Revue@dipr.be*, 2011, p. 125 (birth certificate established in Ukraine); Civ. Huy, 22<sup>nd</sup> of March 2010, *Journal des tribunaux*, 2010, p. 420, note N. GALLUS ; *Jurisprudence de Liège, Mons et Brussels*, 2010, n° 38, p. 1815, note P. WAUTELET et Liège, 6<sup>th</sup> of September 2010, *Revue trimestrielle de droit familial*, 2010, n° 4, p. 1139, note C. HENRICOT, S. SAROLÉA et J. SOSSON ; *Jurisprudence de Liège, Mons et Brussels*, 2011, n° 2, p. 52, note P. WAUTELET ; *Journal des tribunaux*, 2010, p. 634 (birth certificates established in California as a result of a sentence) ; Civ. Nivelles, 6<sup>th</sup> of April 2011, *Rev. trim. dr. fam.*, 2011, p. 695, note C. HENRICOT (birth certificate established in India) and Civ Brussels, 18<sup>th</sup> of December 2012, unpublished and non-final.

<sup>107</sup> Cf. however below the isolated decision given by the First Court in Brussels on the 18<sup>th</sup> of December 2012 (unpublished and non-final) : the Court refused to recognise the Indian birth certificate on the grounds that, in its opinion, Belgian law would not have allowed the establishment of the father of intent's parentage. The argument developed by the Court is not convincing as it seems that, contrary to the opinion of the Court, Belgian law did allow the father of intent to establish his filiation despite the fact that the child was born from a surrogacy agreement.,.

<sup>108</sup> Civ. Antwerp, 19<sup>th</sup> of December 2008, *Revue@dipr.be*, 2010, liv. 4, p. 140.

<sup>109</sup> Liège, 6<sup>th</sup> of September 2010, *Revue trimestrielle de droit familial*, 2010, n° 4, p. 1139.

to Belgian law according to which the birth certificate must mention the name of the mother giving birth to the child) but as *authentic and legally valid certificates* from which the paternity of the genetic father, also the intentional father of the children born from the surrogate mother, is acknowledged.

The maternal parentage of the intended mother is, thus, not acknowledged.

Following the sentence of the tribunal of first instance of Antwerp, the intended mother undertakes a legal procedure before the Youth Court to request the adoption of the children. The tribunal approves the adoption based on the best interests of the children, that is of having parentage with their genetic mother. The tribunal specifies that considering an adoption procedure contrary to public order or as not being founded on fair basis (art. 344-1 Civil code) only due to high-technology surrogacy would penalise the children who did not choose the way they were born. The tribunal also consider that the limit line with the commerce of children was not crossed in this case and that the case is not one of coercion, exploitation, fraud or legal fraud (neither in Belgium nor in Ukraine). Furthermore, the tribunal considers that the adoption procedure must be ruled by the national laws on the basis that it is not proven that the adopting candidate had the intention to adopt the children before their transfer to Belgium.

- **Civ. Brussels, 15<sup>th</sup> of February 2011: case *Samuel*:** the surrogacy took place in Ukraine between a Ukrainian surrogate mother and a homosexual couple formed by a Belgian citizen and a French one, both residing in France. The biological father is the husband of Belgian nationality. The facts mentioned by the sentence do not mention if the surrogate mother is also the genetic mother of the children to be born or if there was a donation of ovules. The birth certificate mentions the name of the surrogate mother as being the legal mother of the child and the name of the Belgian husband as being the legal father of the child. An Ukrainian sentence ascertains that the surrogate mother refuses to assume the education of the child and, thus, strips her of parentage towards the child, in favour of the intended father. The Embassy of Belgium in Kiev refuses the birth certificate and, thus, refuses to deliver the necessary travelling documents. The intended father undertakes an action of interim relief to condemn the Belgian State to deliver a passport to the child. Ruling in interim, the tribunal refuses to settle in favour of the applicant considering that "ordering the Belgian state to deliver the child a passport, with an eventual visa, would equate to recognise the parentage of the applicant to Samuel as well as the Belgian nationality of the child as a passport cannot be delivered by the Belgian State to anyone but a Belgian citizen. The decision would be, thus, declarative of the rights invoked and exceeding the provisory nature of the ruling" (Civ. Brussels (interim), 4<sup>th</sup> February 2010, RR 09/1694/C, inedited). A second interim procedure is undertaken and is also settled by a refusal on the basis that the conditions of an interim ruling are not fulfilled (Civ. Brussels (interim), 9<sup>th</sup> of July 2010, RG 10/830/C, inedited).

In its substance, the action undertaken by the intended father aims at the recognition of the birth certificate by the Belgian authorities (articles 23 and 27 of the Code of private international law). The tribunal acknowledges the act as an authentic and legally valid certificate from which results the paternal parentage of the applicant to the child. The tribunal reaches this conclusion after verifying the authenticity of the birth certificate in relation to the Ukrainian law as well as after verifying the validity of the birth certificate in relation to the Belgian law, the law of the nationality of the intended father trying to establish parentage (application of the rule of conflict of laws in matters of parentage (article 62 of the Code of Private international law on the recognition of foreign authentic certificates). For the purpose of Belgian law, the tribunal considers that the parentage of the intended father is established as the conditions of the article 329*bis*, on the acknowledgement of paternity, are fulfilled.

Following the sentence, the ministry of Foreign Affairs indicated that a Belgian passport would be delivered to the child, allowing him to join his father<sup>110</sup>.

***In connection with India:***

- **Civ. Brussels (interim), 6<sup>th</sup> of April 2010: case C:** the case of surrogacy took place in India with an Indian surrogate mother and a man of Belgian nationality, genetic and intentional father of the child. The surrogacy took place through an IVF with an anonymous ovule donation (gestational surrogacy). Parentage by the intended father was established by an act of acknowledgement before an Indian notary. The birth certificate does not mention the name of the surrogate mother, only the name of the intended father. The intended father demands the Belgian consulate of Mumbai the deliverance of travel documents. The Federal Public Service of Foreign Affairs refusing to act in favour of his request, the intended father undertakes an action of interim relief before the Belgian courts. The tribunal settles in his favour and condemns the Belgian State to deliver the necessary travel documents on the basis of the existence of a family life between the child and the intended father as well as the best interests of the child.

- **Civ. Nivelles, 6<sup>th</sup> of April 2011: case *Amélie and Nina*:** surrogacy took place in India with an Indian surrogate mother and Belgian heterosexual intended parents. The intended father is the genetic father of the children. The surrogacy took place through IVF with an anonymous donation of an ovule (gestational surrogacy). The birth certificates do not mention the name of the surrogate mother, only the name of the intended father. The action undertook on the basis of articles 23 and 27 of the Code of international private law aimed at the recognition of the Indian birth certificates. The tribunal acknowledges the certificates but not as birth certificates but as authentic and legally valid certificates from which results the acknowledgement of paternity of the intended father. The tribunal reaches this conclusion after verifying the authenticity of the birth certificates in relation to Indian law as well as after verifying the validity of the birth certificate in relation to the Belgian law, the law of the nationality of the intended father trying to establish parentage (application of the rule of conflict of laws in matters of parentage (article 62 of the Code of Private international law) implied by article 27 of the Code of Private international law on the recognition of foreign authentic certificates). In relation to the Belgian law, the tribunal considers that the parentage of the intended father is established as the conditions of article 329*bis*, on the acknowledgement of paternity, are fulfilled. The tribunal verifies also the incidence of the fact that the couple sought a surrogate mother and the absence of her name in the birth certificates in relation to the Belgian public order. The tribunal concludes that the illegality of a surrogacy contract cannot jeopardise the best interests of the child, a reason to substantiate the recognition of parentage in relation to the biological father. As for the absence of the mention of the name of the surrogate mother on the birth certificates, the tribunal considers that it is contrary to the dispositions of the Civil code imposing the mention on the birth certificate of the name of the mother, this being the woman giving birth to the child, and thus refuses to recognise the certificates as birth certificates.

- **Civ. Brussels, 18<sup>th</sup> of December 2012** (unpublished and non-final): the surrogacy was carried out in India with an Indian surrogate mother and a Belgian father of intent, who is the genetic father of the child. The surrogacy was done through IVF with anonymous egg donation (gestational surrogacy). The birth certificate doesn't mention the name of the surrogate mother but only states the name of the father of intent. The latter recognised his paternity through a recognition certificate established in front of a solicitor in India. During the interim hearings, the Belgian State was sentenced to deliver a visa or a travel document to the child, to allow him to travel to Belgium. Once the child

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<sup>110</sup> See « Samuel aura un passeport belge », available at the following URL: <http://www.lalibre.be/actu/belgique/article/643798/samuel-aura-un-passeport-belge.html> (online on the 19/02/2011 and viewed on the 18/12/2012).

arrived on Belgian ground, the father of intent asked for the birth certificate to be transcribed in the state registers. Faced with the refusal of the registrar to do so, the father of intent filed an appeal in front of the Court of First Instance to obtain recognition of the birth certificate, and hence the parentage link between the father of intent and the child. The Court of First Instance checked the validity of the parentage link in the eyes of the Belgian law, which is designated by the conflict of law rule on parentage (art. 62 of the Code of Private international law) and concluded that the certificate should not be recognised on the grounds that, in Belgian law, the father of intent would not have been able to assert his paternity over the child through a surrogacy contract. The Court also refused to recognise the birth certificate established by an Indian solicitor on the basis that the declaration of paternity was not established in accordance with Belgian law, which stipulates that to recognise a child born from a married woman, the legal paternity should first have been annulled before the biological paternity of the child could have been recognised. The Court finally considers that it is not in the interest of the child to have its filiation determined on the basis of certificates drawn up in India, on the basis that the latter contravene to the fundamental principles of the protection of the interests of all children, since they spring from commercial transactions that are not concerned with the interests of the child. After having refused to recognise the Indian certificates, the Court finally accepted to confirm the paternal filiation of the child on the basis that the father of intent is also the biological father of the child and that there is a possession of status, and further stressed that "this paternity would match the one established in India and would be in the interest of the child".

***In connection with the United States:***

- **Liège, 6<sup>th</sup> of September 2010, reforming Civ. Huy, 22<sup>nd</sup> of March 2010 and Youth Court Huy (11<sup>th</sup> ch.), 22<sup>nd</sup> of December 2011: case *Maia and Maureen*:** the surrogacy took place in the United States with an American surrogate mother and Belgian homosexual parents of intent. One of the intended fathers is the genetic father of the children. The facts exposed in both decisions do not mention if the surrogate mother is also the genetic mother of the children or if there was a donation of ova. The birth certificates mentioning the names of the two intended fathers were established on the basis of a "declaratory sentence of paternity of the female twins to be born in the framework of a surrogacy contract and in absence of parentage between the legal parents and the twins to be born", as by the Supreme Court of the State of California. The action undertaken before the Belgian courts aims at recognising the birth certificates established in California (articles 23 and 27 of the Code of international private law). At first instance, the tribunal refuses to settle in favour of the applicant, considering that the recognition of the birth certificates would be contrary to the Belgian international public order and that by travelling to the United States to engage in a contract of surrogacy and thus bypass the applicable principles on the matter provided by Belgian law, the intended parents committed a fraudulent evasion of the law. The tribunal refuses to recognise the birth certificates "as they are the last phase of a more general process having as an objective to allow a couple to receive in their household children conceived in the execution of a surrogacy contract". On appeal, the Court reforms the judgement on reasons of procedure and rectifies the reasoning by the tribunal of first instance. In conformity to article 27 of the Code of international private law, the Court verifies the validity of the birth certificates in relation to Belgian law, the law of the nationality of the intended father trying to establish parentage. Belgian law is designed by the application of the rule of conflict of laws in matters of parentage (article 62 of the Code of Private international law implied by article 27 of the Code of Private international law on the recognition of foreign authentic certificates). In relation to the Belgian law, the Court considers that the parentage of the intended biological father is established as the conditions of article 329*bis*, on the acknowledgement of paternity, are fulfilled. In relation to his spouse, no parentage can be established as the Belgian law ignores the establishment of double original paternal parentage. The Court verifies also the incidence of the fact that the couple sought a surrogate mother in relation to the Belgian public

order. It concludes that the illegality of the surrogacy contract cannot jeopardise the best interests of the children, a reason to substantiate the recognition of parentage in relation to the biological father.

Receiving a request of simple adoption by the spouse of the intended father, the Youth court of Huy settles in favour of the applicant, after considering that the adoption was founded on fair basis, to the extent that the children are, from their birth, integrated to the family of the intended parents.

**Therefore**, we see that the recognition of parentage of the parents of intent, who are of Belgian nationality in all cases considered, is not direct but takes place in two stages:

- the paternal filiation of the biological father is established, after validating the parentage link established by the foreign birth certificate considering the Belgian law on parentage<sup>111</sup>;
- the maternal filiation of the mother of intent (who hasn't given birth) cannot be established using the same argument. The fact that the mother of intent is also the genetic mother does therefore not inform the outcome of the dispute, as motherhood is defined by childbirth in Belgian law<sup>112</sup>.

The same applies to the establishment of the paternal filiation towards the homosexual partner of the biological father, insofar as Belgian law ignores the establishment of an initial double paternal parentage link.

The second link of parentage can only result from an adoption procedure.

The concept of "best interest of the child" has been put forward several times, either to justify the deliverance of travel documents to a child born in India in order to allow him to join his intended father in Belgium (in the framework of an interim relief action)<sup>113</sup>, or to justify the establishment of the parentage of the biological father in relation to the children born in California, independently of the nullity of the contract of surrogacy<sup>114</sup> or even to justify the adoption of the child by the intended mother after a surrogacy concluded in Ukraine in order to match the legal reality with the genetic and social-psychological reality<sup>115</sup>.

It's worth stressing, however, that when this notion is invoked in an international case dealing with a request for the recognition of birth certificates established abroad, it seems to allow to "neutralise" the illegality of the surrogacy contract<sup>116</sup> without

<sup>111</sup> Cf. however *contra* Civ Brussels, 18 December 2012.

<sup>112</sup> For an example where the intended mother was also the genetic mother of the children, see Civ. Antwerp, 19<sup>th</sup> of December 2008, *Revue@dipr.be*, 2010, liv. 4, p. 140. For an example where the intended mother wasn't the genetic mother of the children, see Civ. Nivelles, 6 avril 2011, *Rev. trim. dr. fam.*, 2011, p. 695.

<sup>113</sup> Civ. Brussels (interim), 6<sup>th</sup> of April 2010, *Revue trimestrielle de droit familial*, 2010, p. 1164: "That the *best interest of the child* does not appear to be, in view of these elements, to stay in India – country in which he does not seem to have any link – without M. R., a situation that appears contrary to the article 8 of the European Convention of Human Rights".

<sup>114</sup> Liège, 6<sup>th</sup> of September 2010, *Revue trimestrielle de droit familial*, 2010, n° 4, p. 1139, note C. HENRICOT, S. SAROLÉA et J. SOSSON: " In what concerns the relation of parentage with relation to the biological father, A.J., we can however consider that the illegality of the surrogacy contract – from which result the birth certificates of which recognition is requested – cannot harm the *best interest of the children* M. and M. guaranteed by article 3 of the Convention on the rights of children as well as article 22bis of the Constitution. The refusal of recognising the birth certificates to the extent they concern the establishment of the parentage relation with the biological father would deprive the children from any relation to him while at the same time the maternal parentage is not recognised in the country of the surrogate mother. This situation would be greatly harmful for them" In the same sense, See Civ. Brussels, 15<sup>th</sup> of February 2011, *Revue@dipr.be*, 2011, p. 125 and Civ. Nivelles, 6<sup>th</sup> of April 2011, *Rev. trim. dr. fam.*, 2011, p. 695, note C. HENRICOT.

<sup>115</sup> Youth court Antwerp, 22<sup>nd</sup> of April 2010, *Tijdschrift voor Familierecht*, 2012, p. 43, note L. PLUYM ; *Revue@dipr.be*, 2012, p. 22.

<sup>116</sup> Cf. however *contra* Civ Brussels, 18 December 2012, unpublished and non-final. In a strange and perhaps somewhat inconsistent way, the best interest of the child was invoked by the Court of First Instance of Brussels to justify the non-recognition of an Indian birth certificate and a recognition of paternity on the basis that it



constituting by doing so the autonomous foundation of the recognition of parentage. Indeed, it is because the parentage of the biological father can be established by rules on the acknowledgement of paternity, that the tribunal admits to recognise this parentage as it is established by the birth certificates<sup>117</sup>.

As for the concept of family, it is put forward to support the reference to the principle of the best interest of the child<sup>118</sup>. Thus, it seems to play a complementary role in order to, for example, justify the issuance of travel documents to a child born abroad<sup>119</sup>.

It is an interesting fact that the financial aspects related to a contract of for-profit surrogacy are rarely debated by Belgian courts. Thus, in the case Hanne and Elke (surrogacy taking place in Ukraine by heterosexual intended parents), it was revealed that an amount of 30.000 EUR was paid by the intended parents to the Ukrainian law firm. According to the parties, these costs aimed at covering not only judicial advice but also all practical aspects of surrogacy: fees related to travels, translations, contact with professionals in a private clinic of fertilisation, attempts to perform IVF, ultrasounds, medical follow-up of the surrogate mother, etc. When the procedure of adoption was engaged by the adopting mother, the tribunal considered it did not possess enough objective information to know if the amount exceeded the normal amount of compensation concerning the costs resulting from surrogacy and concluded that the parties acted without the intention to make profit<sup>120</sup>.

## **THE NETHERLANDS**

### **1) Administrative stakes: delivering travel documents**

#### ***In connection with Ukraine:***

**Rechtbank 's-Gravenhage (Interlocutory proceedings - Voorzieningenrechter), 9 November 2010**, LJN: BP 3764: surrogacy was carried out in Ukraine with the gametes of the Dutch parents of intent implanted through IVF into the Ukrainian surrogate mother (gestational surrogacy). The action filed for interim proceedings concerns the issuance of travel documents to the children. This is rejected by the Dutch Foreign Ministry on the grounds that the surrogacy done in Ukraine is of commercial nature, which is contrary to the Dutch public order. The Court in interlocutory proceedings sentences the Dutch State to issue the travel documents to the children after finding out that the parents of intent already have a "family life" with the children under article 8 of the ECHR and that it is in the interest of the parents and children that this "family life" is respected.

#### ***In connection with India:***

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would not be "in the interest of child C. to establish his filiation based on acts drawn up in India, as the latter contravene to the fundamental principles of the protection of the interests of all children, since they spring from commercial transactions that are not concerned with the interests of the child" before finally agreeing to establish, on the basis of the Belgian law, filiation from the father of intent with respect to the child on the grounds that "this paternity would match the one established in India and would be in the interest of the child"<sup>116</sup>. This isolated decision does however not reflect the dominant position that the Belgian Courts seem to be developing

<sup>117</sup> J. Sosson, « La filiation d'enfants nés d'une gestation pour autrui à l'étranger », note on Liège, 6<sup>th</sup> of September 2010, *Revue trimestrielle de droit familial*, 2010, n° 4, p. 1153.

<sup>118</sup> Civ. Brussels (interim), 6 April 2010, *Revue trimestrielle de droit familial*, 2010, p. 1171: "Considering that it is appropriate to take into account the fact that M.R. takes care of C. from childbirth; that it is, thus, evident that a privileged link exists between the child and M.R and that a situation of family life has come to being (we know the importance of the links created during the first weeks of life).

<sup>119</sup> *Ibidem*.

<sup>120</sup> Youth court Antwerp, 22<sup>nd</sup> of April 2010, *Tijdschrift voor Familierecht*, 2012, p. 43, note L. PLUYM ; *Revue@dipr.be*, 2012, p. 22.

- **Rechtbank Haarlem (Interlocutory proceedings - Voorzieningenrechter), 10 January 2011**, LJN: BP0426: surrogacy was done in India between an Indian surrogate and a Dutch same-sex couple, with an egg donation from an anonymous Indian woman. The ovum is fertilized by the sperm of one of the fathers of intent and is then implemented into the Indian surrogate mother (gestational surrogacy). The birth certificate of the child mentions the name of the surrogate mother and the name of the biological father. The action filed for interim proceedings concerns the issuance of travel documents to the child. The Dutch Foreign Ministry refused on the ground that the child does not have the Dutch nationality, as no relationship of parentage exists between the biological father and him. According to the Ministry of Foreign Affairs, the fact that the biological father's name appears on the birth certificate does not mean that he should be regarded as the father of the child in Dutch law. The Court in interlocutory proceedings sentences the Dutch State to issue the travel documents to the child after establishing that the father of intent already has a "family life" with the child and that as such, he is entitled to the respect of article 8 of the ECHR. The Court also notes that it is likely that, as a result of this interim judgment, the filiation of the child will be established with the father of intent, which will allow the child to receive a Dutch passport. After balancing the various interests at stake, the Court finds that in the present case, the interests of the child and of the father of intent must take precedence over the interests of the Dutch state.

- **Rechtbank Haarlem, 28 November 2012**, LJN: BY4231: surrogacy has been performed in India between an Indian surrogate mother and Dutch parents of intent, who entered into a partnership registered in the Netherlands. Surrogacy was conducted using an anonymous egg donation. The ovum is fertilized by the sperm of the father of intent and is then implemented in the Indian surrogate mother (gestational surrogacy). The Indian birth certificate mentions the names of the surrogate mother and of the biological father as the child's legal parents. Shortly after birth, the father of intent obtained a judgment from an Indian Court stating that he is the child's legal father. The father of intent then asked his Consulate in Mumbai for a Dutch passport for the child. When the Consulate refused to issue a passport, he filed an interlocutory application. On 10 January 2011, the Judge sentenced the Mumbai Consulate to issue a travel document to the child. Once the child arrived on Dutch territory, the biological father filed a declaration of paternity (November 2011). The juvenile court subsequently appointed the father of intent as guardian of the child. In May 2012, a Dutch passport was issued to the child. The proceedings introduced by the father of intent before the Court of first instance aim to establish that the Consulate wrongly refused to issue a Dutch passport to the child. The Court refuses to follow the father of intent and confirms the position of the Consulate as it considers that the refusal to issue the passport was based on proper reasons since no parent-child relationship existed between the child and the father of intent at the time of the passport application. The father of intent indeed declared his paternity of the child upon the child's arrival on the Dutch territory. In the Court's view, filiation with the father of intent was therefore established by this recognition of paternity and not by the Indian birth certificate mentioning his name. Furthermore, referring to a report by the International Law Institute (IJI: Internationaal Juridisch Instituut)<sup>121</sup> according to which Indian law cannot establish paternity by law, the Court refuses to acknowledge the relationship established by the Indian Court. According to the same report, the mention of the name of the father of intent in the Indian birth certificate doesn't establish with certainty his filiation with respect to the child.

**As such**, the Dutch courts refer to the ECHR's article 8 concept of "family life" to sentence the Dutch state to issue travel documents to children born of a surrogacy in

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<sup>121</sup> The decision of 28 novembre 2012 refers to a "report by the International Law Institute of the Hague from 27 March 2011", but does not provide a specific reference.



Ukraine<sup>122</sup> and India<sup>123</sup> as soon as they discover that the parents of intent have already a family life with the child.

## 2) Civil stakes: recognising foreign birth certificates

### a. Applicable rules

When the surrogacy presents a cross-border aspect, the Dutch courts apply their rules of private international law to decide of the parent-child relationship established abroad in the Dutch legal order.

Two different scenarios should however be considered: on the one hand, where the parents of intents' parentage is established in accordance with the parentage law of the country where the child is born, either directly in the birth certificate or as a result of a judicial decision; on the other hand, where the parentage of the parents of intent is the result of an adoption pronounced abroad. These two situations must be distinguished because the rules for determining the law applicable to the recognition of parentage will be different.

**Under the first scenario**, Dutch private international law rules on filiation are applicable. These are codified in the Parentage (Conflict of Laws) Act (*Wet conflictenrecht afstamming*). Where specific private international law rules on surrogacy are missing, the general rules are used. With regards to parentage, section 10 of the Parentage (Conflict of Laws) Act establishes the rules with regards to the recognition of a legal act (e.g. the paternity recognition made abroad for a child born to a surrogate mother) or of a legal fact (e.g. a legal fact established by a foreign birth certificate). The Dutch civil registry officer will thus have to check whether the parent-child relationship mentioned in a foreign filiation act was validly established under foreign law and if the Dutch public order has not been violated. According to article 10 (2) of the Parentage (Conflict of Laws) Act, a foreign act establishing a recognition of paternity is contrary to Dutch public order if, in particular, this recognition was made by a Dutchman who did not have the right to recognize the child according to Dutch law (Art. 1: 204 (1) (e) DCC: conditions for the recognition of paternity). If the parent-child relationship is the result of a Court order, the Dutch civil registry officer must ensure that the conditions laid down by article 9 of the Parentage (Conflict of Laws) Act, including the rule on the Dutch public order exception, have been respected<sup>124</sup>.

**Under the second scenario**, three instruments are likely to apply: the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, the rules of Dutch private international law on recognition of adoptions (*Wet conflictenrecht adoptie*) and the Dutch law regulating the adoption of foreign children (*Wet opnemng buitenlandse pleegkinderen ter adoptie* or *Wobka*)<sup>125</sup>.

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<sup>122</sup> Rechtbank 's-Gravenhage, 9 November 2010, LJN: BP 3764.

<sup>123</sup> Rechtbank Haarlem (Interlocutory proceedings - *Voorzieningenrechter*), 10 January 2011, LJN: BP0426.

<sup>124</sup> I. CURRY-SUMNER and M.J. VONK, "National and International Surrogacy: an Odyssey", in *The International Survey of Family Law*, 2011, Edition (ed. B. ATKIN), Bristol, Family Law, 2011, pp. 272 – 277.

<sup>125</sup> M. J. VONK, « Netherlands: Maternity for another : a double dutch approach », in *Gestation pour autrui : Surrogate motherhood* (dir. F. MONÉGER), coll. Colloques, vol. 14, Proceedings of the 8<sup>th</sup> Congres of international comparative law, held in Washington DC from 25 to 31 July 2010, Paris, Society of Comparative Legislation, 2011, p. 215.

## **b. Analysis of the decisions**

### **1<sup>st</sup> hypothesis**

#### ***In connection with France:***

One should set aside a decision in which surrogacy was carried out on the Dutch territory. It is classified among the decisions of international nature as childbirth took place anonymously in France ("accouchement sous X"), which led the Dutch courts to examine the recognition of French birth certificate in the Dutch legal order.

- **Rechtbank 's-Gravenhage, 14 September 2009**, LJN: BK1197: surrogacy was realized between a Dutch surrogate mother and a homosexual couple whose spouses, Dutch nationals living in the Netherlands, had been married since 2001 (previously bound by a registered partnership (*geregistreerd partnerschap*), later transformed into marriage). Surrogacy was done by artificial insemination of a surrogate mother, who is therefore the genetic mother of the child (traditional surrogacy). The birth of the child occurred anonymously in France. The French birth certificate only mentions the name of the biological father as the father of the child. The Dutch civil registry officer refused to transcribe the birth certificate due to the absence of the name of the mother on it. The action is primarily filed with the view of having the French birth certificate transcribed in the civil registry and setting out in legal terms that the surrogate mother has given her consent to the recognition of paternity by the biological father. The second aim of the filing is to establish the paternity of the biological father. The Court considers that the absence of the name of the mother in the birth certificate is contrary to Dutch public order, which is why it refuses to recognise the French birth certificate.

The Court also refuses to declare that the surrogate mother has validly consented to the recognition of paternity by the biological father on the grounds that the surrogate mother had already declared this in the contract of surrogacy, while at that time she was not yet pregnant.

With regards to the paternal filiation of the biological father, requested as an alternative, the tribunal refers to article 1:207, al. 1 of the Dutch Civil Code according to which the father of a child is the one that has "created it". Having established that a "sperm donor" cannot be described as "progenitor" within the remit of the Dutch law, the tribunal refers to the case-law of the ECtHR relating to article 8 of the ECHR and notes that the ECtHR ignores the distinction made by the Dutch legislator between a "progenitor father" and a "sperm donor father". What matters is the combination of blood ties and the concrete circumstances of a family life. Therefore, the Court accepts the relationship of filiation of the biological father on the grounds that, under the circumstances of the case, the latter maintains a "family life" with the child. This is the reason why he is entitled to the protection afforded by article 8 of the ECHR.

#### ***In connection with the United States:***

**Rechtbank 's-Gravenhage, 23 November 2009** (328511/FA RK 09-317), unreleased<sup>126</sup>: surrogacy was carried out in California between a same-sex Dutch-American couple residing in the United States and a US national. The Californian birth certificates only mention the identity of the two fathers of intent as being the legal parents. Back in the Netherlands, the Dutch courts have refused to recognize the paternity of the two fathers on the grounds that the Californian authorities had not established the maternity of the woman who gave birth to the children.

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<sup>126</sup> Cited by J.S. KEES, *European private international law on legal parenting?* Thoughts on a European instrument implementing the principle of mutual recognition in legal parenting, 2010, no. 7.2.1.3.3, p. 238, available at: <http://arno.unimaas.nl/show.cgi?fid=19540>

***In connection with India:***

**Rechtbank 's-Gravenhage, 24 October 2011**, LJN: BU 3627: surrogacy was conducted in India between an Indian surrogate mother, a Dutch father of intent and an Irish mother of intent. The parents of intent are residing in the United Arab Emirates. Surrogacy was conducted with anonymous egg donation and sperm from the father of intent. The surrogate mother is not the genetic mother (gestational surrogacy). The Indian birth certificates mention the parents of intent as the legal parents. Back in the Netherlands, the mother of intent seeks to transcribe the Indian birth certificates in the Dutch civil registry. The Registrar refuses the transcription on the grounds that the mother of intent cannot be mentioned in the birth certificate as being the legal mother since she did not give birth to the child. The action brought by the parents of intent aims at sentencing the Registrar to record the birth in the registers of civil status, to establish the Dutch nationality of the child and the legal parentage of the parents of intent. The Court confirmed that it had jurisdiction over the dispute on the grounds that the mother of intent and the child reside in the Netherlands, that the father of intent has the Dutch nationality, and that the child will receive Dutch citizenship due to the establishment of the paternal filiation by the Court (art. 3 *Wetboek van Burgerlijke Rechtsvordering*).

In accordance with the rule of conflict of laws on filiation, the Indian law shall apply to the determination of parentage of the surrogate mother to the child (art. 3 *Wet conflictenrecht afstamming*<sup>127</sup> - WCA: the determination of the relationship between a woman and a child born out of wedlock is determined by this woman's national law). According to Indian law, when a child is born of a surrogacy with anonymous egg donation fertilized by the sperm of the father of intent, the surrogate mother and the father of intent are the legal parents of the child. As a result, the Indian birth certificate mentioning the parents of intent as being both the genetic and the child's legal parents is contrary to the Indian law and to reality and therefore contrary to public order as far as, in Dutch law, the legal mother is the woman who gives birth to a child or who adopted it (art. 1: 198 DCC). This legal provision must be regarded as a fundamental principle of the legal Dutch order. The mother of intent must use the adoption procedure, as long as the Dutch legislation offers no alternative to establish a relationship between a mother of intent and a child born out of surrogacy. The Court therefore confirms the position of the Registrar and refuses to sentence him to transcribe the birth certificate in the Dutch civil registry.

To determine the paternal filiation from the father of intent, the Court applies the Dutch law, designated by the rule of conflict of laws on filiation from the moment the child's usual residence is located in the Netherlands and has spent most of his life there (art. 6 WCA: determination of paternal filiation is governed by the law of the residence of the child, in the absence of a common nationality between the father and the mother and failing for the father and the mother to have a common usual residence). In accordance with Dutch law, the paternal filiation is established if the father is the progenitor of the child (art. 1: 207, 1<sup>st</sup> § DCC). In this case, when the child was conceived by IVF, the father of intent is the genetic father of the child and not its progenitor. Having established that a "sperm donor" cannot be described as "progenitor" within the remit of the Dutch law, the tribunal refers to the case-law of the ECHR relating to article 8 of the ECtHR and notes that the ECtHR ignores the distinction made by the Dutch legislator between a "progenitor father" and a "sperm donor father". What matters is the combination of blood ties and the concrete circumstances of a family life. The Court states that, under the concrete circumstances of the case, the biological father has a "family life" with the child and that as such, he is entitled to the protection afforded by article 8 of the ECHR. As such, the Court admits to establish the paternal filiation of the father of intent. In accordance with article 1: 5, § 2 of the Dutch Civil Code, the child

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<sup>127</sup> Parentage (Conflict of Laws) Act.

bears the surname of the father of intent, chosen by the surrogate mother and the father of intent who are the legal parents of the child.

With regard to parental authority and the temporary guardianship, the Dutch Court confirmed that it had jurisdiction over the case according to article 8 of the Brussels II *bis* regulation, on the grounds that the child has its usual residence on Dutch territory. As the child usually resides in the Netherlands, Dutch law is applicable in accordance with article 16 of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children. According to Dutch law, the surrogate mother has exclusive parental authority over the child. Insofar as the paternal filiation from the father of intent will be established only after a period of three months following the decision by the Court, provided that an appeal is not lodged against this decision, he may not be vested with parental authority over the child. The case is postponed to a later date to allow the Court to rule on parental authority and the temporary guardianship.

In this hypothesis, the recognition of the double parentage link of the child towards the couple of his intended parents is therefore not possible. Only the paternity of the (biological) father of intent can be established on the grounds of the concept of "family life", which combines blood ties and the appreciation of a concrete common life between father and child.

On the other hand, the Dutch courts consider that foreign laws that allow the establishment of maternal parentage towards the mother of intent who has not given birth to the child are contrary to the Dutch public order. The Dutch Courts likewise refuse to recognise foreign (Californian) birth certificates that mention the identity of two fathers of intent (homosexual couple) as being the parents of the child without mentioning the identity of the surrogate mother, on the grounds that the rule *mater semper certa* is of public order<sup>128</sup>.

The Courts reason in the same way when it turns out that the birth certificate does not mention the name of the mother who gave birth. Thus, in case of a surrogacy that involved an anonymous birth in France ("accouchement sous X"), the Court held that the absence of the name of the mother in the birth certificate was contrary to the Dutch public order<sup>129</sup>.

## 2<sup>nd</sup> hypothesis

### *In connection with the United Kingdom:*

**Rechtbank 's-Gravenhage, 11 December 2007**, LJN BB9844: surrogacy was carried out in the United Kingdom with the gametes of the intended parents implanted through

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<sup>128</sup> Rechtbank 's-Gravenhage, 23 November 2009 (328511/FA RK 09-317), unreleased (cited by J.S. KEES, *European private international law on legal parenting?*) *Thoughts on a European instrument implementing the principle of mutual recognition in legal parenting*, 2010, no. 7.2.1.3.3, p. 238, available at:

<http://arno.unimaas.nl/show.cgi?fid=19540>: "The judicial decision from the Superior Court of California of 15th April 2008 cannot be recognised since this is contrary to Dutch public policy, bearing in mind the aforementioned fundamental rule of family law (*mater semper certa est*) and the fact that the judicial decision was ordered without the legal mother first being determined" (translated by I. CURRY-SUMNER and M.J. VONK, "National and International Surrogacy: an Odyssey", in *The International Survey of Family Law*, 2011, Edition (ed. B. ATKIN), Bristol, Family Law, 2011, p. 279).

<sup>129</sup> Rechtbank 's-Gravenhage, 14 September 2009, LJN: BK1197: "Registration of the French birth certificate conflicts with the Dutch public order". In a similar sense, see Rechtbank 's-Gravenhage, 23 November 2009 (328511/FA RK 09-317), unreleased (cited by J.S. KEES, *European private international law on legal parenting?*) *Thoughts on a European instrument implementing the principle of mutual recognition in legal parenting*, 2010, no. 7.2.1.3.3, p. 238, available at: <http://arno.unimaas.nl/show.cgi?fid=19540>: the Dutch courts have refused to recognize California birth certificates on the grounds that it did not establish the maternity of women who have given birth to children.

IVF in the surrogate mother (gestational surrogacy). The father of intent is a Dutch-Austrian national and the intended mother is of Austrian nationality. Although both are resident in the Netherlands, they decided to carry out the surrogacy in the United Kingdom because they did not know anyone in the Netherlands who would have agreed to be surrogate mother. They therefore called upon an English organisation (Childlessness Overcome Through Surrogacy, COTS) that put them in contact with a surrogate mother. The child was born in the United Kingdom and received British citizenship. The parents of intention file a procedure of adoption in the Netherlands. The Court states that article 2 of the *Wobka* (*Wet opnemng buitenlandse pleegkinderen ter adoptie*), applicable to the adoption of foreign children, requires that prospective adoptive parents must obtain the approval (*beginseltoestemming*) of the Minister of Justice to be able to adopt a foreign child. In this case, such an agreement was lacking. However, the Court held that by adopting the *Wobka*, the Dutch legislation did not intend to target children conceived with the genetic material of the adoptive parents. This is why Dutch law shall apply to an application for adoption sought as a result of an IVF surrogacy, and not the *Wobka*. As such, the Court grants adoption to the parents of intent after verifying that the surrogacy had been carried out in accordance with English law and met the conditions laid down by Dutch law, namely that it was not a commercial surrogacy and that the surrogacy complied with the guidelines laid down by the Society for Obstetrics and Gynaecology (medical indications, age of the surrogate mother and the mother of intent, surrogate mother having already given birth to a living child, counseling, etc.). The name of the child, such as shown on the British birth certificate (family name of the parents of intent) was recognized by the Dutch authorities in accordance with the law applicable in respect of names (art. 1 *Wet conflictenrecht namen* conflict rule).

It should be stressed that in this solution that is very favourable to the child, the fact that the mother of intent is also the genetic mother of the child does not seem to have mattered. The Court indeed held that the Dutch law did not intend to apply the law on the adoption of a foreign child (*Wet opnemng buitenlandse pleegkinderen ter adoptie*) when this child is conceived with the genetic material of the parents of intent. The Court therefore granted the adoption despite the fact that the parents did not respect the procedure, namely that they had not obtained the agreement of the Minister of Justice<sup>130</sup>.

## **AUSTRIA**

### **1) Applicable rules**

Concerning surrogacy, there is no explicit prohibition.

According to Art. I, §3 of the *Fortpflanzungsgesetz – FmedG* (Law on Reproductive Medicine) (BGB1 275/1992), (1) artificial reproductive technologies are only allowed when the sperm and ovum of the married couple or life partners are used (2) for artificial insemination of a woman, the use of the sperm of a third person is authorised, under the condition that the husband or the male partner is infertile; (3) eggs and cells capable of development can be used only by the woman who originated them.

### ***Establishing the maternal bond***

Under Austrian law, there is a legal presumption, according to which the mother is the woman bearing the child<sup>131</sup> (§137(b), ABGB ((§137(b), *Allgemeinen bürgerlichen Gesetzbuch - ABGB* (JGS 946/1811), modified by Art. II, *Fortpflanzungsgesetz – FmedG* (BGB1 275/1992)). No indication can rebut this presumption, as ovum donation is illegal.

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<sup>130</sup> Rechtbank 's-Gravenhage, 11 December 2007, LJN BB9844.

<sup>131</sup> "The mother is the woman who has carried the child"

The child has only one legal mother. In case of surrogacy, the surrogate would be considered as the legal mother.

### ***Establishing the paternal bond***

Under §138(1) ABGB<sup>132</sup>, the father of a child is: (1) the man married to the mother while she gave birth to the child, or her husband who deceased not earlier than 300 days before the birth; or (2) the man who made a paternity recognition, or (3) the man whose paternity was established in court. Also, according to §138(2) ABGB, if several men are concerned, the father would be the man who was the last one to be married to the mother.

The names entered on the child's birth certificate are exclusively those of his parents, also in case of surrogacy.

## **2) Analysis of the decisions**

### **- Verfassungsgerichtshof, 14.12.2011**

**Facts:** Two children whose genetic parents are Austrian citizen (a woman) and Italian citizen (a man), residing in Vienna, were born (2006, 2009) in Georgia, USA, through surrogacy by an American surrogate. Because of removal of her uterus the Austrian mother could no longer bear children herself. The children became American citizens by birth in the USA and were recognized as the Austrian parents' children by American courts: the *Superior Court of Cobb County* (3.8.2006) and the *Superior Court of Fulton County* (10.2.2009) gave an *Order of Declaratory Judgment*, declaring that the intended parents were the legal and genetic parents, with all respective rights and obligations. The hospital was asked to mention on the birth certificates the name of the intended parents, without any reference to the surrogate and her husband.

Based upon these birth certificates, the children, back in Vienna, were registered as Austrian citizens by the City ("Magistrat") of Vienna (5.9.2006 and 30.4.2009). When the mother claimed child benefits, the Ministry of Interior asked (4.9.2009) the City of Vienna to examine the Austrian citizenship of the children arguing that surrogacy was illegal under Austrian law (§137(b) ABGB – the mother is the woman bearing the child), and that the American judgments establishing parental rights of the Austrian mother could therefore not be recognized by Austria. The Ministry of Interior also asked the Ministry of Justice whether, surrogacy being authorised under American law, the public order was not infringed, or, on the contrary, as according to American international law, the applicable law is determined in relation to the domiciliation, Austrian law was applicable, and so does §137(b) ABGB.

The City of Vienna began its inquiries; a genetic test confirmed the biological relation between both children and both intended parents.

On November 15th, 2010, the administration took a decision according to which no filiation had been established in regard to the intended mother, and that the children were not Austrian citizens. This decision was grounded upon §21 and 25 IPRG (*Internationale Privatrecht – IPR Gesetz* (BGBl 304/1978, 135/2000), stipulating that the personal status of the children had to be determined according to their domicile, in other words, Austrian law was applicable, as well as §137(b) ABGB. Also, the administration

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<sup>132</sup> „The father of the child is the man who

1. was married with the mother at the time of the birth or dies as husband of the mother less than 300 days before the child was born; or
2. *declared his paternity*
3. *whose paternity is established by law*”



considered that public order included the prohibition of surrogacy, and therefore was opposed to the recognition of the foreign judgments.

### **The Constitutional Court of Austria**

This decision provides a framework to children born through foreign surrogacy: it confirms the maternal filiation of the biological and intended mother, and, in consequence, their Austrian citizenship if she is Austrian. The main considerations are the following:

- The American decisions establishing legal motherhood of the American genetic mother was valid under norms of international private law.
- The Austrian law prohibiting surrogacy is not part of Austria's public order (*ordre public*), thus overriding the American decisions. The federal law on Assisted Reproductive Technologies does neither have constitutional status nor does it protect fundamental rights.
- The American surrogate mother cannot be forced into the position of the legal mother against her will by Austrian law.
- The Ministry of Interior had decided arbitrarily by neglecting scholarly opinion and case law on *ordre public*, and by neglecting the welfare of the child as a key concern while determining the children's nationality.
- The intended parents' right to equal treatment by law was infringed.

It should be noted that the §8 of the ECHR, which was explicitly mentioned as an argument against the decision, neither was included in the list of law presented by the court, nor was considered in itself by the judges (this argument was completely ignored).

Yet, the second decision pronounced by the Austrian Constitutional Court rests precisely on this argument.

### **- Verfassungsgerichtshof, 11.10.2012 – B 99/12 ua**

#### **Facts and procedure**

A pair of twins was given birth in June 2010 in Ukraine. On the birth certificates Mrs T.L is named as the mother, and Mr P.L as the father, both being Austrian. In order to travel with the children, Mr P.L, translated these documents in German, and with an apostille, requested the Embassy of Austria in Kiev to issue passports. The official at the embassy suspected a case of surrogacy (without engaging a penal procedure). As a result of this suspicion, the Ministry of Interior requested from the City of Vienna to determine the nationality of these children.

The couple contests engaging surrogacy, and holds that Mrs T.L. was inseminated with the sperm of her husband, and that she gave birth to these children by a caesarean section. The Embassy of Austria in Kiev and the City of Vienna requested proof from the couple, who was unable to mitigate the suspicions (inexistence of Austrian birth certificates, the lack of disclosure of the name of the Ukrainian clinic, non-disclosure of the identity of the doctor in charge of the medically assisted reproduction procedure, adducing their right to privacy, refusal of the woman of being assessed by a doctor from the embassy, non-disclosure of an individual in Vienna capable of witnessing to her pregnancy).



The youth officer observes that the children are reared by the intended parents.

Through a letter dated the 7<sup>th</sup> of December 2011, the City of Vienna refuses to give the Austrian nationality to the children. As a justification, the suspicion of a surrogacy is highlighted (with the elements previously mentioned).

This refusal is justified by the City of Vienna based on the following legal dispositions: the §137 ABGB (the mother is the woman giving birth), the §3(3) of the FMedG, and the incompatibility of surrogacy with the Austrian public policy, which implies the exclusion of the Ukrainian order (§6 IPRG). Mrs T.L. is, thus, not considered as the mother of these children, who, in consequence, are not Austrian.

### **The Constitutional Court of Austria**

-The scope of protection of art. 8 of the ECHR includes the relations of a child with his/her parents. Under this protection of family life, the right of a child to a nationality is included, when it is based on the relation of parentage between the child and his/her parents.

-According to the §7 StbG (*Staatsbürgerschaftsgesetz – StbG*, 1985 (BGBl 311/1985, 122/2009), a child has the right to the Austrian nationality from his/her birth (for a legitimate child – if one of the parents is Austrian; for a natural child – if the mother is Austrian). In this case, there is no doubt that the children have a genetic relation with the intended parents. There is only doubt on the identity of the surrogate mother. This doubt would lead the administration, as understood by §7 StbG, to ignore the verification of the genetic parenthood, and to concentrate exclusively on the legal parenthood, and to ignore the DNA carried out according to §5 StbG.

- The administration opposes the non-evidential character of the Ukrainian birth certificates, issued with an apostille, as the intended parents are the legal parents of the children.

- Invoking an incompatibility between the Austrian public policy and the fact of recognising these birth certificates, only on the basis of the authorisation of surrogacy in Ukraine, the administration ignored the rule of law within the constitutional sphere.

- Public policy includes basic values protected by the Austrian law (OGH, 13.9.2000, 4 Ob 199/00 v), these are value positions that cannot be renounced, and which are in the legal order. Constitutional rights (in particular, human rights protected by the ECHR) play an essential role. The §6 IPR (*Internationale Privatrecht – IPR Gesetz* (BGBl 304/1978, 135/2000) includes in the basic values, and thus, in the public policy, principles such as personal freedom, equal rights, the prohibition of discrimination on the basis of origins, race and religion, the freedom of marriage, the prohibition of marriage between children, and, not less importantly, the protection of the well-being of children by the children's law. As the Constitutional Court has already ruled before (VfSlg. 19.569/2011), the dispositions of the FMedG and those associated, included in the ABGB, are not a part of these fundamental values of the Austrian law and, this including those prohibiting surrogacy, do not belong to the constitutional sphere.

- The fact that the administration includes in the public policy the prohibition of surrogacy and the §137b of the l'ABGB ("the mother is the woman who gives birth"), which excludes the recognition of Ukrainian birth certificates as well as the application of Ukrainian law on the basis of §6 IPR, exclusively founded on the fact that it authorises surrogacy, is contrary of the well-being of the child. This well-being is threatened by the refusal of recognising foreign certificates bearing an apostille, which conduces, on the terms of §137b ABGB, to consider the surrogate as the legal mother, and to force her to

a maternal role, when she is not the biological mother, and when she does not want, or can assume this maternal role and has not conformed a family nucleus with the child.

In cases as this one, it will be excluded constitutionally, for the determination of parentage (and nationality, as a result) with regards to the child, to apply the substantive Austrian law, in particular §137b ABGB. Such an application would preclude the benefit of the child to his/her genetic parents (but also 'factual), to his maintenance entitlements, to his right of succession etc. Moreover, by refusing the recognition of this foreign legal instrument, these children would be left without the right to the Ukrainian nationality, which would leave them stateless.

Considering art. 8 of the ECHR, the applicable law in cases such as the one at hand is the foreign law, and thus, the right to an Austrian nationality by parentage according to §7 StbG, on the basis of the pertinent public certificates.

- The administration has, in this case, applied the dispositions of Austrian law unreasonably, which led to a violation of the respect of the right to a private and a family life of the applicants.

### **Comment**

- "The best interest of the child" was a primary consideration for the courts in these decisions, as it was clear that these children's well-being was to be raised by the intended parents, and not to stay with the surrogate; it was also in their interest to have Austrian citizenship (in the second case, if Austrian citizenship would have been refused, the children would stay with no citizenship at all, as they did not have the right to an Ukrainian citizenship).

- In the second case, the protection of "family life" (§8 of the ECHR) covered the relations between a child and his intended parents, and also his right to a nationality, where this right is conditioned by filiation. Grounding this decision on §8 of the EC, the Constitutional Court applies foreign law rather than Austrian law (this foreign law giving the child the right to Austrian citizenship). One can consider that the protection of "family life" provides a challenge to the "best interests of the child", as in this particular decision the refusal of Austrian citizenship is *in fine* considered as a violation of §8 (in the first decision, the formal reason was the infringement of the constitutional right of the parents to equal treatment by the law).

- In both decisions, even though surrogacy is not authorised in Austria, no adoption procedure was necessary, as the intended parents were recognised as the legal parents of the children.

- In both decisions, foreign norms are applied, for two reasons, firstly, as the prohibition of surrogacy was not considered as being part of the Austrian *ordre public*. It was explicitly stated that the federal law on Assisted Reproductive Technologies (FMedG) does neither have constitutional status, nor does it protect fundamental rights. Secondly, applying Austrian filiation law would prejudice the child's best interest. Also, a foreign surrogate cannot be forced into the position of the legal mother against her will by Austrian law.

## 2.3.2. MEMBER STATES IN WHICH SURROGACY IS FORBIDDEN

### 2.3.2.1. Ex-ante

#### Law (prohibition)

##### **FRANCE**

Case-law has led in France to the prohibition of associations facilitating surrogacy. In the 1980s, the growth of associations acting as “middle-men” between infertile couples and prospective surrogate mothers, prompted the administrative bodies to ban such associations. The administrative court validated this prohibition (Conseil d'Etat, 22 January 1988, n° 80936, *Assoc. « Les cigognes »*). The ordinary court likewise declared the nullity of such association due to the illegality of their object (Cass Civ. 1<sup>st</sup>, 13 December 1989, *Assoc. « Alma Mater »: D. 1990, p. 273, rapp. Massip; JCP G 1990, II, n° 21526, note Sériaux; Defrénois 1990, p. 743, obs. Aubert ; RTD civ. 1990, p. 254, obs. J. Rubellin-Devichi*). These rulings are at the source of the legal arrangements on agents in surrogacy agreements.

Since 1994, French law prohibits peremptorily all forms of surrogacy (regardless of its purpose, altruistic or profit, and whatever the context, medical or parental). The prohibition of the use of this practice is sanctioned in the civil field by the absolute nullity and in the criminal field by correctional penalties.

On the civil front, specific provisions nullify conventions that affect the reproductive performance of women (laws of 29 July 1994).

“Any agreement relating to human reproduction or pregnancy on behalf of others is void” (article 16-7 Civil Code).

“The conventions conferring patrimonial value to the human body, its elements or its products are null” (art 16-5 Civil Code).

These dispositions “are of public policy” (art 16-9 Civil Code); surrogacy agreements are therefore null and void in all cases.

Generally, article 323 of the Civil Code provides that “actions relating to parentage cannot be subject to waiver”. This article provides for the principle of “unavailability of the State”, which dictates that a woman cannot conventionally undertake to abandon the child she carries and that she cannot conventionally renounce being a mother.

On the criminal front, there are two instances that can constitute a criminal offence by the penal law: the incitement to abandon a child (a) and the substitution of a child (b).

a) Article 227-12 of the penal code punishes “the incitement of the parents or one of them to abandon a born or unborn child, made either for pecuniary gain, or by gifts, promises, threats or abuse of authority, is punished by six months' imprisonment and a fine of €7,500; acting for pecuniary gain as an intermediary between a person desiring to adopt a child and a parent desiring to abandon its born or unborn child is punished by one year's imprisonment and a fine of €15,000; the penalties provided by the second paragraph apply to acting as an intermediary between a person or a couple desiring to receive a child and a woman agreeing to bear this child with the intent to give it up to them. Where the offence is habitually committed for pecuniary gain, the penalties incurred are doubled”.

It is worth noting that neither the couple of intended parents, nor the surrogate mother would be able to be indicted on the basis of the charges specifically on acting as an

intermediary and that concern intermediaries between the surrogate mother and the intended parents. The couple could be eventually prosecuted on the basis of the incitement to abandon a child, if facts pointing to this incitement emerge from the case<sup>133</sup>.

b) Article 227-13 punishes the "wilful substitution, false representation or concealment which infringes the civil status of a child » with « *three years of imprisonment and a fine of €45,000* »

This article targets in particular the hypothesis in which the intended mother is falsely attributed by the birth certificate a child that she did not give birth to (for example if the surrogate who really gave birth declares the child before the Civil Registry forging the identity of the intended mother who did not give birth).

But it is worth recalling that the French penal law does not punish offences not committed on the French territory. It is the application of the principle of the territoriality of the penal law.

A French citizen leaving abroad to engage in facts that would be qualified as criminal offences in France but that do not constitute offences in the hosting country, cannot be subjected to penal prosecution on his return to France in the absence of reciprocity (articles 113-2 and 113-6 of the penal code).

The solution would be different if the offence were qualified by the French law as a "crime". The crime committed by a French citizen abroad is always punishable, even in the absence of reciprocity.

### **Criminal case law**

Can a couple of French citizens engaging in surrogacy abroad be prosecuted in France on the basis of article 227-13 of the penal code? In principle, the absence of reciprocity previously mentioned should constitute an obstacle to prosecution.

But it was held that to the extent that some administrative procedures had taken place by the couple at the Consulate of France of the foreign country, a part of the offence had taken place in France, which justified the prosecution. The Court of Créteil judged that "the French penal law is not applicable in this instance; article 113-2 of the penal code prescribes that the offence is considered as committed on the territory of the republic when one of the constitutive facts of it took place on the territory; as all the constitutive facts of what could be qualified simulation, as defined by article 227-13 of the penal code, took place on the territory of the United States, in conformity to the legislation in force in that country. [...] The attempt to transcribe the birth certificates at the Consulate General of France in Los Angeles cannot be considered as taking place on the French territory to the extent, in international law, the premises of the consulate do not enjoy of extraterritoriality and are a part of the receiving State" (Court of First Instance of Créteil ordinance of the 30<sup>th</sup> of September 2004 D 2005. 476 Note V. Depadt-Sebag).

Could it be perceived from this decision a will of the French judge to avoid convicting under the penal law French couples engaging in cross-border reproduction?

### **GERMANY**

In Germany, surrogacy in itself is not explicitly prohibited or punishable. However, the bringing together of the party who is willing to adopt a child born through surrogacy or is in some other way ready to take permanently care of it (ordering parents) with a woman

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<sup>133</sup> F. Dreifuss-Netter, *Atteintes à la filiation*, Jurisclasseur Pénal, 2000, arts. 227-12 to 227-14.

who is willing to serve as a surrogate, is subject to sanctions. Also, surrogacy agreements are ineffectual and unenforceable.

Three legal sources deal with surrogacy (no amendment is under discussion):

i) The German Civil Code (*Bürgerliches Gesetzbuch* – BGB): §134- any legal transaction violating a statutory prohibition is void if the law does not say otherwise; §138(1)- any legal transaction violating the public policy (*bonos mores*) is void.

ii) The Embryo Protection Act 1990<sup>134</sup>: according to §1(1)(7), “anyone will be punished with up to three years imprisonment or a fine, who ... attempts to carry out an artificial fertilisation of a woman who is prepared to give up her child permanently after birth (surrogate mother) or to transfer a human embryo into her”. Under this provision, no “agreement” in a technical sense is required; the mere willingness of the surrogate to relinquish the child to a third party is sufficient.

Neither the surrogate, nor the ordering parents can be punished. According §1(3)(2), “...the surrogate mother and likewise the person who wishes to take long-term care of the child will not be punished”. If a woman is being inseminated with the sperm of the ordering father with no medical assistance, through sexual intercourse or “home insemination”, this kind of operation will be subject to no sanction.

iii) The Procurement Adoption Act<sup>135</sup>: according to §13(a), the surrogate mother is a woman who by agreement has consented (1) to an artificial or natural insemination, or (2) to having somebody else’s embryo implanted, and, after giving birth to it, to hand the child over in view of an adoption or other permanent accommodation. Once more, this kind of activity is not in itself prohibited. According to §13(b), the procurement of a surrogate mother means the bringing together of the party who is willing to adopt a child born by a surrogate or is in some other way ready to take permanently care of it (ordering parents) with a woman who is willing to serve as a surrogate mother. Such procurement is formally prohibited (§13(c)), and even, following §14(b), punishable (imprisonment up to one year or a fine). Any publicity is prohibited (§13(d)). With an imprisonment up to 2 years or a fine can be punished who has a pecuniary benefit or the promise of such a benefit out of the procurement of a surrogate mother. If the offender turns it into a business activity for financial profit or proceeds on commercial basis, the punishment amounts even to an imprisonment of 3 years or to a fine. §14(b)(3) confirms that the surrogate and the ordering parents cannot be sanctioned.

## **ITALY**

In Italy all forms of surrogacy are forbidden, whether it be traditional or gestational, commercial or altruistic. The Italian parliament provided very strict guidelines in matters of assisted reproduction. Act n. 40 of 19/2/2004, entitled *Rules about medically assisted reproduction*, introduces a prohibition on employing gametes from donors, and specifically decrees: “Anyone who, in any form, realizes, organizes or commercializes gametes or embryos or surrogate motherhood is sentenced to 3 months to 2 years’ imprisonment and to pay a 600,000 to 1,000,000 euro fine” (art. 12, par. 6).

According to the main interpretation<sup>136</sup>, this article incriminates not only intermediary agencies and clinics practising surrogacy, but also the intended parents and the

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<sup>134</sup> Gesetz zum Schutz von Embryonen (*Embryonenschutzgesetz* – EschG), Federal Law Gazette, Part I, n°69, 19.12.1990, p. 2746

<sup>135</sup> Gesetz über die Vermittlung der Annahme als Kind und über das Verbot der Vermittlung von Ersatzmüttern - Adoptionsvermittlungsgesetz – AdVermiG, 2001 (BGBl. 2002, I, p. 354), last modified in 2008 (BGBl, I, p. 2403)

<sup>136</sup> See R. Villani, L. 19 febbraio 2004, n. 40, in A. Zaccaria, *Commentario breve al diritto di famiglia*, 2008, pp. 1828-1834; M. Sesta, *Procreazione medicalmente assistita e status del figlio*, in *Rivista dell’Associazione italiana degli avvocati per la famiglia e per i minori*, 2, 2006, pp.77-92.

surrogate mother too. This interpretation is found out *ab contrariis* from paragraph 8: "The men and the women subject to the reproduction techniques forbidden by par. 1 [assisted reproduction with gametes from donors], 2 [application of Assisted Reproductive Technology (ART) post mortem, or to underage, single, or homosexual couples], 4 [application of ART without the patient's consent] and 5 [application of ART in unauthorized clinics] cannot be condemned". This list does not include paragraph 6, so the doctrine supports the theory of punishability of the patients subject to the application of surrogacy technology. Furthermore, paragraph 9 of the same article provides an accessory penalty for doctors: "the forced interruption of professional practise by 1-3 years".

So far the regime of surrogacy restrictions, providing an absolute ban with penal consequences, has not been applied; no criminal case has emerged; no intended parents or surrogate mothers have ever been criminally convicted.

## **SPAIN**

In Spain, the prohibition of surrogacy was determined by the law of the 22<sup>nd</sup> of November 1988 on the techniques of medically assisted reproduction (TRA, for its Spanish acronym), and confirmed by the law nº14 of the 26<sup>th</sup> of May 2006.

This law stipulates that: "1. A contract convening the gestation, whether for profit or gratuitous, of a woman who will renounce to maternal parentage in favour of a co-contracting party or a third party, will be null and void. 2. The parentage of the children born from surrogacy will be determined by childbirth. 3. The biological father retains the possibility to contest the paternity, in conformity to the rules of common law" (art. 10)<sup>137</sup>.

This law forbids surrogacy explicitly and reinforces the presumption according to which the mother is the woman who gives birth.

From a penal point of view, Art. 221 of the Penal code (based on the version of 2003) establishes: 1. Those who, through economic compensation, deliver a child to another individual, without the existence of a relation of parentage, eluding the legal procedures of custody, hosting or adoption, with the objective of establishing an analogous relation to that of parentage, will be punished with imprisonment of a duration of from one to five years, and with a legal impediment to exercise parental authority, tutelage or custody during a period going from four to 10 years<sup>138</sup>. 2. The same sanction will apply to the person who receives the child as the intermediary, even if the case of the "delivery" of the child took place in a foreign country<sup>139 140</sup>.

Moreover, sanctions are provided for in the form of fines. Surrogacy is sanctioned by a fine going from 10.000 to a million euros and can lead to the closing of the medical centre or the services of medically assisted reproduction that participated in it.

No penal case has been documented until today.

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<sup>137</sup> BUSTOS PUECHE, J-E., El derecho español ante las nuevas técnicas genéticas, *Diario La Ley*, Ed. LA LEY, tome 3, 1992.

<sup>138</sup> It is impossible to know if the incrimination concerns both parents or only the mother, as there has not been a penal case concerning surrogacy until today.

<sup>139</sup> PEREZ VAQUERO, C. "Las pensiones de la poligamia", *Revista Quadernos de Criminología*, 2009, nº 7; pp. 38-39. <http://dialnet.unirioja.es/servlet/articulo?codigo=3104389>.

<sup>140</sup> The penal process develops within the principle of territoriality (regardless of art. 221 of the Penal Code). This principle has to be articulated with the principle of minimal intervention of penal law and the principle of proportionality. This is the reason why the article 221 of the PC has never been applied to cases of international surrogacy.



### 2.3.2.2. *Ex-post*

#### **Internal civil case law**

##### **FRANCE**

###### ***Establishing the paternal bond***

Recognition seems to be the effective way for a man to create a bond between him and the child of a surrogate mother who gave birth anonymously, "sous X", in France. The comment specifically concerns prenatal recognition.

Initially, the courts felt that a prenatal recognition by a man of a child later born "sous X" should be without effect as it relates to the child of a woman who is supposed to actually have never delivered (**Riom, 16 Décembre 1997** D 1998 Somm 301).

But this jurisprudence seems to be abandoned. The Court of cassation, in light of articles 335 and 336 of the Civil Code relating to a child's recognition and in light of article 7 of the CRC (right of the child to know his origins), now judge the paternal prenatal recognition made before birth "sous X" of the child to be effective. This recognition therefore confers effect of creating the paternity bond at birth, as soon as it is transcribed on the birth certificate. It should therefore constitute an obstacle to the placement of the child in social services with a view to its adoption. The child of a woman who gives birth "sous X" can therefore have his paternal link established if he has been recognised prenatally by his father (Civ 1st April 7, 2006, Bul Civ 1 n ° 195 R p.67; D 2006 IR 1065 Obs. I. Gallmeister; D 2007 Panorama 1461, Obs F. Granet Lambrechts: in this case, because the parties has so agreed, the Second Court of Appeal pronounced the adoption of the child by the adoptive couple with maintenance of the relations of the child with his biological father, Reims 12 December 2006, Defrenois 2007. 795, Obs J. Massip).

Paternal filiation can be validly established in case of delivery "sous X" by the mother. A presumption of fraud cannot be derived from this action (CA Versailles 17 May 2001 No. 3717 AJ 2001 26 family). In this case the adoption by the wife of the father (adoption that was requested five years after the birth of the child) has been pronounced and the Prosecutor's application for annulment of recognition was dismissed on the grounds that it failed to provide evidence of its falsity. In this case, the results of a blood compatibility test pronounced in favour of fatherhood. Faced with the sole assumptions of the Prosecutor, the Court refused to order a biological expertise.

###### ***Establishing the maternal bond***

Establishing the maternal bond is still premised on the principle that the mother is the woman giving birth to the child (*mater certa est*). This principle was confirmed by the 2005 statute reforming the law on parentage. The indication of the mother's last name on the birth certificate is henceforth enough to establish the maternal bond.

The possibility for a woman to give birth anonymously « sous X... » and to abandon her child at birth remains. This decision is based on a freedom and can therefore not be the result of an agreement. The principle of inalienability of personal status precludes a woman from agreeing to give birth anonymously and to abandon the borne child. The nuance is important and sheds light on the reason why surrogacy agreements are radically null from their underwriting.

**Adoption** has been historically the first procedure proposed to settle the situation: a woman agrees to abandon the child that she gave birth to. The father acknowledges the



child to establish paternal parentage and his spouse adopts the child in the framework of a full adoption.

The illegal character of the procedure was not obvious, however: the Court of Appeal of Paris accepted to pronounce, in this context, the adoption of a child considering that the adoption was in the child's interest. Recourse to surrogacy was not by then judged contrary to public policy (decision of the Court of Appeal of Paris of the 15<sup>th</sup> of June 1990). At that time the situation had been highly publicised. The Court of Cassation, in plenary assembly, on appeal from the State Prosecution Office and inspired by the hearing pronounced by the French National Ethics Committee President, Jean Bernard, judged that this venue was a "distortion of the adoption". The Court added that "*The decision pronouncing the full adoption of a child violates articles 6 and 1128 of the civil code and article 353 when this adoption was not but the last phase of a process destined to allow a host couple into their household of a child conceived in execution of a contract leading to his/her abandonment at the moment of birth by his/her mother and threatening the principles of the non-availability of the human body and the civil status, this process constituted a distortion of the institution of adoption*" (**C. Cass Plenary Assembly 21<sup>st</sup> of May 1991** Bul Civ. 4 Rec. page 247 D 1991 417 Note D. Thouvenin JCP 1991 II 21 752 note Terre Concl. Dontenville RTD Civ 1991 517 Obs D. Huet Weiller). At this moment emerged the expression of "distortion of adoption".

The Court of Cassation was lead as a result to confirm its case law (V° **Civ 29<sup>th</sup> of June 1994** D 1994 581 note Y. Chartier; V° also on a request of full adoption undertaken twelve years after the birth of a child born from a surrogate mother: **C. Cass 9<sup>th</sup> of December 2003** 1<sup>st</sup> civil chamber n°01/03927 « ...given that surrogacy, which is deduced as illegal... from article 16-7, involves a distortion of the institution of adoption that the judges of substance are entitled by law to refuse to pronounce... »). The interest of the child is not dismissed. The decision was commented by the doctrine (Defrenois 2004 592 Obs. J. Massip, Dr. Famille 2004 n°17 Note P. Murat, RJPF 2004. 4135, Obs T. Garé, RTD Civ 2004 75 Obs. J. Hauser.).

Thus, adoption would seem impossible to undertake. The case law seems stable on this.

## **GERMANY**

Given the legal frame of surrogacy, in particular §134 and 138(1), BGB, surrogacy agreements are not enforceable by the courts, and cannot in any way, be pre-approved by a court in order to be considered as enforceable. This has been confirmed by the jurisprudence (see below): the sole fact that a woman has been a part to a surrogacy agreement is not a reason to take back the child to whom she gave birth (this kind of measure can only be pronounced in exceptional circumstances, when the child<sup>141</sup> suffers from a bodily or mental damage<sup>142</sup>), despite the biological relation between the ordering father and the child, and the financial motivation of the surrogate.

### ***Establishing the maternal bond***

Under German law, there is a legal presumption, according to which the mother is the woman bearing the child (§1591, BGB). No indication can rebut this presumption, as ovum donation and surrogacy are illegal. The mother's identity has to be mentioned in the act of birth. There is no formal possibility of giving birth anonymously. The child has only one legal mother. In case of surrogacy, the surrogate would be considered as the legal mother.

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<sup>141</sup> In case of a bodily or mental damage to the child, he can be institutionalised, because as a rule, the surrogate is only allowed to deliver the child into the hands of the ordering parents when the court has given personal custody to them. Eventually the court will decide on a case to case basis: it can decide to deliver the child to the ordering parents, who will adopt the child; it can also decide to institutionalise the child.

<sup>142</sup> §1666, 1666a BGB.

### ***Establishing the paternal bond***

Under German law, the father is: the husband of a woman while bearing the child (§1592(1) BGB); a man who has recognised his paternity (§1592(2) BGB)<sup>143</sup>; or a man whose paternity has been stated by court (§1592(3) BGB). No specific provisions have been made for the case of surrogacy. If the surrogate was married while the child was born, her husband will be considered as the legal father of the child.

The names entered on the child's birth certificate are exclusively those of his parents (as defined in question 9, 10), also in case of surrogacy.

### ***Adoption***

The ordering parents can adopt the child born through surrogacy under the following conditions: the consent of the surrogate, since the consent of the biological parents in general is mandatory, which cannot be given before the child is 8 weeks old (§1747 BGB). This consent might become unnecessary (§1748 BGB) if the parent has neglected his / her duty to the child permanently or has shown by his / her attitude that he / she doesn't care about the child, and if the child would suffer a disadvantage not being adopted. Also, the consent might be replaced if the child suffers from a serious (although not continuous neglect), or if the parent, suffering from a particularly great emotional disease, or a particularly serious mental or psychological disability, is permanently unable to assume the care and the education of the child.

According to §1741(1) BGB<sup>144</sup>, while deciding upon the adoption, the judge has to take into account the well-being (*Kindeswohl*) of the child, and only if it is to be expected that a parent – child relationship will result between the adopting party and the child. Nevertheless, whoever participates in an unlawful and unethical arrangement or transportation of a child with regard to an adoption, or delegates such an undertaking to a third party against payment, shall only be able to adopt the child, if this is necessary to the welfare of the child. In this context, a surrogacy agreement would not necessarily exclude adoption, and the judge would decide case by case. In any event, the mother is allowed to hand over the child to the ordering parents only under the condition that an order has been given by a court.

The child might be adopted by the couple (if the couple is married) or by one parent (§1741(2) BGB). The guardianship court (*Vormundschaftsgericht*) decides on the adoption of the child.

## **2) Analysis of the decision**

**- Kammergericht (KG) ( "Provincial Court of Appeal" of Berlin) 19<sup>th</sup> of march 1985, 1 W 5729/84; JZ 1985, 1053**

Contract of surrogacy between a couple and a surrogate, involving pecuniary compensation. The couple requests the refund of the compensation after discovering that the biological father of the child is the husband of the surrogate. The intended parents invoked the threat to the interests of the child, as a result of the non-execution of the contract by the surrogate and the husband. The court declares that such a convention is contrary to public moral and decency (§134 and 138(1) of BGB), as there is a degradation of the child, through its commodification, the fact that he/she is the object of a for-profit contract (even if the remuneration is qualified by the parties as

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<sup>143</sup> A paternity recognition can be made before the child is born (§1594(4) BGB).

<sup>144</sup> « Wer an einer gesetzes- oder sittenwidrigen Vermittlung oder Verbringung eines Kindes zum Zwecke der Annahme mitgewirkt oder einen Dritten hiermit beauftragt oder hierfür belohnt hat, soll ein Kind nur dann annehmen, wenn dies zum Wohl des Kindes erforderlich ist »

voluntary, and that it took place after birth); constitutes a threat to his/her well-being. Moreover, the judges highlighted the threat to the family and matrimonial order.

As the existence of a child without a genetic link within the family can cause suffering and conflicts, and that the agreement of the biological mother to an adoption cannot be given before 8 weeks after birth (in this case, this period had not been respected), the judges transferred the case to another court, competent on the matter, the question of the adoption (*Vormundschaftsgericht*).

**- Oberlandesgericht (OLG) Hamm, 2<sup>nd</sup> of December 1985**, 11 W 18/85 (*FamRZ* 1986, 159; *JZ* 1986, 441; *NJW* 986, 781)

A woman having had the role of surrogate, with the agreement of her husband, was inseminated with the sperm of another man. The child was born, and the surrogate and her husband refused to give him/her to the intended parents. The court declared that the fact that the mother concluded a surrogacy convention is not sufficient reason to separate the child from her, as the fact of separating a child from the family where he/she was born is an exceptional measure, taking place only when a physical or mental injury in relation to his/her wellbeing is observed.

**- Amtsgericht (AG) Gütersloh, 17<sup>th</sup> of December 1985** – 5 XVI 7/85

Refusal of an adoption requires, following a surrogacy convention (artificial insemination of the surrogate with the sperm of the intentional father). However, the judges declared that the adoption was not contrary to the interests of the child on the exclusive reason of the existence of a surrogacy convention, as the court is not the guardian of public moral and decency, it has to deliberate only on the question presented before it, in this instance the wellbeing of the child.

## **International case law**

### ***Administrative stakes: delivering travel documents***

#### **GERMANY**

##### **1) Rules applicable in terms of nationality**

A child is considered to be a German citizen if at least one of his parents his German<sup>145</sup>, thus requiring his / her filiation to be determined. According to §19(1) of the Introductory Law of the Civil Code (EGBGB), in respect to the filiation of a child at first the law of the state in which the child has its habitual residence is applicable. However, the filiation, in relation to each parent, can be decided according to the law of the state to which this parent belongs<sup>146</sup>. In the context of surrogacy, the establishment of a filiation is complicated, given that, under German law, the mother is the woman bearing the child (§1591 BGB), and, if she is married, her husband is considered as the legal father (§1592(1) BGB), and not the ordering father.

These kinds of presumptions often do not exist in countries where German citizens choose to make a surrogacy agreement, like India or Ukraine, where the ordering parents are considered as legal parents, and where children born within their territory are not always automatically given the local nationality. This conflict of law can cause painful situations, where these children have neither a filiation in relation to the ordering

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<sup>145</sup> §4(1) *Staatangehörigkeitsgesetz* –StAG : « Durch die Geburt erwirbt ein Kind die deutsche Staatsangehörigkeit, wenn ein Elternteil die deutsche Staatsangehörigkeit besitzt »

<sup>146</sup> §19(1) *Einführungsgesetz zum Bürgerlichen Gesetzbuch* – EGBGB: « Die Abstammung eines Kindes unterliegt dem Recht des Staates, in dem das Kind seinen gewöhnlichen Aufenthalt hat. Sie kann im Verhältnis zu jedem Elternteil auch nach dem Recht des Staates bestimmt werden, dem dieser Elternteil angehört »

parents, nor any citizenship, even if the ordering parents (who are, sometimes, also the biological parents) are German. Nevertheless, this state of the law has been confirmed by the Federal State Department, warning that entrance to Germany of these children, who don't have German passports, is impossible<sup>147</sup>.

#### **- Verwaltungsgericht (VG) Berlin, 26<sup>th</sup> of November 2009 - VG 11 L 396.09**

An Indian woman, surrogate, was inseminated in India with the sperm of the German intended father<sup>148</sup>. He requested the acknowledgement of his paternity in order to take the children into German territory without a visa.

The court dismissed the argument of the biological paternity adduced by the intended father, as the question of the nationality of the children is ruled by the laws of the State where the children live (§19(1) of the law introducing the BGB (EGBGB)<sup>149</sup>), in this case India. According to Indian law, no legal disposition provides for surrogacy, but, in general, the mother is the woman who gives birth, even if she is not the genetic mother; the father is the husband of the woman who gives birth and, if the woman who gave birth to the children were to be married at the time of their birth to an Indian man, he is considered the as the legal father<sup>150</sup>. But the judges take the time to highlight that even according to the German law, the applicant is not considered as the legal father of the children as he is neither married to the woman who gave birth<sup>151</sup>, nor did he acknowledge these children<sup>152</sup>, nor is his paternity legally attested<sup>153</sup>.

The fact that the intended father is mentioned in the birth certificate as the legal father is not a proof of paternity. Even if we are to follow the rules determined by the *Indian Council for Medical Research* as the applicable law according to §19(1) of the EGBGB, these dispositions contravene the German public policy following the §6 of the EGBGB, as surrogacy is, for the judge, contrary to public morals and decency; the intended parents were aware of the rule of law and the risks they were engaging.

*In fine*, neither the Indian government, nor the German government, consider these children as citizens of their State. The Indians consider the couple of intended parents as legal parents, and that their children are German. The Germans consider the surrogate mother as the legal mother, and the children, as a result, to be Indians. The twins are left stateless, and without the possibility of entering Germany, a situation more severe than that of other countries equally prohibiting surrogacy, but allowing the intended parents return to the national territory with the children. As a result, neither the intended mother, nor the intended father, himself being the biological father, can establish their parentage in any of the countries, even if they are mentioned in the birth certificate of the providing country.

It will be noted that this decision is concluded in a very surprising fashion, as the judges suggest the intended parents, and not only the father to attempt an adoption procedure<sup>154</sup> after demonstrating paternity in order to establish a relation to the children.

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<sup>147</sup><http://www.auswaertiges-amt.de/DE/Infoservice/FAQ/GeburtAusland/06-Leihmutterchaft.html?nn=383016>

<sup>148</sup> The Court declares that according to the elements submitted, the surrogate is probably not the genetic mother, a fact that has no incidence in the sense of the decision

<sup>149</sup> According to art. 18 section 1 of the law of introduction to the civil code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch, EGBGB*), the law of a country where the child has his/her habitual residence is applied with priority to determined parentage

<sup>150</sup> According to art. 112 of the Indian Evidence of 1872

<sup>151</sup> §1592 al.1 BGB

<sup>152</sup> §1592 al.2 BGB

<sup>153</sup> §1592 al.3 BGB

<sup>154</sup> Confirming the decision AG Gütersloh, of the 17<sup>th</sup> of December 1985, 5 XVI 7/85, which had rejected an adoption request as a result of surrogacy, while declaring that the adoption does not have to be declared contrary to the interests of the child for the exclusive reason of a surrogacy convention, as the court is not the guardian of public morals and decency, its role being to deliberate on the question of the child's well being

In theory, thus, if one of these two procedures is achieved, the children could enter Germany and would be associated, at least to the biological father – intended in case that the paternity is established, and maybe even to the intended mother in case that the adoption procedure is concluded successfully. It would seem that a solution was found as, in May 2010, the German Embassy conceded them a visa, so that the whole family could return to Germany<sup>155</sup>.

**- Verwaltungsgericht (VG) Berlin, 15<sup>th</sup> of April 2011- VG 23 L 79.11**

The case concerns a child born in India to an Indian surrogacy. The intended couple is made up of a woman of 56 years of age and a man of 61 years of age. This man, whose sperm fertilised the oocyte of a donor, is the biological father of the child. The German Embassy in India refuses to give a German passport to the child, as it considers that his right to German nationality is not established<sup>156</sup>. The Court confirms the existence of doubts on the right of the child to the German nationality, as one of the parents has to have it (birth right), the existence of a relation of parentage between the couple and the child is not established: the maternal parentage is highly unlikely on the basis of her advanced age, and moreover not proved by any medical document. Even if the man is the biological father, this element is not pertinent, as according to the German law and the Indian law, the father of a child born in marriage, is considered to be the husband of the gestating woman. Insofar as the identity of the mother remains contested, and that the paternity is not legally established, the parentage (*Abstammung*) of the child is doubtful, and the embassy was right to refuse the passport.

This decision, avoiding to reference the interests of the child, denies any parentage relation, maternal or paternal as a whole, regardless of the biological relation with the intended father; the judges prefers to give priority to the presumption of the indivisibility of matrimonial parentage of a married man, which allows them not to recognise the biological relation with the intended father.

**- Verwaltungsgericht (VG) Berlin, 5<sup>th</sup> of September 2012 – VG 23 L 283.12**

The decision concerns a contract of surrogacy concluded in Ukraine, with the gametes of the intended parents. As in precedent decisions, the court in Berlin declares that a child can be given a passport only if he/she is a German citizen, and thus through a parentage relation with one of the parents. The German embassy was right not to give the passport. This child cannot enter German territory. The judges concluded the decision declaring that an adoption was the only means to the intentional mother, who is also the genetic mother, to cause the exclusion of the application of the rule according to which a mother is the woman who gives birth.

As we can note from this series of decisions, the “best interest of the child” consideration has never been used to allow the administration of travel documents to children born through foreign surrogacy agreements, this question had to be examined according to nationality and filiation legal provisions. The decisions taken by the administrative court of Berlin which dealt with the child’s right to enter German territory without a visa, don’t mention this criterion, and refuse these requests.

## **FRANCE**

It is necessary here to cite two decisions of the Council of State (Conseil d’État) (**CE 4<sup>th</sup> of May 2011**) in relation to refusals of the request of “travel documents”. The first decision concedes the document, the second refuses it.

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<sup>155</sup> “Fertility treatment in Germany”, 19<sup>th</sup> of August 2011, Dr P. THORN, *BioNews* 621

<sup>156</sup> On the basis of §1 al.4 PassG, only German citizens have the right to a German passport

The first decision concerns a French citizen who travels to India with the objective of requesting the transcription into the French Civil Registry of births, the birth certificates of two Indian children born in Bombay as well as two passports allowing him to take the children to France. The Prosecutions Department, suspecting a convention of surrogacy, refused the transcription into the French Civil Registry and did not settle in favour of the request of passports. The father of the children requests an interim relief measure from the Ministry in order to obtain a "document of travel" (not a passport) to allow the children to enter France. The interim relief judge settles in favour of the request. (TA (tribunal administratif) Lyon, ordinance n°1102538 of the 22<sup>nd</sup> of April 2011). The Ministry of Foreign Affairs undertakes an appeal before the Council of State, invoking the best interest of the child to remain with his/her mother in India and noting that the practice of surrogacy is contrary of the public policy. The Council of State confirms the first decision, highlighting that the administration did not criticise through its appeal the basis on which the first judge considered the condition of urgency to be fulfilled. It was the only question to be considered by the interim relief measure.

The ordinance issued through the interim relief procedure does not question details of the substance; it does not settle on the existence or not of a surrogate or with regards to the alleged fraud. It does not grant a "passport" and does not question the nationality of the children. It only grants a "travel document".

In the same sense, see however: **TA Paris, 15<sup>th</sup> of November 2011** (n° 1120046/9-1): consular authorities were obliged to grant a document of travel allowing a child, born in Ukraine through surrogacy, to enter the French territory.

However, in a case almost identical, the Council of State nullifies on the 8<sup>th</sup> of July 2011 (Interim relief judges, n° 350486) this time the decision of the first judge ordering the granting a laissez-passer on the basis that there were doubts on the identity of the mother and the children.

### *Civil stakes: recognising foreign birth certificates*

#### **FRANCE**

- It was suggested that the **recognition** of the child would establish the paternal bond, and this proposition was adopted successfully.

An unmarried French couple engaging a procedure of surrogacy from an American woman in order to have a child imagined a different solution. The American Civil Registry established the parentage of the twins born in California with the French couple. The female partner was hence registered as the mother in the birth certificate of the State of California, even though she did not give birth. When the American birth certificates were asked to be registered, the French Public Prosecutor requested that the identity of the surrogate mother be rectified and the maternal acknowledgement that occurred in the meantime to be annulled. The Court of Appeal of Rennes confirmed the decision of the first judges who nullified the maternal acknowledgement and ordered the annulment of the mention in the registration of the American birth certificates of the female partner as a mother – the basis of the decision being the adage "mater certa est" as well as articles 16-7 and 16-9 of the civil code; however, the mention of the father in the Californian birth certificates was registered and the paternal acknowledgement substantiating the certificates was upheld (**Rennes Court of appeal of the 4<sup>th</sup> of July 2002** n°01/02 471 D 2002 29 02 Note F. Granet; Dt famille, 2002, December, comm. n° 142, note P. Murat).

A recent decision however calls into question the validity of the recognition of paternity when the child is born out of a surrogacy procedure carried out abroad (CA Paris 10 January 2012, n° 11/01846; see analysis below).



- Regarding the establishment of maternal filiation through adaption, one singular case from the **Paris Court of Appeal of the 25<sup>th</sup> of June 1990**<sup>157</sup> is worth mentioning. The case concerned a traditional surrogacy performed by an American woman for a sterile French couple. The woman, spawning and gestational carrier, had given birth in Kentucky, and at the end of a judicial procedure, had abandoned its rights over the child for the benefit of the progenitor and father. The intended mother had requested the adoption of the child and the Court of appeal, reversing the previous decision, had acceded to her request. She had then boldly stated that surrogacy allowed the couple to exercise their "natural right to found a family by procreation" and that the conditions in which this surrogacy took place did not clash with the French conception of public policy, intervening in its attenuated effect. It should be noted that the Prosecution had not finally seen fit to form an appeal against this judgment, whilst the second ruling delivered on the same day the Court of appeal of Paris, in a similar case but without international scope, specifically gave rise to the appeal by the plenary Assembly of the Court of Cassation on 31 May 1991, which has long informed case law in France. The fact that the breach of the French ban on surrogacy was the result of a judgement rendered abroad justified without doubt at the time that the sanction of public order was not triggered.

This decision has remained isolated, as it is in contradiction with the solution adopted by the Court of Cassation and expanded to cross-border surrogacy practices.

- A **de facto child-parent relation** has also been proposed in vain: a French couple travelled to the United States to meet a surrogate. The child born in the United States had an American civil status establishing parentage with the French couple. But the birth certificate was not registered in the Civil Registry of Nantes<sup>158</sup>. The French couple, faced to the impossibility of producing a French birth certificate, requested a notarial deed establishing the de facto child-parent relation, constituted in France, before the judge of first instance of Tourcoing who granted it. But the Prosecutor's Department of Nantes refused the registration of the instrument into the birth certificate held by the Consular Civil Registry of Nantes. The Court of Cassation confirmed the decision issued by the court of Douai: the nullity of the convention of surrogacy "creates an obstacle in France to the de facto child-parent relation invoked for the establishment of parentage as a consequence of this convention, illegally concluded abroad, regardless of its legality abroad, as a result of its incompatibility with the French international public policy" (**C. Cass, 1<sup>st</sup> Civ, 6<sup>th</sup> of April 2011** couple Labassée/MP). Is it legal, then, to rear a child who entered regularly in France? Is the de facto child-parent relation flawed? An appeal was undertaken before the European Court of Human Rights.

- The option that has been envisaged the most has been the demand for transcription of foreign birth certificates on French civil status registers.

It was proposed to the Court of Cassation to say that a "foreign (judicial) decision recognising the parentage relation of a child with regards to a couple having concluded a convention with a surrogate mother is not contrary to the international public policy, which is not the same as the internal public policy".

The Court of Cassation did not follow this reasoning: **C. Cass, 1<sup>st</sup> Civ., 6<sup>th</sup> of April 2011** (3 successive decisions, V<sup>o</sup> Dr Fam Mai 2011 Note C. Neirinck; D. 2011. 1522, note. L. Brunet and D. Berthiau). The judges held "that it is justified to refuse to register a birth certificate established through the execution of a foreign decision, based on the opposition to the French international public policy of the decision, when it includes dispositions that infringe essential principles of the French law; that in the state of the

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<sup>157</sup> CA Paris, 15 juin 1990, D. 1990, p. 540, note F. Boulanger ; JCP 1990.II.21653, note B. Edelman et C. Labrusse-Riou ; JDI 1990, p. 982, note H. Gaudemet-Tallon.

<sup>158</sup> Le service central de l'état civil du ministère des affaires étrangères se trouve à Nantes.

settled law, it is contrary to the principle of non-availability of the human body and the civil status, an essential principle of French law, of giving effect, in matters of parentage, to a convention on surrogacy, that, even if legal abroad, is null and void in relation to public policy in the terms of articles 16-7 and 16-9 of the civil code”

Often, the reference to the interest of the child is invoked: is it not contrary to the interests of the child to annul the registration of the name of the host mother from the Civil Registry, especially when this registration occurred years ago? (See for example the decision of the 9<sup>th</sup> of December 2003 previously mentioned). Nevertheless in the three decisions mentioned above, the Court of Cassation in 2001 affirmed that the interest of the child has to cede before the principle of the non-availability of the human body and the civil status. The Court however observes that “the situation thus reserved to the child, which does not deprive him from the parentage that [the State in which he was born] recognises, nor prevents him from living with those raising him in France, does not affect the right to respect for private and family life of the child within the meaning of article 8 of the ECHR, nor does it affect its best interests (...)” (C. Cass. 6<sup>th</sup> of April 2011 previously cited).

The wording of the Court of Cassation is awkward. If the child does not have parentage in the sense of the French law, he disposes of parentage in the sense of the American law. Whilst on the one hand the High court of law refuses to transcribe the birth certificates, on the other hand it considers that this does not deprive the children of the filiation ties acquired abroad and that it does not prevent them from living with their parents. How should we understand a decision that sets out a sanction (the refusal of a French civil status), and in the meantime removes any concrete effect of this sanction (the filiation established abroad is recognised and the ownership of the foreign birth certificate suffices to guarantee a normal family life)? The decision contradicts itself.

What should be taken away from this? It could be that the refusal of delivering French birth certificates has a symbolic effect, the parent being sufficiently established in the light of the foreign birth certificates. The paradox inherent to the decision of the Court of Cassation solves itself when the French refusal to issue a birth certificate has only a formal scope, without real impact on the daily lives of children who will have access to care and can go to school. One can also think that it would be possible to obtain a French identity card, on the basis of a French parentage bond established by a foreign certificate. Even in special situations, such as in cases of divorce or death of a parent, why would the judge or the notary, seized many years later, not be content with the foreign certificates without any suspicion about the circumstances of the birth of children?

At the end of the interview that Ms. Valérie Delnaud, Head of the Office of law of persons and family to the Directorate of Civil Affairs and the Seal (as of 26 March 2013) kindly granted us, it seems that this is the correct interpretation of the three decisions of the Court of Cassation<sup>159</sup>.

But if ultimately the violation of the statutory prohibition on surrogacy has so little effect, then is this not the legal ban itself which is emptied of its substance? Did the venture of the judges of the Court of cassation not involve, in a hidden form, to subvert the effectiveness of the prohibition of surrogacy in favour of the best interests of the child? The increase in surrogacy procedures and the imperative need to protect the children therefore led the jurisprudence to bend the law, in veiled terms.

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<sup>159</sup> The authors would like to thank Valérie Delnaud, head of the « bureau du droit des personnes et de la famille » at the « Direction des affaires civile et du sceau » for the enlightening interview she gave Laurence Brunet on the state of French positive law on these matters.

The balancing act of the Court of cassation can no doubt be explained by the desire to avoid a condemnation of France by the European Court of Human Rights. In two of the three cases decided by the Court of cassation in 2011, remedies have indeed been introduced before the European Court of Human Rights and two proceedings are now pending (application No. 65192/11 Sylvie MENNESSON and other introduced 6 October 2011 vs France and query no. 65941/11 Francis LABASSE and others vs France, introduced on 6 October 2011). It remains to be seen whether the ambiguity cultivated by the Court of cassation will succeed. Can an uncertain protection, dependent upon the interpretation judges or notaries make of an obscure theoretical solution, suffice? Can the best interests of the child rely on random and smokescreen guarantees? Does formally depriving a child of French civil status while allowing him to enjoy a *de facto* family life and conditional family rights, whilst betting on the fact that no legal obstacle will intervene, constitute a compromise in accordance with the right to the respect of the child's family life, which is protected by article 8 of the ECHR?

Be that as it may, the clever attempt of the Court of cassation to neutralize the French law which condemns surrogacy found a relay with some judges.

**- Recently, solutions based on domestic dispositions in relation to the authority of foreign certificates of civil registry (article 47 of the civil code) were also proposed.**

**Article 47 of the civil code** disposes that "all certificates of the French or foreign civil registries issued in a foreign country and written with the forms used in that country is authoritative, except if other certificates and available documents, of exterior information or elements of the certificate itself establish, in the case all useful verifications had been undertaken, that the certificate is irregular, forged or that the facts declared therein do not correspond to reality".

One set of decisions deserves to be analysed here. They concern similar cases where a single man, either living alone or with a same sex partner, asks that the French state recognises the birth certificate of a child born in India from a surrogate mother. The child possesses an Indian birth certificate mentioning the name of his biological father and that of the woman who has given birth. Unlike the decisions mentioned previously, the mother's name appearing on the birth certificate is not the mother of intent (in a heterosexual couple) but that of the woman who actually gave birth to the child. This specificity will give an opportunity for judges to retain a formalistic and literal interpretation of article 47, favourable to the protection of the child.

**Court of Appeal of Rennes, 29<sup>th</sup> of March 2011**, n°10/02646 (Dt fam. 2012, comm. 67, obs. C. Neirinck): If the irregularity or fraud are not demonstrated by the Procurator's office, the registration will be ordered. In this case, two children born in Bombay in 2009 from an unknown mother were acknowledged in June 2009 in Nimes by their father. The Consul General of France refused to register the birth certificate on the Consular Registry, observing that the birth certificates do not mention the name of the mother (anonymous childbirth not existing in India). The birth certificates were, however, rectified and the name of the mother added. But the Procurator's office insisted in its refusal, suspecting this time a surrogacy convention. The Court of Appeal of Rennes considered that the Procurator's office (in charge of demonstrating the fraud) did not bring forward proof of its suspicions and ordered as a result the registration.

**Court of Appeal of Rennes, 6<sup>o</sup> ch, sect. A, 21<sup>st</sup> of February 2012**, n° 11/02758 (Dt fam. 2012, comm. 67, obs. C. Neirinck): a man, in a civil partnership with another man in France, obtained the recognition in France of the birth certificate of his twins born in India through surrogacy. The birth certificate indicated the name of the biological father and of the Indian surrogate. It therefore coincided with the biological truth. The action of the Prosecutor is therefore doomed to failure. Its action can indeed not prosper on the

basis of article 47 if the certificates contain false statements or irregularities. However this was not the case here; the Prosecutor could therefore challenge nor the formal regularity or the compliance with the biological reality of the particulars of the birth certificate.

**Court of Appeal of Rennes, 6° ch. A, 15 January 2013**, RG 11/07500, unpublished: a child was born thanks to a surrogate mother who donated her own egg to be fertilised. The birth certificate mentioned the name of the biological father and of the Indian surrogate. The same reasoning was followed by the judges here as in the previous decision to authorise the transcription of the Indian birth certificate. It is considered to be in line with the particulars of article 47.

A decision taking the opposite stance should also be mentioned: **Court of Appeal of Rennes, 10<sup>th</sup> January 2012**, n° 11/02758 (Dt fam. 2012, comm. 67, obs. C. Neirinck). In this case the request for transcript was accompanied by a recognition underwritten by the French father to the Registrar of the Civil Status of his place of residence. The Prosecutor then acted in cancellation of this recognition, citing legal fraud, as article 336 of the Civil Code permits. Despite the compliance of the recognition to the biological truth, the judges ruled in this case that it was not only "a surrogacy contract prohibited by French law, but a purchase of child, obviously contrary to public policy". The recognition has been cancelled and the transcription of the birth certificate denied.

### Comment

It is difficult to predict the evolution of the jurisprudence even if there is a clear tendency in favour of the recognition of the child's parentage. The three decisions of the Court of Appeal of Rennes which have accepted the transcript of the birth certificates are the object to appeal on the part of the Prosecutor. New decisions by the Court of cassation are therefore pending.

The effort of judges to separate the question of the validity of the contract of surrogacy from the transcript of a child's birth certificate should however be stressed in the decisions of 21 February 2012 and 15 January 2013 rendered by the Court of appeal of Rennes. The judges are careful not to combine the two issues in a way that the nullity of the surrogacy agreement does not obstruct the argument on the establishment of filiation. This cleavage of two legal issues deriving from surrogacy guards the debate from being focused on the issue of fraud to the French law fraud, paralysing the establishment of filiation. By dissociation judges limit the assessment of the legality of birth certificates to the sole article 47 of the Civil Code. They can avoid "opposing or prioritising concepts of public policy such as the best interests of the child or the inalienability of the human body" (Rennes, 21 February 2012). Some Quebec judges seized in closely related cases of surrogacy put forward the same reasoning (see below).

The line of jurisprudence favourable to the recognition of the status of the child has very recently found unexpected backing from the Ministry of Justice, Ms Christiane Taubira. The increase in the number of children born out of surrogacy<sup>160</sup> and living with one or more French parents indeed led the Minister of Justice to adopt a measure which, if it is applied, will have much wider implications than it seems at first reading. A circular CIV/02/13 was indeed published on 25 January 2013 relative to the issuance of certificates of French nationality (CNF) to children born abroad of French citizens and out of a surrogacy procedure. Under the hypothesis of requests for CNF being made, the

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<sup>160</sup> We only know conclusively the requests for transcription filed before the Court of Nantes. Since 2008, 44 transcript requests were recorded, which have led to this day to 38 decisions of the public prosecutor in Nantes refusing the creation of birth certificate for these children. Out of these 38 negative prosecution decisions, 13 have been the subject to litigation. It is quite clear that these applications are the tip of the iceberg of practices of much greater importance (see section: empirical data). Parents are reluctant to confront justice, and it seems that the decision of the Court of Cassation would actually allow them to avoid them.

Minister recommends that "they be granted in the event that the parentage with a French citizen results from an act of convincing foreign civil State under article 47 of the Civil Code". Minister Taubira takes care to specify that "the sole suspicion that such an agreement was concluded abroad cannot suffice to refusing CNF requests, as long as the local civil registry attesting parentage with a French citizen, legalised or apostilled unless otherwise conventional, are conclusive in the sense of article 47 cited above".

The CNF, single mode of extra-judicial proof of French nationality, is an administrative document. Issue falls within the exclusive competence of chief clerks in some magistrates' courts (art. 31-1 Civil Code). It controls neither the establishment of the birth certificate nor the resulting parentage of the child, but it facilitates the issuance of a passport or a French identity card during a first application, when parentage with French citizen is insufficiently established. As one author explains with far-sightedness, "the circular calls implicitly those who resort to surrogacy agreements to just do a CNF – now obtained without difficulty – that allows their child to have a relationship and a French nationality based on a birth certificate that escapes from the Prosecutor's Office checks" (C. Neirinck, La circulaire CIV/02/13 sur les certificats de nationalité française ou l'art de contourner implicitement la loi, Dr fam. 2013, mars, comm. 42). We can therefore clearly see how the work started by the Court of cassation in the three decisions of April 2011 is pursued. The objective is to arrange a semi-statute for the children born abroad out of surrogacy, on the fringes of the law that is protective enough to allow them to have a normal family life, without officially recognising their legal parentage, which would blatantly contradict the principle of public policy prohibiting reproduction and surrogacy agreements. The objective is clearly to empty the law of any efficiency without giving the impression of doing so.

It remains to be seen if this last manoeuvre will produce the effects expected by the Minister of Justice. It is indeed feared that such circular encroaches upon the legislative power. Moreover, is it not in contradiction with a law of public order? Is such a circular not ultra vires? It is precisely the object of the appeal which was introduced by a Member of Parliament before the Council of State (administrative High Court).

It looks like we can authorise ourselves to conclude as follows: French law has become illegible.

## **GERMANY**

### **- Amtsgericht (AG) Nürnberg, 14<sup>th</sup> of December 2009 - UR III 264/09**

A German married man recognises a child born in Russia from a Russian mother. The administrative tribunal suspected surrogacy, as the man admitted that the child was born of an extramarital relation, and that the Russian surrogate requested a visa to attend Germany on the sixth month of pregnancy, probably to engage a procedure of adoption by the wife of the father. Very soon after birth, the father requested the German embassy in Moscow to grant a passport for the child, to be able to return with him to Germany, without the surrogate. The surrogate agreed for the child to acquire the German nationality of his/her father and for him/her to live with him.

The judged declared that the child, through the acknowledgement of paternity, was of German nationality (§4(1)(2) StAG). The parentage of the child is to be determined according to German law (§19(1) EGBGB), his/her habitual residence, and different alternative elements chosen on the basis of the interest of the child. As a result, the interest of the child consists in establishing the identity of his/her parents, and as fast as possible. The residence of the child was organised by the parents in Germany, and, according to German law, the man acknowledging the child is his/her father (§1594 BGB), the unmarried mother consenting to it (§1595 BGB), the formal conditions being



respected (§1597 BGB). German law is equally applicable to determine the nationality of the child (§4 StAG) - the child is German through his father.

For the issue of nationality and parentage, there cannot be a threat to the public policy (§6 EGBGB), as it is not a matter of recognising a foreign legal instrument in the sense of §16(a) FGG (Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit-Jurisdiction Act), and in particular, of §107 FamFG (Familienverfahrgesetz- Family Procedure Act. The judges declared that the document at stake was not a foreign judgment<sup>161</sup>, and even if it were, there would be no contradiction with public policy (*ordre public*), for two reasons: first, because of the right to know one's own origins, considered as derivative from another right, a constitutional one, concerning the right to one's own personality development (§2 and 1 of the German Constitution); this kind of right cannot be void by any party to a surrogacy agreement (intended father, surrogate, etc.). Second, even if this surrogacy agreement would have taken place within the German territory, there would be no infringement to public policy, as §1594 BGB sets conditions to paternity recognition, which do not include any genetic tie between the recognizing father and the child, this provision being possible to use also in a surrogacy context. Accordingly, any foreign decision, which achieved the same result, cannot be considered as contrary to public policy.

The judges take the considerations to note that even applying the Russian law on parentage, the admission into Germany of the certificate of acknowledgement does not threaten public policy.

**- Amtsgericht (AG), Hamm, 22<sup>nd</sup> of February 2011**, Az. XVI 192/08 (confirmed by **Landesgericht (LG), Dortmund, 8<sup>th</sup> of July 2011**, Az. 9 T 210/11)

The decision concerns a contract of surrogacy taking place in the United States (anonymous donor, sperm of the intended father). In the birth certificates issued by the State of Pennsylvania, the intended parents are mentioned as the legal parents. Returning to Germany, the intended father takes a genetic test before the *Amtsgericht* (administrative tribunal), confirming his relation with the child. Then, he engages a procedure of adoption with his wife, and with the agreement of the surrogate.

The judges refuse this request: According to §1741(1) BGB, an adoption decision can be pronounced even if the origin of the child-parent relation relates to a convention contrary to public morals and decency, which is the case, the child being considered as a commodity, which is degrading for his status (Hamm, 1985). The surrogacy contract is not in conformity with articles §134 and 138 of the BGB. It violates the law of 1990, as §1(1)(2) prohibit that a woman undertakes a pregnancy with the oocyte of another woman, and §1(1)(7) prohibits surrogacy.

The judges justified their decision by declaring that even if §1741(1) BGB might have allowed the adoption in the interest of the child, the child is in this case growing up under optimal conditions with the care of the intended parents, this situation should continue in the future, and authorising adoption cannot make his situation better. The judges mentioned that the intended parents, along with the surrogate, have planned to continue their cooperation in making an adoption request, and, in full conscience and knowledge, took the decision to undergo such a risk of legal uncertainty for the child, whose only paternal filiation could be determined. Adoption is therefore seen as a try to regulate an illegal situation under the Embryo Protection Law. This situation hurts the child's interest, being unable to know the identity of his biological mother, and being conscientious of the fact that he was considered as the object of a commercial agreement. For the abovementioned reasons, the court has decided to refuse this

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<sup>161</sup> In the sense of §16(a) FGG, and in particular §107 FamFG



request for adoption, and proposed to take some testimonial dispositions to guarantee the inheritance rights of the child.

**- Oberlandesgericht (OLG) Stuttgart, 7 Feb. 2012 – Az 8 W 46/12**

The case concerns a surrogacy agreement entered into in the United States, with the gametes of the parents of intent. Twins were born. A request to recognise a birth certificate issued in California has been refused<sup>162</sup>, on the ground of §36(1) PStG (Personal Status Law), according to which only the transcription of German citizens born abroad is possible. This provision requires German citizenship. §19 EGBGB provides that German law is applicable for questions of nationality. In the present case, the children were not German citizens, as their legal mother is the one who was bearing them (§1591 BGB), and their legal father the husband of the surrogate. The only option that remains open is that of the adoption of the children by the parents of intent.

**- Landesgericht (LG), Düsseldorf, 15 March 2012 – 25 T 758/10**

The case is concerning an adoption request in favour of the partner (an American citizen) of the biological father of a child (a German citizen), the men having concluded a civil partnership in Germany. The couple had concluded a surrogacy agreement in the US, which involved an ovum donation from a third party, and the German citizen's sperm. The American birth certificate mentions the surrogate as the mother, and the German citizen as the father. The men (ordering parents) returned to Germany in order to settle down, and asked for an adoption judgment in favour of the American citizen, partner of the biological father, with the surrogate's consent (which was made before a notary in California). This adoption request was refused in first instance by the *Amtsgericht*, but was admitted by the *Landesgericht*, on the basis of the "best interest of the child" consideration. The court has decided that German law was applicable, as the civil partnership was concluded in Germany: following §19(1)(1) EGBGB, the child's filiation is to be determined according to the law of the state where he / she resides habitually. In German filiation law the legal mother was the surrogate (§1591 BGB), and, as she wasn't married when she gave birth, and as no paternity recognition has been made, no paternal filiation could be established (the fact that the birth certificate mentioned the biological father was irrelevant). The court has therefore declared that the paternal filiation would be determined following rules respecting the most the child's best interest. Several "child's best interest theories" could be possible. The one which respects the child's need to determine his paternity as soon as possible, even up to his birth; the one which respects the child's need to access, as soon as possible, the knowledge of his genetic origins. Following both theories, the Californian law was applicable, recognising the German citizen (the biological father) as the father.

Nevertheless, the judges decided that in this precise case, §1741(1), al. 2 BGB would be the most respectful of the child's need to have a stable relationship with the people who take care of him, thus an adoption. Also, according to §9(7) of the *Lebenspartnerschaftsgesetz*, under the condition of the child's best interest (which, in this case, is respected, given the harmonious environment in which the child was growing up), the biological child of one of the civil partners could be adopted by the other partner, thus considering both civil partners as legal parents. The judges considered that, in this particular case, the subjective relationship between the parties and the child, and the fact that he would have to face objective difficulties in the future, were sufficient to justify a legal solution, namely an adoption. The child's need for a double filiation would be fulfilled; he would be allowed to inherit and to get other financial rights.

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<sup>162</sup> OLG Stuttgart, 7.2.2012 – Az 8 W 46/12. This case dealt with a surrogacy agreement made in the US, where the intended parents had both a genetic relation to the twins.

## Comment

The series of decisions mentioned lead to a very contrasted appreciation of the German law. The German judges attribute to themselves a great freedom when it comes to interpreting the legal rules and in the application of the public policy exception public. The receptivity of certain courts (AG Nürnberg and LG Düsseldorf) contrasts with the severity of others (OLG Stuttgart and AG Hamm). The conceptions of public policy are opposed between the two blocs of decision; similarly the comprehension and application of the right to know about one's origins differ strongly between judges. This great variability of decisions harms the predictability of the rules of law and the security of legal situations.

## ITALY

Act 40/2004 (*Rules about medically assisted reproduction*) forbade surrogacy in Italy, causing an increase in "procreative tourism". Nevertheless only two relevant cases arose in the courts, both dealing with the recognition of documents issued by foreign authorities.

The decision taken by **the Civil Court of second instance of Bari**<sup>163</sup>, in **13/2/2009**, is very interesting. A couple (an English husband and an Italian wife), who were resident in Bari, drew up two surrogate agreements in Great Britain with the same Englishwoman (the genetic and surrogate mother), who bore two children: one in 1998 and one in 2001. She gave up her parental rights and, pursuant to two different parental orders, British authorities recognised the commissioning couple as legal parents. As Italian children's birth certificates indicate only the genetic parents, the "social mother" asked the judges to order the Bari mayor to change these documents, effectively enforcing in Italy the parental orders issued by British judges. The Civil Court of Bari approved the instance. The decision is based on some principles that are very progressive in the Italian legal context: 1) surrogate motherhood, as it is permitted in some Member countries, does not contrast with international public order; 2) the best interest of the child is a primary consideration for every judicial decision (according to the Convention on the Rights of the Child of New York, 20 November 1989) and 3) in the case of Bari, the best interest of child is the recognition of the "social mother" as the legal mother; finally, 5) *favor filiationis* can be higher a higher priority than *favor veritatis*.

[There was no referral to the Cassation Court]

The latest case arose in the **Civil Court of first instance of Napoli in 1/7/2011**. A single man benefited from a surrogacy arrangement in Colorado and became the father (both the genetic, and legal father according to Colorado rulings) of two children<sup>164</sup>.

He asked the Neapolitan judge to recognize his parental *status*. In this case, the Court also approved the instance, decreeing that "*the forbidding of surrogacy is not found in the need to guarantee the constitutional principles about child protection, but this forbidding is based on a legislator's choice*". So, a child's birth certificate which is issued abroad does not contrast with the Italian public order, as it is possible to "*harmonize the domestic ban of using surrogacy arrangements in Italy with the recognition of the parental relation between the social father and the child born due to surrogacy in the U.S.A*". [There was no appeal.]

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<sup>163</sup> It's a Court of second degree as the case has dealt with the registration of a foreign judicial decision (see art. 67, act. N. 218/1995)

<sup>164</sup> It was not possible to know who was mentioned as the mother in the birth certificate and if the father lived with a partner.

## Comment

The Court of Bari found its decision on the best interest of the child as a primary consideration and used such a notion to allow the enforcing of the British parental order in Italy. The interpretation of the judges of Bari underlay the need for analysis, in each single case, of the material, deep, real issues of the child, supporting the innovative conception of the prominence, in some case, of the *favor filiationis* over the *favor veritatis*. The proceedings, rather than affirm the truth at any cost, have to guarantee above all the well-being of the child. So, in the case of Bari, the children require: 1) to have a definite *status filiationis* and not two different statuses, one in Britain, one in Italy; 2) to continue to live with their social mother even if the genetic reality indicates another woman.

*Favor filiationis* is a notion generally used in decisions about divorce. It was considered the main principle to be followed when the divorcing couple has children and it was necessary to solve capital and practical issues related to them.

There is no real difference between the notions "best interest of the child" and *favor filiationis*. The Italian judges used both expressions with the same meaning. Nevertheless, the second one could be more precise and immediately related to the condition of the child within the family: the child considered as a member of a parental group, the child to be protected as a daughter or a son. There is a new, heavy, question for Italian jurists: following the introduction of special technology such as ART and surrogacy, what is the best interest of the sons and the daughters born due to these arrangements? Is it more important to protect the right to the genetic truth or the right to grow up with the intended parents? The last two Italian decisions (Bari and Napoli) gave a clear answer to this issue.

In the cases analysed, if the intended mother is also the genetic mother, it does not make a difference to the judicial reasoning. Italian judges have never focused on these two different situations because of the presence of art. 269 par. 3 ("*the mother is the woman who bears the child*"), so the most important point in the judicial reasoning has always been the difference between "social" and "bearing" mother.

In the case of Bari, the document is a judicial one: a parental order attributing legal motherhood to the Italian intended mother. In the case of Napoli, the document is a birth certificate. In both situations the intended parents had petitioned the relevant administrative office for the registration of each document. As a consequence of the refusal, both the intended mother of Bari and the intended father of Napoli have commenced judicial proceedings. The judges accepted to recognise both types of document. So, we could say that paternal genetic connection is no more a favoured condition than intended motherhood.

In a broader interpretation of the rulings of Bari and Napoli, the "public order" has to mean a notion of international order, that is the need to guarantee that human rights and dignity are universally recognised. According to such reasoning, neither the British parental orders nor American birth certificate damage the public order, even if in Italy surrogacy is illegal<sup>165</sup>.

In the context of surrogacy cases, the Courts appeared more able to accept the issues coming from public opinion rather than legislative or administrative institutions. In the context of surrogacy cases, Italian judges don't have more discretion or more freedom to decide; they are ordinary judges in ordinary courts; they have the power to apply the law following a complex procedure of interpretation. On the one hand they suggest the

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<sup>165</sup> See M. Castellaneta, *Dietro l'interesse del minore si nasconde il rischio di un turismo procreativo*, in *Famiglia e minori*, 5, 2005, pp. 66-69; L. Mazzanti, G. Pavan, [http://www.studiocataldi.it/news\\_giuridiche.asp/news\\_giuridica\\_11416.asp](http://www.studiocataldi.it/news_giuridiche.asp/news_giuridica_11416.asp)

need for legal reform, on the other hand they take on a substitute creative role, and through more liberal decisions they can bring new principles into the Italian set of rules. Unfortunately the Cassation Court has not even decided about surrogacy cases; we have to wait for a statement of the Unified Sections of Cassation in order to discern the main determining tendency of Italian jurisprudence. The power of such a decision could really influence the legislature's next choices.

It's also worth noting one last case which is presently in front of the European Court of Human Rights: **the Paradiso and Campanelli v. Italy case**, introduced on 27 April 2012. A surrogacy contract was agreed between an Italian couple and a Russian company, « Rosjurconsulting ». A child was born from a Russian woman. The birth certificate states that the child is the son of the Italian couple of intent. Upon their return to Italy, the parents asked to have the birth certificate transcribed, but the Italian administration (Ufficiale di Stato civile) refused to do so under the premise that the birth certificate did not state the name of the real parents.

It dealt with a very special case of surrogacy, because neither the intended father nor the intended mother were the genetic parents of the child born through the Russian woman. Biological tests were indeed carried out.

This couple avoided not only the ban on reproduction with gametes from donors, but the rules about the adoption too. The Court for minors had to declare a state of abandon (and adoptability) regarding the child, because the biological parents were unknown and the intended parents could not be considered parents – according to Italian law – without any genetic or legal ties to the minor. The Court refused to foster the child to the intended parents. The judgment denying the foster is related to the discretion of the judges, as it is generally employed in the Italian Court of minors. The Court of Appeal confirmed the first judgment<sup>166</sup>. The child was entrusted to the social services and placed in foster care. The couple has no contact with him.

It will be interesting to know the ruling of the Civil Court called to decide about the transcription of the child's birth certificate. But neither the civil sentence nor the Penal Court's sentence (about the violation of the art. 567 of Italian Penal Code) has yet been published.

## **SPAIN**

According to some publications and in the light of some data (see report on Spain in Annexe) it seems that Spanish heterosexual couples were able to successfully obtain the transcription of foreign birth certificates in the Spanish Civil Registry, as if the children born from surrogacy were children born through natural means. It is evident that the gay couples struggling to register their children in the Spanish Civil Registry from abroad made visible an issue that was until then invisible (or taboo). The discretion of this practice, even in recent cases, is explained by the fact that the heterosexual couples could misrepresent reality and pretend to be both legal and biological parents of the child.

In this respect, we should mention the reform of the L.T.R.A. in 2007 recognising explicitly the possibility of engaging in a procedure of recognition of parentage in favour of the non-biological mother, so as for it to enter into force when the child is born: "When the woman is married, and not legally or de facto separated, with another woman, the latter will be able to manifest before the officer in charge of the Civil Registry of the matrimonial home that she consents to a relation of parentage to her favour, when the child of her spouse is born".

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<sup>166</sup> These cases were not publicised and they are not described in the most famous generalist legal reviews.

Thus, according to article 235-8 of the Spanish Civil Code, the children born from a surrogacy to which the partner (no matter his sex) gave his approval are the latter's children.

### **1) The position of the Directorate General for Registers and Notaries (DRGN)**

**Resolution of the Directorate General for Registers and Notaries (RDRGN)<sup>167</sup> of the 18/2/2009 (RJ/2009\1735)<sup>168</sup>: *assessing the action undertaken against the legal decision of the officer in charge of the Consular Registry, and ordering the transcription into the Spanish Civil Registry of the contents of the foreign birth certificates of the twins born through surrogacy in California.***

The Resolution of the 18/2/2009 (RDGRN) resolves the legal action undertaken by two married men, both Spanish citizens residing in Spain, against a legal sentence of the officer in charge of the Spanish Consular Register Office in Los Angeles-California, who refused the registration after birth of their two children born through surrogacy in that American state. The parents of the minors appeared before the Spanish Consular Register Office in California with the objective of obtaining the documentation necessary to return to Spain with the newly born children.

In this case, the officer in charge of registration at the consulate refuses the registration because the children were born through surrogacy, which is prohibited by article 10 of the law on the techniques of assisted human reproduction<sup>169</sup>.

The Directorate General for Registers and Notaries (DGRN) orders for the children to be registered in the Civil Registry, arguing that the question of parentage in relation to the minors is not the object of the procedure but to attend to the issue of recognising the validity of the proof of the certificates issued by the foreign registry office<sup>170</sup> (Art. 81 of the Decree of the 14<sup>th</sup> of November 1958 concerning the Regulation of the law on the Spanish Civil Registry<sup>171</sup>).

The DGRN settles in favour of the couple and orders the registration of the birth of the minors with parentage, identically to what appeared in the Californian civil registry: the children born in California are the "natural" children of the Spanish gay couple. On the Spanish family record booklet they are identified as having a direct relation of parentage with the gay couple.

The RDGRN invokes the best interests of the minor, on the basis of the supranational norm of the article 3 of the United Nations Convention on the Rights of the Child (UNCRC 1989), in force in Spain from the 5<sup>th</sup> of January 1991. Moreover, the RDGRN adduces the need to guarantee a single identity to the minors through national borders.

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<sup>167</sup> The DGRN is not a judicial entity but an administrative one depending on the Ministry of Justice. The decision of the DGRN can be contested and taken before the courts. But the DGRN is the supreme entity governing registries and gives instructions (directives) to ensure the correct functioning of the registries (certificates, registrations).

<sup>168</sup> N° 1032/2009 TSJ Madrid, the Resolution of the Directorate General of Registers and Notaries (DGRN) of the 18<sup>th</sup> of February 2009 (RJ 2009\1735), "The DGRN instruction of 5 October 2010 on the registration regime of children born out of surrogacy arrangements" (OFFICIAL BULLETIN OF THE STATE, n° 243, 7<sup>th</sup> of October 2010).

<sup>169</sup> QUIÑONES ESCAMEZ, A., "Doble filiación paterna de gemelos nacidos en el extranjero mediante maternidad subrogada. En torno a la RDGRN de 18 de febrero de 2009", WWW. INDRET.COM, 2009. QUIÑONES ESCAMEZ, A., « La famille homosexuelle en Espagne », Homoparentalité? Approche comparative, Sociétés de législation comparée, Paris 2012, pp. 41-79.

<sup>170</sup> CALVO CARAVACA A.-L. et CARRASCOSA GONZALEZ, J., « Gestación por sustitución y derecho internacional privado: consideraciones en torno a la resolución de la dirección general de los registros y del notariado de 18 de febrero de 2009 », *Cuadernos de Derecho Transnacional*, vol. 1, n° 2, October 2009, pp. 294-319.

<sup>171</sup> Decree of the 14<sup>th</sup> of November 1958 concerning the Regulation of the law on the Spanish Civil Registry.

Besides, the RDGRN considers that refusing the registration of the demanded parentage is a case of discrimination, because such a refusal would be motivated by the fact that both partners are of the same sex.

After ordering the transcription of such documents, the DGRN does not solve neither the questions of substance in relation to the legality of the surrogacy contract (according to article 10 of the Law on Assisted Reproduction) nor the question of parentage of the children (according to the law designed by article 9.4 of the Civil Code), nor the question of the eventual recognition in Spain of the Californian legal sentence (according to articles 951 and following of the Law of Civil Procedure<sup>172</sup>).

**- Directive of the 5<sup>th</sup> of October 2010, by the Directorate General of Registers and Notaries** (BOE n<sup>o</sup> 243, of the 7<sup>th</sup> of October 2010).

The content of the directive of the 5<sup>th</sup> of October 2010 of the DGRN is the following: when it comes to the registration of minors born through surrogacy in California, the question is not to determine parentage but to transpose into the Spanish Civil Registry a parentage that has already been determined by a certificated issued by a foreign Civil Registry offering all the necessary guarantees<sup>173</sup>.

The directive of the DGRN confirms what expressed the RDGRN of 2009 and pretends to grant with legal protection the Spanish children born abroad through surrogacy. Unlike the RDGRN (2009), this directive specifies that only one birth certificate will not be sufficient<sup>174</sup>.

Indeed the DGRN indicates that: "In no case will it be admitted as a document allowing for the registration of birth and parentage of the new-born child, a foreign civil registry certificate or the simple declaration accompanied by a medical birth certificate of the minor, in which the identity of the gestating mother is not established".

As a result, the Directorate General of Registers and Notaries abandons the position that it had held in the Resolution of the 18<sup>th</sup> of February 2009, in which it had admitted the possibility of registering the parentage of children born through surrogacy on the basis of a simple certificate of registration of birth. On the contrary, while the DGRN admits the registration in the Consular Civil Registry of the children born through surrogacy, it will be necessary to present to the officer in charge of the Registry, a legal resolution (sentence), issued by the competent jurisdiction on the matter in the country of origin<sup>175</sup>.

As a result, the attribution of parentage of the newborn children born through surrogacy should be based on a previous judicial decision, which must be the subject of an exequatur, in conformity with the procedure established in articles 954 and subsequent

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<sup>172</sup> Law 1/200 of the 7<sup>th</sup> on Civil Procedure.

<sup>173</sup> QUIÑONES ESCAMEZ, A., "Maternité de substitution et droit international privé (commentaire à la Instruction du 5 octobre 2010, de la Direction Générale des Registres et du Notariat, sur l'enregistrement de la filiation des enfants nés par gestation pour autrui)", *Revue Critique droit international privé*, 2011-1, pp. 183-188.

<sup>174</sup> CERDA SUBIRACHS, J., "La insostenible legalización de facto de la maternidad subrogada en España. A propósito de la Instrucción de 5 octubre de 2010 de la DGRN", *Abogados de Familia*, N<sup>o</sup> 60, Section Tribuna Abierta, Second trimester of 2011, Editorial LA LEY. LA LEY 4893/2011.

<sup>175</sup> The introduction of this new requirement is argued in the following way:

"The requirement of a judicial resolution in the country of origin aims at controlling the compliance with the conditions required by the contract within the legal framework of the country where it was formalised, as well as the protection of the best interests of the minor and the gestating mother. Especially, it allows to ascertain the full legal capacity of the gestating mother, the legal validity of her consent, which must have been given without being affected by an error on the consequences and the scope and without being submitted to deception, violence or coercion (...). It allows also to verify that no simulation exists in the surrogacy contract, which would disguise the international traffic of children".



of the Law of Civil Procedure<sup>176</sup> of 1881 (Law 1/1881) (after the reform introduced by Law 62/2003, of the 30<sup>th</sup> of December (Law 2013/2003) on fiscal, administrative and social measures).

E.g.: Registration of childbirth from a Spanish homosexual couple in the United States through surrogacy. It is necessary to assess if the conditions of the Directive of the DGRN of the 5<sup>th</sup> of October 2010 are complied with, that is: a) the presentation before an officer in charge of the Civil Registry of a judicial sentence issued by a competent court; b) the foreign resolution was issued according to a procedure comparable to that of the Spanish law; c) the Californian legal entity founded its international judicial decision on criteria equivalent to those of the Spanish legislation; d) the best interest of the child is respected by the Californian judicial resolution; e) the rights of the gestating mother are guaranteed. If all the conditions are complied with, there is no basis to refuse the recognition of the sentence of the Supreme Court of the State of California.

#### **- Resolutions of the DGRN ordering the registration in the Consular Civil Registry of the Spanish children born through surrogacy**

All the decisions relate to married gay couples.

**DGRN, Resolution of the 6<sup>th</sup> of May 2011:** In the case of the registration of the birth of two minors presented to that Direction Centre (the DGRN) in a procedure of appeal by the applicants against the resolution of the officer in charge of the Consular Civil Registry of Los Angeles (United States).

The DGRN granted the appeal, leaves the resolution of the officer in charge of the Consular Civil Registry of Los Angeles without effect and then orders the indicated registration.

**DGRN, Resolution of the 9<sup>th</sup> of June 2011:** In the case of the registration of the birth of two minors presented to that Direction Centre in a procedure of appeal by the applicants against the resolution of the officer in charge of the Consular Civil Registry of Los Angeles (United States).

The DGRN granted the appeal, leaves the previously mentioned legal decision without effect and then orders the indicated registration.

**DGRN, Resolution of the 23<sup>rd</sup> of September 2011** (children born in India through surrogacy): The DGRN refuses the registration because the conditions required by the Directive of the DGRN of the 5<sup>th</sup> of October 2010 are not complied with.

The DGRN refuses the action and does not revoke the decision of the officer in charge of the Consular Civil Registry refusing the registration of the birth of children born in India through surrogacy, as the conditions required by the Directive of the DGRN of the 5<sup>th</sup> of October 2010 are not complied with. Indeed, the sentence issued in Mumbai does not guarantee the respect of the best interest of the child, it doesn't guarantee either the free consent of the gestating mother.

**DGRN, resolution of the 22<sup>nd</sup> of December 2011** (In a case of the registration of birth of two minors presented to that Direction Centre in a procedure of appeal by the applicants against the resolution of the officer responsible of the Central Civil Registry; children born in the United States)

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<sup>176</sup> Law 1/2000, of the 7<sup>th</sup> of January on Civil Procedure.

The local birth certificate does not mention the gestating mother but only the international parents. The parentage regime of newborn children was determined by a judicial sentence)

Considering that this case respects all the conditions stipulated by the Directive of the 5<sup>th</sup> of October 2010 of the DGRN, the DGRN censured the refusal of the registration of the two children to the Civil Registry. Thus, the registration is agreed

## 2) Courts and Case law

### **- Sentence of the Court of First Instance nº 15 of Valencia, of the 15<sup>th</sup> of September 2010**

*The legal position reflected by the referenced legal sentence is founded on the prevalence of the express prohibition of surrogacy in the Spanish norm, and the control that the Civil Registry must carry out in conformity to the art. 23 of law on the Civil Registry, as it specifies that the registration will occur "...whenever there is no doubt of the reality of the fact registered and its legality in conformity to the Spanish Law"<sup>177</sup>. The sentence highlights that, due to the fact that in Spain surrogacy is prohibited, the registration in the Civil Registry cannot be allowed.*

For the judge of Valencia, the couple undertaking the action was aware of the prohibition in the Spanish law, and was aware that the request could be refused. Thus, for the judge, the two adults made an informed choice. In this sense, according to the sentence –adopting fully the action undertaken by the Public Procurator (Ministerio Fiscal) against the RDGRN– there is a prevalence of the Spanish norm (prohibition of surrogacy) in relation to the recognition of foreign birth certificates, especially in cases of fraudulent "forum shopping". Let us note that the sentence does not mention the best interest of the child, a fundamental argument of the RDGRN.

The sentence of the Court of First Instance nº 15 of Valencia notes that the resolution of the RDGRN opposes the prevalence of the Spanish norm (prohibition of surrogacy). According to the court of Valencia, it is a responsibility of the officer in charge of the Civil Registry to verify the "reality of the registered fact", and a formal control of qualification would not be enough, as it is also necessary to prove that both applicants are the "real" fathers of the children, something that is biologically impossible and, thus, would have left without legal effect the registration.

However, the sentence highlights that the "nullity of the registration is not in relation to the fact that the applicants are two men, but to the fact that the infants born are the consequence of a contract of surrogacy"; "this observation would be applicable to their situations, concerning two women, a single woman, or a heterosexual couple. It is possible that on the cases concerning women or heterosexual couples, the problem of surrogacy will be harder to identify, but if the identification takes place, the consequence should be the same: to refuse the registration".

### **- Sentence of the Provincial Supreme Court of Valencia, of the 23<sup>rd</sup> of November 2011). (nº. 8621/2011) Appeal of the sentence by the Court of First Instance of Valencia of 2010. Questioning of the Directive of the DGRN of the 5<sup>th</sup> of October 2010.**

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<sup>177</sup> According to this article: Childbirth should be declared before the registry of the competent consulate in relation to the place of birth. The registration is based on general rules. The foreign birth certificate can be subjected to a registration, if there is no doubt of the reality of the childbirth and of the legality of the certificate according to Spanish law (art. 16 and 23 of the Law of the Civil Registry).

The Sentence of the Provincial Supreme Court of Valencia confirms the sentence of the Public Procurator (Ministerio Fiscal) against the RDGRN, it proposes to nullify the practiced registration and agrees to its annulment.

The Sentence of the Supreme Court of Valencia defends that there are "important obstacles to the registration to the Spanish Civil Registry of the pretended parentage, even without demanding [...] that the foreign sentence coincides with the one that could have been adopted by applying the Spanish law. These obstacles concern the infringement, through the Californian registration certificate, of the Spanish international public order".<sup>178</sup>

In this case, the conditions specified by the directive with the objective to recognise the paternity were not complied with. However, the question of a potential invalidation of the directive of the DGRN by the judges is raised.

### **Conflict of the hierarchy of laws**

The sentence of the Court of First Instance nº 15 of Valencia, of the 15<sup>th</sup> of September 2010 refuses the solution given by the DGRN, on the basis of the nullity of surrogacy conventions in the Spanish legal system (art. 10 of the law on the techniques of assisted human reproduction)<sup>179</sup>. According to this sentence, founded on articles 81 and 85 of the Regulation of the Civil Registry, and art. 23 of the Law of the Civil Registry, which have a major normative value, the registration requires that there "should be no doubt with regards to the reality of the birth". According to this point of view, the parentage of children born from Spanish persons through surrogacy should be determined by childbirth. In this sense, the Spanish law explicitly prohibits that parentage in cases of surrogacy is not attributed to the mother giving birth.

For some authors, this regulation is void as it infringes the principle of normative hierarchy of the Spanish legal order. The Ministry of Justice, through the Directorate General of Registers and Notaries, would have made the mistake of thinking that regulatory norms can be arbitrarily used against the Law in force, affecting critically the legal system constitutionally established and guaranteed. In particular, article 9.3 of the supreme law establishes that the "Constitution is the hierarchic norm"; as does article 1.2 of the Civil Code: "the dispositions opposing the norms of superior level will not be valid"<sup>180</sup>.

## **Outside Europe**

### **QUEBEC**

It is enlightening to go beyond the European sphere and to extend the comparison with the law of Quebec. Indeed, in matters concerning surrogacy, it is very similar to many national European laws, in particular the law of France and the law of Belgium.

Under Quebec law, the prohibition of surrogacy was codified in the Civil Code under the chapter concerning parentage of children born through medically assisted procreation. Article 541 provides expressly that "the conventions by which a woman agrees to procreate or gestate a child for the benefit of others are null and void". The nullity

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<sup>178</sup> VELA SÁNCHEZ, A. J. (2012), "De nuevo sobre la regulación del convenio de gestación por sustitución o de maternidad subrogada en España A propósito de la sentencia de la Audiencia Provincial de Valencia de 23 de noviembre de 2011", *Diario La Ley*. Section Doctrina, nº 7815, Year XXXIII, pp. 1-12.

<sup>179</sup> VELA SÁNCHEZ, A.-J., "Propuesta de regulación del convenio de gestación por sustitución o de maternidad subrogada en España. El recurso a las madres de alquiler (1): a propósito de la Instrucción de la DGRN de 5 de octubre de 2010", *Journal La Ley*, Nº 7621, Section Doctrina, 3<sup>rd</sup> of May 2011, Year XXXII, Ref. D-190, Editorial LA LEY.

<sup>180</sup> VELA SÁNCHEZ, *Op.cit.* LASARTE ÁLVAREZ, C. (2012), "La reproducción asistida y la prohibición legal de maternidad subrogada admitida de hecho por vía reglamentaria", *Journal La Ley*, nº 7777, pp. 1.

targets both the conventions agreed free of charge and those providing for payment. When the Civil Code of Quebec came to force in 1994, the Minister of Justice insisted on the objective of article 541 that seemed to concern not exclusively the act of surrogacy per se but particularly the impossibility to establish parentage with regards to a child born from surrogacy. Indeed, it is necessary to interpret the law of Quebec by contextualising it in the more general framework of the law of Canada that does not condemn this practice. The *Assisted Human Reproduction Act* (SC 2004), on the contrary, has the objective of providing a legal framework for the practice. In this sense, it sets the minimum age required to become a surrogate at 21 years. The article 6 of the law does not attribute a criminal sanction to the surrogacy per se but to the financial retribution received or given to become a surrogate (which does not exclude the possibility to reimburse the fees incurred by the surrogate).

As parentage cannot be established on the basis of a surrogacy agreement, it is necessary to abide by Quebec's common law<sup>181</sup>: the establishment of paternity will be done by declaration of parentage; with regards to maternity, it is derived in the law of Quebec from the certificate of birth that the birth attendant has the obligation to produce, indicating the place, the date and the hour, the sex of the child as well as the name and the residence of the mother. The birth assistant has to transmit a copy of this certificate to those who will have to declare the birth and address the other copy to the director of the civil registry; on her side, the mother giving birth has the obligation to declare her maternity in relation to the child. "None of the parties will oblige the director of the civil registry to enter into the registry the name of an intended parent as being the mother or, in the cases in which a homosexual couple engages the services of a surrogate, as being the second father of the child"<sup>182</sup>.

Hence, to establish parentage, the mother will have to engage a procedure of adoption. It will be necessary for both of the birth parents to agree to the adoption. It will be a special consent in favour of the spouse of the father, as it is provided for by article 555 C. civ. Q (if the persons are cohabitants, cohabitation for at least 3 years shall be demonstrated).

To complete the presentation of the normative context, it is worth mentioning the reflection published in 2009 by the Commission of Ethics, Science and Technology of Quebec, named "Ethics and Assisted Procreation: orientations for the donation of gametes and embryos, surrogacy and pre-implantation diagnosis"<sup>183</sup>. In the discussions dedicated to surrogacy, this commission concludes recommending to upkeep the principle of nullity of surrogacy agreements (p. 80). However, when in the event that a surrogacy convention was agreed upon and by which a child was given to the intended parents, it is primordial for the birth mother to be able to give a special consent for the adoption of the child by the spouse of the biological father, in order to fully integrate the child to the family in which he/she lives. The Commission considers that the interest of the child *ex-post* has prevalence on the child's interest *ex-ante*, which justifies the disincentive of surrogacy and the non-facilitation of the regularisation of such situations. Once the child is born his/her interests implies, on the contrary, that "the people who really desire to assume the role of parents can do so" (p. 71). The Commission reasons using an analogy with the situation of a child born in adultery, for a long time the subject of discrimination: the child born from surrogacy should not suffer prejudice from his/her parents behaviour". While the solution is explained with precaution, as it would allow to

<sup>181</sup> Québec, Ministry of Justice, *Commentaires du ministre de la Justice*, Montréal, Publications DAFCO, 1993, p. 201 (art. 541 C.civ. Q.). "It seems opposed to public order to allow for parentage to be determined by an agreement. As this is considered as having never existed, parentage will be established following the forms of evidence previously provided for".

<sup>182</sup> M. Giroux, Le recours controversé pour établir la filiation de l'enfant né d'une mère porteuse: entre ordre public contractuel et intérêt de l'enfant; *Revue du barreau/ Tome 70/Autumn 2011*, p. 509-544

<sup>183</sup> The opinion is accessible online on the site of the Commission of Ethics, Science and Technology: [http://www.ethique.gouv.qc.ca/index.php?option=com\\_docman&Itemid=109](http://www.ethique.gouv.qc.ca/index.php?option=com_docman&Itemid=109)

“do indirectly what cannot be done directly”, the Commission insists, nevertheless, that it should remain a possible option. The work of this commission had an influence on the courts.

At first, the legal conviction of surrogacy agreements was reinforced by the refusal of a tribunal to pronounce the adoption of a child by his/her intended mother. This was the decision of judge Dubois in the decision of the **Court of Quebec, youth division, 6 of January 2009: Adoption-091, 2009 QCCQ 628**: in this case all parties were from Québec; the intended parents, living in cohabitation, recruited online a surrogate having previous experience (she had 5 children and had already done one surrogacy). She was inseminated with the sperm of the child’s father. It was, thus, a surrogacy agreement in which the surrogate uses her oocytes. The contract was concluded with a financial retribution (20,000 dollars to account for the inconveniences and expenditures of the surrogate). After birth, the child was given to the intended parents. In this case the birth certificate only specified the paternal parentage, the field concerning the mother being left blank, while in the certificate produced by the birth assistant “the name of the child’s biological mother” was indicated.

Little after the child’s birth, the father consented to his/her adoption by his spouse (art. 551 C. civ. Q.), and she had asked for the court to obtain an order of placement in view of the adoption (which would ultimately lead to an adoption).

Interpreting article 543 par. 1 C. civ. Q., according to which “the adoption cannot take place but in the interest of the child and within the conditions provided for by the law”, the judge Dubois specified that “the conditions provided for by the law” mentioned by the text went beyond the formal and procedural respect of the consent of adoption issued by the father. He explained that, hence, it “is not [...] possible to dissociate the question of the validity of this consent from the preceding stages engaged by the couple in view of realising their parental project [...]”. For this reason, the judge concluded that the consent was not but “the logical and foreseen continuation of carefully planned parental project, *a distorted way to give validity to a contractual arrangement* by producing legal consequences to what is prohibited by the law”. To refuse the request of adoption of the intended mother, the judge explained that he refused to “voluntarily pretend to be blind to the facts and to confirm that the ends justify the means”.

In the eyes of the judge, the nullity of the surrogacy agreement affected the validity of the consent of the parent to the adoption of his child by his spouse and left void all the adoption process. The interest of the child to have a maternal parentage with regards to the woman raising him/her cannot have precedence over the circumvention of the institution of adoption.

However, a clear shift away from this interpretation that results in prejudice to the child, left without maternal parentage, took place in five subsequent decisions of the Court of Québec (Youth Division) that, on the contrary, accepted the request of adoption tabled by the social mothers. If the interest of the child, understood concretely, guided the judges, the richness and the diversity of reasoning deserve that we assess in detail these decisions<sup>184</sup>

In these cases, the judges insisted on the fact that the parties were transparent and did not try to dissimulate the agreement concluded with a surrogate. The name of the surrogate giving birth appears always in the birth certificate under “mother”; it is, thus, her that is considered *ab initio* the legal mother of the child.

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<sup>184</sup> For more details, we suggest the reference of the previously mentioned analysis of Mr Giroux, which inspires this section of our study.

See also M-F. Bureau et É. Guilhermont, *Maternité, gestation et liberté : réflexions sur la prohibition de la gestation pour autrui en droit québécois*, *Revue de droit et santé de McGill* 2011 [vol. 4., no. 2], p. 42-73.

***Adoption-09184, 2009 QCCQ 9058 and -09185, 2009, QCCQ 8703 (judge Tremblay), 9<sup>th</sup> of June 2009*** (case of twins)

The intended parents live in cohabitation. The surrogate mother is the aunt-in-law of the intended mother who could not bear children without risking her life (two previous miscarriages with uterus rupture); according to the words of the judge, the actions of the surrogate are inspired "on pure altruism and appear to be the fruit of extreme generosity". It is highlighted that the woman acted "with the mission of giving life and giving a very atypical gift to two people on her extended family". No compensation was obtained. Two twins were given birth. It is the intended mother that chose the name and breastfeeds the children thanks to a special hormonal treatment.

After observing that the contentment for the adoption was given, the judge Tremblay favoured the interest of the child. To decided that it was in this case in his/her interest to be adopted by the applicant and that she should be given the full exercise of the parenting authority, the judge points to the fact that "the child receives a complete response to his/her moral, intellectual, emotional and physical needs from Mrs A and Mr B [...]". It is only in a later stage of the decision that the judge evokes the validity of the agreement with the surrogate in relation to article 541 C. civ. Q. While he recognised that the text is applicable in this case and that the verbal agreement is definitely void, this is done to explain that the intended parents would not have been able to oblige the surrogate to successfully complete her pregnancy or to consent to the adoption by virtue of the verbal agreement concluded between them. Indeed, this agreement being null and void, it would not have been able to produce any of its effects. But this nullity does not concern anyone beyond the contracting parties. Thus, the judge highlighted that in the case it was not on this matter that he was deciding on. It was a matter of "deciding on the status of a child who exists and who needs his rights to be fully respected".

Hence, contrary to judge Dubois, judge Tremblay sought to "decide from the point of view of the child and not from the point of view of the people that in good faith and moved by pure altruism, in what regards the surrogate, concluded an assisted procreation agreement" and to order the placement of the child in view of his/her adoption by the intended mother. It was, thus, desirable in the eyes of the judge to "allow for this child, who represents the future of our society, to benefit from all the advantages of having a real maternal parentage".

Moreover, to the extent that the social mother was also the genetic mother, the judge determines that other means were possible to determine the maternity (an action claiming maternity together with an action to contest the current status of the child).

In this decision, the judge asserts a power of discretion to assess the contours of public order that has to be "modelled to take into account the fundamental values of society at moments of its evolution".

***Adoption-09367, 2009 QCCQ 16815 (judge Grégoire), 4th of August 2009***

The social parents are two men in a civil partnership. The surrogate was inseminated with the sperm of the child's father. Thus, it is a surrogacy agreement and it was concluded with the provision of financial compensation (the cost of the agency and the surrogate as well as those pertaining to medical fees). The contract was concluded in the United States, but the surrogate gave birth in Quebec; her identity is declared and her name is mentioned in the birth certificate. After childbirth, the child is given to the intended parents. Each of the legal parents -the surrogate mother and the biological father- having consented to the adoption of the child by the spouse of the father, the latter requests an order of placement of the child in the shared household of the intended parents.



The judge bases the decision on articles 522 and 523 C. civ. Q. according to which parentage is established by the birth certificate that grants the same rights and responsibilities to all children, regardless of the circumstances of birth. Hence, the court fails to see why this child would be treated differently to any other child. Also, it is "clear that the interest of the child involves being adopted by the applicant and thus become a member of a family, to be the daughter of parents who wish and want to educate her, raise her and assume all the responsibilities concerning the status of parent". The judge specifies that "the nullity provided for by article 541 C.c.Q. does not have an effect in anyone but the contracting parties" and cannot be dealt with by a request of adoption that has to be assessed independently of the conditions of validity of the surrogacy agreement. The Court recognises that the "right to be a parent" does not exist, he considers that "the right of a child to be taken care of by his/her parents or the people serve as parents, is real itself. This right is recognised by different conventions, charters and the civil laws dealing with the child's interest".

The judge settles in favour of the request, granting the adoption to the father's spouse.

We must then mention a series of four decisions concerning surrogacy. In each of these cases the names of the father and the surrogate are mentioned in the birth certificate: the birth certificate is, thus, in conformity with the law of Québec on parentage; each of the parents consented specially to the adoption of the children by the spouse/partner of the father.

***Adoption A.C./E.S. and A-M.M., n° 525-43-005788-092 (Judge Wilhelmy), 7th of January 2010***

The social parents are married. The husband is a doctor and he confessed to one of the nurses working in his service the problems of fertility that his couple faced; the nurse "offered to bear the child for them". The father discussed this with the ethics committee of the hospital to be sure that the procedure was acceptable and, according to him, he was received full backing.

The agreement is verbal and compensation is provided (between 10,000 and 15,000 dollars) for any disadvantage and reimbursement of expenditures. The judge considers that this implies that the agreement involves financial profit ("in view of renting the uterus of the surrogate").

In the arguments exposed, the court considers that it is pertinent to "point to a *distinction* between a situation of surrogacy in which the surrogate lends not only her uterus, but the ovule that is necessary for fertilisation and the surrogate who accepts to host the fertilised ovule of another woman".

When the intended mother and her spouse are both biological parents and take the child into their household from childbirth, "the interest of the child implies that the child has a relation of parentage with his/her biological parents". In this case, the child has to be able to benefit from "his/her real maternal parentage, in conformity with the existing and constant parent-child relation". On the contrary, if the intended mother is not also the biological mother, it is the opposite solution that should be taken, in the name of the "best interest of the child to know the persons involved in his creation".

The judge also highlights that the question does not concern the nullity of the agreement between the parties and the sanctions that the competent authorities could inflict to those who engaged "an illegal procedure that is contrary to the public order, aiming at producing legal consequences from an illegal act by circumventing the law".

The judge, here also, asserts a power of discretion to assess the contours of the public order, a power that has to be exercised gradually.

***Adoption-10329, 2010, QCCQ 18645 (judge Garneau-Fournier), 1st of October 2010***

The intended couple is married. The surrogate is a colleague from work of the intended mother. The name of the surrogate is mentioned in the birth certificate, in conformity with the prescriptions of the law of Québec.

According to the judge, the request has to be analysed from the point of view of the child, even if it is understood that "the agreement convened, by which the surrogate committed herself to bear the child for the intended mother, is null and void". Indeed, the judge considers that the request of adoption is not a request executing the agreement.

The judge recalls the decision of judge Wilhelmy distinguishing between cases in which the surrogate is or is not the genetic mother. If the surrogate had lent her ovule then the request of adoption by the social mother would have to be rejected.

According to the judge, the request of the intended mother "converges towards the real interest of the child who has the right to have parentage in conformity with reality, regardless of "the circumstances of his/her birth".

As it was the case in the two previous decisions, the judge invokes her power to assess the contours of the public order that has to take into account the fundamental values of society at a certain point in its evolution.

***Adoption-10489, 2010 QCCQ 19971 (judge Leduc), 13th of December 2010***

The intended parents are married. The surrogate is not close to the couple: the couple contacted her after watching a TV programme where she explained having already bore a child for another couple. She accepts to repeat the experience out of altruism: the surrogacy agreement is concluded not for profit.

The judge takes into consideration the genetic relation to receive favourably the request of placement of the child in the household of the social mother. "The current objective is to give the child his/her real maternal parentage, which is the one derived from the biological relation and the parent-child relation existing constantly since childbirth".

To underpin the arguments, the judge makes reference to the decision of judge Tremblay.

**Comment**

Thus, two opposed judicial currents of thought exist in Quebec, in the absence of a decision by a higher court that could settle the question. In any case, it seems that the second current is predominant today, the one that gives prevalence to the interest of the child to have a relation with his/her social mother through adoption.

We note that the judges of the second current carefully distinguished the question of the adoption by the social mother and that of the legality of the surrogacy convention. It is following this reasoning that they justified not following the first current pioneered by judge Dubois, refusing, on the contrary, to dissociate the request of adoption from the illegal convention concluded *ex-ante* by the parents. In this current, the opposition to the establishment of a legal maternity works as a sanction, in the frame of a global assessment by the judge of the actions of the social parents. In the second current, conversely, the judges consider that the question of the nullity of the illegal convention should not be addressed by the debate on the adoption of the child by the spouse of the father, as the convention was already fully executed. Without pretending to encourage

the practice of surrogacy –which certain judges do not shy from denouncing, such as is the case for judge Wilhelmy– they consider that the request that is presented to them does not concern the validity or the forced execution of the surrogacy convention. This argumentative ability allows them to ignore the way a child was conceived and to consider that parentage is established in the birth certificate in conformity with the rules of the law of Quebec. As a result, it is possible to consider that the surrogate validly gave her consent to the adoption and that it is in the interest of the child to be adopted by the spouse of the father who already raises the child.

This reasoning of the judges of Quebec deserves to be highlighted to the extent certain judges in France recently undertook a similar path. Indeed, except for the Court of Cassation of France that adopted a global assessment where the violation of French policy leads to blocking the recognition of maternal parentage of the social mother, many tribunals adopted the same reasoning, differentiating the question of parentage from that of the legality of the surrogacy convention and limiting their decision to the former.

We will also notice that out of the five decisions, four evoked the genetic link to motivate granting the placement of the child in view of his/her adoption by the intended mother. The biological parentage seems, thus, to be a solid support for the legal recognition of the maternity of the intended mother. Is it a necessary and essential requirement for the judges of Québec? In other words, will the absence of the genetic link between the child and his/her social parent create an obstacle for the adoption? For judges Wilhelmy and Garneau-Fournier, it would be definitely the case; it is less evident for judge Tremblay. The fact remains that only the judge Grégoire decided in favour of the adoption by a social parent without a genetic link to the child, to the extent that he is the same-sex spouse of the father. It is difficult to know to which extent the biological link is a determinant criterion for the judges of Québec when it comes to establish (through adoption) the parentage of a child born from surrogacy with regards to the parent that did not procreate him/her.

Lastly, we will note that the judge of Québec retains quite a large margin of manoeuvre in matters of assessing the consequences with regards to the law on parentage of the practice of surrogacy. Three of the judges (Tremblay, Garneau-Fournier, Wilhelmy) assert it openly considering that the notion of public order has to be the subject of a renovated and creative interpretation to take into account the evolution of the fundamental values of society. The judges do not make explicit, however, what the fundamental values of society have to say with regards to surrogacy. Do they mean that society has become more tolerant with regards to certain practices of surrogacy? Or is it a way to place an accent on the fundamental objective of protecting the interest of the child?

### 3. LEGAL ANALYSIS – EUROPEAN UNION LAW

As this study has indicated, the factual and legal recognition of surrogacy has garnered considerable attention around the globe. The substantive discussion about whether to permit couples to use the services of a surrogate mother in order to have a child is one of the most contested issues within Europe and the world. The issue becomes even more disputed and complicated in cross-border situations because private international law approaches to these relationships differ greatly. After having previously seen how the Member States of the European Union cope with the problems created by the movement of surrogacy users across internal borders, it must now be seen how the European Convention of Human Rights (ECHR) and the European Union (EU) frame surrogacy.

The aim of this section is to assess the EU's ability to frame this diversity. Analysing the European Union's capacity to legislate implies to study 1) the fundamental rights framework and 2) the tools available within the EU to substantially frame surrogacy, especially the freedoms of movement across countries.

1) As regards European fundamental rights, the ECHR is applicable in the EU and its Member States<sup>185</sup>. It is also a good mirror of the European national evolutions as the Court always relies on national traditions.

2) As regards the EU freedoms of movement across Member States, the analysis goes into two directions: we should first analyse the EU mechanisms in order to identify the available tools, particularly the legal bases and then use these legal bases in order to re-read the national mechanisms.

Imagining a legal framing of surrogacy involves assessing the management of surrogacy practices (*ex-ante*) and the adequacy of legal parenthood frameworks (*ex-post*). In other words, when confronted with surrogacy, one asks two questions: Does the national legal order authorise or prohibit this practice and how is it regulated? This prompts the question of the practical arrangements around the identification of intended parents, a surrogate mother, possibly a contract or agreement between them, an in-vitro fertilisation (IVF) procedure and the taking care of the pregnant woman until the birth and finally the delivery of the child. It raises issues of contract law as well as protection of each of the parties. The existing (*ex-ante*) provisions cover these different questions.

Once surrogacy has taken place and a baby is born, *ex-post* questions are raised: Who are the parents of child: the bearer? The genetic parents? The intended parents? Can the child be registered on the civil status of the State where he/she was born? Of the State of origin (residence or nationality) of the parents? What is his/her nationality? Many legal consequences will be derived from the answers to these three questions such as issues relating to inheritance, right to access information on his/her origin, etc. At the European level, these two aspects are touched upon by different bodies of law.

#### 3.1. EX-ANTE: THE MANAGEMENT OF SURROGACY PRACTICES

The *ex-ante* management of surrogacy practices can be summarised in four questions:

- Are surrogacy acts authorised or prohibited? By which means?
- How to frame the movement towards a Member State which allows surrogacy in order to proceed to it and return to the Member State of origin?
- How to protect the different parties to the arrangement?

<sup>185</sup> The ECHR has been applied in the EU for a long time as general principles of EU law (art. 6 TEU). This is about to be reinforced by the pending adhesion of the EU to the ECHR and Council of Europe. The ECtHR should soon have jurisdiction over EU fundamental rights.

- How to control the legality of a surrogacy contract between the intended parents and the surrogate mother?

Even if neither the European Court of Human Rights (ECtHR), nor the Court of Justice of the European Union (CJEU) have come across cases specifically devoted to surrogacy, an analysis of their case law allows for a partial consideration of these questions.

### 3.1.1. ECtHR

#### 3.1.1.1. *Authorisation or prohibition of surrogacy's acts*

None of the cases presented to the ECtHR directly concerns medically assisted reproduction in the context of surrogacy or cross-border reproduction. This does not mean however that the ECtHR does not provide useful thoughts on the issue. Indeed, travel for the purpose of medically assisted reproduction received an unexpected encouragement from this jurisdiction. In a recent Austrian case, the *S.H.* case<sup>186</sup>, the Court had to deal with an Austrian law forbidding two Austrian couples from attempting to conceive a child through IVF. One couple needed the use of sperm from a donor and the other, donated ova. Austrian law prohibits the use of donated sperm for IVF and ova donation in general. The Court noted that, although there was a clear trend across Europe in favour of allowing gamete donation for in-vitro fertilisation, the emerging consensus was still under development and was not based on settled legal principles. The Court relied on Article 8 (family life) on its own and together with Article 14 (non-discrimination). It noted that Austrian legislators had tried, among other things, to avoid the possibility that two women could claim to be the biological mother of the same child. They had approached carefully a controversial issue raising complex ethical questions and had not banned individuals from going overseas for fertility treatment unavailable in Austria. The Court concluded that there had been no violation of the Convention. However, it underlined the importance of keeping legal and fast-moving scientific developments in the field of artificial procreation under review.

The ECtHR is not banning a law which forbids egg donation, IVF and gamete donation<sup>187</sup>. But it suggests the possibility to go abroad to have the desired fertility treatment. It thus respects the sovereignty of the State and chooses a more procedural control (it checks that the legislator identified and dealt with the ethical issues of protection of the parents and child) instead of a substantial one (assessment of the values themselves).

We don't know whether this case could be extended to surrogacy. If a case arose, the Court would probably underline the lack of emerging consensus as a recent report of the Council of Europe on the question shows<sup>188</sup>. It would probably respect the State's choices, and could therefore confirm a prohibition. The factual and legal contestation of motherhood, as between not only the ovum donor and the intended mother (who may or

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<sup>186</sup> *S.H. and Others v. Austria* (no. 57813/00) 03.11.2011 (Grand Chamber)

<sup>187</sup> But another cross-border option is proposed, see further.

<sup>188</sup> This is not case law, but still an interesting declaration made within the Parliamentary assembly where 22 MP from about 7 countries solemnly affirm that "surrogacy is incompatible with women and children's dignity and constitutes a violation of their fundamental rights", see <http://www.assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=18711&Language=FR>. For IVF, see: 41. Principle 11 of the principles adopted by the *ad hoc* committee of experts on progress in the biomedical sciences, the expert body within the Council of Europe which preceded the present Steering Committee on Bioethics (CAHBI, 1989), states: "1. In principle, *in vitro* fertilisation shall be effected using gametes of the members of the couple. The same rule shall apply to any other procedure that involves ova or *in vitro* or embryos *in vitro*. However, in exceptional cases defined by the member states, the use of gametes of donors may be permitted." 42. The Convention on Human Rights and Biomedicine of 1997 does not deal with the question of donation of gametes, but forbids the use of a medically assisted reproduction technique to choose the sex of a child. Article 14 reads as follows: "The use of techniques of medically assisted procreation shall not be allowed for the purpose of choosing a future child's sex, except where serious hereditary sex-related disease is to be avoided." 43. The Additional Protocol to the above Convention, on Transplantation of Organs and Tissues of Human Origin, of 2002, which promotes the donation of organs, expressly excludes from its scope reproductive organs and tissues.

may not be the same person), but also of course the woman who bears the child, is highly controversial. The Court may pay particular attention to the interests, life and dignity of a surrogate mother, given her particularly onerous bodily contribution to the surrogacy arrangement.

In the *S.H.* case, the Court notes down that the objective of the Austrian legislator was "to avoid to create atypical family links (a child with two biological mothers) and to prevent the exploitation of women"<sup>189</sup>. This argument perfectly be used again in the case of surrogacy and it appears likely that it would go substantively unchallenged by the ECtHR.

### 3.1.1.2. *Protection of the different parties*

Protection can be given to the surrogate mother, to the intended parents, to the child to be born and to the genetic parents. This protection has been developed through the application of fundamental rights mainly by the ECtHR. As we just saw, in the *S. H.* case, the Court acknowledged the intent of the Austrian legislator, to avoid the possibility that two women could claim to be the biological mother of the same child, on the basis that this would protect the interests of the child and the parents (as defined by the Austrian legal system)<sup>190</sup>.

Another relevant case is the *Evans v UK* (10 April 2007) case, which concerned the ability of a woman to use frozen embryos without her former partner's consent<sup>191</sup>. The background to this case was that Natallie Evans, when diagnosed with ovarian cancer, had her remaining eggs extracted and fertilised with her then partner's sperm, prior to having her ovaries removed. Six embryos were created and placed in storage for future use in fertility treatment. When the couple's relationship ended, J withdrew his consent for the embryos to be used, not wanting to be the genetic parent of Ms Evan's child. National law consequently required that the eggs be destroyed, thus preventing Ms Evans from ever having a child to whom she would be genetically related. While sympathising with Ms Evan's plight, the European Court of Human Rights found no violation of Articles 2 (right to life), 8 (right to respect for family life) or 14 (prohibition of discrimination) of the ECHR: the embryos created did not have a right to life; there was no European consensus; and, the rules on consent were clear, brought to Ms Evan's attention before she underwent IVF and the refusal to allow her to use the embryos was deemed to strike a fair balance between the competing interests.

Here again, even though this case is not directly about surrogacy, we see a timidity from the ECtHR which is not willing to condemn a national law where there is no European consensus. Instead, it tries to strike a balance between the competing fundamental rights of the various parties.

As regards children's rights, even if several programs are dedicated to them,<sup>192</sup> none of them consider the establishment of legal parenthood. The only related area concerns a child's interest in knowing about the circumstances of his/her origins and/or genetic parents. However, this is a complicated area and the primary motivation behind the assertion of article 8 and 14 in this context by the Court is to ensure that an abandoned child is not left without any information about his/her identity<sup>193</sup>. If again these cases are not directly applied to surrogacy, they are relevant. The ECtHR has a case by case

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<sup>189</sup> §19

<sup>190</sup> See previous section.

<sup>191</sup> *Evans v. United Kingdom* (application no. 6339/05) 10.04.2007 (Grand Chamber).

<sup>192</sup> There is a program of the Council of Europe entitled "Building a Europe for and with children", COM(2011)35, 19 April 2011, see

[https://wcd.coe.int/ViewDoc.jsp?Ref=CM\(2011\)35&Language=lanEnglish&Ver=original&Site=DC&BackColorIntranet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/ViewDoc.jsp?Ref=CM(2011)35&Language=lanEnglish&Ver=original&Site=DC&BackColorIntranet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864)

<sup>193</sup> <http://combatsdroitshomme.blog.lemonde.fr/2012/09/29/laccouchement-anonyme-a-lepreuve-europeenne-du-droit-a-la-connaissance-de-ses-origines-cedh-2e-sect-25-septembre-2012-godelli-c-italie/>



analysis approach, where it tries to balance the child's right to know who their parents are and the parent's right to e.g. privacy<sup>194</sup>. The existing cases may not be straightforwardly applicable to the context of surrogacy, where sometimes the problem is that there are too many persons seeking parental recognition, rather than nobody seeking such recognition.

But the fact that the Court attempts to strike a fair balance is likely to be applicable to all birth cases. The answer is to be found in the balancing of the fundamental rights of family life and equality (a child's personal development and right to know her/his origins; a mother's right to protect her health by giving birth in appropriate medical circumstances; and, the protection of other members of the various families involved) and public interest (the prevention of abortions – especially illegal abortions – and the abandonment of babies).

Regarding surrogacy contracts, the ECtHR has never been given the opportunity to rule on this question.

### **3.1.2. EU**

EU law, like the ECtHR, does not specifically regulate surrogacy. The different questions about the authorisation or prohibition and management of surrogacy practices and the protection of the parties have never been answered by the legislator or the CJEU. But general EU law and more specifically the freedom of movement of patients could be applicable to the situations where intended parents and/or surrogate mothers who are EU citizens (or third-country national who are also legal residents of a Member State) choose to move from their Member State towards another Member State which allows surrogacy in order to proceed to it and return to the Member State of origin. To this day, there is only one Member State with a comprehensive *ex-ante* legal framework for surrogacy: Greece<sup>195</sup>.

Since a legally enforceable surrogacy agreement can take place in one Member State, one could imagine a situation where EU citizens decide to leave their Member State of origin<sup>196</sup>. It can then be asked if cross-border surrogacy is made possible and how the different parties to the arrangement are protected as well as how to control the legality of a surrogacy contract between the intended parents and the surrogate mother.

#### *3.1.2.1. The recognition of the Member States sovereignty*

##### **The non-recognition of an EU right to reproduce**

A right to reproduce is not clearly recognised. There is no consensus in the EU and nothing on surrogacy in EU law. IVF, which is a necessary step in a gestational surrogacy

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<sup>194</sup> In the Grand chamber Odièvre case<sup>194</sup>, the applicant, who was adopted, found out that she had three biological brothers. Her request for access to information to identify them was rejected because she had been born under a special procedure which allowed mothers to remain anonymous. In addition, she could not inherit from her natural mother. The Court found that there had been no violation of Articles 8 or 14 in that France had struck a fair balance between the various competing interests at stake. But, more recently, in the Godelli v. Italy case, the Court held that the Italian system did not take account of the child's interests. It considered that a fair balance had not been struck between the interests at stake since the legislation, in cases where the mother had opted not to disclose her identity, did not allow a child who had not been formally recognised at birth and was subsequently adopted to request either non-identifying information about his or her origins or the disclosure of the birth mother's identity with the latter's consent. See ECtHR, Odièvre v. France (no. 42326/98) 13.02.2003 (Grand Chamber) and ECtHR, Godelli v. Italy (no. 33783/09), 25.09.2012.

<sup>195</sup> See the country report on Greece in the Annex.

<sup>196</sup> We are not saying nationality here as they could be living permanently and legally in another Member State than that of their nationality. We are not saying residence either as the intended parents might decide to change their residence in order to proceed to surrogacy. We could say their Member State of affiliation (to national social security), but again this would not be the best as again the intended parents might decide to change their State of affiliation in order to proceed to surrogacy. The State of origin is normally the State of residence and affiliation where the parents are before they start thinking of surrogacy.

agreement, is already seen as controversial. It appears in Directive 2004/23 of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells. It indicates that "this Directive should not interfere with decisions made by Member States concerning the use or non-use of any specific type of human cells, including germ cells and embryonic stem cells. If, however, any particular use of such cells is authorised in a Member State, this Directive will require the application of all provisions necessary to protect public health, given the specific risks of these cells based on the scientific knowledge and their particular nature, and guarantee respect for fundamental rights". The choice is left to Member States.

Tamara Hervey has proposed to build a right to reproduce around Articles 8 (right to privacy) and 12 ECtHR (right to marry and found a family) or around the Charter of fundamental rights which recognises the same rights (Articles 7 and 9) as well as new rights such as "a right to physical and mental integrity"<sup>197</sup> which includes "the prohibition on making the human body and its parts as such a source of financial gain"<sup>198</sup>.

### **The right of the Member States to decide on whether authorising or prohibiting surrogacy**

In the *Grogan* case<sup>199</sup>, a Students' Union at an Irish University was distributing information regarding the availability of abortion services in Member States where the termination of pregnancy, in contrast to the position in Ireland, was lawful. The Society for the Protection of the Unborn Child objected and claimed that Article 40.3.3 about the right to life of the unborn of the Irish Constitution was applicable. A preliminary reference was made by the Irish High Court to the Court of Justice. The students claimed that the distribution of materials was supported by the freedom to provide services.

The Court judged that "it is not contrary to Community law for a Member State in which medical termination of pregnancy is forbidden to prohibit student associations from distributing information about the identity and location of clinics in another Member State where voluntary termination of pregnancy is lawfully carried out and the means of communicating with those clinics, where the clinics in question have no involvement in the distribution of the said information".

It is interesting to know that after this case Ireland introduced a protocol in the Maastricht treaty ensuring its right to difference<sup>200</sup> and a change of the Irish constitution. It was also followed by an ECtHR judgment (*Open Door and Dublin Well Woman* judgment of 29 October 1992).

The CJEU clearly indicated that it did not want to judge the moral/constitutional position of Ireland by stating that "it is not for the Court to substitute its assessment for that of the legislature in those Member States where the activities in question are practised legally".

"With respect to abortion, the European courts so far have only enforced a coexistence among the different national traditions. To that extent, European limits to national sovereignty have been set"<sup>201</sup>.

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<sup>197</sup> Article 3 of the Charter, see S. Millns, *Reproducing inequalities ; assisted conception and the challenge of legal pluralism*, 24 *Journal of Social Welfare and Family law* (2002) 19, p. 32, quoting Tamara Hervey.

<sup>198</sup> Article 3, §2, subparagraph 3.

<sup>199</sup> CJEU, Judgment of the Court of 4 October 1991. - *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others*, Case C-159/90.

<sup>200</sup> Which was then forgotten.

<sup>201</sup> RICK LAWSON *The Irish Abortion Cases: European Limits to National Sovereignty?* *European Journal of Health Law* 1: 167-186, 1994.

The *Grogan* case showed that constitutional principles can put a limit to the freedom to provide services. It appears that Member States can keep their policies provided they can show that there is a necessary and legitimate interest and that its protection is proportional. Several public interest justifications have been identified such as the burden on the public purse, the organisation of national health (insurance) schemes, the need for planning or the management and capacity building of a national healthcare system. Moreover, ethical issues or a specific understanding of dignity (of the surrogate mother) can justify a limitation to the European freedom of movement.

Nonetheless, the freedom of movement of patients is authorised and promoted and as a consequence, national rules on rights to treatment cannot prevent citizens of the EU seeking treatment elsewhere in the EU, however unethical the treatment is in the State of origin.

### 3.1.2.2. *The freedom of movement of intended parents and surrogate mother as patients*

"National rules on rights to treatment cannot prevent citizens of the EU seeking treatment elsewhere in the EU, no matter how unethical or immoral such treatment may be seen in the home state, provided it is acceptable in another Member States"<sup>202</sup>. This was already ascertained in the *Grogan* case even though it also showed the limitation which could be brought to this principle. The diversity of the Member States legislations makes modern reproductive technologies one obvious area in which patients may seek treatment in another Member State of the EU.

This makes the freedom of movement of patients relevant. There is case law on cross-border healthcare mainly when a treatment is not available in the member state of origin/affiliation. Since Article 22 of Regulation 1406/71 on social security coordination as completed by the *Kohll* and *Decker* cases<sup>203</sup>, the freedom to provide treatment has expanded to cross-border healthcare treatment.

The recent Directive 2011/24 on the freedom of movement of patients<sup>204</sup> now confirms the possibility for patients to get treatments abroad and sometimes to be reimbursed by their Member State of affiliation. Point 7 states -in *Grogan's* line- that Member States cannot be forced to provide a treatment. But the principle remains that patients have a right to move and get treatments in another Member State of the EU. In the same line as the *S.H.* case (and this is probably an explanation of this decision in a period of convergence of the two legal systems), it seems that nothing prevents patients from going abroad to get a treatment which is forbidden in their country of origin.

The question remains as to whether surrogacy can be considered as a 'treatment' in the national legal order<sup>205</sup>. This is not only because traditional surrogacy may not actually necessitate medical intervention, but also because surrogacy *per se*, even in Member States where it is not legally prohibited, is not straightforwardly countenanced as a medical treatment. While a surrogacy arrangement may certainly involve medically assisted reproduction techniques, it is questionable whether the process of gestating and giving birth to a child will be defined as 'treatment'. While pregnancy and child birth usually involves medical intervention, we must ask whether pregnancy and child birth in and of themselves constitute a treatment. The collaborative use of bodies in surrogacy arrangements presents challenges for the definition of 'treatment', which is more commonly used to refer to an intervention on a particular person and their body.

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<sup>202</sup> T. Hervey and J. McHale (2004) *Health Law and the European Union* (Cambridge University Press), p. 151

<sup>203</sup> C-120/95 and C-158/96.

<sup>204</sup> 2011/24.

<sup>205</sup> The definition is given by the Member States. See Article 3)a Directive 2011/24.

In terms of the medical treatments that some surrogacy arrangement may involve, these include the collection of sperm and an ovum from donors (who can be the intended parents or not), the IVF, the impregnation of the surrogate mother, the healthcare of the surrogate mother and the prenatal care of the child and the delivery of the child. These different procedures can all be considered as services in the sense of the Treaties. Taken all together, surrogacy can also be considered a treatment. As it is put in the *Grogan* case, services which are illegal or immoral as a matter of national law may constitute services in the sense of the treaty<sup>206</sup>. Where some Member States permit an economic activity, and others do not, those national prohibitions do not have the effect of removing the services from the scope of EU law<sup>207</sup>. EU law would therefore extend to various medical services relating to human reproduction, for instance all forms of assisted reproduction, which may, or may not, include the service of a surrogate mother<sup>208</sup>.

Similarly the question must be asked of who the patient is: is it one or both of the intended parents, the gamete providers or the surrogate mother? Again this will be answered by national laws<sup>209</sup>.

The patient has three rights: the right to go abroad to get surrogacy treatment, to right to information about it and the right to be reimbursed for the medical costs.

### **The right to go abroad to get IVF and/or prenatal care**

"National rules on rights to treatment cannot prevent citizens of the EU seeking treatment elsewhere in the EU, no matter how unethical or immoral such treatment may be seen in the home state, provided it is acceptable in another Member States"<sup>210</sup>.

A decision to move around EU for health care services can take place because a therapy is not available in the home state because it is a new experimental therapy (*Smits, Peerbooms* case<sup>211</sup>), where an individual is seeking access to care which can be provided more rapidly (*Kohl, Van Riet* cases<sup>212</sup>) or more cheaply (*Vanbraekel* case<sup>213</sup>) or where the patient believes it can be provided at a higher standard (*Muller-Faure* case<sup>214</sup>). The movement for health care services can also be in situations where the services are unavailable in his/her own Member State, due to the fact that the home Member State has chosen to limit the provision of such services on "ethical" grounds. It can be cultural or religious perspective, which may be opposed to certain health care services or the use of certain technologies. This may be inherent in national law, and possibly even expressed within the Constitution of that Member State<sup>215</sup>. But patients cannot be prevented from going abroad to access fertility treatment which is part of a surrogacy agreement, or to engage in a surrogacy agreement.

### **The right to information about surrogacy in another Member State**

The *Grogan* case teaches us that "it is not contrary to Community law for a Member State in which medical termination of pregnancy is forbidden to prohibit students associations from distributing information about the identity and location of clinics in another Member State where voluntary termination of pregnancy is lawfully carried out

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<sup>206</sup> It was known that the sale of unlawful drugs did not fall within the provisions of EU law, see C-294/82 Einberger.

<sup>207</sup> *Grogan*, §16-21.

<sup>208</sup> T. Hervey and J. McHale (2004) *Health Law and the European Union* (Cambridge University Press), p. 150.

<sup>209</sup> See Article 3)b Directive 2011/24.

<sup>210</sup> T. Hervey and J. McHale (2004) *Health Law and the European Union* (Cambridge University Press), p. 151.

<sup>211</sup> CJEU, Case C-157/99, *Geraets-Smits and Peerbooms*, 12 July 2001.

<sup>212</sup> CJEU, Case 158/96, *Raymond Kohll*, 28 April 1998 *Van Riet*): Case C-385/99 and f., *Van Riet*, 13 May 2003.

<sup>213</sup> CJEU, Case C-368/98, *Vanbraekel*, 12 July 2001.

<sup>214</sup> CJEU, Case C-385/99 and f., *Muller-Faure*, 13 May 2003.

<sup>215</sup> T. Hervey and J. McHale (2004) *Health Law and the European Union* (Cambridge University Press), p. 144.

and the means of communicating with those clinics, where the clinics in question have no involvement in the distribution of the said information”.

Many comments of this case have shown that the Court tried to avoid the actual confrontation between the fundamental right to life and the economic freedom by considering that the associations providing information about abortion did not have an economic activity, which entailed the non-application of the EU freedom of services. The question therefore remains open: would the Court forbid a law prohibiting the provision of information about an unethical medical procedure by the foreign hospitals or providers of surrogacy services?

Directive 2011/24 does not take position. It provides that “appropriate information on all essential aspects of cross-border healthcare is necessary in order to enable patients to exercise their rights on cross-border healthcare in practice. For cross-border healthcare, one of the mechanisms for providing such information is to establish national contact points within each Member State”<sup>216</sup>. It adds that “information that has to be provided compulsorily to patients should be specified” thus leaving the question of the right to know about procedures which are forbidden in the Member State of affiliation to come either to the national authorities, the EU legislative bodies or to the CJEU.

### **The right to be reimbursed by the State of affiliation**

The principle is that the obligation to reimburse cross-border healthcare under Directive 2011/24 is “limited to such healthcare that is among the benefits to which the patient is entitled within its Member State of affiliation”<sup>217</sup>.

In the *Smits and Peerbooms* case, the Court gave a right to reimbursement to the patient undergoing a new experimental therapy. We don't have an example of reimbursement of a treatment forbidden in the Member State of affiliation. But point 34 and Article 7§1 of Directive 2011/24 on general principles for reimbursement of costs state that there will be no reimbursement if the procedure is not provided for in the national legislation of the Member State of affiliation<sup>218</sup>.

There can be hesitations in case of a rare disease<sup>219</sup>, but it is unlikely that it can include unethical treatments.

Directive 2011/24 adds that the Member State might choose to reimburse the cost of cross-border healthcare beyond simple reimbursement of the treatment itself. “Member States are free, for example, to reimburse extra costs, such as accommodation and travel costs, or extra costs incurred by persons with disabilities even where those costs are not reimbursed in the case of healthcare provided in their territory”<sup>220</sup>. It remains to be seen whether Member States are willing to go in this direction.

### **The alternative of the freedom of establishment of EU citizens**

An alternative to relying on the freedom to provide services is to use the freedom of movement and residence and establishment of EU citizens (Article 21 and 49 TFEU). The idea is then to move and legally reside in a Member State which legalises surrogacy in order to proceed to it. There are very few States in Europe which allow it, one example is Greece. This is an inconvenient burden for the surrogate mother, citizen of the EU, who

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<sup>216</sup> Point 48 and Article 5§3 of Directive 2011/24.

<sup>217</sup> Point 34 of Directive 2011/24.

<sup>218</sup> Article 7/1 states that “the Member State of affiliation shall ensure the costs incurred by an insured person who receives cross-border healthcare are reimbursed, if the healthcare in question is among the benefits to which the insured person is entitled in the Member State of affiliation”. *A contrario*, there will be no reimbursement if the procedure is not provided for in the national legislation of the Member State of affiliation.

<sup>219</sup> Article 8 §4 of Directive 2011/24.

<sup>220</sup> Point 34 of Directive 2011/24.

should accept to move for at least four years to Greece, but it is reimbursed as the Greek social security system pays the expenses related to IVF and pregnancy care<sup>221</sup>.

Greece allows altruistic surrogacy and its welfare state provides for all the healthcare needs of the surrogate mother. The condition put to access the Greek scheme is to be a legal resident of Greece according to EU law and the freedom of movement of EU citizens and/or freedom of establishment. According to Directive 2004/38, the acquisition of the right of permanent residence can take up to five years (Article 16). Until this time, the Member State of residence does not have the obligation to provide social assistance (Article 24). For example, the Greek law<sup>222</sup> provides that an EU citizen can obtain social assistance and surrogacy in Greece when he/she has stayed there for three years.

It must also be remembered that in addition to the payments for medical treatment, surrogacy agreements usually involve other costs which are incurred by the intended parent(s). These are sometimes referred to as "reasonable expenses" associated with the pregnancy and the surrogacy agreement.

### *3.1.2.3. The protection of the parties*

In the EU, the protection can be found in the protection of fundamental rights and in the existence of medical standards.

## **Human Rights**

### Application of ECtHR rights

The EU Court and legislator ensure the protection of fundamental rights (art. 6 TEU). Further, the adhesion of the EU to the ECtHR pushes for a greater respect of ECtHR's judgments. It is likely that the EU will follow the ECtHR's interpretation of fundamental rights.

Non-discrimination rights are also applicable. They do not allow for surrogacy *per se*, but once it is authorised for a category of people, the non-discrimination principle could be used to try and ensures that other categories fairly access the same rights. For instance, article 14 ECtHR or Article 19 TFEU could be used to allow homosexual parents to acquire the same reproductive rights as heterosexual parents. It has not been done yet, and it must be said that the ECtHR's interpretation has been shy<sup>223</sup>. But new cases on equality have shown a remarkable activism of the CJEU for instance in the field of age equality<sup>224</sup>, or sexual orientation<sup>225</sup>, but there has been no case concerning surrogacy.

### Protection of children

In the EU's texts, children's rights have been protected but again, not in specific relation to surrogacy<sup>226</sup>.

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<sup>221</sup> It creates a real burden on Greek healthcare services. Greece might become a destination for procreative tourism. It would not be able to ask other Member States to reimburse its expenses in the case of foreign surrogates as, according to EU law, legal residents are not considered to belong to their Member State of origin. This is the difference between establishment and provision of services.

<sup>222</sup> See the national report included in this study.

<sup>223</sup> See below. 2.1.

<sup>224</sup> In the line of the Mangold case, etc ; 13 septembre 2011 C-447/09 Prigge e.a.

<sup>225</sup> C-147/08 Römer A supplementary retirement pension paid to a partner in a civil partnership, which is lower than that granted in a marriage, may constitute discrimination on grounds of sexual orientation.

<sup>226</sup> All texts about children's rights are focused on the protection of the children after they are born and without link to their origins. See COM (2011) 60: After the European strategy, An EU Agenda for the Rights of the Child: [http://ec.europa.eu/justice/policies/children/docs/com\\_2011\\_60\\_en.pdf](http://ec.europa.eu/justice/policies/children/docs/com_2011_60_en.pdf)  
Going on: [http://www.europa-eu-un.org/articles/fr/article\\_6682\\_fr.htm](http://www.europa-eu-un.org/articles/fr/article_6682_fr.htm); COM (2006) 367 : Communication of the European Commission : Towards a European strategy on children's rights



## Medical Standards

### The protection of reproductive cells

Directive 2004/23 creates a minimum standard in the use of reproductive cells. It has been seen already that the Directive will only apply to reproductive cells if Member States have decided so<sup>227</sup>. When it is so, as the explanatory text of the Directive explains, the Directive applies to tissues which are defined as "groups of cells, which may be transplanted or implanted as viable cells, or otherwise preserved, fixed or altered. Originating from alive or dead donor, they include reproductive cells (e.g. semen, sperm, and ova)"<sup>228</sup>.

There is thus a whole procedure to be followed in order to ensure that the donation, procurement, testing, processing, preservation, storage and distribution of cells are controlled by accredited establishments<sup>229</sup>.

### Import and export of cells

The Directive mentions the possibility of import/export of human tissues and cells which could be particularly relevant in the framework of surrogacy. The only requirement, however, is the collaboration between accredited establishments meeting the standards of quality and safety equivalent to the ones laid down in the Directive, whether the movement is from or towards a third country<sup>230</sup> or a Member State.

## Protection of the genetic parents/donors

The *Blood* case<sup>231</sup> is not an CJEU case. It was decided by the English Court of Appeal on the basis of EU law. The Court considered that Article 59 TEC (now 56 TFEU) was applicable in order to allow the movement of sperm from Stephen Blood, husband of the claimant who had died in the UK to a fertility clinic in Belgium. It could be said that the application of EU law on free movement to the export of the sperm effectively undermined the provisions of national criminal and civil law with respect to the storage of the sperm<sup>232</sup>. It raised numerous questions regarding the protection and movement of reproductive cells, thus leading to Directive 2004/23.

### Unpaid donation

The protection of the genetic parents/ donors is stated by Article 12 of Directive 2004/23.

The donation should be voluntary and unpaid. "Donors may receive compensation, which is strictly limited to making good the expenses and inconveniences related to the

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The EU Parliament's resolution on adoption 19/1/2011 : <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:136E:0024:0026:FR:PDF>; Programme "Building a Europe for and with children", COM(2011)35, 19 April 2011, see [https://wcd.coe.int/ViewDoc.jsp?Ref=CM\(2011\)35&Language=lanEnglish&Ver=original&Site=DC&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/ViewDoc.jsp?Ref=CM(2011)35&Language=lanEnglish&Ver=original&Site=DC&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864)

<sup>227</sup> See point 12 of the Directive, and upon.

<sup>228</sup> As well as bone and musculo-skeletal elements (e.g. cartilage, tendons), cardiovascular tissues (e.g. arteries, veins, and heart valves), ocular tissue (e.g. cornea), nerve and brain cells, skin, foetal tissue and stem cells. See Quality standards for human tissues and cells, [http://europa.eu/legislation\\_summaries/public\\_health/threats\\_to\\_health/c11573\\_en.htm](http://europa.eu/legislation_summaries/public_health/threats_to_health/c11573_en.htm) (Seen on the 11/12/12).

<sup>229</sup> Directive 2004/23 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells.

<sup>230</sup> Article 9 Directive 2003/24.

<sup>231</sup> English Court of Appeal, *R v Human Fertilisation and Embriology Authority, ex parte Blood* [1997] 3 All ER 687

<sup>232</sup> T. Hervey and J. McHale (2004) *Health Law and the European Union* (Cambridge University Press), p. 151.

donation. In that case, Member States define the conditions under which compensation may be granted<sup>233</sup>. Member States shall endeavour to ensure that the procurement of tissues and cells as such is carried out on a non-profit basis.

This is very interesting as we know that some countries allow commercial surrogacy<sup>234</sup>. Also, pregnancy and child birth are very different bodily experiences from the procurement of tissues and cells.

#### Right to information

A further protection relates to the information provided to gamete donors to insure their informed consent to their donation. They must be properly informed prior to the procurement<sup>235</sup> and they should consent to the donation. The information must cover: the purpose and nature of the procurement, its consequences and risks; analytical tests, if they are performed; recording and protection of donor data, medical confidentiality; therapeutic purpose and potential benefits and information on the applicable safeguards intended to protect the donor<sup>236</sup>. It should be given by a trained person able to transmit it in an appropriate and clear manner, using terms that are easily understood by the donor<sup>237</sup>.

#### Anonymity

A last protection is particularly relevant in the context of surrogacy. It is the anonymity of all data, including genetic information. The data protection and confidentiality obligations ensure that neither donors nor recipients remain identifiable, to anyone other than persons with a legal right to access such information<sup>238</sup>. An possible exception is mentioned in §3 where it is said that "Member States shall take all necessary measures to ensure that the identity of the recipient(s) is not disclosed to the donor or his family and vice versa, without prejudice to legislation in force in Member States on the conditions for disclosure, notably in the case of gametes donation".

Again this is very interesting as it is not an obvious conclusion drawn by the ECtHR<sup>239</sup>.

#### *3.1.2.4. Legality of a surrogacy contract between the intended parents and the surrogate mother*

- The legality of a surrogacy contract between the intended parents and the surrogate mother will not be grasped by EU law. Its several aspects regarding the eligibility, suitability and capacity of both the intended parent(s) and the surrogate mother, as well as the consent to arrangements, its formal and essential validity and enforceability will depend on national law.
- Performance issues (such as discharge of contract, and remedies for non-performance by the surrogate mother (including frustration by way of miscarriage or abortion; responsibility for over-performance: multiple birth) or by intended parents (including total or partial non-payment; or repudiation of contract) and consequences of total/partial breach of contract), compensation/remuneration to the surrogate

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<sup>233</sup> Article 12 Directive 2003/24.

<sup>234</sup> For instance, Russia, Illinois, and California: detailed in Section 2 of this Report.

<sup>235</sup> Article 13 Directive 2003/24.

<sup>236</sup> Annex of Directive 2003/24.

<sup>237</sup> A similar procedure is in place for deceased donors. In this case, it is for the relevant persons in accordance with the legislation in Member States to make the decision. See Annex of Directive 2003/24.

<sup>238</sup> Article 14§1, see also §2 : "For that purpose, they shall ensure that: (a) data security measures are in place, as well as safeguards against any unauthorised data additions, deletions or modifications to donor files or deferral records, and transfer of information; (b) procedures are in place to resolve data discrepancies; and (c) no unauthorised disclosure of information occurs, whilst guaranteeing the traceability of donations".

<sup>239</sup> See 2.13.

mother; costs and expenses of surrogate mother and mandatory protective provisions or public policy conditions also depend on national laws.

Insofar as a surrogacy arrangement is contractual in nature, it is important at the outset to note the non-applicability of Regulation (EC) No 593/2008 on the law applicable to contractual obligations ('Rome I'). By Article 1.2. of Rome I, contractual obligations involving the status or legal capacity of natural persons (Art 1.2.a, subject only to Art 13 'incapacity'), and contractual obligations arising out of family relationships (Art 1.2.b), are *excluded* from the scope of the instrument. Hence, any court in the EU, whether it is a national court or one of the EU courts, currently must apply its own (private international law) national rules in order to assess the validity and enforceability of a surrogacy agreement which involves a conflict of laws.

So too, insofar as any non-contractual obligations may be said to derive from international surrogacy arrangements (e.g. a claim in unjust enrichment), it is important to note the non-applicability of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations ('Rome II'). By Art 1.2.a of Rome II, non-contractual obligations arising out of family relationships are excluded from the scope of the instrument<sup>240</sup>.

In most European countries, contracts on surrogacy are considered as either void and/or unenforceable as they are contrary to public order. But other countries/states do enforce surrogacy contracts in certain circumstances (e.g. Greece, Illinois, California). A European citizen could use his/her freedom of movement in order to have the contract written in a country which allows it and then attempt to have it recognised in a country which would not initially allow it. We need to distinguish between two situations:

- 1) The contract is enforced so that the surrogacy takes place. This can only happen in two States which allow surrogacy.
- 2) The contract is enforced in another Member State after the surrogacy has taken place and a child is born. This is an *ex-post* mechanism of *a posteriori* recognition (see *infra*, mutual recognition section).

### 3.1.2.5. Preliminary conclusion: Tools and Legal basis

The case law of the ECtHR has been based on Articles 8, 9 and 14 ECtHR. These articles are at the basis of all family issues. As it stands, we are waiting for one case on surrogacy, the *Menesson* case<sup>241</sup>. It is also based on these articles. The ECtHR is likely to check that a balance has been found between the interests of the child (right to a family life) and those of the intended parents (right to a family life, equality between heterosexual parents and homosexual parents), the genetic parents (right to privacy, right to anonymity) and the surrogate mother (right to anonymity, right to health protection). Some authors have proposed to add Article 1 ECtHR on dignity mostly in order to prohibit surrogacy practices which would amount to an objectification of the woman's body.

The legal bases used in the previous section were Articles 114 (approximations of laws) and 168 TFUE (public health). They provided competence to adopt Directives 2004/23 and 2011/24. These two legal bases could provide a useful combination to adopt texts relating to the free movement and the healthcare of surrogate mothers.

The case law of the CJEU on freedom of movement of patients are based on the legal bases of articles 56 TFUE (freedom to provide services) and 34 (freedom of movement of goods). If this does not stem from the case law, one could also think of relying on Article

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<sup>240</sup> For more details as to the contractual arrangements, see Section 4 of this Report (Private International Law Issues, written by Professor Janeen Carruthers).

<sup>241</sup> *Menesson and Others v. France* (no. 65192/11) Communicated on 12.02.2012.

21 TFEU (free movement of EU citizens) and Article 49 TFEU (freedom of establishment) as it has been suggested in the Greek scheme for surrogacy<sup>242</sup>. These four freedoms allow for the movement of a patient (the gamete donors and/or the surrogate mother) in order to access the 'treatment', i.e. the collection of ovum and sperm, the IVF, the implantation procedure and the care associated to pregnancy and delivery of a child.

### **3.2. EX-POST: LEGAL PARENTHOOD FRAMEWORKS**

Once surrogacy has taken place and a child is born and given to the intended parent(s), several questions are raised: who are/is the child's legal parent(s) and is an adoption procedure required? Where is she/he inscribed on civil status registers? And what is his/her nationality? Then, the legal consequences which flow from such a determination (immigration status, parental responsibility, duty to maintain the child, inheritance etc.) must be assessed.

We must distinguish between two situations: either the birth and recognition are taking place in one single country, or the parents moved to one country to proceed to surrogacy and have then come back to their country of origin. In both cases, the previous questions must be answered.

Again, it is easier to distinguish between the protection provided by the ECtHR and the EU.

#### **3.2.1. ECtHR**

The European Court of Human Rights has considered the right to the recognition of parental legal status and authority, and the child's civil status (1) and nationality (2), the right of parents to access and visitation (3) and the right to inheritance (4). It also takes into account the possibility to move to another State in order to proceed to surrogacy (5).

##### *3.2.1.1. Personal identity, civil status, legal parentage (filiation / adoption) and parental authority*

The establishment of the legal parenthood of a child born through a surrogacy agreement can be tricky. Most countries recognise the bearer of the child as his/her mother. Only some countries, mostly the ones which authorise surrogacy procedures, recognise the intended parent(s) as the parent(s) of the child. The countries which accept IVF may take into account the gamete providers and sometimes the intended parents, who are not genetically related to the child, but indicate their intention to be parents.

The ECtHR has not judged on surrogacy cases, but it has tried to accommodate the different approaches to IVF and adoption, especially in the case of homosexual partners.

The most relevant cases, the *Francine Bonnaud and Patricia Lecoq v. France* case<sup>243</sup> about parental authority, and the *X and Others v. Austria* case<sup>244</sup> about adoption have not been judged yet<sup>245</sup>.

The *Bonnaud* case concerns the rejection of the applicants' requests to each be granted parental legal status in respect of the other's child. The female applicants, who live as a couple, each had a child using medically assisted reproduction. The claim is based on

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<sup>242</sup> See upon, 1.2.2.4

<sup>243</sup> ECtHR, *Francine Bonnaud and Patricia Lecoq v. France* (no. 6190/11) (no. 6190/11) Communicated on 03.02.2012

<sup>244</sup> *X and Others v. Austria* (no. 19010/07) Grand Chamber hearing on 03.10.2012

<sup>245</sup> A third case, the *Mennesson* case is also relevant in terms of legal parentage, see right below, 2.1.2

Articles 8 and 14 trying to make a comparison between the rights of homosexual and heterosexual couples to create a family. They rely on the notion of 'social parent' which can be equated to the intended parent. We need to see how the ECtHR will define this notion and what role it is prepared to give it.

The *X and Others v. Austria* case<sup>246</sup> concerns the complaint by two women, who live in a stable homosexual relationship, about the Austrian courts' refusal to grant one of the partners the right to adopt the son of the other partner without severing the mother's legal ties with the child. A Chamber hearing took place on 1 December 2011. On 5 June 2012, the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber.

These two decisions will be an opportunity for the ECtHR to assess two national legal systems and consider adoption, legal parenthood and the recognition of the parental status of homosexual couples.

A rather old ECtHR case shows the limitation which could be put to the recognition of legal parenthood in cases of surrogacy. The *X, Y and Z v. the United Kingdom*<sup>247</sup> case concerned X, a female-to-male transsexual who was living in a stable relationship with a woman, Y, and their child, Z, born after donor insemination in a licensed fertility clinic. The applicants complained that X's role as Z's father was not recognised and that their situation amounted to discrimination. The Court considered that there was no violation of Article 8 given that transsexuality raised complex issues in respect of which there was no generally shared approach in Europe. The fact that the law of the UK did not allow special legal recognition of the relationship between X and Z did not amount to a failure to respect family life within the meaning of that provision. Here again, the Court is not willing to transform the definition of traditional family. The same line could be chosen in case of surrogacy.

A recent empirically-informed Council of Europe study on the legal status of children across Europe was silent on the possibility of recognising more than two legal parents in the context of collaborative reproduction, as well as the singular grounding of legal motherhood in gestation.<sup>248</sup> The possibilities would be interesting to consider in the context of surrogacy, particularly as a way of responding to competing claims of parental status.

### 3.2.1.2. Nationality

When it comes to nationality or citizenship, the question is double: Can the child get the nationality of the territory where he/she was born? Can the child get the nationality of his/her intended parent(s)?

The ECtHR has not given any answer to this specific question, but a pending case, the *Menesson* case<sup>249</sup>, should be an occasion to shed some light on this question. The case concerns the refusal of the French authorities to recognise a heterosexual married couple as the parents of twin daughters, despite their parental status being legally established in another country and to give them their parents' French nationality. The couple had recourse to *in-vitro* fertilisation using the applicant's gametes and a donated ovum, with implantation of the embryos thus obtained into the uterus of a surrogate mother in California.

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<sup>246</sup> *X and Others v. Austria* (no. 19010/07) Grand Chamber hearing on 03.10.2012

<sup>247</sup> ECtHR, *X, Y and Z v. the United Kingdom* (no. 21830/93) 22.04.1997

<sup>248</sup> Nigel Lowe (2009) [A study into the rights and legal status of children brought up in various forms of marital and non-marital partnerships and cohabitation](#) (Council of Europe).

<sup>249</sup> *Menesson and Others v. France* (no. 65192/11) Communicated on 12.02.2012

Meanwhile, the most relevant case is the *Genovese* case<sup>250</sup> which applies Article 14 (prohibition of discrimination) and Article 8 (right to respect for private life) to recognise the right of a child to obtain his mother's citizenship even though he was born out of wedlock.

It is not obvious that this solution could be transposed to children born after surrogacy, asking for the same nationality as their parents. In this instance, the Court relied on the European consensus existing on the question, as reflected by the 1975 European Convention on the Legal Status of Children Born out of Wedlock in force in more than 20 European countries. But a similar text does not exist when it comes to surrogacy. The right of children to obtain the nationality of their intended parent(s) gets very different answers in the Member States. Some courts have relied on the interest of the child, but it is likely that a balance should be found between the child's interest and the State's understanding of public order.

#### 3.2.1.3. *Access and visit, custody*

The right to access and visit the children is a difficult one, not least because an application for such may come from an adult/parent, and or a child, with different situations raising considerably different interests. The following cases are useful to consider.

The *Anayo* case<sup>251</sup> concerned the refusal of German courts to allow the applicant to see his biological children, twins, with whom he had never lived. The Court identified a violation of Article 8 as it found in particular that the authorities had not examined the question of whether a relationship between the twins and the applicant would have been in the children's interest.

The pending *Jiaoqin Zhou v. Italy* case<sup>252</sup> concerns the suspension of a genetically-related mother's access rights in connection with an adoption procedure, whereas an expert had found that whilst the mother was incapable of looking after her child, her conduct was not negative for him.

Again, these cases should be considered with circumspection as none of them are specifically about surrogacy. It is nonetheless interesting to get a broader picture<sup>253</sup>.

#### 3.2.1.4. *Inheritance*

It is now clear in European law that non-biological children have the same rights in terms of inheritance rights as biological children<sup>254</sup>. In the *Negrepointis-Giannisis v. Greece*<sup>255</sup>, the Court sees a violation of Article 1 of Protocol No. 1 (protection of property), because the decision of the Greek courts had deprived the applicant of his status as heir where it acknowledged the refusal of the Greek authorities to recognise the full adoption order made in the United States allowing a monk to adopt his nephew.

#### 3.2.1.5. *Recognition of a surrogacy which has taken place abroad*

None of the cases presented to the European Court of Human Rights directly concerns surrogacy. This does not mean however that the ECtHR does not provide useful thoughts on the issue. Procreative tourism indeed received an unexpected encouragement from

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<sup>250</sup> ECtHR, *Genovese v. Malta* (no. 53124/09), 11.10.2011

<sup>251</sup> ECtHR, *Anayo v. Germany* (no. 20578/07) 21.12.2010

<sup>252</sup> (no. 33773/11) Communicated on 06.07.2011

<sup>253</sup> There are also cases which address these issues in the context of divorce or separations. However, these are less useful for this study as they typically relate to families where existing child-parent relationships are well established.

<sup>254</sup> ECtHR, *Pla and Puncernau v. Andorra* (no. 69498/01) 13.07.2004.

<sup>255</sup> no. 56759/08) 03.05.2011.



this jurisdiction. In the recent *S.H. v. Austria* case<sup>256</sup>, the Court decided that, for lack of efficient harmonisation, it would take advantage of the very different national legislations on medically assisted reproduction. This case concerned two Austrian couples wishing to conceive a child through IVF. One couple needed the use of sperm from a donor and the other, donated ova. Austrian law prohibits the use of sperm for IVF and ova donation in general. The Court noted that, although there was a clear trend across Europe in favour of allowing gamete donation for *in-vitro* fertilisation, the emerging consensus was still under development and was not based on settled legal principles. Austrian legislators had tried, among other things, to avoid the possibility that two women could claim to be the biological mother of the same child. They had approached carefully a controversial issue raising complex ethical questions and had not banned individuals from going overseas for infertility treatment unavailable in Austria. The Court concluded that there had been no violation of the Convention. However, it underlined the importance of keeping legal and fast-moving scientific developments in the field of artificial procreation under review.

It becomes more interesting: instead of sentencing Austria's prohibition of egg donation, *in vitro* fertilization and gamete donation, it stresses that it is possible to receive these treatments elsewhere than on Austrian soil.<sup>257</sup> The Court notes that national rules on filiation law can be comprehensive enough to absorb and validate situations that were originally created in contradiction with the law. Does this not come down to indicating "procreative tourism" as a real alternative to escape the conditions set by each legal framework regarding the access to medically assisted reproduction? We don't know whether this cross-border situation could include surrogacy undertaken in a foreign country that authorises it.

Again the *S.H.* case can be further interpreted. One can wonder if the decision of the Court according to which national rules on filiation law can be comprehensive enough to absorb and validate situations that were originally created in contradiction with the law should be understood as a confirmation of the existing Austrian system or as an incentive to this State to adapt its legal regulations in order to acknowledge the filiation of the child born in surrogacy and in particular the maternal filiation of the intended mother who did not give birth to the child.

The above-mentioned *Mennesson* case<sup>258</sup> should also bring some lights as to the reception of a foreign surrogacy in France. Does the interest of the children imply recognising their intended parents as legal parents and does it imply giving them the nationality of their parents?

### **3.2.2. EU**

Two routes can be followed: freedom of movement of EU citizens and mutual recognition on the one hand and European private international law on the other hand.

#### *3.2.2.1. Free movement of citizens and statuses recognition*

The freedoms of movement are a very powerful way of developing EU law.

The principle of the free movement of EU citizens is granted by article 20 and 21 TFEU. It has become one of the leading principles in the discussion on the unification and harmonization of family law in Europe<sup>259</sup>. It will only apply to EU citizens moving from

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<sup>256</sup> *S.H. and Others v. Austria* (no. 57813/00) 03.11.2011 (Grand Chamber)

<sup>257</sup> The Court developed the same argument with regards to abortion: ECTHR, G.C. 16 December 2010, *A. B. C. v. Ireland*. The judges explicitly allowed for Irish women, who can only abort in their country under very restrictive conditions, to have the procedure abroad.

<sup>258</sup> *Mennesson and Others v. France* (no. 65192/11) Communicated on 12.02.2012. See upon, 2.1.2

<sup>259</sup> 133. Katharina Boele-Woelki, *The European Agenda: An Overview of the Current Situation in the Field of Private International Law and Substantive Law*, in 2006 INT'L FAM.L. 149, 149-54.

one Member State to another. If a case concerning the non-recognition in one Member State of a status obtained in another Member State is brought to the Court of Justice, chances are high that the Court will ensure the useful effect of the free movement of EU citizens<sup>260</sup>.

The situation is the following: an EU citizen has moved from one Member State to another and wants his/her name of his/her civil status to be recognised on the Member State of residence. The Court has developed a broad-ranging case law on the question. Since the *Dafeki* case<sup>261</sup>, mutual recognition is presumed. Since EU citizenship has been created, some cases have directly concerned family names. For instance, in the *Garcia Avello* case, the Court was asked whether a right to get the same name as one's parents existed. The question was not about surrogacy, but about the obligation for the Belgian State to register two family names of a Belgo-Spanish child instead of one, thus following the Spanish tradition of giving the father's name and the mother's name and not the Belgian rule which imposes to give only the father's name. The Court relied on EU citizenship and non-discrimination to give a right to be given a Spanish name in Belgium. The useful effect of the movement of citizens implies to give them the possibility to name their children in the way they would have done in their country of origin.

The Court has never been asked to deal with the intended parent(s) of a child born following a surrogacy agreement. But it is interesting to wonder whether it would oblige national courts to recognise the civil status of a child born after surrogacy and indicating the intended parent(s) as his/her parent(s); whether this civil status is made in the Member State where the surrogacy arrangement took place (ex: Greece) or in a Member State where a parental order was made in order to recognise the intended parents as the legal parents after the surrogacy arrangement has taken place in another State (ex: UK after a surrogacy in California).

The Court has developed case-law about the useful effect of having a foreign name recognised in the other Member States. However, it has recently recognised that the State can limit the recognition. Two recent cases, the *Runevic Vardyn* case and the *Sayn Wittgenstein* case have shown that the Court is willing to take into account the sovereignty of the Member States when it reflects constitutional traditions. In the former case, the Court recognised the right for the Member State to refuse to change the spelling of a name in order to protect the distinctiveness of its alphabet<sup>262</sup>. In the latter case, the Court accepted that Austrian constitutional rules forbid nobility titles in the name even if this name had been given by adoption and had been used for a long time in the host Member State<sup>263</sup>.

This line of analysis could easily lead us to imagine the CJEU confirming the refusal of a Member State to change the civil status of a child born from a surrogacy arrangement. The following public policy arguments could be used. First, and most importantly, reference could be made to the traditional concept of family. Moreover, it is often argued that this concept is protected by the national constitution. Finally, it is submitted that non recognition does not violate the human rights protected by the European Convention

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134. For the results of the Commission on European Family Law, which are aimed at providing a contribution to this process, see Katharina Boele-Woelki et al., *Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses*, in 7 EUROPEAN FAMILY LAW SERIES 176 (2004); Katharina Boele-Woelki et al., *Principles of European Family Law Regarding Parental Responsibilities*, in 16 EUROPEAN FAMILY LAW SERIES 1-276 (2007).

<sup>260</sup> See Peter McEleavy, *Free Movement of Persons and Cross-Border Relationships*, in 7 INT'L L. F DU DROIT INT'L 153, 153-58 (2005); Clare McGlynn, *Family Reunion and the Free Movement of Persons in European Union Law*, in 7 INT'L L. E DU DROIT INT'L 159, 159-66 (2005); Johan Meeusen et al., *General Report*, in INTERNATIONAL FAMILY LAW FOR THE EUROPEAN UNION 1, 7-11 (Johan Meeusen et al. eds., 2007).

<sup>261</sup> *Dafeki*, C-336/94

<sup>262</sup> CJEU, *Runevic Vardyn*, C-391/09

<sup>263</sup> CJEU, *Sayn Wittgenstein*, C-208/09

on Human Rights. In other words, it is for each national state to decide how to regulate formalized relationships according to its own constitution, culture, religion, and family system.

At the level of private international law, it is under discussion whether the primary role of the free movement of persons may serve as a "theoretical gateway" for establishing a private international law principle of mutual recognition that facilitates the recognition of EU citizens' personal status and family relationships within the Union<sup>264</sup>.

#### 3.2.2.2. *Mutual recognition*

At present there is no EU private international law regulation of surrogacy *per se*, and so any individual Member State forum would apply its own national jurisdiction rules and choice of law rules on a case-by-case basis, according to the facts and circumstances of the particular cause. There is no established body of choice of law rules to deal in a systematic way with surrogacy. The question of what law governs various legal issues is of pivotal importance<sup>265</sup>.

More Precisely, Article 1.3 of Regulation 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility states that "this Regulation shall not apply to: (a) the establishment or contesting of a parent-child relationship; (b) decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption; (c) the name and forenames of the child; (d) emancipation; (e) maintenance obligations; (f) trusts or succession". It does not apply to the establishment of legal parenthood, since this is a different matter from the attribution of parental responsibility, nor to other questions linked to the status of persons (recital 10).

When determining parental status and legal parenthood, and the legal effects thereof<sup>266</sup>, it is mostly national law which will be applied.

But Brussels II *bis* applies to all civil matters concerning the 'attribution, exercise, delegation, restriction or termination of parental responsibility.' (Art 1.1.b)

By Art 1.2, the Regulation shall apply, in particular, to rights of custody and access (Art 1.2.a); guardianship, curatorship and similar institutions (Art 1.2.b); the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child (Art 1.2.c); and measures for the protection of the child relating to the administration, conservation or disposal of the child's property (Art 1.2.d).

As the national case law analysis in Section 2, Part B of this Report has indicated, all European countries accept to formally recognise (with more or less enthusiasm) the relationship between the surrogate child and the intended parent(s). Again, EU law does not regulate this recognition. If there was a trial in the Member State (and whether the issue was intra-European or not), EU law would not be applicable<sup>267</sup>.

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<sup>264</sup> For discussion on this matter, see Roberto Baratta, *Problematic Elements of an Implicit Rule Providing for Mutual Recognition of Personal and Family Status in the EC*, 27 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS [IPRAX] 4, 6-11 (2007) (ER.G.).

<sup>265</sup> For more details, see Section 4 of this Report (Private International Law Issues, written by Professor Janeen Carruthers).

<sup>266</sup> Framework for legal parenthood: 2-parent framework; how is legal motherhood attributed; how is legal fatherhood attributed; judicial authorisation of transfer of parenthood *after* birth; cf. Adoption. withdrawal of parental rights and responsibilities from the surrogate mother (and spouse); conferral of parental rights and responsibilities on the intended parents.

<sup>267</sup> See Section 4 of this Report (Private International Law Issues, written by Professor Janeen Carruthers).

### 3.2.2.3. Preliminary conclusion: Tools and Legal Basis

Here again, the freedom of movement and specially that of EU citizens can be called upon in order to rely on the fundamental status of EU citizens and promote equality between nationals of different Member States (Articles 18, 20 and 21 TFEU).

The principles of non-discrimination on the ground of nationality (Article 18 TFEU) and on the grounds of sex and sexual orientation can also be relevant. The latter has been argued before the ECtHR, but a similar construction could be thought of in the EU (19 TFEU) especially in the light of the recent *Römer* case<sup>268</sup>.

Mutual recognition instruments could also be relevant. Regulation 2201/2003 on parental responsibility was adopted on the basis of Articles 67 (4)<sup>269</sup> and 81 TFEU<sup>270</sup> on civil statuses.

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<sup>268</sup> See CJEU, C-147/08, *Römer*, upon, 1.2.5.

<sup>269</sup> 4. The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.

<sup>270</sup> Article 67(4) and Article 81 TFEU give the Union the power to enact secondary law for the recognition of judicial and extrajudicial decisions in civil and commercial matters, which includes the power to lay down jurisdiction and conflict-of-laws rules. The Brussels I Regulation on the jurisdiction and recognition of judgments in civil and commercial matters, the Rome I and II Regulations on the law applicable to contractual and non-contractual obligations, the Brussels II Regulation on matrimonial proceedings and parental responsibility (2201/2003) and the new 1259/2010 Regulation on the law applicable to divorce provide relevant examples of harmonisation of EU PIL and show that the EU is slowly turning from commercial and trade issues towards family law. These developments are associated to the building of an area of freedom, security and justice for the European citizens (see the Stockholm programme, COM 2010/171). The building of the Area of freedom, security and justice is part of the completion of the Internal Market (art. 3 TUE). They are not applicable to surrogacy but they provide interesting examples of mutual recognition.

**Table 13 Summary table**

LEGAL FRAMEWORK		MEMBER STATES POSITIONS	ECtHR PROTECTION	EU ACTION
<b>EX-ANTE</b>				
Authorisation or prohibition of surrogacy's acts (gestation/procreation)		Disagreement among MS		National constitutional traditions and sovereignty recognised (Grogan+ 2004/23) = Limit to EU action
Movement towards a MS which allows surrogacy and return + information on movement		Possible	Art 2 (life), 8 (family), 14 (equality), HS v Austria Mennesson case expected	Freedom of movement of patients/ Freedom of Establishment Reproductive tourism (Directive 2011/24) + right to information + NO reimbursement
- the protection of the different parties (surrogate mother, child, intended parents)		Protection only organised in the MS where the procedure is authorised	Art 8, Art 14, Child & Mother (S.H. v Austria)	EU general protection of children, EU general protection of healthcare standards
- the establishment of a contract		Idem		
<b>EX-POST</b>				
-Child's legal parentage - Inscription on civil status registers - Nationality	=> Establish ment in the state of birth:	Automatic in MS where procedure authorised + fathers	Art 8, Art 14, adoption X v Austria XYZ v UK	Impossible
	=> Recognitio n in the state of the parents	not automatic	HS v Austria	(European) IPL Automatic recognition? Mutual recognition of statuses (see the Grunkin case)
Legal consequences which flow from such a determination of the parentage (immigration status, parental responsibility, duty to maintain the child, etc.)		Diverse	Art. 1 proto 1, Art 8, Art 14, Right to access, parental authority, inheritance	(European) PIL Idem: no need to know

### 3.3. CONCLUSION

"The potential of EU law to undermine legally enshrined national ethical choices raises the question of whether deregulatory EU-level rules relating to the internal market are best equipped to fulfil the function of legal enforcement of the types of moral or ethical choices made by European society or societies"<sup>271</sup>.

The EU remains a relevant place for action given the existing differences between Member States, the multiplication of questions sent to the ECtHR, and the *sui generis* effective legal order that the EU proposes. But one could wonder if the EU is the best level at which to regulate.

### 3.4. INTERNATIONAL LAW

The section excludes international private law concerns which are treated further. The interest of studying these texts relies in the option for the EU and/or for the Member States to adhere to a convention about surrogacy. Such a convention does not exist to this day, but this hypothesis is starting to be considered by the ICCS and by the Hague Conference on Private International Law. Even if this would not be directly relevant, the EU could also consider joining UN international convention on children's rights. It must finally be noted that some States of the Council or Europe have made declarations concerning surrogacy.

#### 3.4.1. ICCS

The International Commission on Civil Status (ICCS) is an intergovernmental organisation created by a Protocol signed in Bern on 25 September 1950, made up of 16 member States, whose seat has been established in Strasbourg<sup>272</sup>. According to the Protocols which founded the ICCS and the Commission's internal Rules, the mission of the ICCS is to facilitate international cooperation in civil-status matters and to further the exchange of information between civil registrars. The internal Rules specify that the Commission carries out all studies and work aimed at harmonising the provisions in force in the member States in these same matters, in particular by the drafting of Conventions or Recommendations, and at improving the operation of civil-status departments in those States.

One report on 'maternal filiation and surrogacy in the ICCS States' was drafted in 2003<sup>273</sup>. It presents the different legal answers of France, Spain, the United Kingdom and Greece.

A convention on surrogacy does not exist to date.

#### 3.4.2. The Hague Conference on International Private Law

The Hague Conference on Private International Law decided to focus on the question of surrogacy in 2010<sup>274</sup>. It is about to send a questionnaire to all States about their laws and practices as regards surrogacy. This is in process<sup>275</sup>. The other conventions are taken into account further<sup>276</sup>.

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<sup>271</sup>T. Hervey and J. McHale (2004) *Health Law and the European Union* (Cambridge University Press), p. 153

<sup>272</sup> See <http://www.ciec1.org/Documentation/CLARCIEV-PresentationCIEC-CN-EN-Mexico-29.07.2007.pdf>.

<sup>273</sup> <http://www.ciec1.org/Documentation/EVS-Congres7-Gand-14-15mai2007-MeresPorteusesExposeCN-Francais.pdf>.

<sup>274</sup> Conclusions and Recommendations adopted by the Conseil sur les affaires générales et la politique de la Conférence (7-9 avril 2010), p. 3.

<sup>275</sup> Hague Conference Permanent Bureau, *Conclusions and Recommendations adopted by the Council, Council on General Affairs and Policy of the Conference (17-20 April 2012)* (April 2012); Hague Conference Permanent



### **3.4.3. The UN International Convention on Children's Rights**

The Convention on the Rights of the Child is the most widely ratified human rights treaty in history. Together with other international and regional standards on the rights of the child, including those adopted by the Council of Europe, it contains a comprehensive set of legally binding international standards for the promotion and protection of children's rights. It is relevant to surrogacy only where it protects the interest of the child. It is referred to by the EU<sup>277</sup>: Article 7 is about the right to a name, the right to a nationality, and, as far as possible, the right to know one's parents and to be raised by them; Article 6 is on the right to life and Article 21 is about adoption framing<sup>278</sup>.

### **3.4.4. Council of Europe declarations**

Several declarations were made by the Council of Europe. One was recently declared within the Parliamentary assembly where 22 MP from about 7 countries solemnly affirm that "surrogacy is incompatible with women and children's dignity and constitutes a violation of their fundamental rights"<sup>279</sup>.

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Bureau, Preliminary Report on the Issues Arising from International Surrogacy Arrangements (General Affairs and Policy: Doc. Prel. No 10) (March 2012); Hague Conference Permanent Bureau, Private International Law Issues Surrounding the Status of Children, including Issues Arising from International Surrogacy Arrangements (General Affairs and Policy: Doc. Prel. No 11) (March 2011).

<sup>276</sup> See Section 4 of this Report (Private International Law Issues, written by Professor Janeen Carruthers).

<sup>277</sup> [www.consilium.europa.eu/uedocs/.../16031.07.pdf](http://www.consilium.europa.eu/uedocs/.../16031.07.pdf).

<sup>278</sup> UN International convention of children's rights of 20 November 1989.

<sup>279</sup> See <http://www.assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=18711&Language=FR>.

## 4. LEGAL ANALYSIS – PRIVATE INTERNATIONAL LAW

### 4.1. SCOPING

#### 4.1.1. Aim of the current report

To examine the private international law dimension of the legal issues arising from cross-border surrogacy, following the classic analytical structure viz.: jurisdiction; applicable law; recognition and enforcement of foreign judgments, taking account also of softer concepts such as international cooperation and administrative best practice.

To consider the possibility of an EU level response to the legal issues arising from cross-border surrogacy (noting the significance of territorial ambit of such a response – intra-EU/ vis-à-vis third States?), including the possible harmonisation of private international law principles relative thereto, and/or the facilitation of cross-border co-operation among states, with particular reference to legal issues such as legal parenthood and the determination of the nationality of children born as a result of surrogacy arrangements, and the regulation of matters pertaining to the parent-child relationship; and further to consider the legal management of cross-border surrogacy as a practice, and the legal deliberation of cross-border disputes consequential to a cross-border surrogacy arrangement.

#### 4.1.2. Bibliography

##### Select literature re. surrogacy agreements having a cross-border dimension

- D Cullen, 'Surrogacy: 'Commissioning' parents not domiciled in UK – matters to be borne in mind by those contemplating surrogacy arrangements' (2008) 32 Adoption & Fostering 1
- Hague Conference on Private International Law:
  - Hague Conference Permanent Bureau, Private International Law Issues Surrounding the Status of Children, including Issues Arising from International Surrogacy Arrangements (General Affairs and Policy: Doc. Prel. No 11) (March 2011)
  - Hague Conference Permanent Bureau, Preliminary Report on the Issues Arising from International Surrogacy Arrangements (General Affairs and Policy: Doc. Prel. No 10) (March 2012)
  - Hague Conference Permanent Bureau, *Conclusions and Recommendations adopted by the Council, Council on General Affairs and Policy of the Conference (17-20 April 2012)* (April 2012)
  - Hague Conference Permanent Bureau, *Report of the Council on General Affairs and Policy of the Conference of 17-20 April 2012: Doc. Prel. No 1* (July 2012)
- K Horsey and S Sheldon, 'Still Hazy After All These Years: The Law Regulating Surrogacy' 2012 Medical Law Review 67
- D Howe, 'International Surrogacy: A Cautionary Tale' (2008) 38 Family Law Journal 61
- I Lebowitz-Dori, 'Womb for Rent: The Future of International Trade in Surrogacy' (1997) 6 Minnesota Journal of Global Trade 329

- L Theis, N Gamble and L Ghevaert, 'Re X and Y (Foreign Surrogacy): 'A Trek Through a Thorn Forest' (2009) 39 Family Law Journal 239
- K Trimmings and P Beaumont, 'International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Law' (2011) J. Pr. I. L. 627

### Select UK case law

- *Re X (Children) (Parental Order: Foreign Surrogacy)* [2008] EWHC 3030 (Fam); [2009] 1 F.L.R. 733
- *Re S (Parental Order)* [2009] EWHC 2977 (Fam); [2010] 1 F.L.R. 1156
- *Re L (A Child) (Parental Order: Foreign Surrogacy)* [2010] EWHC 3146 (Fam); [2011] Fam.106
- *Re D (Minors) (Surrogacy)* [2012] EWHC 2631 (Fam); [2013] Fam Law 38
- *A v P* [2011] EWHC 1738 (Fam)
- *Re IJ (A Child) (Foreign Surrogacy Agreement: Parental Order)* [2011] EWHC 921 (Fam)
- *Re X (Children) (Parental Order: Retrospective Authorisation of Payments)* [2011] EWHC 3147; [2012] 1 F.L.R. 1347

### Cognate instruments

At present, there is no EU private international law measure which regulates cross-border surrogacy agreements, or the legal effects thereof. Cognate instruments, however, are:

- Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility (Brussels II *bis*).

Since 1 March 2005, jurisdiction, recognition and enforcement of judgments on parental rights and responsibilities have been governed by Brussels II *bis*. Brussels II *bis* lays down rules on jurisdiction (Chapter II), recognition and enforcement (Chapter III), and cooperation between central authorities (Chapter IV) in the field of parental responsibility, and contains specific rules on child abduction and access rights. The Regulation applies to all civil matters concerning the 'attribution, exercise, delegation, restriction or termination of parental responsibility' (Art 1.1.b).

Brussels II *bis* does not apply, however, to the establishing or contesting of a parent-child relationship (Art 1.3.a): '... it does not apply to the establishment of parenthood, since this is a different matter from the attribution of parental responsibility, nor to other questions linked to the status of persons' (recital 10).

- 1980 Hague Convention on the Civil Aspects of International Child Abduction ('1980 HC').
- 1993 Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption ('Adoption Convention').

- 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children ('1996 Convention').

#### **4.1.3. Overarching questions**

1. Is there a need for the articulation of rules and the establishment of standards legally binding on (all/some?) EU Member States in connection with cross-border surrogacy (as that term is to be defined, a matter of key importance)?
2. Is there a need to impose a system of supervision, to ensure that such standards are observed?
3. Is there a need for co-operation between/among EU Member States (state of origin and receiving state, q.v.)?
4. What would be the objectives of an EU response?
5. Is there a need for a 'global' international response?

#### **4.2. TERRITORIAL SCOPE OF PUTATIVE EU REGIME**

Given the factual matrix which may occur in these cases, the territorial scope of an EU level response would require to be delineated very carefully.

The main participants in a surrogacy arrangement appear to be:

- Surrogate mother;
- Surrogacy services provider ('the agency');
- Intended parent(s);
- [Egg donor – in cases of gestational surrogacy/collaborative use of bodily materials];
- [The child]; and
- Other consenting parties – e.g. surrogate mother's spouse/partner.

The interested legal systems appear to be:

- State of origin (personal law of the surrogate mother – say, her habitual residence);
- Receiving state (personal law of the intended parent(s) – say, their habitual residence);
- Principal place of business of the surrogacy services provider (if any);
- (Branch office of the surrogacy services provider);
- Locus of reproductive procedure/services;
- Place of birth of child, likely to coincide with state of origin; and

- Personal law of the child (say, its habitual residence, arguably coinciding with the state of origin, depending on the facts).

The most straightforward set of cross-border surrogacy circumstances would be where all participants have a personal law connection with the EU (say, habitual residence in an EU Member State); all interested legal systems are EU Member States; and all Member States are bound by a common regulatory framework ('the putative EU regime').

Legal complications would emerge where the factual matrix involves one or more connections with a non-EU Member State ('third State'). For example, it may occur that one or more participants – most likely the surrogate mother and/or the agency – is/are not habitually resident in an EU Member State. Alternatively, or in addition, some or all of the reproductive procedure/services and/or the birth of the child might take place in a third State. It would require to be determined to what extent one or more connection(s) with a third State would remove the case beyond the reach of the putative EU regime.

Conversely, it would have to be determined to what extent only minimal factual connection with an EU Member State would bring the case *within* the remit of the putative EU regime (e.g. if neither the surrogate mother nor the intended parent(s) is habitually resident in an EU Member State, but some element of the reproductive procedure took place within the EU, or the agency had a presence in an EU Member State, or the egg donor was habitually resident in the EU).

The geographical reach of the putative EU regime would be a matter of central importance, and so the territorial scope of any European framework would require to be drawn with exacting care, not least because it can be anticipated that, in the context of cross-border surrogacy, connections with Third States are very likely to be present.

The instrument in which any harmonised response would be delivered would require to recognise the wide spectrum of domestic law attitudes to surrogacy across states: if, as a matter of policy, a given legal system does not admit surrogacy in its domestic law, it would be inappropriate to impose on it a (European) structure of cross-border surrogacy regulation, based on the premise that the fulfilment of a cross-border surrogacy agreement would be facilitated and enforced in such a state (cf Council Regulation (EU) No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation 'Rome III', Arts 10 and 13).

In relation to choice of law in divorce, recourse was had, *per* Rome III, to the enhanced co-operation procedure, creating a 'two-speed' Europe on this matter. In the context of cross-border surrogacy, in the event of insurmountable policy difficulties liable to make unanimity of response among all Member States impossible, it is likely that, as a legislative model, the enhanced cooperation procedure would be one meriting consideration. However, if this procedure were utilised, problems of hybridity would arise if, with regard to such an instrument, there were to be participating Member States *and* non-participating Member States. The concept of hybridity, i.e. the problem of demarcating the scope of application of an EU instrument, is well known, and has been encountered, e.g. in relation to the application of the Brussels I Regulation; and can be expected to arise, e.g. in Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession ('Rome IV'), as a result of there being Member States bound by the Regulation, Member States not bound by the Regulation, and third States.

In the matter of choice of law, the principle of universal application must be considered. It is usual in EU instruments in the field of private international law for the universality principle to apply, that is to say, that a participating EU forum must apply the law

indicated by operation of the choice of law rules contained in the instrument, no matter whether the law identified is that of an EU Member State or that of a third State.

In the context of cross-border surrogacy, a regulatory framework imposed by means of a European regulation may sit uneasily with the universality principle. Where, for example, the authorities of the state of origin and of the receiving state each were to have a role and function to perform, it would be problematic if one of those states were not bound by the putative EU regime. An EU response, necessarily capable of binding, at best, only (all) EU Member States would be deficient in this regard; such a response could *not* impose administrative or other requirements on the authorities of a third State. This would be likely to produce, therefore, a limping system. The only way to have a balanced system would be to negotiate an instrument of potentially global reach, through, e.g., the auspices of the Hague Conference on Private International Law. An instrument under the aegis of the Hague Conference would be one which Contracting States would be free to ratify/accede to or not. A framework set in place by such a Convention would operate bilaterally between Convention States in the same manner as does, e.g., the 1980 Hague Convention.

### **4.3. ISSUES OF JURISDICTION**

Jurisdiction, in the sense of rules conferring competence on a court to determine issues arising in any given area of law, is normally the first matter to be addressed in a conflict of laws analysis or harmonisation exercise.

In the context of cross-border surrogacy, disputes potentially requiring court determination may arise pertaining to any one or more of the following issues:

- the process of negotiation of contractual terms between the surrogate mother and the putative intended parent(s), with or without an intermediate surrogacy services provider ('contractual issues');
- there may be an anterior or parallel contract between/among the surrogate mother, intended parent(s), the surrogacy services provider, and an egg donor, from which contractual issues may derive;
- the process of enforcement of agreements entered into by the surrogate mother and intended parent(s), and resolution of disputes pertaining to, e.g. alleged non-performance or defective performance of the contractual terms, including (non-) payment of expenses/compensation to the surrogate mother ('enforcement issues');
- the process of assessment of participants' eligibility/suitability to act as surrogate mother or putative intended parent(s), respectively, and of securing due consents ('regulatory issues');
- the conferral of legal parenthood in respect of a child born or to be born, and the attribution of parental rights and responsibilities ('parental civil status issues');
- the determination of a child's status, incidents of his status, and rights, including his permitted departure from the state of origin, entry to the receiving state, and citizenship ('child civil status issues').

#### **4.3.1. Jurisdiction in respect of contractual issues and enforcement issues**

Contractual issues and enforcement issues are likely to result from the arrangement between or among the following participants:



- Surrogate mother;
- Surrogacy services provider ('the agency');
- Intended parent(s); and
- Egg donor – in cases of gestational surrogacy/collaborative use of bodily materials.

Contractual issues of a justiciable nature are capable of arising at any point in the sequence of events inherent in the practice of surrogacy, from the point of initiation of negotiations between the surrogate mother (or the surrogacy services agency), the putative legal parent(s), [and the egg donor], to the point of physical transfer of the child to the intended parent(s), and the transfer in law of legal parenthood.

With regard to these issues, there are, at present, no harmonised rules allocating jurisdiction in the surrogacy context. Specifically:

- Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels I Regulation') (and Council Regulation (EC) No 2015/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) ('Brussels I *bis* Regulation') shall not apply to the status or legal capacity of natural persons (Art 1.2(a)).

But such issues are capable of generating litigation in a traditional sense, and therefore may require rules of jurisdiction. At present, with regard to disputes pertaining to such issues, each country will apply its own national rules to determine jurisdiction allocation, on a case by case basis. One question which emerges from the current study is whether it would be a valuable exercise to create bespoke harmonised rules of jurisdiction.

Since these issues may arise irrespective of the birth of a child, it is arguable that any rules of jurisdiction could be modelled on rules of civil and commercial jurisdiction, rather than on rules of jurisdiction pertaining to parental responsibility.

Restricting analysis to an 'intra-EU' solution (i.e. to circumstances concerning an EU-domiciled defendant), and taking as a template the rules in the Brussels I Regulation, the following rules might be put forward for debate:

1. In the event of a bipartite contract (surrogate mother – Party A; intended parent(s) – Party B), a person domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State. (cf. Article 2, Brussels I Regulation).
2. Alternatively, a provision akin to Article 5 (special jurisdiction) might be utilised, to the effect that in a matter relating to a surrogacy agreement, the claimant may sue in the courts for the place of performance of the obligation in question (cf. Art 5.1.b of the Brussels I Regulation).

An autonomous definition of 'place of performance' would be required. By analogy with EU jurisprudence concerning civil and commercial contracts, 'place of performance' in commercial surrogacy arrangements (as in gratuitous surrogacy arrangements) should *not* be the place of payment for surrogacy services (or expenses related thereto). The likeliest contender, it is submitted, would be the place where the child was born, or should have been born.

Claims in tort or delict (e.g. damages for *culpa in contrahendo* in relation to negotiation of the surrogacy contract) founded on a ground equivalent to Article 5.3 seem fanciful.

3. A suggestion that a surrogacy contract should be treated as one of imbalance between the participants, such as to warrant 'weaker party protection' akin to Section 4 (consumers) of the Brussels I Regulation, would seem unwise. In policy terms, it would be harsh to treat a surrogate mother as a 'professional/business party' in a consumer contract, and thereby to impose jurisdictional disadvantages upon her. Indeed it is arguable that the surrogate mother herself should be entitled to a *forum actoris* rule for, in this uncharted subject area, in which legal systems vary in attitude (e.g. in the extent to which they will enforce commercial surrogacy arrangements), a surrogate mother seeking to sue the intended parent(s) in the court of a legal system (their domicile) which is antagonistic towards commercial surrogacy services, would be foiled by the public policy of that forum. In this sense, the availability to her of the defendant's forum would be worthless. The exercise of public policy by the forum (against enforcement) shows the intimate link between jurisdiction rules and choice of law rules. Arguably, both in matters of jurisdiction and of applicable law, the surrogate mother would benefit from, and be entitled to, the comfort of her home legal system.
4. In the event of a multiple (related) contracts (among surrogate mother – Party A; intended parent(s) – Party B; and surrogacy services provider – Party C), a related actions provision akin to Article 6 of the Brussels I Regulation could operate, conferring jurisdiction, in the case of an action against a number of EU-domiciled defendants, in the Member State of the domicile of any one of them.

#### 4.3.2. Jurisdiction in respect of regulatory issues

Regulatory issues (pertaining to the process of assessment of participants' eligibility/suitability to act as surrogate mother or putative legal parent(s), respectively, and of securing consents) are unlikely to be the subject of litigation in a traditional sense.

There is, at present, no set of harmonised rules regarding eligibility etc to participate in a cross-border surrogacy arrangement. Each legal system would apply to such issues its own national conflict of laws rules, if they exist, and, in the absence thereof, its own domestic rules. Questions of interpretation may arise as to the territorial application of the domestic statutes of any country concerning surrogacy and related matters.<sup>280</sup>

If, as a matter of policy, it were deemed appropriate to advance a common EU approach to regulatory issues, orthodox conflict of laws rules of jurisdiction allocation may seem less appropriate than would a framework of Central Authority regulation and co-operation, such as is found in the 1993 Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption ('Adoption Convention') (q.v.).

The Adoption Convention does not lay down *expressis verbis* rules of jurisdiction, but nonetheless it may yield assistance in the context of surrogacy.

#### **Intercountry adoption: jurisdiction – applications to adopt<sup>281</sup>**

There is no chapter in the Adoption Convention specifically devoted to jurisdiction. The only criterion to be satisfied to enable parties to utilise the intercountry adoption process

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<sup>280</sup> E.g., in the UK, Part 2 of the Human Fertilisation and Embryology Act 2008.

<sup>281</sup> See EB Crawford and J M Carruthers, *International Private Law: A Scots Perspective*, 3<sup>rd</sup> edition (2010), W.Green, para 14-74.

provided is that the parties (i.e. the prospective adopters) are habitually resident in a Contracting State (the receiving state), and that the child is habitually resident in another Contracting State (Adoption Convention, Art 2). By Article 14 of the Adoption Convention, persons habitually resident in a Contracting State who wish to adopt a child habitually resident in another Contracting State shall apply to the Central Authority in the state of their habitual residence. Requirements for intercountry adoption are assessed by the state of origin and the receiving state acting in concert (q.v.).

### **Cross-border surrogacy: jurisdiction in an intra-EU situation<sup>282</sup>**

A gateway similar to that used in the Adoption Convention could be devised for use in cross-border surrogacy arrangements, that is to say, in circumstances, e.g, where the surrogate mother and the intended parent(s) are habitually resident in (different) EU Member States. On this premise, a putative EU regime could operate in the following manner, by analogy with the Adoption Convention:

A person or persons ('the intended parent(s)'), habitually resident in a Member State ('the receiving state') who wish(es) to enter into a surrogacy arrangement with a person ('the surrogate mother') habitually resident in another Member State ('the state of origin') shall apply to the Central Authority in the receiving state.

This model would be effective only where both the state of origin and the receiving state were (participating) EU Member States. As indicated, above, further deliberation would be required in the event of one or more factual connection(s) with a third State.

#### *4.3.2.1. Jurisdiction in respect of parental civil status issues and child civil status issues*

Parental civil status issues and child civil status issues, unlike contractual issues and enforcement issues, are dependent upon the birth of a child.

Disputes concerning the conferral of legal parenthood in respect of a child born or to be born, and the attribution of parental rights and responsibilities ('parental civil status issues') might emerge, e.g. where there is doubt or challenge concerning the status of the intended parent(s) and his/her parental rights and responsibilities. Challenge to his/her status or the incidents of his/her status may occur at the point of attempted departure of the child from the state of origin, or at the point of entry to the receiving state.

So too there could be expected to be disputes concerning the determination of the child's status, the incidents of his status, and rights, including his permitted departure from the state of origin, entry to the receiving state, and citizenship ('child civil status issues'). It seems likely that some of the issues in dispute would be of a 'public law' nature, concerning nationality and immigration.

There is, at present, no set of harmonised rules allocating jurisdiction in the surrogacy context. Specifically: -

- The 1996 Convention does not apply, *inter alia*, to the establishment or contesting of a parent-child relationship (Art 4(a)).
- Brussels II *bis* does not apply to the establishing or contesting of a parent-child relationship (Art 1.3.a): '... it does not apply to the establishment of parenthood, since this is a different matter from the attribution of parental responsibility, nor to other questions linked to the status of persons' (recital 10).

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<sup>282</sup> See re. scope of application of EU level response, Section II above.

At present, therefore, with regard to parental civil status issues and child civil status issues, each country will apply its own national rules to determine jurisdiction allocation.

If an EU-level response were deemed appropriate, consideration ordinarily would be given to the question whether or not rules of jurisdiction would require to be drafted, to clothe courts with the power to adjudicate in relation to such matters. Arguably, if parental civil status issues or child civil status issues were to arise 'in isolation' (i.e. separate from any dispute as to contractual or enforcement issues), reference could be made to two existing models of jurisdiction in respect of parental responsibility and the person and property of a child, in order to arrive at, by analogous reasoning, a possible scheme of rules of jurisdiction, viz.:

### **Jurisdiction *per* 1996 Hague Convention**

The scheme of jurisdiction rules (Chapter II, Arts 5 – 14) in the 1996 Convention is broadly as follows:

#### *Article 5*

The first ground of jurisdiction, in favour of the *habitual residence [undefined] of the child*, is concerned with measures directed to the protection of the child's person and property. It is notable that jurisdiction is conferred on the habitual residence *for the time being* of the child.

#### *Article 6*

Article 6 is a special rule, which applies principally to refugee children and displaced children, but also to children whose habitual residence cannot be established (a category more likely to be of importance in the context of the subject under examination), conferring jurisdiction on the court of *the territory in which the child is present*.

#### *Article 7*

Article 7 is a special rule, applicable in cases of wrongful removal or retention of a child, which confers jurisdiction on the authorities of the contracting state of *the habitual residence of the child immediately before the removal or retention*.

This jurisdiction continues until the acquisition by the child of a habitual residence in another state, and there has been acquiescence in the removal/retention by each person, institution or other body having rights of custody, or the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.

So long as the authorities of the contracting state of the immediate pre-removal/retention habitual residence of the child keep their jurisdiction, the authorities of the Contracting State to which the child has been removed or in which he or she has been retained can take only such urgent measures under Article 11 as are necessary for the protection of the person or property of the child.

#### *Articles 8 and 9*

Article 8 provides an exception to the jurisdiction conferred by Articles 5 and 6, and is to the effect that the authority of a Contracting State having jurisdiction under Article 5 or 6, if it considers that the authority of *another Contracting State* would be

*better placed in the particular case to assess the best interests of the child*, may either request that other authority to assume jurisdiction to take such measures of protection as it considers to be necessary, or suspend consideration of the case and invite the parties to introduce such a request before the authority of that other State. Such other Contracting State may assume jurisdiction if it considers that this is in the child's best interests.

The Contracting States whose authorities may be addressed are limited to a State of which the child is a national; a State in which property of the child is located; a State whose authorities are seized of an application for divorce or legal separation of the child's parents, or for annulment of their marriage; or a State with which the child has a substantial connection.

#### *Article 10*

Without prejudice to Articles 5 – 9, the authority of a *Contracting State exercising jurisdiction in respect of the matrimonial status of the parents of a child* habitually resident in another Contracting State may, if the law of their State to provides, take measures directed to the protection of the person or property of such child if certain jurisdictional requirements are satisfied.

#### *Article 11*

In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have *jurisdiction to take any necessary measures of protection*, such jurisdiction lapsing as soon as Contracting State authorities having jurisdiction under Articles 5 – 10 have taken the measures required by the situation.

#### *Article 12*

Subject to Article 7, Article 12 confers jurisdiction on the authorities of a Contracting State in whose *territory the child or property belonging to the child is present*, to take measures of a provisional character for the protection of the person or property of the child which have a territorial effect limited to the State in question, in so far as such measures are not incompatible with measures already taken by authorities which have jurisdiction under Articles 5 to 10. Article 12 jurisdiction lapses as soon as Contracting State authorities having jurisdiction under Articles 5 – 10 have taken the measures required by the situation.

#### *Article 13*

Article 13 recognises that more than one Contracting State may have jurisdiction under Articles 5 – 10, and imposes a *priority of process* rule.

#### *Article 14*

By Article 14, measures taken in application of Articles 5 to 10 shall remain in force, even if a change of circumstances has eliminated the basis upon which jurisdiction was founded, so long as the authorities which have jurisdiction under the Convention have not modified, replaced or terminated such measures.

**AND**

## **Jurisdiction *per Brussels II bis***

The scheme of jurisdiction rules (Chapter II, Section 2, Arts 8 – 15) in Brussels II *bis* in respect of parental responsibility is broadly as follows:

### *Article 8*

The primary ground of jurisdiction, subject to Arts 9, 10 and 12, is that the courts of the Member State shall have jurisdiction in matters of parental responsibility over a child who is *habitually resident* [ *undefined* ] *in that Member State at the time the court is seized* (defined in Art 16).

### *Article 9*

Although habitual residence is not defined in Brussels II *bis*, Article 9 provides for the situation where a child moves lawfully from one Member State to another and acquires a new habitual residence there. The position is that the courts of the Member State of the *child's former habitual residence* shall, by way of exception to Article 8, *retain jurisdiction during a three-month period* following the move for the purpose of modifying a judgment on access rights issued in that Member State before the child moved, where the holder of access rights pursuant to the judgment on access rights continues to have his or her habitual residence in the Member State of the child's former habitual residence

### *Article 10*

Article 10 provides for the situation where a child, habitually resident in one Member State, is wrongfully removed or retained to/in another. This article contains a complex construct of rules to ensure retention of jurisdiction by the court of the Member State of the child's erstwhile habitual residence.

### *Article 12*

Article 12 contains rules on *prorogation of jurisdiction*, principally to clothe the court having matrimonial jurisdiction in respect of the child's parents with jurisdiction in any matter relating to parental responsibility, subject to certain provisos.

### *Article 13*

Article 13 provides a *rule based on presence*, applicable in relation to children whose habitual residence cannot be established, refugee children and displaced children.

### *Article 15*

Article 15 contains a *transfer mechanism* on a discretionary basis whereby the court seized, if it considers that a court of another Member State with which the child has a particular connection would be better placed to hear the case, and that this is in the best interests of the child, may stay the case in favour of such other court.

### *Article 19*

Article 19 recognises that more than one Member State may have jurisdiction under Section II, and imposes a *priority of process* rule.

### *Article 20*



By Article 20, the courts of a Member State may take such *provisional including protective measures* in respect of persons or assets in that State as may be available under the law of that State even if the court of another Member State has jurisdiction as to the substance.

The 1996 Convention and Brussels II *bis* demonstrate the operation of certain common principles, namely jurisdiction based on:

- habitual residence of the child (Art 5, 1996 Convention; Art 8, Brussels II *bis*);
- jurisdiction in respect of refugee/displaced children and children whose habitual residence is uncertain (Art 6, 1996 Convention; Art 13, Brussels II *bis*);
- continuing jurisdiction in the face of changed circumstances of lawful or wrongful removal (Arts 7 and 14, 1996 Convention; Arts 9 and 10, Brussels II *bis*);
- discretionary transfer to a more appropriate court (Arts 8 and 9, 1996 Convention; Art 15, Brussels II *bis*);
- related matrimonial proceedings (Art 10, 1996 Convention (protective measures only); Art 12, Brussels II *bis*);
- urgency/physical presence of person or asset (Art 11, 1996 Convention; Art 20, Brussels II *bis*); and
- priority of process (Art 13, 1996 Convention; Art 19, Brussels II *bis*).

Arguably a similar scheme of rules (under exclusion of the obviously inappropriate) could be adopted in surrogacy cases for *parental civil status issues* and *child civil status issues*, viz. jurisdiction based upon:

- habitual residence of the child;
- presence of the child, where the child's habitual residence is uncertain;
- discretionary transfer to a more appropriate court;
- urgency/physical presence of child; and
- priority of process.

#### **4.3.3. Jurisdiction in relation to contractual issues / enforcement issues AND parental status issues / child civil status issues**

Were such issues to arise cumulatively in a given case, it would be highly unsatisfactory for them to fall within the jurisdiction of different courts.

A straightforward priority of process rule would carry the risk that a court having jurisdiction in relation to contractual issues or enforcement issues would be seized first, thereby precluding proceedings in a court second seized exercising jurisdiction in relation to civil status issues. Against that, however, is the likelihood that the court having jurisdiction in proceedings for enforcement of a surrogacy contract against a (say, renegeing) surrogate mother would coincide with that in which civil status issues ought to be adjudicated.

At best perhaps, a general transfer of jurisdiction mechanism desirably would operate, perhaps via a 'related proceedings' provision (cf. Art 28, Brussels I Regulation; Art 15, Brussels II *bis*).

This brief examination reveals some of difficulties which would be inherent in allocating jurisdiction according to the approach adopted traditionally in the subject of the conflict of laws.

#### **4.4. ISSUES OF CHOICE OF LAW**

The question of what law governs various legal issues arising in connection with cross-border surrogacy is of pivotal importance. At present, there is no harmonised private international law regulation of surrogacy *per se*, and so any individual Member State forum would apply to the facts and circumstances of a particular cause its own national choice of law rules, on a case by case basis. In the UK at least, there is no established body of national choice of law rules to deal in a systematic way with cross-border surrogacy.

Insofar as a surrogacy arrangement is contractual in nature, it is important, at the outset, to note the non-applicability of Regulation (EC) No 593/2008 on the law applicable to contractual obligations ('Rome I'). By Article 1.2 of Rome I, contractual obligations involving the status or legal capacity of natural persons (Art 1.2(a), subject only to Art 13 'incapacity'), and contractual obligations arising out of family relationships (Art 1.2.b), are *excluded* from the scope of the instrument. Hence, any EU court currently must apply its own (private international law) national rules pertaining to contractual obligations in order to assess the validity and enforceability of a cross-border surrogacy contract.

So too, insofar as any non-contractual obligations may be said to derive from international surrogacy arrangements (e.g. a claim in unjust enrichment), it is important to note the non-applicability of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations ('Rome II'). By Art 1.2.a of Rome II, there are excluded from the scope of the instrument non-contractual obligations arising out of family relationships.

Cross-border surrogacy may give rise to queries about choice of law in some or all of the following areas, for each of which choice of law rules (i.e. rules by which to determine applicable law) may require to be framed, either by each national legal system for its own private international law purposes, by way of EU-level harmonised response, or by way of global (Hague Conference) harmonised response.

##### **4.4.1. Contractual aspects of surrogacy**

- Eligibility/suitability/capacity
  - of intended parents
    - legal eligibility: age; permissibility of sole/joint application; application by married parties/parties to a civil partnership/*de facto* cohabiting parties/single applicant;
    - mental/physical eligibility.
  - of surrogate mother
    - legal eligibility: age; married/unmarried status;

- mental/physical eligibility.
- Consents to arrangements
  - of intended parents;
  - of surrogate mother;
  - of 3<sup>rd</sup> parties, e.g. spouse of surrogate mother.
- Formal validity of arrangement
- Essential validity of arrangement
  - applicable law *per* party autonomy, if permissible;
  - applicable law in the absence of choice of law;
  - enforceability.
- Interpretation of surrogacy contract
  - ensuring party giving consent understands the effect and consequences of that decision;
  - ensuring consent was given freely, and not induced or otherwise improperly obtained.
- Performance issues
  - Discharge of contract, and remedies for non-performance by surrogate mother (including frustration by way of miscarriage or abortion; responsibility for over-performance: multiple birth) or by intended parents (including total or partial non-payment; or repudiation of contract);
  - Consequences of total/partial breach of contract.
- Compensation/remuneration to surrogate mother; costs and expenses of surrogate mother
  - ensuring prevention of improper [?] financial gain and corruption.
- Mandatory protective provisions
  - of the forum; of other interested states (e.g. habitual residence of surrogate mother; *situs* of fertility clinic);
  - vis-à-vis putative child? surrogate mother? spouse of surrogate; intended parents?
- Public policy
  - of forum (*qua* receiving state?; *qua* state of origin?);
  - awareness of 'reproductive tourism'/lab shopping': surrogacy-friendly states v. exploitation.

Broadly equivalent considerations would apply to the contractual aspects of any parallel contract between/among the surrogate mother, intended parent(s), the surrogacy services provider, and an egg donor.

#### **4.4.2. Civil status implications of surrogacy**

There is an important difference between contractual consequences *in personam* and issues of personal status *contra mundum*. By Scots and English law, parties (the surrogate mother and the intended parents) cannot by contract determine the civil status of a child born or to be born, nor deny/confer upon themselves, through exercise of party autonomy, the status of legal parenthood. There are also public law issues concerning citizenship and permitted residence.

Brussels II *bis* applies to all civil matters concerning the 'attribution, exercise, delegation, restriction or termination of parental responsibility.' (Art 1.1.b)

By Art 1.2, the Regulation shall apply, in particular, to rights of custody and access (Art 1.2.a); guardianship, curatorship and similar institutions (Art 1.2.b); the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child (Art 1.2.c); and measures for the protection of the child relating to the administration, conservation or disposal of the child's property (Art 1.2.d).

Brussels II *bis* does not apply to the establishing or contesting of a parent-child relationship (Art 1.3.a): '... it does not apply to the establishment of parenthood, since this is a different matter from the attribution of parental responsibility, nor to other questions linked to the status of persons' (recital 10).

A putative EU regime would require to give consideration to the framing of choice of law rules to determine the following issues:

- Legal parentage (a parent/child relationship based on bio-genetic affinity), and the legal effects thereof;
- Legal parenthood (i.e. the attribution of parental status, that is the attribution of legal status to someone as the parent of a child. cf. filiation) and the legal effects thereof:
  - framework for legal parenthood (2-parent framework?);
  - attribution of legal motherhood;
  - attribution of legal fatherhood;
  - judicial authorisation of transfer of parenthood *after* birth;
  - withdrawal of parental rights and responsibilities from the surrogate mother (and spouse);
  - conferral of parental rights and responsibilities on the intended parents;
- Related civil status issues
  - authorisation of child's departure from state of origin;
  - authorisation of child's entry to receiving state;

- conferral of citizenship/nationality of child born from surrogacy;
- cognate legal issues – e.g. children's rights to genetic information;
- public policy issues – statelessness; exploitation of surrogate mother; welfare of child.

The likelihood is that the choice of law governance of these issues would be distributed between the law of the state of origin and the law of the receiving state.

#### **4.4.3. The Adoption Convention template**

In speculating as to the formulation of choice of law rules for this subject area, it is impossible to ignore the essential *contractual* component of cross-border surrogacy arrangements (which is stronger than in intercountry adoption). This may tend to suggest that a body of choice of law rules corresponding to those found in the Rome I Regulation should apply.

Conversely, there is a close parallel with intercountry adoption, and of the patent need for child welfare safeguards, which tend to the conclusion that matters cannot be left entirely to party autonomy. That being so, it would be a matter of delineating that which properly can be left to individual contract, from that which pertains to civil status and its consequences and which must be monitored, therefore, at state level.

A third consideration is the extent to which it would be advisable for a single instrument to contain applicable law rules for *both* the contractual and the civil status issues. It is probably better for this to be the aim, rather than for contractual issues to be regulated by a separate instrument modelled, e.g., on the Rome I Regulation. A holistic approach may be thought to be the optimum objective, for policy reasons of internal consistency, and coherence of regime provisions – assuming, in policy terms, that a regime regulatory in nature were to be considered desirable in principle.

The fundamental principles of the Adoption Convention<sup>283</sup> are:

- a) *best interests principle*: the best interests of the child are the primary consideration in all matters relating to Convention adoptions;
- b) *subsidiarity principle*: the subsidiary nature of intercountry adoption is one element to be considered when applying the best interests principle;
- c) *safeguards principle*: the development of safeguards is necessary to prevent the abduction, sale of, and traffic in children;
- d) *co-operation principle*: effective co-operation between authorities must be established and maintained to ensure that safeguards are applied effectively; and
- e) *competent authorities principle*: only competent authorities, appointed or designated in each State, should be permitted to authorise intercountry adoptions.<sup>284</sup>

It is said that,

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<sup>283</sup> For information on the Adoption Convention, see 'The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice, Guide No 1' (2008) ('Adoption Good Practice Guide No 1'); and 'Accreditation and Adoption Accredited Bodies: General Principles and Guide to Good Practice, Guide No 2' (2012) ('Adoption Good Practice Guide No 2').

<sup>284</sup> Adoption Good Practice Guide No 2, p 21. See also Adoption Good Practice Guide No 1, p 27

'Promotion of good practices in the field of intercountry adoption accordingly relies on:

- acceptance of the primary mission or object, namely protecting the best interests of children affected by adoption;
- a shared understanding of the role of the Central Authority, the competent authorities and the accredited bodies;
- mutual respect among those entities and a relationship of trust; and
- continuous dialogue among the players regarding the powers and functions of each

and the way in which they are exercised.<sup>285</sup>

It is important to appreciate that the Adoption Convention does not require national adoption laws to be uniform: 'The Convention is designed to operate between systems having different internal laws relating to adoption.'<sup>286</sup> Rather it establishes minimum standards and safeguards.

#### *8.1.1 Basic procedures and minimum standards*

440. The Convention provides a clear set of basic procedures and minimum standards for intercountry adoption, governing *inter alia* the application process, the preparation of reports on the child and the adopting parents, the obtaining of necessary consents, the exchange of information between the two States concerned, the decision concerning entrustment, authorisation for the child to reside permanently in the receiving State, and the transfer of the child from the State of origin to the receiving State.<sup>287</sup>

The Adoption Convention is an important contribution in an area of law which is difficult to regulate.<sup>288</sup> Its provisions appear to contain many safeguards for the child, and for those whose consent to intercountry adoption is necessary.

*Ex facie* the Convention contains fewer conflict rules than might be expected; indeed they must be searched out, and/or inferred. The most notable absence is of any express mention of choice of law amid much facilitative and precautionary provision. The dual responsibility of the state of origin and the receiving state is a noteworthy characteristic.<sup>289</sup>

Whilst this last mentioned aspect would be likely to be an important feature of any putative EU regime on international surrogacy, choice of law rules within that projected instrument to regulate the core contractual dimension of surrogacy would seem to be necessary. This aspect differentiates the cross-border surrogacy legislative profile from the intercountry adoption profile. Therefore, although the best legislative model, it would appear, is the Adoption Convention, that model, to be effective in the surrogacy context,

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<sup>285</sup> Adoption Good Practice Guide No 2, p 13.

<sup>286</sup> Adoption Good Practice Guide No 1, para 8.1.2. See also Adoption Good Practice Guide No 1, p 13, 'One of the great advantages of the Convention is the flexibility it gives to Contracting States in deciding how its provisions are to be implemented. Each State may adapt its own laws and procedures to implement the Convention.'

<sup>287</sup> Adoption Good Practice Guide No 1, para 8.1.1.

<sup>288</sup> See, for detail on UK position, EB Crawford and JM Carruthers, *International Private Law: A Scots Perspective* (3<sup>rd</sup> edition) (2010), W Green, paras 14-72 – 14-76.

<sup>289</sup> 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption – Information Brochure (2012), p 5.



would require to be *supplemented* by certain rules with regard to choice of law in contract (possibly deriving from the Rome I Regulation).

The following section aims to summarise where drafting assistance could be derived from the template of the Adoption Convention:

## CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION

The States signatory to the present Convention,

Recognising that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Recalling that each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin,

Recognising that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin,

Convinced of the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children,

Desiring to establish common provisions to this effect, taking into account the principles set forth in international instruments, in particular the United Nations Convention on the Rights of the Child, of 20 November 1989, and the United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (General Assembly Resolution 41/85, of 3 December 1986).

Have agreed upon the following provisions –

### CHAPTER I – SCOPE OF THE CONVENTION

#### Article 1

The objects of the present Convention are:

a) to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law;

b) to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children;

## CROSS-BORDER SURROGACY

The policy and aims of an EU level response would require to be agreed, and carefully narrated in any instrument.

The objectives of co-operation and recognition would appear to be transferable to the surrogacy context; so too the aim of safeguarding the best interests of a child born, or to be born.

If an EU-level response were to be generated, agreement would have to be struck, in policy terms, as to where the balance of interests/protection should lie (and at what time) among the surrogate mother, the intended parent(s), the child born or to be born.

c) to secure the recognition in Contracting States of adoptions made in accordance with the Convention.

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As indicated in Section II of this Report, the geographical remit of any EU-level response would be a matter of critical importance.

The most straightforward model would be premised on a situation where all interested legal systems were those of EU Member States, and all Member States were bound by the putative instrument. Complications would emerge where the factual matrix involves one or more connection(s) with a non-EU Member State (third State).

The Adoption Convention envisages application where the state of origin and the receiving state both are in Contracting States. An EU surrogacy instrument could operate where the state of origin (say, habitual residence of the surrogate mother) and the receiving state (say, habitual residence of the intended parent(s)) both are (participating) EU Member States.

Detailed consideration, however, would require to be given also to the weighting of alternative/ additional connections with EU Member States by reason of, e.g. principal place of business of the surrogacy services provider; branch office of the surrogacy services provider; locus of reproductive procedure/services; place of birth of child (likely to coincide with state of origin); personal law of the child (probably habitual residence; arguably coinciding with the state of origin, depending on the facts).

In terms of subject-matter scope of an EU- level response, detailed definitions would be required of all critical words and phrases.

## CHAPTER II – REQUIREMENTS FOR INTERCOUNTRY ADOPTIONS

### Article 4

An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin –

- a) have established that the child is adoptable;
- b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests;
- c) have ensured that
  - (1) the persons, institutions and authorities whose consent is necessary for adoption, have been counselled as may be necessary and duly informed of the effects of their consent, in

It would have to be determined whether or not an EU- level response would establish an exclusive framework for cross-border surrogacy.

Article 4 outlines the responsibilities of the authorities of the state of origin.

Article 5 outlines the responsibilities of the authorities of the receiving state.

It would be feasible to follow this model in the context of cross-border surrogacy, for whatever the other connecting factors, the legal systems principally interested would appear to be those of the state of origin and the state of receipt.

Issues which would require to be addressed in a conflict of laws sense include, e.g.,

- a. eligibility/suitability/capacity of intended parents (legal eligibility: age; permissibility of sole/joint application; application by married parties/parties to a civil partnership /de facto cohabiting parties/single

particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin,

(2) such persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing,

(3) the consents have not been induced by payment or compensation of any kind and have not been withdrawn, and

(4) the consent of the mother, where required, has been given only after the birth of the child; and

d) have ensured, having regard to the age and degree of maturity of the child, that

(1) he or she has been counselled and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required,

(2) consideration has been given to the child's wishes and opinions,

(3) the child's consent to the adoption, where such consent is required, has been given freely, in the required legal form, and expressed or evidenced in writing, and

(4) such consent has not been induced by payment or compensation of any kind.

applicant; and mental/physical eligibility).

b. eligibility/suitability/capacity of surrogate mother (legal eligibility: age; married/ unmarried status; mental/physical eligibility).

c. consents to arrangements (e.g. of intended parents; surrogate mother; 3rd parties, e.g. spouse of surrogate mother). (See generally also Art 16).

A balance would need to be struck between the powers and responsibilities of the state of origin and those of the receiving state. On analogy with the Adoption Convention, issues pertaining to the surrogate mother could be referred to the authorities of the state of origin; and issues pertaining to the intended parent(s) to the authorities of the state of receipt.

The Adoption Convention does not specify a choice of law rule by which the authorities of the state of origin and the receiving state, respectively, are to determine the various issues. This probably leads to the conclusion, with regard to that instrument, that the issues are to be determined by the relevant authorities according to the domestic law of their own state. This solution could be extended to a surrogacy instrument.

As noted above at Section IV.C of this Report, there are differences between intercountry adoption and cross-border surrogacy as a result of the latter being founded in contract. Parties cannot by contract determine status, but without the impetus of the contract no question of status would arise.

The Adoption Convention model would secure for surrogacy certain safeguards, some of which have a contractual aspect, e.g. eligibility.

If eligibility were construed as a matter of purely contractual capacity (e.g. many systems of law could be expected to prescribe only a minimum requirement of age, sanity and solvency) it would be subject to the contractual *lex causae*. However, if 'eligibility' to enter into a surrogacy arrangement were construed as going beyond 'capacity' to 'suitability', it would fall within the control of the 'civil status' *lex causae* (i.e. the law of the state of origin, or of the receiving state, as may be determined, per the 'status-related' rules of the putative EU regime). There could be a clash between the applicable law in contract and the 'civil status' *lex causae*. Ultimately, it would appear that the latter would have to prevail because of overarching child welfare considerations.

A similar clash between the contractual *lex causae* and the civil status *lex causae* could arise with regard to the important issue of whether or not commercial surrogacy is valid, i.e. whether a contractual provision for payment of the surrogate mother is essentially valid.

There are other 'core contractual' issues (which may arise whether or not a child is born, and therefore

Article 5

An adoption within the scope of the Convention shall take place only if the competent authorities of the receiving State –

- a) have determined that the prospective adoptive parents are eligible and suited to adopt;
- b) have ensured that the prospective adoptive parents have been counselled as may be necessary; and
- c) have determined that the child is or will be authorised to enter and reside permanently in that State.

**CHAPTER IV – PROCEDURAL REQUIREMENTS IN INTERCOUNTRY ADOPTION**

Article 14

Persons habitually resident in a Contracting State, who wish to adopt a child habitually resident in another Contracting State, shall apply to the Central Authority in the State of their habitual residence.

Article 15

(1) If the Central Authority of the receiving State is satisfied that the applicants are eligible and suited to adopt, it shall prepare a report including information about their identity, eligibility and suitability to adopt, background, family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption, as well as the characteristics of the children for whom they would be qualified to care.

(2) It shall transmit the report to the Central Authority of the State of origin.

Article 16

(1) If the Central Authority of the State of origin is satisfied that the child is adoptable, it shall –

whether or not civil status issues are engaged), for which the Adoption Convention has no parallel, e.g. formal validity of the arrangement; interpretation of surrogacy contract; performance issues (discharge of contract), and remedies for non-performance by surrogate mother or by intended parents; and consequences of total/partial breach of contract. Such contractual issues (if and when litigated) would be referred by Member State courts to their own residual, national choice of law rules in contract, unless the putative EU regime were to seek to deal with the entirety of the surrogacy arrangement, i.e. the contractual issues and the status issues.

Article 5 outlines the responsibilities of the authorities of the receiving state.

'Convention adoptions' must be channelled via the Central Authority of the receiving state.

In the context of cross-border surrogacy, a policy decision would require to be taken as to whether or not a surrogacy arrangement involving more than one EU Member State was required to proceed in accordance with the putative EU regime, i.e. a decision would have to be taken as to how regulatory the system was intended to be, and whether it should be mandatory/exclusive. Would it operate to render unenforceable all 'private' arrangements, territorially within the EU?

Mutatis mutandis.

It is of the essence of surrogacy that the contract between the surrogate mother and intended parent(s) is put in place in advance of the birth of the child. Therefore, certain of the duties incumbent

a) prepare a report including information about his or her identity, adoptability, background, social environment, family history, medical history including that of the child's family, and any special needs of the child;

b) give due consideration to the child's upbringing and to his or her ethnic, religious and cultural background;

c) ensure that consents have been obtained in accordance with Article 4; and

d) determine, on the basis in particular of the reports relating to the child and the prospective adoptive parents, whether the envisaged placement is in the best interests of the child.

(2) It shall transmit to the Central Authority of the receiving State its report on the child, proof that the necessary consents have been obtained and the reasons for its determination on the placement, taking care not to reveal the identity of the mother and the father if, in the State of origin, these identities may not be disclosed.

#### Article 17

Any decision in the State of origin that a child should be entrusted to prospective adoptive parents may only be made if –

a) the Central Authority of that State has ensured that the prospective adoptive parents agree;

b) the Central Authority of the receiving State has approved such decision, where such approval is required by the law of that State or by the Central Authority of the State of origin;

c) the Central Authorities of both States have agreed that the adoption may proceed; and

d) it has been determined, in accordance with Article 5, that the prospective adoptive parents are eligible and suited to adopt and that the child is or will be authorised to enter and reside permanently in the receiving State.

#### Article 18

The Central Authorities of both States shall take all necessary steps to obtain permission for the child to leave the State of origin and to enter and reside permanently in the receiving State.

#### Article 19

(1) The transfer of the child to the receiving State may only be carried out if the requirements of Article 17 have been satisfied.

(2) The Central Authorities of both States shall ensure that this transfer takes place in secure and appropriate circumstances and, if possible, in the

upon the Central Authority of the state of origin in adoption could not be extended, mutatis mutandis, to surrogacy.

Article 16 imposes child-protective duties on the Central Authority of the state of origin of the child.

Article 17 imposes child-protective duties on the Central Authority of the state of origin of the child, after liaison with the Central Authority of the receiving state.

Mutatis mutandis.

Article 18 imposes on both the Central Authority of the state of origin and the Central Authority of the receiving state the duty to ensure that the child is permitted to leave the state of origin, and to enter and reside permanently in the receiving state. A putative EU regime in surrogacy would be required to deliver this vital objective.

Mutatis mutandis.

company of the adoptive or prospective adoptive parents.

(3) If the transfer of the child does not take place, the reports referred to in Articles 15 and 16 are to be sent back to the authorities who forwarded them.

Article 20

The Central Authorities shall keep each other informed about the adoption process and the measures taken to complete it, as well as about the progress of the placement if a probationary period is required.

Article 22

(1) The functions of a Central Authority under this Chapter may be performed by public authorities or by bodies accredited under Chapter III, to the extent permitted by the law of its State.

(2) Any Contracting State may declare to the depositary of the Convention that the functions of the Central Authority under Articles 15 to 21 may be performed in that State, to the extent permitted by the law and subject to the supervision of the competent authorities of that State, also by bodies or persons who –

a) meet the requirements of integrity, professional competence, experience and accountability of that State; and

b) are qualified by their ethical standards and by training or experience to work in the field of inter-country adoption.

(3) A Contracting State which makes the declaration provided for in paragraph 2 shall keep the Permanent Bureau of the Hague Conference on Private International Law informed of the names and addresses of these bodies and persons.

(4) Any Contracting State may declare to the depositary of the Convention that adoptions of children habitually resident in its territory may only take place if the functions of the Central Authorities are performed in accordance with paragraph 1.

(5) Notwithstanding any declaration made under paragraph 2, the reports provided for in Articles 15 and 16 shall, in every case, be prepared under the responsibility of the Central Authority or other authorities or bodies in accordance with paragraph 1.



Mutatis mutandis.

Mutatis mutandis.



#### **4.5. ISSUES OF COOPERATION AND BEST PRACTICE**

In the matter of administration of cross-border surrogacy arrangements, a policy decision would require to be taken as to whether or not a putative EU regime was to be facilitative (i.e. to encourage cross-border surrogacy and good practice in the management thereof) and/or regulatory (to control the practice and to impose minimum standards/safeguards), i.e. a mandatory/exclusive system.

Whatever the nature of a putative EU regime, the use of Central Authorities would seem to be desirable and indeed necessary to establish effective co-operation between/among participating states. This system is very well embedded in Conventions of the Hague Conference on Private International Law, e.g. the 1980 Hague Convention on the Civil Aspects of International Child Abduction (Arts 7-11 and 21-30), the Adoption Convention (Arts 6-13 and 14-21), and the 1996 Hague Convention (Arts 29-40). The creation of Central Authorities to facilitate the operation of these Conventions is mandatory for all Contracting States. Contracting States bear an obligation to deter all practices contrary to the objects and standards of the relevant Convention. The focus is on effective co-operation; strong, open communication; expeditious procedures; and transparency of decision-making. Yet it must be noted that in international instruments of this type, certain seemingly administrative measures may have a substantive component (e.g. in determining and certifying suitability), and insofar as that were the case, authorities of the state endowed by the regime would be very likely to apply to such issues their own domestic law.

Were a system of best practice via Central Authorities to be being laid down, relevant considerations would include, *inter alia*:

- Powers and duties of Central Authorities
  - Pre-surrogacy (eligibility etc)
  - Post-surrogacy
    - Preservation of information (including child's right to information)
    - Reporting to state of origin
- Location, personnel and material resources of Central Authorities
- Operational funding for Central Authorities' services in the regulation and supervision of surrogacy arrangements
- Dissemination of information re. cross-border surrogacy process and role and remit of Central Authorities
- International co-operation among Central Authorities
- Collection and maintenance of statistics

By way of example, the Adoption Convention establishes a system of co-operation between authorities in states of origin and in receiving states, which is designed to ensure that inter-country adoption takes place under conditions which help to guarantee the best adoption practices and eliminate potential abuses:

##### *2.3 Establishing co-operation between States*

94. Co-operation between States is the third central principle of the Convention. The system of co-operation envisioned under the Convention is one in which all Contracting States work together to ensure the protection of children. In order to achieve this goal, it is important that States:

- create systems that complement and strengthen the protections implemented by other Contracting States;
- consider the impact that their regulation of adoption, or lack thereof, may have on other States;
- provide mechanisms for the collection and dissemination of information and statistics to other States Parties, and to those who utilise the adoption and child care and protection system;
- co-operate with other Parties to address temporary or permanent changes in procedures, emergency situations, and enforcement of criminal sanctions;
- provide the Permanent Bureau with updated contact information in respect of Central Authorities and accredited bodies.<sup>290</sup>

#### *4.2.3 International co-operation and co-ordination*

183. Article 7(1) provides that Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to protect children and to achieve the other objects of the Convention.

184. Co-operation between authorities is enhanced by:

- clearly identifying the responsible authorities and personnel in adoption matters, and publishing their contact details;
- building confidence, understanding and trust between countries and their Central Authority personnel;
- encouraging good communication, especially the ability to communicate with Central Authority personnel of countries of origin in their own language;
- attending meetings and exchanging information at conferences, Hague Special Commission meetings, and bilateral or regional meetings.<sup>291</sup>

Thus:

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<sup>290</sup> Adoption Good Practice Guide No 1, page 27. See also Adoption Good Practice Guide No 2, page 13.

<sup>291</sup> Adoption Good Practice Guide No 1, para 4.2.3.

## CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION

### CHAPTER III – CENTRAL AUTHORITIES AND ACCREDITED BODIES

#### Article 6

(1) A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

(2) Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority and to specify the territorial or personal extent of their functions. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.

#### Article 7

(1) Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to protect children and to achieve the other objects of the Convention.

(2) They shall take directly all appropriate measures to –

a) provide information as to the laws of their States concerning adoption and other general information, such as statistics and standard forms;

b) keep one another informed about the operation of the Convention and, as far as possible, eliminate any obstacles to its application.

#### Article 8

Central Authorities shall take, directly or through public authorities, all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention.

#### Article 9

Central Authorities shall take, directly or through public authorities or other bodies duly accredited in their State, all appropriate measures, in particular to –

a) collect, preserve and exchange information

## CROSS-BORDER SURROGACY

This is a general clause requiring states party to the Convention to designate a Central Authority to discharge the duties imposed by the Convention.

This imposes on Central Authorities the duties of administrative co-operation, and would be required in the cross-border surrogacy context. Certain changes tailored to surrogacy would be necessary, but the basic model of co-operation in principle would be workable and appears to afford the most obvious means of facilitating/regulating/monitoring surrogacy practice.

The question of the legality of payment for surrogacy services is one of central policy importance. Any duty imposed on the Central Authorities, akin to Art 8 of the Adoption Convention, would require to be tied in to whatever choice of law rule (if any) were formulated in the putative instrument/regime.

Mutatis mutandis.

about the situation of the child and the prospective adoptive parents, so far as is necessary to complete the adoption;

b) facilitate, follow and expedite proceedings with a view to obtaining the adoption;

c) promote the development of adoption counselling and post-adoption services in their States; d) provide each other with general evaluation reports about experience with intercountry adoption; e) reply, in so far as is permitted by the law of their State, to justified requests from other Central Authorities or public authorities for information about a particular adoption situation.



Article 10

Accreditation shall only be granted to and maintained by bodies demonstrating their competence to carry out properly the tasks with which they may be entrusted.

Mutatis mutandis.

Article 11

An accredited body shall –

a) pursue only non-profit objectives according to such conditions and within such limits as may be established by the competent authorities of the State of accreditation;

b) be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoption; and

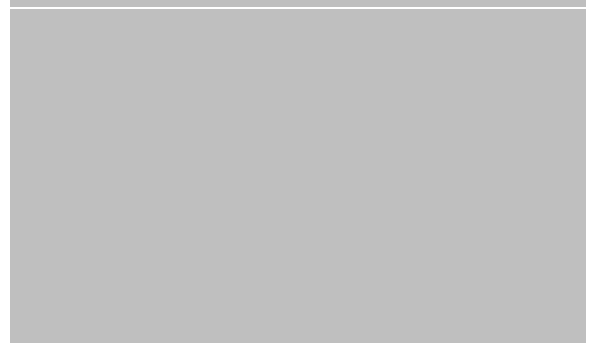
c) be subject to supervision by competent authorities of that State as to its composition, operation and financial situation

Mutatis mutandis.

Article 12

A body accredited in one Contracting State may act in another Contracting State only if the competent authorities of both States have authorised it to do so.

Mutatis mutandis.



Mutatis mutandis.

#### **4.6. ISSUES OF RECOGNITION AND ENFORCEMENT OF THE SURROGACY ARRANGEMENT**

There are at least two separate issues in this regard:

- (a) Recognition and enforcement of the surrogacy agreement.

This is largely a matter of contract concerned with enforceability of a contract *inter partes*, to which rules of jurisdiction and choice of law, such as those described in Sections III and IV, above, would be relevant.

- (b) Recognition and enforcement of foreign judgments/authentic instruments relating to surrogacy, if any; and/or (more likely) the legal effects of surrogacy, including in particular, the attribution of legal parenthood.

This is largely a matter of civil status. Parallels can be drawn with the situation in intercountry adoption, and assistance could be derived from the approach in Chapter V of the Adoption Convention (*q.v.*).

At present, there are no harmonised rules concerning international recognition of the legal effects of surrogacy.

##### **4.6.1. Inter-country adoption and legal parenthood**

The main challenge in the drafting of the Adoption Convention was devising recognition provisions apt to cover recognition of a status which varies from country to country, some adoption laws effecting full adoption, and others only simple adoption. This problem of bifurcation will not generally be present in the cross-border surrogacy situation, but other provisions of the Adoption Convention may be relevant.

The solution in the Adoption Convention is that an adoption certified by the competent authority of the state of the adoption (being the state of origin, or the receiving state, as the case may be), as having been made in accordance with the Convention, shall be recognised as having operation of law in the other Contracting States (Art 23). The recognition of an adoption may be refused in a Contracting State only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child (Art 24).

Crucially, by Article 26(1) of the Adoption Convention, the recognition of an adoption *includes* recognition of (a) the legal parent-child relationship between the child and his/her adoptive parents; (b) parental responsibility of the adoptive parents for the child; and (c) the termination of a pre-existing legal relationship between the child and his/her biological parents, if the adoption has this effect in the Contracting State where it was made.

By Article 26(2), where an adoption has the effect of terminating a pre-existing legal parent-child relationship, the child shall enjoy in the receiving State, and in any other Contracting State where the adoption is recognised, rights equivalent to those resulting from adoptions having this effect in each such state.

Notably, in connection with citizenship:

497. With regard to the acquisition of citizenship through intercountry adoption, the clear trend among States which are Parties to the Hague Convention of 1993 is in favour of according automatically to the adopted child the nationality of the receiving State, provided that the adopter or one of them has the nationality of that State.

498. A fairly typical example is the United Kingdom's Adoption (Intercountry Aspects) Act 1999 which provides for a child adopted under the Hague Convention to have British citizenship conferred on him / her, provided that all the requirements of the Convention have been met and at least one adoptive parent is a British citizen at the time the adoption order is made and both (in the case of a joint application) are habitually resident in the United Kingdom.<sup>292</sup>

#### 4.6.2. Cross-border surrogacy, contractual validity and legal parenthood

As indicated above, insofar as surrogacy is based in contract, whereas intercountry adoption is not, the Adoption Convention does not provide a complete model. The matter of the enforceability of the contract between a surrogate mother and the intended parent(s) would be anterior to (say) the state of origin's decision as to the eligibility and suitability of the parties. Nonetheless, the Adoption Convention is a useful template as regards civil status implications of surrogacy.

As noted above, consideration would require to be given to whether or not a putative EU regime were intended to regulate the *entirety* of the surrogacy undertaking, that is, the contractual dimension (from the initiation of negotiations between the surrogate mother and intended parent(s)) AND the civil status dimension (through to completion of the process, and transfer of the child to the intended parent(s), i.e. the physical transfer of the child to the receiving state, and legal transfer of the child (and legal parenthood) to the intended parent(s), with concomitant incidents regarding the child's citizenship and right to reside in the receiving state).

In order to eliminate potential conflict between the provisions of a contractual *lex causae* (governing the contractual aspects of surrogacy, that is, rights of the contracting parties *inter se*) and the provisions of a civil status *lex causae* (governing the civil status implications of surrogacy, that is, the rights and duties of the interested parties *contra mundum*), it is probable that the putative EU regime should govern the *entirety* of the cross-border surrogacy undertaking, and that in terms of the regime the civil status *lex/leges causae* should prevail (because of overarching child welfare considerations) if the content thereof were to differ from that of the contractual *lex causae*.

An alternative solution would be for the regime to provide that the contractual *lex causae* must coincide with the civil status *lex causae*. Insofar as the law of the state of origin and the law of the receiving state are the laws most likely to form the basis of a putative EU regime in respect of civil status, as above suggested (cf. Arts 4 and 5, Adoption Convention), it would seem that, in order to avoid a clash between the contractual *lex causae* and the civil status *lex causae*, each of the two primarily interested legal systems, namely, the law of the state of origin and the law of the receiving state, would require to be recognised as the principal connecting factors with regard to choice of law in contract. But, if there were not a single civil status *lex causae*, but rather the laws of the state of the origin and of the receiving state operate in tandem (cf. Arts 4 and 5 of the Adoption Convention), there would present a further difficulty.

It would not be appropriate to downgrade the role of the contractual *lex causae* to a vanishing point, because there could be instances where the surrogacy arrangement would fail, and the process envisaged in the Adoption Convention model would not be engaged (e.g. where no baby were born to the surrogate mother). In this situation, it would be entirely possible that a purely contractual dispute would arise between the parties, requiring application of a governing law in contract. There would have to be a contractual *lex causae*, even if the suggestion to align it with the civil status *lex/leges causae* did not find favour.

<sup>292</sup> See Adoption Good Practice Guide No 1, para 8.4.5.



Thus, on the model of the Adoption Convention:

<b>CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION</b>	<b>CROSS-BORDER SURROGACY</b>
<p><b>CHAPTER V – RECOGNITION AND EFFECTS OF THE ADOPTION</b></p> <p>Article 23</p> <p>(1) An adoption certified by the competent authority of the State of the adoption as having been made in accordance with the Convention shall be recognised by operation of law in the other Contracting States. The certificate shall specify when and by whom the agreements under Article 17, sub-paragraph c), were given.</p> <p>(2) Each Contracting State shall, at the time of signature, ratification, acceptance, approval or accession, notify the depositary of the Convention of the identity and the functions of the authority or the authorities which, in that State, are competent to make the certification. It shall also notify the depositary of any modification in the designation of these authorities.</p>	<p>Mutatis mutandis.</p> <p>The Abduction Convention achieved a breakthrough in establishing a system of automatic recognition of adoptions made in accordance with the Convention. Every adoption certified as made in accordance with Convention procedures is recognised in all other Contracting States.</p> <p>‘In other words, the Convention gives immediate certainty to the status of the child, and eliminates the need for a procedure for recognition of orders, or re-adoption, in the receiving State.’<sup>293</sup></p>
<p>Article 24</p> <p>The recognition of an adoption may be refused in a Contracting State only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child.</p>	<p>If surrogacy per se offends the public policy of a Member State, it would be preferable for that State to decline to participate in any harmonisation instrument reached by enhanced co-operation procedure.</p> <p>The public policy provision which is universally found in private international law rules would therefore be seen as a customary ‘backstop’ in a surrogacy instrument, permitting forum discretion in extreme cases, e.g. where despite process and safeguards, exploitation and duress could be proved.</p>
<p>Article 26</p> <p>(1) The recognition of an adoption includes recognition of</p> <ul style="list-style-type: none"><li>a) the legal parent-child relationship between the child and his or her adoptive parents;</li><li>b) parental responsibility of the adoptive parents for the child;</li><li>c) the termination of a pre-existing legal relationship between the child and his or her mother and father, if the adoption has this effect in the Contracting State where it was made.</li></ul>	<p>The Adoption Convention makes provision (Arts 26–27) about the effect of a recognisable adoption, one of which is the recognition of the legal parent-child relationship between the child and his or her adoptive parents.</p> <p>This would be an extremely important provision in a putative surrogacy instrument.</p>

<sup>293</sup> The 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption: Information Brochure (2012), p 6.

(2) In the case of an adoption having the effect of terminating a pre-existing legal parent-child relationship, the child shall enjoy in the receiving State, and in any other Contracting State where the adoption is recognised, rights equivalent to those resulting from adoptions having this effect in each such State.

(3) The preceding paragraphs shall not prejudice the application of any provision more favourable for the child, in force in the Contracting State which recognises the adoption.

Article 27

(1) Where an adoption granted in the State of origin does not have the effect of terminating a pre-existing legal parent-child relationship, it may, in the receiving State which recognises the adoption under the Convention, be converted into an adoption having such an effect –

a) if the law of the receiving State so permits; and

b) if the consents referred to in Article 4, subparagraphs c and d, have been or are given for the purpose of such an adoption.

(2) Article 23 applies to the decision converting the adoption.

**CHAPTER VI – GENERAL PROVISIONS**

Article 30

(1) The competent authorities of a Contracting State shall ensure that information held by them concerning the child's origin, in particular information concerning the identity of his or her parents, as well as the medical history, is preserved.

(2) They shall ensure that the child or his or her representative has access to such information, under appropriate guidance, in so far as is permitted by the law of that State.

Article 31

Without prejudice to Article 30, personal data gathered or transmitted under the Convention, especially data referred to in Articles 15 and 16, shall be used only for the purposes for which they were gathered or transmitted.

Article 32

(1) No one shall derive improper financial or other gain from an activity related to an intercountry adoption.

(2) Only costs and expenses, including reasonable professional fees of persons



It is to be hoped in surrogacy that there would be no need to provide for two-tier status. It is the essence of the surrogacy agreement that there will be a termination of any legal relationship (per the law of the state of origin) between the child and the surrogate mother, and it must be expected that the civil status provisions of a putative EU regime would seek to secure this outcome contra mundum.

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Mutatis mutandis.

The different attitudes in Member States towards commercial surrogacy is a difficult issue. This would become a policy issue. A choice of law rule would have to be formulated, to reflect the policy decision, in order to govern the matter of legitimacy or not of payment to the surrogate mother of a sum by way of

<p>involved in the adoption, may be charged or paid.</p> <p>(3) The directors, administrators and employees of bodies involved in an adoption shall not receive remuneration which is unreasonably high in relation to services rendered.</p>	<p>remuneration/compensation in addition to costs and expenses. Likewise, a choice of law rule would be necessary to determine the extent to which accredited agencies may operate on a commercial basis.</p>
<p>Article 33</p> <p>A competent authority which finds that any provision of the Convention has not been respected or that there is a serious risk that it may not be respected, shall immediately inform the Central Authority of its State. This Central Authority shall be responsible for ensuring that appropriate measures are taken.</p>	<p>Mutatis mutandis.</p>
<p>Article 34</p> <p>If the competent authority of the State of destination of a document so requests, a translation certified as being in conformity with the original must be furnished. Unless otherwise provided, the costs of such translation are to be borne by the prospective adoptive parents.</p>	<p>Mutatis mutandis.</p>
<p>Article 35</p> <p>The competent authorities of the Contracting States shall act expeditiously in the process of adoption.</p>	<p>Mutatis mutandis.</p>
<p>Article 36</p> <p>In relation to a State which has two or more systems of law with regard to adoption applicable in different territorial units –</p> <p>a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;</p> <p>b) any reference to the law of that State shall be construed as referring to the law in force in the relevant territorial unit;</p> <p>c) any reference to the competent authorities or to the public authorities of that State shall be construed as referring to those authorised to act in the relevant territorial unit;</p> <p>d) any reference to the accredited bodies of that State shall be construed as referring to bodies accredited in the relevant territorial unit.</p>	<p>It is usual in an EU instrument to have a multi-legal system state provision, and to exclude the operation of renvoi (pace Rome IV).</p> <p>There would also have to be a provision such as Art 22(2) of the Rome I Regulation, re. 'internal' arrangements for states with more than one legal system.</p>
<p>Article 39</p> <p>(1) The Convention does not affect any international instrument to which Contracting States are Parties and which contains</p>	<p>It is usual in an international instrument to have a disconnection clause.</p> <p>Examples can be cited of bilateral arrangements being permitted alongside principal international</p>

provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument.

(2) Any Contracting State may enter into agreements with one or more other Contracting States, with a view to improving the application of the Convention in their mutual relations. These agreements may derogate only from the provisions of Articles 14 to 16 and 18 to 21. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention.

instruments, or in the absence of international regulation, but if an EU instrument on surrogacy were promulgated, it would seem unwise to authorise the overlaying of the putative EU regime by bilateral agreements.

#### 4.7. CONCLUDING REMARKS

Certain matters of overarching importance emerge, which require to be emphasised, viz.:

1. If a policy decision were to be taken that an EU level response to the legal issues arising from cross-border surrogacy is required, very careful attention at the outset would need to be paid to the definition of the term 'cross-border surrogacy'.
2. The territorial scope of a putative EU regime for cross-border surrogacy would be a matter of central importance. Bearing in mind the inevitable geographical constraints of a purely 'intra-EU', i.e. regional, response, consideration should be given to the desirability of a global solution, e.g., on a Hague Convention basis.
3. Within the framework of a putative EU regime, a decision would have to be taken as to whether the rules contained therein should be mandatory (in the sense of exclusive), and whether the regime should be facilitative and/or regulatory.
4. Whatever the nature of a putative EU regime, it should be recognised that cross-border surrogacy agreements encompass both matters of contract (private autonomy) and matters concerning the status and welfare of children, and the status of legal parenthood (public interest). It would be necessary for a decision to be taken on whether a putative EU regime should seek to regulate the private international law dimension of both these aspects within a single instrument/framework; and if so, the ranking of provisions *inter se*.
5. If an EU level response to the legal issues arising from cross-border surrogacy is thought desirable, consideration ought to be given to the need to draft harmonised rules of jurisdiction to cater for contractual issues, enforcement issues, regulatory issues, parental civil status issues, and child civil status issues, as set out in Section III.
6. If an EU level response to the legal issues arising from cross-border surrogacy is thought desirable, the question of what law governs various legal issues arising in connection with surrogacy would be of pivotal importance. Attention would require to be paid to the need, or not, for harmonised choice of law rules concerning the contractual aspects of cross-border surrogacy and the civil status implications thereof, as set out in Section IV.
7. Recognising the role of Central Authorities in the operation of Hague Conventions pertaining to children, consideration should be given to whether a similar administrative framework could usefully be replicated for use in an EU regime.

8. Whatever the nature of a putative EU regime, it is suggested that one of the principal aims which it should seek to deliver is certainty as to the legal parenthood of the child, and the child's entitlement to leave the state of origin, and to enter and reside permanently in the receiving state.

## 5. CONCLUSION AND SUMMARY OF RECOMMENDATIONS

This Report has provided a multi-layered consideration of surrogacy arrangements, to include empirical, policy and legal perspectives. In doing so, it has demonstrated both their complexity and increasing prevalence. While part of the complexity lies in the fact that surrogacy agreements must often operate in legal and regulatory frameworks that did not countenance their existence, or were designed to discourage or prohibit surrogacy as a practice, complexity also lies in the wide range of ethical and policy issues that surrogacy agreements raise. The dearth of empirical data about surrogacy as a practice makes it difficult to know how to proceed in relation to ethical, policy and legal concerns, particularly in light of not only a lack of public consensus about surrogacy, but also the polarisation of attitudes that the practice effects. Yet, to fail to respond to the legal and regulatory challenges presented by the increasing prevalence of surrogacy appears untenable, both at the national and supra-national level.

### 5.1. EMPIRICAL DATA

While the empirical data collected for this Report certainly indicated an increasing prevalence of surrogacy in the EU, to include in a Member State where surrogacy is legally prohibited, the research process further identified and confirmed the difficulties in collecting accurate information in the context of surrogacy. This is particularly true for quantitative information, as unlike other reproductive techniques such as e.g. IVF, there is simply no national reporting mechanism for surrogacy arrangements. Even in Greece, as the only EU member state to provide for an *ex-ante* legal facilitation of gestational surrogacy, no attempt is made to collate statistics on a national level. This makes it very difficult for individual fertility clinics or surrogacy agencies to respond to queries about the national prevalence of surrogacy, as realistically they can only report on their own records, if indeed such information has been collated by the fertility clinic or surrogacy agency. Likewise, where civil status records can be accessed in order to estimate the prevalence of surrogacy in a particular country, we must remain circumspect as to what such records tell us about the prevalence of surrogacy, in light of the fact that the legal relations between the intended parent(s) and the child born from a surrogacy arrangement may never be formally settled.

This study therefore confirms that only very limited data are available across the EU and recommends that improved systems need to be put in place to routinely record relevant information across all countries.

### 5.2. POLICY CONCERNS

The policy research carried out for this Report emphasises the wide range of policy concerns raised by the practice of surrogacy. Crucially, this policy research makes clear that surrogacy must be understood as a global phenomenon, with policy implications both within national regimes, given differing cultural, political and national concerns relating to assisted reproduction, and as between different national regimes when people travel to other countries to engage in surrogacy agreements. Cross-border arrangements in particular have important health policy implications relating to not only the provision of fertility treatment for the purposes of surrogacy, but also in relation to the health infrastructure of the country hosting the surrogacy agreement. There may also be policy issues surrounding the ability of children born following a surrogacy agreement to gain access to healthcare. Moreover, the financial dynamics of surrogacy cannot be ignored, whether these relate to disparities in wealth as between the intended parent(s) and the surrogate mother, or as between the relative wealth of the countries where people travel *from* or *to*, in order to practice surrogacy. Attention must also be given to other parties who may profit from surrogacy, such as surrogacy agencies and medical professionals.



Surrogacy is also a highly gendered phenomenon and as the research for this Report makes clear, this must be seen in the context of globalisation, whereby women from lower income countries are increasingly acting as surrogate mothers for women and men from higher income countries. Issues of wealth disparity in the context of surrogacy are perhaps inevitable, to include surrogacy agreements that do not involve cross-border travel.<sup>294</sup> The policy priority may therefore be to help ensure fair practices and reduce the risk of exploitation of women who act as surrogate mothers, as well as the children who are born from surrogacy agreements. Yet the gendered implications of surrogacy are more extensive than the position of the surrogate mother, and relate also to intended mothers, egg donors and of course the general attitude towards women in a society that may emerge from the practice and regulation of surrogacy.

This study has provided a preliminary overview of the wide range of policy concerns relating to surrogacy as a practice on both the national and global level. It recommends further empirical research into these concerns, particularly those relating to health policy and gender. In particular, qualitative research on the experience of surrogacy would add an invaluable perspective for future policy and legislative work in this area.

### 5.3. LEGAL

The legal research for this Report was fourfold. It considered:

- i. National legislative models for surrogacy.
- ii. National case-law approaches to a range of issues raised by surrogacy.
- iii. Possible EU legal approaches to surrogacy.
- iv. Possible private international law approaches to surrogacy.

The extensive examination of national legal approaches to surrogacy in this Report demonstrates the sheer array of legal issues that need to be considered in this context and the range of approaches that might potentially be taken. It is impossible to indicate a particular legal trend across the EU and while an increasing number of Member States are leaning towards legislating for surrogacy, there remains considerable debate as to what form such legislation should take. While all Member States indicate a policy concern with the welfare of the child, the meaning that is given to the principle and how law is evoked to help ensure it, varies greatly: from general prohibitions on all forms of surrogacy, to an *ex-ante* legal management of the practice which frames legal parenthood prior to the child's birth. However, what all Member States appear to agree on is the need for a child to have clearly defined legal parents and civil status; however such is eventually facilitated in legal terms.

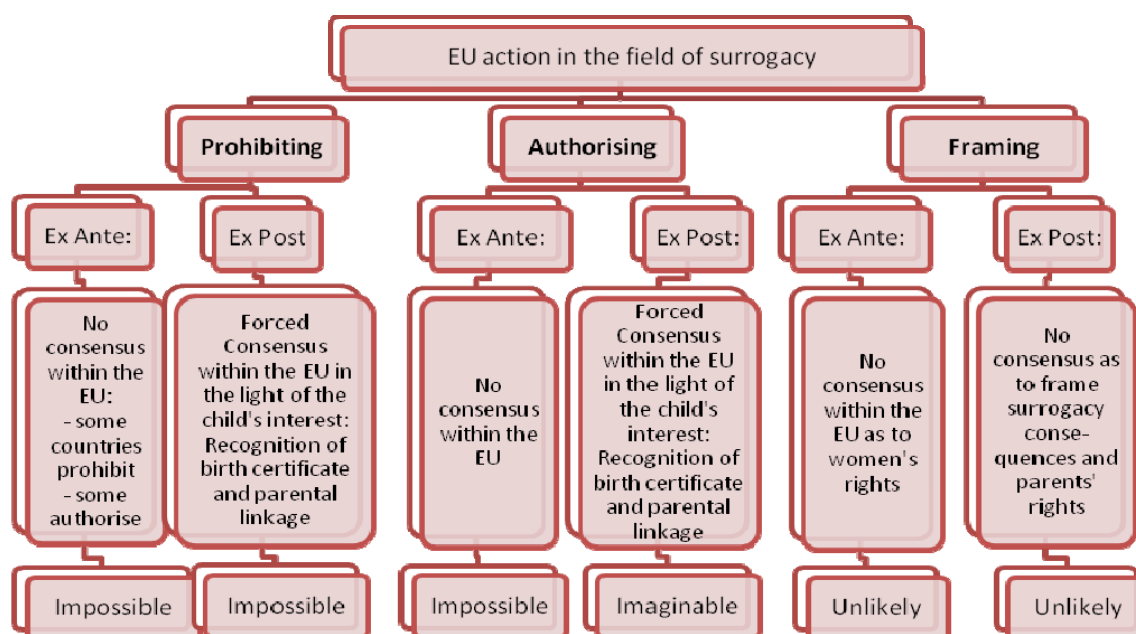
Sections 3 and 4 of this Report consider the EU and private international law dimensions of surrogacy respectively. Each section provides a considerable analysis of the legal issues arising from surrogacy in each context, as well as mapping out potential ways forward for EU and private international law.

This research indicates that while the EU remains a relevant place for action given the existing differences between Member States, the multiplication of questions sent to the ECHR and the *sui generis* effective legal order that the EU proposes, it may not necessarily be the most appropriate level at which to regulate. The territorial limitations of a purely intra-EU regime signal the desirability of a more global response, as considered in detail in Section 4 of this Report.

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<sup>294</sup> See the country report on Greece in the Annex, which provides details on the women who acted as surrogate mothers in the applications for the approval of a surrogacy agreement before the court in Thessaloniki. In many cases the woman, although now residing in Greece, was originally from a lower-income country and had worked as a domestic worker for either the intended mother or a member of her family.

By way of a final conclusion to this Report, we have devised a table of the different possible actions of the EU to accompany the phenomenon of surrogacy. This table is reproduced below. However, what seems clear in thinking about the future competency of the EU in this area is that Member States will retain the competency to decide on what moral grounds to act and what policy decisions to make on the permissibility of surrogacy. If an action or a legislative act was adopted, the instrument in which any harmonised response would be delivered would be required to recognise the wide spectrum of domestic law attitudes to surrogacy across states: if, as a matter of policy, a given legal system does not admit surrogacy in its domestic law, it would be inappropriate to impose on it a (European) structure of cross-border surrogacy regulation. As the table below indicates, any consensus that is apparent across the EU is forced. After the table, a number of further questions about EU competency in these areas are considered.



### 5.3.1. Why should the EU regulate in this area?

The EU would only regulate if it brings an added value to the framing of surrogacy.

The EU can regulate only if it manages to prove subsidiarity.

Subsidiarity is a test which consists in asking whether the EU is the best level to regulate a given subject. In this case, the EU would have to show that there is an international (cross-border) dimension which entails its action. More specifically, this cross-border element could be found where an intended parent moves from one country which prohibits surrogacy to have this procedure in another Member State which authorises it and then returns in his/her own Member State.

As indicated above, however, we must question whether the international level or a global approach (e.g. an international convention) would not be more appropriate as countries from all around the world are involved in addressing cross-border surrogacy issues. The EU would therefore have to establish the need for a regional response to this otherwise international question.

The lack of consensus between the Member States on the permissibility of surrogacy makes it highly unlikely that a majority or even unanimity could be obtained in the Council on a substantial harmonisation. Surrogacy is a contentious issue which raises

arguments of public order, morality, dignity and constitutional identity. In addition, the health policies and social infrastructure of each Member State will have a significant bearing on any regulation of surrogacy.

In cognate cases, the ECHR has indicated that: 1) there is no consensus in relation to assisted reproduction; and 2) that where there is no consensus, a wide margin of appreciation should be left to States (see Section 3 of this Report). The case-law of the CJEU has also indicated this approach (see Section 3 of this Report). Nonetheless, a fragile consensus amongst Member States can perhaps be identified, in relation to the acknowledgment of the child's civil status and legal parenthood.

### **5.3.2. How could the EU regulate in this area?**

In any case, a political choice should be considered regarding a possible action. Three solutions are accounted for in this conclusion: 1) Prohibiting, 2) Authorising and 3) Framing surrogacy.

#### *5.3.2.1. Prohibiting*

Prohibiting surrogacy means to prevent either the conception of a surrogate child and/or the recognition of this child in another State than where she/he was born. If the EU is to choose this option, it should consider both aspects.

#### **Prohibiting the ex-ante mechanisms of conception of the surrogate child**

If the EU is to prohibit the conception of a child through surrogacy mechanisms, it should look for a consensus among the Member States. This consensus is not found in the EU, which renders this option difficult to imagine.

#### **Prohibiting ex-post mechanisms of recognition**

If the EU is to prohibit the conception of a child through surrogacy mechanisms, it should look for a consensus among the Member States. This consensus is not found in the EU, which renders this option difficult to imagine.

#### *5.3.2.2. Authorising*

Authorising surrogacy means to allow either the conception of a surrogate child and/or the recognition of this child in a State other than the one where she/he was born. If the EU is to choose this option, it should consider both aspects.

#### **Authorising ex-ante mechanisms of conception of the surrogate child**

If the EU is to authorise the conception of a child through surrogacy mechanisms, it should look for a consensus among the Member States. This consensus is not found in the EU, which renders this option difficult to imagine.

#### **Authorising ex-post mechanisms of recognition**

We can consider that the recognition of the freedom of movement of European citizens and the existing mutual recognition of the civil status from one Member State to the other is reflecting the existing consensus regarding surrogacy.

It must be acknowledged, however, that not all Member States are happily facilitating the recognition of the civil status and the legal parenthood of a child born through surrogacy. If some Member States now provide for legal orders and guidelines in order to make this recognition possible, others still require a painful judicial process and the

children (and parents) face uncertainty as to the recognition. Others still will only facilitate this process through exceptional administrative, as opposed to legal processes.

It could be argued that leaving the free movement rules to operate as they do so now, amounts to an implicit authorisation of surrogacy.<sup>295</sup> Regarding *ex-ante* mechanisms, the freedom of establishment of intended parents in Greece and the freedom of patients generally are ways through which intended parents may be able to access legally permitted surrogacy. Regarding *ex-post* mechanisms, mutual recognition within the EU (mostly via national laws and not EU law<sup>296</sup>) allows the desired civil and parental status of children born through surrogacy to be recognised in their State of residence.

This at once presents an advantage and an inconvenience. While it leaves difficult ethical and policy questions to the jurisdiction of Member States, it is in practice an inconvenience to their sovereignty as the choice of how to regulate is taken out of their hands by the mere existence of competitive systems. As we know that this occurrence is not limited to surrogacy arrangements which take place in Europe, this adds a further dimension to the encroachment of the sovereignty of the Member States. This constitutes a possible argument in favour of EU regulation on this issue. In other words, while framing surrogacy and reaffirming civil status mutual recognition may be a difficult regulatory option for the EU, it may be preferable to the realities of what is currently happening.

#### 5.3.2.3. Framing

Several examples of framing surrogacy are provided by legal orders which authorise it.

We need to distinguish between situations which are internal to the EU and situations which are in and outside the EU. As regards the later, they cannot be tackled by the EU unless the EU was to adhere to a broader international convention. As regards the former hypothesis, it remains unlikely to date, whether we consider substantial harmonisation or a procedural coordination via international private law.

#### **Substantial harmonisation**

Whatever choice is made, the action should be based on a legal basis in the EU treaties.

Under the Treaties and the case law of the Court of Justice, the EU cannot extend its competences using fundamental rights, including children's rights. In other words, it does not have a general competence in the area of fundamental rights. However, under Article 6.2 of the Treaty on the European Union, the EU must respect fundamental rights in whatever action it takes in accordance with its competences. These rights include in particular the ECHR, which contains provisions concerning children's and parents' rights, i.e. the rights to family life and to private life (art 8 ECHR).

Moreover, the provisions of the UNCRC must be taken fully into account. The Charter of Fundamental Rights, independently of its legal status<sup>297</sup>, may be seen as a particularly authentic expression of fundamental rights guaranteed as general principles of law. In addition to the rights to family life and to private life, article 24 of the Charter is about the protection of children. It is reinforced by Article 3 of the Lisbon treaty, also about the protection of children.

The EU's obligation to respect fundamental rights, including children's rights, implies not only a general duty to abstain from acts violating these rights, but also to take them into

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<sup>295</sup> As recalled by the ECHR regarding IVF in the S.H. case, see supra.

<sup>296</sup> See Section 2 of this Report.

<sup>297</sup> One will think of the protocols regarding the United Kingdom and Poland.

account wherever relevant in the conduct of its own policies under the various legal bases of the Treaties.

Notwithstanding the above-mentioned lack of precise treaty competence, various particular competences under the Treaties could allow the EU to take specific positive action to frame surrogacy. Any such action needs to respect the principles of subsidiarity and proportionality and must not encroach on the competence of the Member States.

- Fundamental rights: art 6.1 TEU on respect of fundamental rights and art. 3 TEU on the protection of children.
- Freedom of movement of patients: art 56 (services), 34 (goods), 114 (approximation of laws) and 168 TFEU (public health).
- Freedom of movement of cells: art 114 and 168 TFEU.
- Freedom of movement of citizens and European citizenship: art 20 and 21 TFEU.
- Non-discrimination: art 19 TFEU.
- European international private law: Art 67 (4) and 81 TFEU.<sup>298</sup>

Several methods are available:

- Judicial change: case law effect.
- Legislative action.
- Soft law.
- Mainstreaming of fundamental rights: right to family life, right to private life and protection of children.
- Financial assistance.
- Political dialogue: help organised at the EU level to the national actors.

In the context of cross-border surrogacy, in the event of insurmountable policy difficulties liable to make unanimity of response among all Member States impossible, it is likely that the enhanced cooperation procedure would be an interesting one. The idea would then be to identify a central authority in each Member State and to coordinate between different existing legal answers to surrogacy.

### **International Private Law instrument**

On the basis of Articles 67 (4) and 81 TFEU, one could imagine a harmonisation of conflict-of-law rules or a mutual recognition. As Section 4 of this Report considers, one question which emerges from the current study is whether it would be a valuable exercise to create bespoke harmonised rules of jurisdiction. Issues of jurisdiction and choice of law would be raised<sup>299</sup>. Since these issues may arise irrespective of the birth of a child, it is possible that any rules of jurisdiction could be modelled on rules of civil and commercial jurisdiction, rather than on rules of jurisdiction pertaining to parental responsibility. Restricting analysis to an 'intra-EU' solution (i.e. to circumstances concerning an EU-domiciled defendant), and taking as a template the rules in the

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<sup>298</sup> Article 67(4) and Article 81 TFEU give the Union the power to enact secondary law for the recognition of judicial and extrajudicial decisions in civil and commercial matters, which includes the power to lay down jurisdiction and conflict-of-laws rules. The Brussels I Regulation on the jurisdiction and recognition of judgments in civil and commercial matters, the Rome I and II Regulations on the law applicable to contractual and non-contractual obligations, the Brussels II Regulation on matrimonial proceedings and parental responsibility (2201/2003) and the new 1259/2010 Regulation on the law applicable to divorce provide relevant examples of harmonisation of EU PIL and show that the EU is slowly turning from commercial and trade issues towards family law. These developments are associated to the building of an area of freedom, security and justice for the European citizens (see the Stockholm programme, COM 2010/171). The building of the Area of freedom, security and justice is part of the completion of the Internal Market (art. 3 TUE). They are not applicable to surrogacy but they provide interesting examples of mutual recognition.

<sup>299</sup> See Section 4 of this Report.

Brussels I Regulation<sup>300</sup>. But again, insurmountable policy difficulties might appear and make unanimity of response among all Member States impossible.

A lighter solution would amount to assisting national authorities in the quest for practical solutions.

The deepening of civil status mutual recognition also appears as a good solution. An opinion of the Committee of the Regions on the communication of the Commission about 'Less bureaucracy for citizens: Promoting free movement of public documents and recognition of the effects of civil status records' was released in February 2012<sup>301</sup>. It seems to be an encouraging direction as the Commission recently proposed to get rid of the requirement of the so-called 'Apostille' certificate which is used by public authorities in other states as proof that public documents, or the signatures of national officials on documents, are genuine<sup>302</sup>. It encourages the free movement of public documents and the creation of a European civil status office. One proposition could also be to copy and adapt article 21(2) of the above mentioned Regulation 2201/2003 to state that "no special procedure shall be required for updating the civil-status records of a Member State on the basis of a decision relating to *SURROGACY* given in another Member State". But, here again, the Member States' divergences might be an obstacle to such proposals.

#### *5.3.2.4. Other solution: Joining an international convention*

There is a need to tackle issues which go beyond the EU (i.e. where one party is not a national from the EU/where a non EU State has an interest in the surrogacy arrangement). The EU could consider adhering to an international instrument regulating these issues on the grounds of its external competences to join treaties.

To date, no international convention on surrogacy exists. The Hague Conference on Private International Law and the International Commission on Civil Status are both envisaging such a measure.<sup>303</sup> A solution is to start negotiating it. It would be an instrument of potentially global reach where Contracting States would be free to ratify or not.

### **5.3.3. More work is necessary**

This report has provided a detailed, but preliminary consideration of the direction of any future EU measure in the area of surrogacy. We would recommend that particular attention be given to the following in any future EU work on the area of surrogacy:

- To question the EU legal basis and their potential to frame surrogacy.
- To draft a hypothetical legislative act.
- To assess the relationship between the EU, the Hague Conference on Private International Law and the ICCS in the field of surrogacy. Their work is progressing and the EU should remain a key-actor in the negotiations and research.

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<sup>300</sup> See Section 4 of this Report.

<sup>301</sup> OJ C 54, 23.2.2012, p. 23–27.

<sup>302</sup> See Commission Proposal of Regulation of the European Parliament and of the Council on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation 1024/2012, see also <http://europa.eu/citizens-2013/en/news/no-more-costly-and-bureaucratic-stamps-public-documents-%E2%80%93-european-commission-acts-slash-red-ta>.

<sup>303</sup> See Section 3 of this Report.



## 6. COUNTRY REPORTS

### 6.1. AUSTRALIA

Although there are no legal provisions relating to the issues raised by the practice of surrogacy on a federal level, the vast majority of the Australian states have recently introduced legislation that allows for and expressly regulates surrogacy. The individual state legislatures are free to impose their own specific conditions that set limits, ban, or impose (sometimes severe) hurdles to the legal acknowledgement of the family relationships stemming from a surrogacy contract. Commercial surrogacy is prohibited in all states, and a criminal conviction is more than a mere possibility. Surrogacy services for the provision of which no money exchange is arranged, namely the form of altruistic surrogacy, is allowed by all state legislations, with the exception of the Tasmanian Surrogacy Contracts Act 1993, which unequivocally renders all surrogacy arrangements void and unenforceable as contrary to the social ethos and policy (paragraph 7).

According to recently published statistical data, the incidence of surrogacy in Australia was not very widespread, with just seventy four reported cases of fertilisation for the purpose of surrogacy in 2007, which resulted in only four live births.<sup>304</sup> However, this may well be an underestimate given the accepted dearth of empirical research about surrogacy in Australia<sup>305</sup>, both in relation to up-to-date statistical and experiential data, as well as studies which consider children conceived outside of the jurisdiction in cross-border surrogacy agreements.<sup>306</sup> In a report by the Victorian Law Reform Commission, reference was made to an unpublished study involving interviews with thirteen gestational surrogates.<sup>307</sup>

With respect to law, a series of major reforms in 2008 to the federal-level Family Law Act 1975 (FLA) brought the issue of surrogacy and legal parenthood to the fore. In its previous form, the FLA did not deal with the matter of legal parenthood in cases of collaborative reproduction involving same-sex lesbian couples or surrogacy.

Under the 2008 amendments of subsection 60HB of the FLA, the definitions of "parent" and "child" in federal law have been extended to include lesbian parents who have a child through collaborative reproduction and/or fertility treatment, and to some parents who have children through surrogacy arrangements. The effect of subsection 60HB FLA is to clarify that any transfer of legal parenthood by state and territory courts for surrogacy families alters legal parental status under the FLA.

Up until 2010, surrogacy laws in Australia varied significantly from state to state. However, some uniformity was accomplished when all states – except Tasmania – adopted laws that prohibited commercial surrogacy and accepted the occurrence of (gestational) surrogacy in limited circumstances.

The legal regimes in most states now currently present the option of a court-based issuance of a 'parentage order' that leads to the transfer of legal parenthood to the commissioning couple. This possibility is generally available to all opposite and same-sex couples in legal or 'de facto' relationships. The above mentioned legal process was deemed to be in accordance with the 'best interests of the child' because it ensures that

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<sup>304</sup> Constantinidis, D., Cook, R., 'Australian Perspectives on surrogacy: the influence of cognitions, psychological and demographic characteristics', *Human Reproduction*, Vol.27, No.4 pp. 1080–1087 (2012).

<sup>305</sup> See for example, Queensland Parliament Report, Investigation into Altruistic Surrogacy Committee (2008), paras 2, 11-13.

<sup>306</sup> Millbank, J., 'The new surrogacy parentage laws in Australia: Cautious regulation or '25 brick walls'?' 35 *Melbourne Law Review* 1-44.

<sup>307</sup> Victorian Law Reform Commission, Assisted Reproductive Technology and Adoption: Final Report (2007), paras 37, 161 and 178.

the child will not be left stateless or parentless, as well as protecting the surrogate mother from a coerced consent when offering her gestational services.

The following table illustrates the different pieces of legislation that cover the issue of surrogacy in each Australian state and briefly explains the basic content of the legal provisions.

State	Legal response	Content of legal provisions
Australia	<p>No express federal legal response to surrogacy other than the Family Law Act 1975, 60HB, which allows for federal-level recognition of any transfer of legal parenthood in the context of surrogacy by state or territory courts.</p> <p>Most states have express legislation permitting some form of surrogacy.</p>	<p>Summary of generally applicable legal provisions:</p> <ul style="list-style-type: none"> <li>• Commercial type of surrogacy is a criminal offence.</li> <li>• The rule of medical necessity exists. The commissioning couple should provide sufficient evidence of their inability to produce a child or carry a pregnancy to term.</li> <li>• The surrogate mother must be over 25 years old, able to carry a pregnancy, and have a history of a previous live childbirth.</li> <li>• Only gestational surrogacy arrangements are accepted. The eggs should not come from the surrogate.</li> <li>• Criminal records check to all participants in the arrangement.</li> <li>• The parties must undergo counselling.</li> <li>• Informed consent free from coercion is a prerequisite in some states.</li> <li>• Legal advice prior to the drafting of a surrogacy contract should be sought.</li> <li>• If state laws do not provide otherwise, it is accepted that the person(s) who have parental responsibilities towards the child is/are the intended parent(s). Parentage is acquired through adoption.</li> <li>• Surrogacy contracts are unenforceable.</li> <li>• The best interests of the child are paramount.</li> </ul>

<p><b>Australian Capital Territory (ACT)</b></p>	<p>Parentage Act 2004</p>	<ul style="list-style-type: none"> <li>• This legislation was closely based upon s. 30 of the UK HFEA 1990308, but its scope is arguably more limited. Only altruistic gestational surrogacy is acceptable, and the courts have no power on the authorisation of any payments made or to be made.</li> <li>• Commercial surrogacy is prohibited (para. 41).             <ul style="list-style-type: none"> <li>○ Parental recognition under strict requirements (par. 24-25):</li> <li>○ the child should be conceived via IVF performed in a fertility clinic based in the ACT;</li> <li>○ the surrogate mother and/or her potential partner should not have offered their genetic material;</li> <li>○ the parties have come to an agreement for substitute parenthood;</li> <li>○ the child is the product of the genetic material of at least one of the intended parents;</li> <li>○ intended parents' residence in the ACT.</li> </ul> </li> </ul>
<p><b>New South Wales (NSW)</b></p>	<ul style="list-style-type: none"> <li>- Surrogacy Act 2010 No 102</li> <li>- Assisted Reproductive Technology Act 2007</li> <li>- Assisted Reproductive Technology Regulations 2009</li> <li>- Status of Children Act 1996</li> <li>- Births, Deaths and Marriage Registration Act 2010</li> </ul> <p>(See also NSW Legislative Council Standing Committee</p>	<ul style="list-style-type: none"> <li>• Altruistic surrogacy allowed.</li> <li>• Presumption of motherhood for the birth mother. It is difficult for the intended mother to gain legal rights to parenthood.</li> <li>• Any surrogacy agreements must be drafted prior to the pregnancy, but they are unenforceable.</li> <li>• Transfer of legal parentage through parental orders.</li> <li>• Single and same-sex parenting is acceptable.</li> <li>• Age limit for the surrogate (she must be over 25) and the intended parent(s) (he/she/they must be over 18)</li> <li>• Payment of reasonable expenses is allowed.</li> </ul>

<sup>308</sup> Read further Millbank, J., 'De facto Relationships, Same-Sex and Surrogate Parents: Exploring the Scope and Effects of the 2008 Federal Relationship Reforms', (2009) 23(3) *Australian Journal of Family Law* 160.

	<p>on Law and Justice, 'Legislation on Altruistic Surrogacy in NSW', May 2009).</p>	
<p><b>Queensland</b></p>	<p>Surrogacy Act 2010</p>	<ul style="list-style-type: none"> <li>• This state's laws regarding surrogacy have been criticised as harsh. Under the previous regime (Surrogate Parenthood Act 1988) all forms of surrogacy were prohibited and criminal sanctions were in force. The maximum penalty was 100 penalty units<sup>309</sup> or three years of imprisonment for entering into or offering to enter into a surrogacy arrangement.</li> <li>• The change came in 2008, after the Queensland's Parliamentary Select Committee's recommendation for the legalisation of altruistic surrogacy (see also Queensland Parliament, 'Investigation into Altruistic Surrogacy', Report 2008). Queensland's law is said to be the most controversial one, as it allows for state intervention in matters relating to private contracting and intimate personal relationships.</li> <li>• Altruistic surrogacy.</li> <li>• No requirement of a genetic link between the intended parents and the child.</li> <li>• Conception can be accomplished by any means, not necessarily through the use of ARTs.</li> <li>• Same-sex and single parenting acceptable.</li> <li>• No residence requirements: the court has discretion to grant parenthood orders even in cases where the intended parents do not live in Queensland (Surrogacy Act 2010, s. 23 (2)).</li> <li>• Payment for reasonable expenses allowed.</li> </ul>
<p><b>South Australia</b></p>	<p>Family Relationships Act 1975, as amended.</p>	<p><b>During the lifetime of this study, restrictive reform to the Queensland Surrogacy Act 2010, relating to access to the legislation by single and same-sex couples was proposed.<sup>310</sup> This proposal has now been dropped.</b></p> <ul style="list-style-type: none"> <li>• Altruistic surrogacy.</li> <li>• Criminal penalties for intermediaries.</li> <li>• Automatic transfer of legal parentage (s. 10 (c)). The intended mother's husband is considered to be the legal father of the child (s. 10 (d)).</li> <li>• Surrogacy is only available to heterosexual married</li> </ul>

<sup>309</sup> The value of a penalty unit differs from state to state in Australia, and may be regularly reviewed by the state authorities. In Queensland, a penalty unit is currently 110 Australian Dollars. 100 penalty units would therefore be 1,100 Australian Dollars, which is approximately 847 EURO (calculated on 13<sup>th</sup> May 2013).

<sup>310</sup> See Smith, Malcolm K., Willmott, Lindy, Trowse, Pip, & White, Benjamin P. 'Back to the future: prohibiting surrogacy for singles, same-sex and shorter-term heterosexual couples in Queensland', (2013) 20(3) *Journal of Law and Medicine* 638-654.

		<p>couples or couples in a de facto relationship for a period of 3 years or more.</p> <ul style="list-style-type: none"> <li>• The intending couple must reside within the state's jurisdiction.</li> <li>• Pregnancy must be accomplished through the use of fertility treatment, which will take place in a licensed fertility clinic based in South Australia.</li> </ul>
<p><b>Tasmania</b></p>	<p>Surrogacy Contracts Act 1993</p> <p>See also Department of Justice 'Proposed Tasmanian Surrogacy Bill: Exposure Bill', 1 (2011).</p>	<ul style="list-style-type: none"> <li>• ALL types of surrogacy are prohibited for reasons of public policy.</li> <li>• Surrogacy contracts are void and unenforceable (par. 7)</li> <li>• Third-party intervention in a surrogacy agreement is a criminal offence (par. 5-6).</li> </ul>
<p><b>Western Australia</b></p>	<p>- Surrogacy Act 2008</p> <p>- Human Reproductive Technology Act 1991</p>	<ul style="list-style-type: none"> <li>• The Surrogacy Act came into force in 2009.</li> <li>• Surrogacy for commercial reasons is prohibited (par. 8-9).</li> <li>• Payments for reasonable expenses related to the pregnancy and insurance claims are allowed (par. 6 (3)).</li> <li>• A court authorisation process for parental orders and transfer of legal parentage to the intended parents is provided by law, and the child's best interests are paramount to this decision.</li> <li>• The intended parents must persuade the court for their fitness to parent the child (par. 13 (2)).</li> <li>• A plan of communication and contact between the parties must be submitted to the court.</li> <li>• The surrogate mother must be at least 25 years old and have a child of her own.</li> <li>• The progressiveness and innovation of this piece of legislation can be found in the availability of surrogacy also to a single man or a male couple.</li> <li>• At the same time, however, there are limitations which point to the requirement for the residency of the intended parent/ couple within the state's jurisdiction; the requirement of a pre-conceptual written surrogacy agreement; as well as that of a "cooling-off" period of 3 months for the surrogate mother to decide whether she would like to relinquish the child or not.</li> <li>• The request for a parental order can be reviewed by a government appointed Tribunal court.</li> </ul>

## Victoria

- The state of Victoria was the first to adopt a law on surrogacy.
- In 1995 the legislature introduced the Infertility Treatment Act, which classified commercial surrogacy as a criminal offence. Altruistic surrogacy was passively accepted, but in some cases it was practically impossible for intended parents to be allowed to perform fertilisation with the purpose of surrogacy, as under the Act the woman who would be treated (i.e. the surrogate mother) must have been infertile (para 20).
- In 2008, the Assisted Reproductive Treatment Act was passed (it came into force on 1 January 2010), and rendered surrogacy contracts void and unenforceable (par. 44).
- However, the practice of surrogacy was not illegal if the IVF treatment of the surrogate occurred within the Victorian jurisdiction.
- The law states an age limit for the surrogate (she must be over 25), as well as the precondition of a previous live birth and experience of motherhood, and requires prior consultation of all the participants with a legal professional, as well as counselling (dictated by the Assisted Reproduction Regulations of 2009).
- With regards to the intending mother, she must be infertile, and she and her partner must undergo and succeed in a criminal record and child protection check.
- Moreover, a number of organisations, such as the Victorian Assisted Reproductive Treatment Authority (VARTA) function in this state.
- More specifically, VARTA is responsible for the administrative matters of the ART Act 2008 and ensures that the participants have complied with the state law requirements.
- The Act refers to a Parent Review Panel, before which the parties of the surrogacy arrangement must present their case and provide evidence for their altruistic motives, their need for surrogacy in order to procreate, and their suitability to become parents. The decisions of this Panel are reviewable by the Victorian Civil and Administrative Tribunal.
- The Victorian Supreme Court holds the ultimate decisive power for the authorisation of individual requests for the acknowledgement of any substitute parental orders, which will then lead to the transfer of legal parentage.



## 6.2. BELGIUM

### A. Legislation

#### 1. Absence of legislation framing surrogacy and proposed legislation

Currently, Belgium does not have specific legislation in matters of surrogacy. The nullity of surrogacy conventions results from the illegality of its object and its 'cause', its opposition to the principles of non-availability of the human body and the civil status as well as the inalienable and non-available right of the mother who bears and gives birth to a child to determine parentage<sup>311</sup>. However, some hospitals take advantage of the legislative gap to attend to requests of surrogacy<sup>312</sup>. Doing so outside any legal framework, these hospitals have established strict rules to condition the practice of surrogacy.

Considering the nullity affecting it, when surrogacy takes place on Belgian territory, the contract cannot be subjected to enforcement<sup>313</sup>. Besides, parentage cannot be established in relation to the intended mother unless an adoption procedure takes place, the surrogate mother being considered the legal mother according to Belgian law<sup>314</sup>, while the intended father will have to, according to the circumstances, either acknowledge the child if the surrogate mother is not married, or engage an adoption procedure.

Facing this legislative gap, legislative propositions have been tabled at the parliamentary assemblies with the objective of either expressly forbidding for-profit surrogacy<sup>315</sup>, or to authorise and frame surrogacy under certain conditions<sup>316</sup>. In order to expose the state of the legislative reflections on the subject, the core ideas of the four propositions aiming at accepting the legalisation of surrogacy in certain circumstances are summarised in an overview table, which appears in the main body of this Report. An accent will be made on the analysis on the ways these propositions aim to answer the different questions arising from the issues of surrogacy, namely: the type of accepted surrogacy, the

<sup>311</sup> Cf. Articles 6 ("Statutes relating to public policy and morals may not be derogated from by private agreements") and 1128 of the Civil code ("Only things which may be the subject matter of legal transactions between private individuals may be the object of agreements")

<sup>312</sup> The hospital of the "Citadelle de Liège" and the hospital "Saint-Pierre" in Brussels, practice surrogacy in Belgium under certain conditions.

<sup>313</sup> N. GALLUS, *Le droit de la filiation. Rôle de la vérité socio-affective et de la volonté en droit belge*, Larcier, 2009, pp. 355 and s., n° 336 à 348.

<sup>314</sup> Art. 312 Civil code.

<sup>315</sup> Proposed law completing the Penal Code on dispositions relating to the commercialisation of surrogacy and the settling of the practice, of the 5<sup>th</sup> of April 2011, tabled by Mr Wouter Beke and associates, *Doc. parl.*, Senate, 2010-2011, n° 5-932/1 (Proposition identical to the Proposed law completing the Penal Code on dispositions relating to the commercialisation of surrogacy and the settling of the practice, of the 4<sup>th</sup> of May 2011, tabled by Mrs Nahima Lanjri and associates, *Doc. parl.*, Chamber, 2010-2011, n° 53-1429/1) ; Proposed law to forbid surrogacy with commercial purposes and publicity thereof, of the 9<sup>th</sup> of June of 2011, tabled by Mrs Marleen Temmerman and Mr Guy Swennen, *Doc. parl.*, Senate, 2010-2011, n° 5-1074/1 (identical to the Proposed law modifying the Penal Code in matters of surrogacy with commercial purposes, of the 28<sup>th</sup> of October 2010, tabled by Mrs Myriam Vanlerberghe, Mr Renaat Landuyt and Mrs Maya Detiège, *Doc. parl.*, Chamber, 2010-2011, n° 53-497/1) ; Proposed resolution concerning the international legal framework of surrogacy, of the 9<sup>th</sup> of June 2011, tabled by Mrs Elke Sleurs and Mrs Inge Faes, *Doc. parl.*, Senate, 2010-2011, n° 5-1075/1.

<sup>316</sup> Proposed law framing surrogacy, of the 9<sup>th</sup> of September 2010, tabled by Mr Bart Tommelein and associates, *Doc. parl.*, Senate, 2010, n° 5-130/1 ; Proposed law relating to surrogate mothers, of the 23<sup>rd</sup> of September 2011, tabled by Mrs Christine Defraigne, *Doc. parl.*, Senate, 2010, n° 5-160/1 ; Proposed law relative to surrogacy, of the 6<sup>th</sup> of October 2011, tabled by Mr. Philippe Mahoux, *Doc. parl.*, Senate, 2010, n° 5-236/1 ; Proposed law on the organisation of surrogacy centres, of the 5<sup>th</sup> of April 2011, tabled by Mrs Marleen Temmerman et Mr Guy Swennen, *Doc. parl.*, Senate, 2010-2011, n° 5-929/1, identical to the proposed law on the organisation of surrogacy centres, of the 12<sup>th</sup> of May 2011, tabled by Mrs Myriam Vanlerberghe, Mr Renaat Landuyt and Mrs Maya Detiège, *Doc. parl.*, Chamber, 2010-2011, n° 53-1453/1. Maya Detiège, *Doc. parl.*, Chamber, 2010-2011, n° 53-1453/1.

conditions to accede to it (profile of intended parents and medical indications), the financial aspects of the convention, the standards of protection provided for the surrogate mother and the intended parents, the rules determining parentage, the dispositions legislating the donation of gametes, the attribution of Belgian citizenship to a child, the existence and content of a model of contract for surrogacy as well as the existence of centres organising surrogacy on the Belgian territory. The example of Belgium can be particularly enriching to the extent that the need to legislate surrogacy, agreed by all, can give rise to numerous reflections and propositions. A study of the proposed laws allows us to concentrate on the construction of legislation in matters of surrogacy, with its uncertainties, interrogations and doubts. To this extent, Belgium is quite a laboratory of ideas.

## **2. Type of surrogacy**

Currently, only altruistic and gestational surrogacy (*altruistic and gestational surrogacy arrangements*) are authorised by hospitals receiving requests for surrogacy in Belgium. In the majority of the circumstances, both of the parents have a genetic relation with the child, a situation that is perceived as ideal by the hospitals receiving these requests. If, however, the intended mother is not in the capacity of providing the oocyte, the donation of ovules can be provided for. It would seem that hospitals deal with each request on a case-by-case basis.

In the context of the proposed laws analysed, only the altruistic surrogacy has been considered. Three propositions expressly forbid the payment of a contribution to the surrogate mother even if they provide that the expenditures linked to pregnancy and medical exams required by law are to be covered by the sterile couple. From the four proposed laws analysed, two demand at least one genetic relation with the intended parents, authorising implicitly the situations when the surrogate mother provides the oocyte (*traditional surrogacy arrangement*). Only one of the four proposed laws that were tabled authorises only the *gestational surrogacy arrangement* providing that the oocyte cannot be provided by the surrogate mother when it is not provided by the intended mother.

## **3. Access to surrogacy: profile of requesting parents and medical indications**

Currently, only heterosexual couples have access to surrogacy as carried out in certain Belgian hospitals. These restrictions are related to the medical indications set by these hospitals conditioning the access to surrogacy to the sterility of the intended mother or to her incapacity to complete a successful pregnancy.

In the context of the proposed laws analysed, very different responses were given to the question of the profile to be satisfied by the intended parents. The proposed law tabled by Mr Tommelein and associates seems to reserve surrogacy to heterosexual couples (married or not) and single women. The proposed law tabled by Mrs Defraigne reserves it to heterosexual couples, married or not. The proposed law tabled by Mrs Temmerman and Mr Swennen concerns heterosexual and homosexual couples, married or cohabiting and 'lasting' (a minimum of 3 years of affective life). Finally, the proposed law tabled by Mr Mahoux opens surrogacy to all profiles.

As for medical indications, all the proposed laws concerned demand the intended mother to be in the physiological impossibility of bearing a child or that her pregnancy constitutes a danger for her health, her life or that of her child. One of the analysed laws enumerates these medical indications in a very precise manner: congenital or acquired absence of the womb or dysfunction of it; counter-indicated pregnancy due to a risk for her health, her life or those of the child.

#### **4. Financial aspects**

Currently, the financial aspect of surrogacy is not regulated by any convention. Such a contract would be in effect illicit and, thus, null and void. It would seem, then, that the parties convene arrangements between themselves on the responsibility for the financial aspects.

In what concerns the proposed laws analysed, they all provide the responsibility of the costs related to the pregnancy to be assumed by the intended parents. Two of them detail these costs:

- "all medical costs of any kind related to the fecundation of the surrogate mother, to the pregnancy, to childbirth and all of their medical consequences, including non-reimbursed medical costs;"
- All legal and administrative costs relating to the pregnancy, childbirth and eventual adoption of the new-born child;
- all costs related to an insurance for which the surrogate mother designates a beneficiary or beneficiaries, covering death or permanent invalidity that she could suffer as a result of an accident, a medical complication or an illness linked to the pregnancy or childbirth (proposed law tabled by Mr Mahoux)".

The proposed law tabled by Mrs Temmerman and Mr Swennen goes even further proposing a model of convention for surrogacy detailing the "effective and reasonable" costs that are the responsibility of the intended parents:

« 1<sup>o</sup> miscellaneous costs:

These include but are not limited to:

- a. clothing for pregnancy;
- b. costs of transportation, namely ... euros per km, for each travel carried out in the context of the surrogacy;
- c. where necessary, a compensation for the loss of salary (... euros/day);
- d. an arrangement for the hypothetical situation where the surrogate mother would suffer an accident, a medical complication or an illness related to the pregnancy.

Except for the case of a multiple pregnancy, the surrogate mother receives monthly an amount not exceeding ... euros. In case of a multiple pregnancy, the monthly provision cannot exceed the amount of ... euros.

2<sup>o</sup> medical costs:

(To be detailed by the parties, taking into account the fees of the fertility centre).

All the medical costs linked to the surrogacy are paid by the intended parents.

3<sup>o</sup> legal and administrative costs:

The requesting parents pay the centre a basic compensation of ... euros to cover administrative fees.

The parties enjoy the legal assistance of Mr/Mrs ..., legal expert of the surrogacy centre. The costs related to the drafting of the convention are of ... euros. The conversion of the convention into authentic instrument implies a cost of ... euros.

4<sup>o</sup> insurances:

a. healthcare insurance:

The surrogate mother declares owning, when the convention is signed, a valid healthcare insurance and hospital insurance. This insurance will reimburse an important part of the medical fees related to the surrogacy, the hospitalisation, childbirth, etc. The surrogate mother attaches to this convention a proof of existence and validity of these insurances.

The surrogate mother is responsible for the presentation of bills and certificates to the insurance company. She will also provide the requesting parents with a copy of these documents as well as the eventual refusals to the requested reimbursements issued by the insuring entity. She is also responsible to contest these refusals.

If the surrogate mother is even at the slightest risk of losing her insurance, she must warn immediately the requesting parents

b. life insurance:

The requesting parents pay for the subscription of a life insurance for the surrogate mother. An amount of ... euros is paid to ... (a person designed by the surrogate mother)".

##### ***5. Standards of protection for the surrogate mother and the intended parents***

- ***Age of the surrogate mother:*** all the proposed laws set conditions relating to the age of the surrogate mother, the minimum and the maximum age varying from a proposition to the other. Thus, the proposed law tabled by Mrs Defraigne and the one tabled by Mr Tommelein and associates demand that the surrogate mother is of age and less than 45 years of age. However, if the surrogate mother is the mother of one of the intended parents, the proposed law by Mr Tommelein and associates raises the maximum age to 49. The proposed law tabled by Mr Mahoux fixes the maximum age to 36 years of age, while demanding the surrogate mother to be of age. As for the proposed law tabled by Mrs Temmerman and Mr Swennen, the surrogate mother has to be of an age of minimum 21 years and a maximum of 37 years. The limit of age is raised to 45 if the surrogate mother is a relative in first or second degree with one of the intended parents.
- ***Condition related to the fact that the surrogate mother has already given birth to a healthy child:*** three of the proposed laws analysed demand that the surrogate mother has given birth to at least one living child and two also provide that this child must be living.

***Verification of the free an informed consent given by the surrogate mother:*** the current practice by hospitals ensures the free and informed consent of the surrogate mother pointing her attention to the implications of the role. Similarly, the proposed laws analysed provide the verification of the consent of the surrogate mother: "it will be ensured in particular that the surrogate mother decides freely and the hardships of giving away a child after bearing it will be insisted to her" (proposed law

tabled by Mr Tommelein and associates). One of them provides equally that the surrogate mother has a reflection period of three months before the beginning of her pregnancy (proposition tabled by Mrs Temmerman and Mr Swennen).

- **Medical and psychological consultation of the surrogate mother:** As it is done currently, the proposed laws analysed provide for medical and psychological support and, sometimes, even social and legal.
- **Age of intended parents:** Amongst the four proposed laws analysed, three fix a limit of age for the intended mother or the intended parents:
  - ° on the first one, the limit of age for the intended mother is fixed to 43 years of age in case of a *gestational surrogacy arrangement* while the limit is raised to 45 years of age in case of a *traditional surrogacy arrangement* (proposed law tabled by Mr Tommelein and associated);
  - ° on the second one, the limit of age of the intended parents is fixed to 47 years of age (proposed law tabled by Mr Mahoux);
  - ° on the third one, the intended parents have to be of age and no more than 45 years of age (proposed law tabled by Mrs Temmerman and Mr Swennen).
- **Provision aiming at ensuring the impossibility for the intended parents to withdraw their consent:** the convention for surrogacy provided by the proposed law tabled by Mrs Temmerman and Mr Swennen contains a section concerning the anticipated termination of the convention. Once the pregnancy is established and accounted for, only the surrogate mother can unilaterally terminate the convention and this in a delay of ninety days following the implantation of the embryo, which excludes the possibility of the intended parents to withdraw their consent. Other proposed laws provide that if the intended parents do not respect the obligations imposed to them, they will be liable for damages (proposed law tabled by Mrs Defraigne) and specify that the intended parents will accept the child without the slightest reserve, including the case of handicap (proposed law tabled by Mr Tommelein and associates).
- **Conditions linked to the residence, domicile and/or the nationality of the intended parents and/or the surrogate mother:** of the four proposed laws analysed, only three fix conditions of residence, domicile and/or nationality for the intended parents and/or for the surrogate mother:
  - ° the first one demands that the surrogate mother and the intended parents are of Belgian nationality and that one of the two intended parents is domiciled in the Belgian territory for at least the last two years (proposition tabled by Mrs Temmerman and Mr Swennen);
  - ° the second one demands that the intended parents are domiciled in Belgium for at least the last two years (proposed law tabled by Mr Mahoux);
  - ° the third one demands that the intended parents and the surrogate mothers are of Belgian nationality or have a fixed residence in Belgium (proposed law tabled by Mr B. Tommelein and associates).
- **Demand of legal advice:** some of the proposed laws analysed provide that the parties will be assisted by a legal expert attached to the surrogacy centre and that they will have to be assisted by an independent lawyer (proposed law tabled by Mrs Temmerman and Mr Swennen). Currently, the hospitals practicing surrogacy demand the parties to be advised by a legal expert on the law of parentage.

## 6. Laws determining parentage

### - Current system

◦ **Maternal parentage:** As there is no legislation enacted on matters on surrogacy, the rules determining the establishment of maternal parentage follow the traditional adage *mater semper certa est* by establishing that the legal mother is the mother giving birth<sup>317</sup>. In other words, the surrogate mother is the legal mother of the child, even if she has no genetic relation to the child, while the intended mother has no legal relation to the child, even if she is the genetic mother. In order to establish a parentage relationship with the child, the intended mother has to engage an adoption procedure either through a joint adoption with her spouse/cohabitant, if he could recognise the child, or adopting the child on her own if she is single. Belgium authorises the adoption by a single parent as well as by same-sex persons. Moreover, the law does not require that the candidates seeking to adopt are married. It is sufficient to be "cohabitants", for example, having made a declaration of legal cohabitation or of permanent and affective life together for at least the last three years when the adoption request takes place (art. 343 Civil code).

◦ **Paternal parentage:** In the absence of modifications to the rules related to paternal parentage, the husband of the surrogate mother is considered as the legal father of the child, in compliance to the rule relating to the presumption of paternity<sup>318</sup>. The intended father will have to either engage an adoption procedure to establish parentage to the child or contest the paternal parentage of the husband of the surrogate mother to establish his own paternity. If the surrogate mother is not married, the intended father can acknowledge the child with the consent of the surrogate mother<sup>319</sup>, which allows him to establish parentage without engaging an adoption procedure. If there is no consent from the surrogate mother, a court tries to conciliate the parties and can reject the claim by the intended father in case a conciliation is not attained and with the condition that it is proven that the intended father is not the biological father of the child. Moreover, the court can reject the acknowledgment if the child is a year or older and the acknowledgement is obviously against the child's best interests.

If the intended parents engage an adoption procedure aiming at establishing parentage to the child, it will be organised according to the classic rules governing adoptions aiming at establishing parentage in Belgium. As a result, no genetic relation is required between the child and the intended parents for these to be eligible for the adoption procedure.

Finally, surrogacy being practiced outside of any legal framework, there is currently no system of "birth order" or of "pre-birth order" in the Belgian legal body. Only one of the four proposed laws, opting for a system of establishment of parentage through an adoption procedure, proposes a system of "pre-adoption", giving the surrogacy convention a status of "ex-ante adoption declaration" (proposed law tabled by Mr Tommelein and associates). In this system of "pre-adoption", no legal intervention takes place before birth. The judicial control is done afterwards through an adoption procedure.

<sup>317</sup> Art. 312 Civil code: "The child has as a mother the person designed as such at the act of childbirth".

<sup>318</sup> Art. 315 Civil code: "The child born within marriage or within the 300 days following its dissolution or annulment, has the husband as a father".

<sup>319</sup> Art. 319 and 329bis Civil code: "When the paternity is not established in relation to articles 315 or 317, the father can recognise the child within the conditions fixed in article 329bis".



- **Proposed laws:** The proposed laws analysed seek to establish maternal parentage proposing two different models:
  - **Conventional model:** Of the four proposed laws taken into account, two propose establishing maternal parentage through a convention (proposed law tabled by Mrs Defraigne and proposed law tabled by Mme Temmerman and Mr Swennen). According to the first proposed model, the civil registrar mentions directly in the birth certificate the names of the intended mother and father after receiving notice of the child delivery as well as a copy of the surrogacy convention. Maternal and paternal parentage is, thus, established directly in the birth certificate and the child born of the surrogacy bears the surname of the intended father (proposed law tabled by Mrs Defraigne). According to the second model proposed, maternal parentage in the case of the intended mother results from the mention of her name in the birth certificate while paternal parentage is ruled by the classic rules of parentage (proposed law tabled by Mrs Temmerman and Mr Swennen). Thus, if the intended mother is married, the child bears the surname of the intended father. However, if she is not married, the child bears the surname of the intended mother.

As a result, this conventional model does not allow to establish maternal parentage to the surrogate mother, and it does not guarantee a right of "retention" of the child after birth. Also, there is no judicial control provided for, before or after. Finally, this model provides that the surrogate mother cannot engage any action to contest the maternity or paternity (proposed law tabled by Mrs Defraigne and proposed law tabled by Mme Temmerman and Mr Swennen) even if she is the genetic mother of the child (only the proposed law tabled by Mrs Defraigne provides for the possibility of the surrogate mother to be the genetic mother of the child).

- **Parentage model of the "classic" type or "pre-adoption":** the other two proposed laws analysed provide for the establishment of the parentage of the intended parents through the figure of adoption: one provides for a classic adoption procedure (proposed law tabled by Mr Mahoux), the other one attributing to the surrogacy convention the status of "ex-ante adoption declaration" (proposed law tabled by Mr Tommelein and associates). In both hypotheses, maternal parentage is established with regards to the surrogate mother in conformity with the rules of the Civil code. As a result, the child bears the surname of the husband of the surrogate mother if she is married or the surname of the surrogate mother if she is single, in conformity with the rules of the Civil code regarding the attribution of name<sup>320</sup>. In the first model, the surrogate mother has a right of "retention" as she is not obliged to consent the adoption (period of two months to agree to the adoption starting from childbirth) while in the model of "pre-adoption", the surrogate mother has a reflection period until childbirth as she cannot agree to adoption before childbirth. In both cases, a judicial control takes place downstream through an adoption procedure.

## 7. Donation of gametes

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<sup>320</sup> Art. 335 Civil code: « § 1. The child of whom only paternal parentage is established or of whom maternal and paternal parentage are established at the same time, bears the name of the father. § 2. The child of whom only maternal parentage is established bears the name of the mother".

The donation of gametes is governed by the law of the 6<sup>th</sup> of July of 2007 related to the medically assisted procreation and the destination of supernumerary embryos and gametes<sup>321</sup>. According to article 57 of this law, the donation of gametes can be anonymous or non-anonymous<sup>322</sup>.

### **8. Attribution of Belgian citizenship to the child**

A child can acquire Belgian citizenship either on the basis of the nationality of his/her parents, or his/her birth on Belgian territory, or by the collective effect of an acquisition act.

- ***Attribution of the Belgian nationality on the basis of the nationality of the father, the mother or the adopting parent at the time of birth***<sup>323</sup>: A child is automatically Belgian if he/she is born in Belgium to a Belgian parent at the moment of birth, if he/she is born abroad to a Belgian parent born in Belgium or to a Belgian parent with the condition that the child does not possess another nationality before coming of age. The Belgian nationality is attributed to a child born abroad to a Belgian parent with the condition that his/her parent undertakes a declaration to request the attribution of the Belgian nationality to the child before he/she is 5 years of age.
- ***Attribution of the Belgian nationality on the basis of birth of the child in Belgium***<sup>324</sup>: In certain circumstances, the child will be attributed the Belgian nationality on the basis of his/her birth on Belgian territory even if his/her parents are not Belgian.

Such is the case of a child who would be stateless if the Belgian nationality was not attributed. In this hypothesis, the attribution of the Belgian nationality is conditioned to the fact that the child cannot obtain another nationality, through the execution of an administrative procedure by his/her parents before the diplomatic or consular authorities of their country of origin.

Such is equally the case if one of the parents is born in Belgium and has had his/her main residence there during 5 years in the last ten years preceding the birth of the child or if the child is adopted before the age of 18 by a foreigner born in Belgium who has had his/her main residence there for 5 years of the ten years preceding the birth of the child.

Finally, the Belgian nationality can also be attributed to children of the so-called "second generation", meaning born in Belgium from parents born abroad. This attribution is conditioned to a declaration made by the parents.

- ***Attribution of the Belgian nationality to a child on the basis of the acquisition of the Belgian nationality by the father, the mother or an adopting parent before the child is 18 years old***<sup>325</sup>: If a parent or an adopting parent who has parental authority on the child acquires or recovers the Belgian nationality, the nationality is automatically attributed to the child (collective effect).

### **Model of surrogacy convention**

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<sup>321</sup> Law of the 6<sup>th</sup> of July 2007 on medically assisted procreation and the destination of supernumerary embryos and gametes, *M.B.*, 17<sup>th</sup> of July 2007.

<sup>322</sup> Art. 57: "When gametes are assigned to a donation programme, the consulted fecundation centre is liable not to give access to any information allowing the identification of the donor. The non-anonymous donation that results from an agreement between the donor or the donors is authorised".

<sup>323</sup> Articles 8 and of the Code of Belgian nationality, *M.B.*, 12<sup>th</sup> of July 1984.

<sup>324</sup> Articles 10, 11 and 11bis of the Code of Belgian nationality, *M.B.*, 12<sup>th</sup> of July 1984.

<sup>325</sup> Article 12 of the Code of the Belgian nationality, *M.B.*, 12<sup>th</sup> of July 1984.

Currently, the parties agree on the surrogacy arrangements without a contract, as any convention dealing with surrogacy would be illegal and, thus, void.

Of the four proposed laws analysed, only one proposes a project for a standard convention on surrogacy, annexed to this report (proposed law tabled by Mrs Temmerman and Mr Swennen). This project of standard convention, very detailed, contains dispositions relating to the psychological and medical exam that the intended parents and the surrogate mother will have to undertake, the dispositions ruling the sexual relations and the behaviour of the surrogate mother, another one organising the psychological and medical support for the surrogate mother, a disposition relating to the possibility of the surrogate mother to get an abortion and the measures to be taken if the prenatal diagnostic reveals that the child will suffer from a physical or psychological retardation or that he/she will have a severe hereditary disease as well as a disposition concerning the follow-ups in case of miscarriage or stillbirth. The convention rules also the attribution of parental rights in case of separation or death of the intended parents. The costs that are a responsibility of the intended parents are detailed. Finally, dispositions ruling the possibility of an early termination of the convention, unilaterally or by common agreement, and specifying the consequences of an eventual violation of a disposition of the convention enumerating in a non-limitative manner the hypotheses of the non-respect of the convention by the surrogate mother or the intended parents. The final disposition provides that the parties will be assisted by the legal expert attached to the surrogacy centre and that they will be also assisted by an independent lawyer in case of conflict.

### 9. Institutions organising surrogacy

Currently, only some hospitals practice surrogacy in Belgium. The absence of legislation on the matter justifies that there is neither a specific institution dedicated to surrogacy nor an association organising the procedure, for this would be illegal.

#### B. Case law

1. The judicial procedures concern both domestic cases of surrogacy<sup>326</sup> (surrogacy taking place in Belgium between a surrogate mother and intended parents of Belgian nationality) and international cases of surrogacy (surrogacy taking place abroad - in Ukraine<sup>327</sup>, in India<sup>328</sup> or in the United States<sup>329</sup> - or surrogacy taking place in Belgium between a Belgian surrogate mother and foreign intended parents<sup>330</sup>).

<sup>326</sup> Ghent (15<sup>th</sup> ch.), 16<sup>th</sup> of January 1989, T.G.R., 1989, p. 52; Brussels (3<sup>th</sup> ch.), 1<sup>st</sup> of March 2007, *Revue trimestrielle de droit familial*, 2007, p. 754; Antwerp (16<sup>th</sup> ch. bis), 14<sup>th</sup> of January 2008, *RechtskundigWeekblad*, 2007-2008, p. 1774, note F. SWENNEN, « Adoptie na draagmoederschap revisited », reforming Youth court of Antwerp (7<sup>th</sup> ch.), 11<sup>th</sup> of October 2007, *RechtskundigWeekblad*, 2007-2008, p. 1777, note F. SWENNEN; Ghent (15<sup>th</sup> ch.), 30<sup>th</sup> of April 2012, *Tijdschrift voor Belgisch Burgelijk Recht*, 2012, p. 261, note L. PLUYM; *Tijdschrift voor Belgisch Burgelijk Recht*, 2012, p. 372, note G. VERSCHULDEN reforming Youth court Bruges, 19<sup>th</sup> of January 2012, *Tijdschrift voor Jeugd en Kinderrechten*, 2012, p. 260; Youth court. Brussels, 4<sup>th</sup> of June 1996, *Jurisprudence de Liège, Mons et Brussels*, 1996, p. 1182; Youth court. Turnhout, 4<sup>th</sup> of October 2000, *RechtskundigWeekblad*, 2001-2002, p. 206, note F. SWENNEN, « Volle adoptie na draagmoederschap: nihil obstat ? »; Civ. Hasselt (1<sup>st</sup> ch.), 27<sup>th</sup> of March 2001, *Limb. Rechtsl.*, 2001, p. 323; Civ. Ghent (3<sup>rd</sup> ch.), 31<sup>st</sup> of May 2001, *Revue générale de droit civil*, 2002, p. 27, note G. VERSCHULDEN; Youth court. Brussels, 6<sup>th</sup> of May 2009, J.L.M.B., 2009, p. 1083; Youth court. Ghent, 13<sup>th</sup> of June 2012, 590.B.2011/57, unpublished.

<sup>327</sup> Civ. Antwerp, 19<sup>th</sup> of December 2008, *Revue@dipr.be*, 2010, liv. 4, p. 140, note J. VERHELLEN, « Draagmoederschap: het internationaal privaatrecht uitgedaagd », p. 171; Youth court Antwerp, 22<sup>th</sup> of April 2010, *Tijdschrift voor Familierecht*, 2012, p. 43, note L. PLUYM; *Revue@dipr.be*, 2012, p. 22; Civ. Brussels, 15<sup>th</sup> of February 2011, *Revue@dipr.be*, 2011, p. 125; T. *Vreemd.*, 2011, p. 117 (somm.), note K. VANVOORDEN.

<sup>328</sup> Civ. Brussels (interim), 6<sup>th</sup> of April 2010, *Revue trimestrielle de droit familial*, 2010, p. 1164; Civ. Nivelles, 6<sup>th</sup> of April 2011, *Rev. trim. dr. fam.*, 2011, p. 695, note C. HENRICOT and Civ. Brussels, 18 December 2012, unpublished and non-final.

<sup>329</sup> Liège, 6<sup>th</sup> of September 2010, *Revue trimestrielle de droit familial*, 2010, n° 4, p. 1139, note C. HENRICOT, S. SAROLÉA et J. SOSSON; *Jurisprudence de Liège, Mons et Brussels*, 2011, n° 2, p. 52, note P. WAUTELET; *Journal des tribunaux*, 2010, p. 634, ayant réformé Civ. Huy, 22<sup>th</sup> of March 2010, *Journal des tribunaux*, 2010, p. 420,

### **a) Domestic cases of surrogacy**

Of the eleven decisions taken into account, relating to cases of domestic surrogacy, seven concern the approval of adoption procedures; five decisions concede it and two refuse to sentence on it. Only one decision has been taken on the subject of the protection of childhood.

The judicial decisions are presented in the following lines in chronological order, starting by the decisions ruled by the highest degree of jurisdiction (courts of appeal and then, jurisdiction of first instance).

- Ghent (15<sup>th</sup> ch.), 16<sup>th</sup> of January 1989: the surrogate mother was inseminated with the sperm of the intended father. Thus, it was a case of “traditional” surrogacy, the surrogate mother being also the genetic mother of the child. The legal action undertaken by the intended parents seeks to approve a full adoption with regards to the child conceived by the surrogate mother. The Court of appeal refuses to settle the case, considering that it was not the intention of the legislator that a couple could request a child from a surrogate mother to integrate the child into their household after childbirth through an adoption procedure.

- Antwerp (16<sup>th</sup> ch. *bis*), 14<sup>th</sup> of January, reforming Youth court Antwerp (7<sup>th</sup> ch.), 11<sup>th</sup> of October 2007: the surrogacy took place with the gametes of the intended parents implanted through IVF, the woman being the mother of the intended mother (gestational surrogacy). The intended father’s parentage is established by the acknowledgment of paternity, the surrogate (grand-)mother not being married<sup>331</sup>. The action introduced before the Youth court of Antwerp seeks the approval of the adoption requested by the intended mother. In first instance, the Youth court refuses to concede the adoption on the basis that a surrogacy convention is illegal and that it cannot be used as a fair basis framing the adoption unless it is accepted and framed by the law. The tribunal considers, thus, that the full adoption resulting from an intra-familial surrogacy is not in conformity with the best interests of the child or his/her fundamental rights. The Court of Appeal of Antwerp reforms the sentence pronounced by the Youth court and concedes the adoption underscoring the fact that an altruistic surrogacy by a surrogate mother, whose only objective is to satisfy the desire to have a child by her daughter, is not contrary to the public order.

- Ghent (15<sup>th</sup> ch.), 18<sup>th</sup> of May 2009, reforming Youth court. Ghent (27<sup>th</sup> ch.), 31<sup>st</sup> of March 2009: after an agreement concluded between the biological parents and the intended mother before childbirth, the child is given to the intended mother so that she can adopt him/her (traditional surrogacy). The circumstances of the case do not suggest a for-profit surrogacy. In first instance, the Youth court considers that it is not necessary to pronounce an enforceable pedagogical measure with regards to the child. The Court of Appeal reforms this decision and grants the child to an adoption family for a period of six months, considering

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note N. GALLUS ; *Jurisprudence de Liège, Mons et Brussels*, 2010, n° 38, p. 1815, note P. WAUTELET et Youth court Huy (11<sup>th</sup> ch.), 22<sup>nd</sup> December 2011, *Revue trimestrielle de droit familial*, 2012/2, p. 403, note.

<sup>330</sup> Civ. Ghent, 24<sup>th</sup> of December 2009, *Revue@dipr.be*, 2010, n° 4, p. 133, note J. VERHELLEN, « Draagmoederschap: het internationaal privaatrecht uitgedaagd », p. 17 (Belgian surrogate and Dutch intended parents) and Ghent, 5<sup>th</sup> of September 2005, *Tijdschrift voor Vreemdelingenrecht*, 2006, n° 2, p. 163, note Th. KRUGER, « Kinderhandel: welke rechters moeten/mogen de zaak horen ? » (Belgian surrogate and Dutch intended parents).

<sup>331</sup> At first instance, the acknowledgement of paternity by the intended father in relation to the child born from his mother-in-law was problematic in view of the article 321 of the Civil code that forbids the acknowledgement of paternity when it crates between the mother and the father an absolute obstacle to marriage. Following a reform of the law on parentage, the intended father could acknowledge his child, the obstacle becoming relative and not absolute anymore. See F. SWENNEN, « Adoptie na draagmoederschap revisited », note on Antwerp (16<sup>th</sup> ch. *bis*), 14<sup>th</sup> of January 2008, *RechtskundigWeekblad*, 2007-2008, p. 1775,

necessary to take an urgent enforceable pedagogical measure applying article 37, 2° of the decree on the special assistance to the youth. The child was then placed in a centre for children care and family assistance. While this placement was first extended by request of the public prosecutor (Youth court. Ghent (27<sup>th</sup> ch.), 4<sup>th</sup> of November 2009, inedited), the Youth court settled in favour of the request of the social services, requesting the attribution of the child to the intended mother, in whose household the child currently lives (Youth court. Ghent (27<sup>th</sup> ch.), 4<sup>th</sup> of November 2009, inedited).

- Ghent (15<sup>th</sup> ch.), 30<sup>th</sup> of April 2012, reforming Youth court. Bruges, 19<sup>th</sup> of January 2012: the surrogate mother was inseminated with the sperm of the intended father. It is, thus, a "traditional" surrogacy, the surrogate mother being also the genetic mother of the child. In addition to the costs linked to the pregnancy, the intended parents paid an amount of 1.600 euros per month to the surrogate. The action undertaken seeks to obtain the approval of the adoption requested by the intended mother. In first instance, the Youth court settles in favour of her request, considering that it is not within the responsibility of the tribunal to carry out, within the framework of an adoption procedure, an exam of the content, the scope and the legal (in)validity of a surrogacy contract concluded between the surrogate mother and the adopting mother. The tribunal considers that only the basis of the adoption requires analysis without taking into consideration the illegality of the surrogacy contract. In appeal, the Court of Ghent reforms the sentence pronounced and refuses the full adoption requested by the intended mother on the basis that the dissimulation, through an adoption, of buying-selling a child is an illegal basis that makes the adoption illegal. The Court affirms that the human individual cannot be lowered to the level of a monetarily quantifiable object, which makes a for-profit surrogacy contrary to human dignity. To verify if the adoption was based on a fair basis, the Court has to analyse the information preceding the procedure of adoption, based on article 351 of the Civil code, according to which the sale of a child can lead to a revision of the adoption sentence. This analysis cannot be thwarted by the circumstance that there is a de facto parent-child relation between the child and the adoption candidate and that, in social relations, the child is considered the child of the adoption candidate.

- Youth court. Brussels, 4<sup>th</sup> of June 1996: the surrogacy took place with the gametes of the intended parents implanted through IVF, the surrogate mother being the sister of the intended mother (gestational surrogacy). The parental parentage is established by acknowledgement of paternity. The action undertaken before the tribunal of first instance of Brussels aims to obtain an approval of the adoption requested by the intended mother. The tribunal settles in favour of her request highlighting that it is in the best interests of the child that his/her legal situation corresponds to the social reality, the child being reared in the household by the intended mother.

- Youth court. Turnhout, 4<sup>th</sup> of October 2000: surrogacy took place with the gametes of the intended parents implanted through IVF, the surrogate mother being the sister of the intended mother (gestational surrogacy). The action undertaken aims to obtain the approval of the adoption requested by both intended parents, the surrogate mother being married. The tribunal settles in favour of their request after observing that the surrogate mother and her spouse (legal parents) consent to the adoption and on the basis that a surrogacy not for profit is not against public order.

- Youth court. Brussels, 6<sup>th</sup> of May 2009: the surrogacy took place with the gametes of the intended parents implanted through IVF, the surrogate mother not being related to the intended parents (gestational surrogacy). The parentage



of the intended father is established by acknowledgement of paternity. The action undertaken aims to obtain the approval of the adoption requested by the intended mother. The tribunal settles in favour of her request on the basis that the request is substantiated on a fair basis and that it responds to the best interests of the child as it allows to match the law with the facts as the intended mother is the genetic mother of the child and considered by everyone as the child's mother.

- Youth court. Ghent, 13<sup>th</sup> of June 2012: the surrogacy took place with the gametes of the intended parents implanted through IVF (gestational surrogacy). The parentage of the intended father is established by acknowledgement of paternity. The action undertaken aims to obtain the approval of the adoption requested by the intended mother. The tribunal settles in favour of her request, considering that the adoption is based on a fair basis as the twins are, from the moment that they were born, a part of the household of the intended parents

In other two decisions published, the tribunals settle in favour of the approval of the acknowledgement of paternity of the intended father<sup>332</sup>.

- Brussels (3rd ch.), 1<sup>st</sup> of March 2007: the surrogacy took place with the gametes of the intended parents implanted through IVF, the surrogate mother not being related to the intended parents (gestational surrogacy). The action undertaken aims at obtaining the approval of the act of acknowledgement made by the intended father in relation to the child to be born of the surrogate mother. This action is founded on the old article 319*bis* of the Civil code, according to which "if the father is married and acknowledges a child conceived by a woman who is not his spouse, the act of acknowledgement has to be presented through a request of approval before the tribunal of first instance where the child is domiciled". In this case, the Court tried to determine if by use the terms "child conceived by a woman who is not his spouse", the legislator had aimed at distinguishing between the different modes of conception, responding in different ways to requests of acknowledgement on the basis of whether the child bore and given birth to by a woman who is not a spouse was conceived with the gametes of the spouse or not. The Court responded negatively considering that the surrogate mother could equally "conceive" a child even if she was not the genetic mother. The Court of Appeal of Brussels settles in favour of the applicant and approves the acknowledgement made by the biological father with regards to the child who was given birth to by the surrogate mother.

A procedure of approval of full adoption was then introduced by the intended mother, equally the genetic mother, before the Youth court, which settled in favour of her request.

- Civ. Hasselt (1<sup>st</sup> ch.), 27<sup>th</sup> of March 2001: the surrogacy took place with the gametes of the intended parents implanted through IVF, the surrogate mother being anonymous (gestational surrogacy). The child was born through anonymous childbirth in France ('accouchement sous x'). The action undertaken aims at obtaining the approval of the act of acknowledgement made by the intended father in relation to the child to be born of the surrogate mother. The tribunal settles in favour of the request of the intended father after verifying that the conditions of the old article 319*bis* of the Civil code, on the acknowledgement of paternity of a child conceived by a woman who is not his spouse, were fulfilled. The tribunal considers that this disposition applies to the equally to a situation in

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<sup>332</sup> Ever since a reform on the laws of parentage came into force on the 1<sup>st</sup> of July 2007, a married man who acknowledges a child conceived by a woman who is not his spouse does not have to request an approval of the act of acknowledgement from the tribunal of first instance. See Law of the 1<sup>st</sup> of July 2006 modifying the dispositions of the Civil code on the establishment of parentage and the effects of it *M.B.*, 29<sup>th</sup> of December 2006.



which the woman, other than the spouse, gives birth to a child even if she is not genetically related to the child.

A procedure of approval of full adoption was then introduced by the intended mother, equally the genetic mother, before the Youth court, which settled in favour of her request.

Finally, the last decision concerns an action to contest paternity, introduced by the husband of the surrogate mother, claiming not consenting the insemination of his wife.

- Civ. Ghent (3<sup>rd</sup> ch.), 31<sup>st</sup> of May 2001: the surrogate mother was inseminated with the sperm of the intended father. This is, thus, a "traditional surrogacy", the surrogate mother being also the genetic mother of the child. Paternal parentage was established in relation to her husband, in accordance with the presumption of paternity. The action undertaken by the husband of the surrogate mother before the tribunal of first instance of Ghent aims at contesting his paternity on the basis that he had not consented to the artificial insemination of his wife. The tribunal declares the action admissible and well-founded, after ascertaining the absence of consent from the husband to the artificial insemination of his wife as well as the absence of genetic relation between the husband and the child given birth to by his wife.

#### ***b) International surrogacy***

Of the eight published decisions related to international surrogacy, six concern surrogacy cases taking place abroad and two concern surrogacy cases on the Belgian territory between a Belgian surrogate and foreign intended parents.

- ***Surrogacy cases taking place abroad.***

Of the six published decisions related to surrogacy cases taking place abroad, three concern surrogacy cases taking place in Ukraine, other two concern surrogacy cases taking place in India and the sixth concerns a surrogacy case in the United States.

#### ***Ukraine:***

- Civ. Antwerp, 19<sup>th</sup> of December 2008 and Youth Court Antwerp, 22<sup>nd</sup> of April 2010: case *Hanne and Elke*: the surrogacy took place in Ukraine between an Ukrainian surrogate mother and heterosexual Belgian intended parents. The intended parents are also the genetic parents of the children (gestational surrogacy). The birth certificates mention the intended parents as the legal parents of the children given birth to by the surrogate mother. The Embassy of Belgium in Kiev refuses to acknowledge the birth certificates and, thus, refuses to deliver a passport to the children in order to allow them to travel to Belgium. The intended parents undertake an action before the tribunal of first instance of Antwerp on the basis of articles 23 and 27 of the Belgian Code of Private International Law so as to request the recognition of the birth certificates. The tribunal acknowledges the certificates but not as birth certificates (on the basis that the mention of the name of the intended mother in the Ukrainian birth certificate is contrary to Belgian law according to which the birth certificate must mention the name of the mother giving birth to the child) but as *authentic and legally valid certificates* from which the paternity of the genetic father, also the intentional father of the children born from the surrogate mother, is acknowledged.

The maternal parentage of the intended mother is, thus, not acknowledged. Following the sentence of the tribunal of first instance of Antwerp, the intended mother undertakes a legal procedure before the Youth Court to

request the adoption of the children. The tribunal approves the adoption based on the best interests of the children, that is of having parentage with their genetic mother. The tribunal specifies that considering an adoption procedure contrary to public order or as not being founded on fair basis (art. 344-1 Civil code) only due to high-technology surrogacy would penalise the children who did not choose the way they were born. The tribunal also considers that the limit line with the commerce of children was not crossed in this case and that the case is not one of coercion, exploitation, fraud or legal fraud (neither in Belgium nor in Ukraine). Furthermore, the tribunal considers that the adoption procedure must be ruled by the national laws on the basis that it is not proven that the adopting candidate had the intention to adopt the children before their transfer to Belgium.

- Civ. Brussels, 15<sup>th</sup> of February 2011: case *Samuel*: the surrogacy took place in Ukraine between an Ukrainian surrogate mother and a homosexual couple formed by a Belgian citizen and a French one, both residing in France. The biological father is the husband of Belgian nationality. The facts mentioned by the sentence do not mention if the surrogate mother is also the genetic mother of the children to be born or if there was a donation of ovules. The birth certificate mentions the name of the surrogate mother as being the legal mother of the child and the name of the Belgian husband as being the legal father of the child. An Ukrainian sentence ascertains that the surrogate mother refuses to assume the education of the child and, thus, strips her of parentage towards the child, in favour of the intended father. The Embassy of Belgium in Kiev refuses the birth certificate and, thus, refuses to deliver the necessary travelling documents. The intended father undertakes an action of interim relief to condemn the Belgian State to deliver a passport to the child. Ruling in interim, the tribunal refuses to settle in favour of the applicant considering that "ordering the Belgian state to deliver the child a passport, with an eventual visa, would equate to recognise the parentage of the applicant to Samuel as well as the Belgian nationality of the child as a passport cannot be delivered by the Belgian State to anyone but a Belgian citizen. The decision would be, thus, declarative of the rights invoked and exceeding the provisory nature of the ruling" (Civ. Brussels (interim), 4<sup>th</sup> February 2010, RR 09/1694/C, inedited). A second interim procedure is undertaken and is also settled by a refusal on the basis that the conditions of an interim ruling are not fulfilled (Civ. Brussels (interim), 9<sup>th</sup> of July 2010, RG 10/830/C, inedited).

In its substance, the action undertaken by the intended father aims at the recognition of the birth certificate by the Belgian authorities (articles 23 and 27 of the Code of private international law). The tribunal acknowledges the act as an authentic and legally valid certificate from which results the paternal parentage of the applicant to the child. The tribunal reaches this conclusion after verifying the authenticity of the birth certificate in relation to the Ukrainian law as well as after verifying the validity of the birth certificate in relation to the Belgian law, the law of the nationality of the intended father trying to establish parentage (application of the rule of conflict of laws in matters of parentage: article 62 of the Code of Private international law on the recognition of foreign authentic certificates). For the purpose of Belgian law, the tribunal considers that the parentage of the intended father is established as the conditions of the article 329*bis*, on the acknowledgement of paternity, are fulfilled.

Following the sentence, the ministry of Foreign Affairs indicated that a Belgian passport would be delivered to the child, allowing him to join his father<sup>333</sup>.

**India:**

- Civ. Brussels (interim), 6<sup>th</sup> of April 2010: case C: the case of surrogacy took place in India with an Indian surrogate mother and a man of Belgian nationality, genetic and intentional father of the child. The surrogacy took place through an IVF with an anonymous ovule donation (gestational surrogacy). Parentage by the intended father was established by an act of acknowledgement before an Indian notary. The birth certificate does not mention the name of the surrogate mother, only the name of the intended father. The intended father demands the Belgian consulate of Mumbai the deliverance of travel documents. The Federal Public Service of Foreign Affairs refusing to act in favour of his request, the intended father undertakes an action of interim relief before the Belgian courts. The tribunal settles in his favour and condemns the Belgian State to deliver the necessary travel documents on the basis of the existence of a family life between the child and the intended father as well as the best interests of the child.
  
- Civ. Nivelles, 6<sup>th</sup> of April 2011: case *Amélie and Nina*: surrogacy took place in India with an Indian surrogate mother and Belgian heterosexual intended parents. The intended father is the genetic father of the children. The surrogacy took place through IVF with an anonymous donation of an ovule (gestational surrogacy). The birth certificates do not mention the name of the surrogate mother, only the name of the intended father. The action undertook on the basis of articles 23 and 27 of the Code of international private law aimed at the recognition of the Indian birth certificates. The tribunal acknowledges the certificates but not as birth certificates but as authentic and legally valid certificates from which results the acknowledgement of paternity of the intended father. The tribunal reaches this conclusion after verifying the authenticity of the birth certificates in relation to Indian law as well as after verifying the validity of the birth certificate in relation to the Belgian law, the law of the nationality of the intended father trying to establish parentage (application of the rule of conflict of laws in matters of parentage (article 62 of the Code of Private international law) implied by article 27 of the Code of Private international law on the recognition of foreign authentic certificates). In relation to the Belgian law, the tribunal considers that the parentage of the intended father is established as the conditions of article 329*bis*, on the acknowledgement of paternity, are fulfilled. The tribunal verifies also the incidence of the fact that the couple sought a surrogate mother and the absence of her name in the birth certificates in relation to the Belgian public order. The tribunal concludes that the illegality of a surrogacy contract cannot jeopardise the best interests of the child, a reason to substantiate the recognition of parentage in relation to the biological father. As for the absence of the mention of the name of the surrogate mother on the birth certificates, the tribunal considers that it is contrary to the dispositions of the Civil code imposing the mention on the birth certificate of the name of the mother, this being the woman giving birth to the child, and thus refuses to recognise the certificates as birth certificates.
  
- Civ. Brussels, 18 December 2012 (non-final): the surrogacy was carried out in India with an Indian surrogate mother and a Belgian father of intent, who is

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<sup>333</sup> See « Samuel aura un passeport belge », available at the following URL: <http://www.lalibre.be/actu/belgique/article/643798/samuel-aura-un-passeport-belge.html> (online on the 19/02/2011 and viewed on the 18/12/2012).

the genetic father of the child. The surrogacy was done through IVF with anonymous egg donation (gestational surrogacy). The birth certificate doesn't mention the name of the surrogate mother but only states the name of the father of intent. The latter recognised his paternity through a recognition certificate established in front of a solicitor in India. During the interim hearings, the Belgian State was sentenced to deliver a visa or a travel document to the child, to allow him to travel to Belgium. Once the child arrived on Belgian ground, the father of intent asked for the birth certificate to be transcribed in the state registers. Faced with the refusal of the registrar to do so, the father of intent filed an appeal in front of the Court of First Instance to obtain recognition of the birth certificate, and hence the parentage link between the father of intent and the child. The Court of First Instance checked the validity of the parentage link in the eyes of the Belgian law, which is designated by the conflict of law rule on parentage (art. 62 of the Code of PIL) and concludes that the certificate should not be recognised on the grounds that, in Belgian law, the father of intent would not have been able to assert his paternity over the child through a surrogacy contract. The Court also refused to recognise the birth certificate established by an Indian solicitor on the basis that the declaration of paternity was not established in accordance with Belgian law, which stipulates that to recognise a child born from a married woman, the legal paternity should first have been annulled before the biological paternity of the child could have been recognised. The Court finally considers that it is not in the interest of the child to have its filiation determined on the basis of certificates drawn up in India, on the basis that the latter contravene to the fundamental principles of the protection of the interests of all children, since they spring from commercial transactions that are not concerned with the interests of the child. After having refused to recognise the Indian certificates, the Court finally accepted to confirm the paternal filiation of the child on the basis that the father of intent is also the biological father of the child and that there is a possession of status, and further stressed that "this paternity would match the one established in India and would be in the interest of the child".

#### **United States:**

- Liège, 6<sup>th</sup> of September 2010, reforming Civ. Huy, 22<sup>nd</sup> of March 2010 and Youth Court Huy (11<sup>th</sup> ch.), 22<sup>nd</sup> of December 2011: case *Maïa and Maureen*: the surrogacy took place in the United States with an American surrogate mother and Belgian homosexual parents of intent. One of the intended fathers is the genetic father of the children. The facts exposed in both decisions do not mention if the surrogate mother is also the genetic mother of the children or if there was a donation of ovules. The birth certificates mentioning the names of the two intended fathers were established on the basis of a "declaratory sentence of paternity of the female twins to be born in the framework of a surrogacy contract and in absence of parentage between the legal parents and the twins to be born", as by the Supreme Court of the State of California. The action undertaken before the Belgian courts aims at recognising the birth certificates established in California (articles 23 and 27 of the Code of international private law). At first instance, the tribunal refuses to settle in favour of the applicant, considering that the recognition of the birth certificates would be contrary to the Belgian international public order and that by travelling to the United States to engage in a contract of surrogacy and thus bypass the applicable principles on the matter provided by Belgian law, the intended parents committed a fraudulent evasion of the law. The tribunal refuses to recognise the birth certificates "as they are the last phase of a more general process having as an objective to allow a couple to receive in their household children conceived in the execution of a surrogacy

contract". On appeal, the Court reforms the judgement on reasons of procedure and rectifies the reasoning by the tribunal of first instance. In conformity to article 27 of the Code of international private law, the Court verifies the validity of the birth certificates in relation to Belgian law, the law of the nationality of the intended father trying to establish parentage. Belgian law is designated by the application of the rule of conflict of laws in matters of parentage (article 62 of the Code of Private international law) implied by article 27 of the Code of Private international law on the recognition of foreign authentic certificates). In relation to the Belgian law, the Court considers that the parentage of the intended biological father is established as the conditions of article 329*bis*, on the acknowledgement of paternity, are fulfilled. In relation to his spouse, no parentage can be established as the Belgian law ignores the establishment of double original paternal parentage. The Court verifies also the incidence of the fact that the couple sought a surrogate mother in relation to the Belgian public order. It concludes that the illegality of the surrogacy contract cannot jeopardise the best interests of the children, a reason to substantiate the recognition of parentage in relation to the biological father.

Receiving a request of simple adoption by the spouse of the intended father, the Youth court of Huy settles in favour of the applicant, after considering that the adoption was founded on fair basis, to the extent that the children are, from their birth, integrated to the family of the intended parents.

- ***Surrogacy cases in Belgium between a Belgian surrogate mother and foreign intended parents***

Two published decisions concern surrogacy cases taking place in Belgium between a Belgian surrogate mother and Dutch intended parents.

- Civ. Ghent, 24<sup>th</sup> of December 2009: case *J*: the surrogacy took place in Belgium with a Belgian surrogate mother and Dutch intended parents to whom the child was sold beforehand via Internet. The surrogate mother and her spouse are the genetic parents of the child. At the moment of birth, the surrogate mother pretends to be the intended mother and, for this reason, the identity of the Dutch intended mother is specified on the birth certificate in place of the identity of the Belgian surrogate mother. Parentage in relation to the child of the intended father is established by presumption of paternity, him being married to the intended mother. When the fraud is revealed, a penal enquiry takes place in Belgium and the Netherlands and, as a result, the child is withdrawn from the Dutch intended parents and placed with a host family in Belgium. The results of the penal enquiry clearly demonstrate that the Belgian woman gave birth to the child. The action undertaken by the Belgian surrogate mother before the tribunal of first instance of Ghent contests the parentage of the Dutch intended parents. The Belgian courts are competent as the child has habitual residence on the Belgian territory (article 61 of the Code of international private law, on the rules of international competence in matters of parentage). The applicable law in the case of the contestation of paternity and maternity is the Dutch law as designed by the rule of conflict of laws in matters of parentage (article 62 of the Code of Private international law). Indeed, it is the law of the State from which the intended parents – whose parentage is contested – are citizens of. According to article 209 of the Dutch Civil code, parentage as established in a birth certificate cannot be contested if there is a *de facto* parent-child relation between the child and the person mentioned in the birth certificate. The tribunal considered that in the current case this was not the case for the Dutch parents to the extent that the child had not lived but only a few months with the Dutch family and soon placed in a Belgian host family. In the absence

of a de facto parent-child relation between the child and the parents mentioned in the birth certificate, the action of contestation is open to a third party. In conformity with the article 209 of the Dutch Civil code, the surrogate mother was, thus, capable of undertaking an action contesting the parentage as there was no de facto parent-child relation between the child and the Dutch parents. The maternal parentage of the intended mother was, then, easily revoked by proving that she did not give birth do the child and the parentage of the husband was revoked by domino effect, as the parentage of his wife was revoked. The parentage of the surrogate mother was, thus, re-established.

Before the Dutch courts, the case produced a penal conviction of the Dutch parents for forgery and illegal adoption (Rechtbank Zwolle, 14<sup>th</sup> of July 2011, LJN: BR1608 (sentence condemning the woman) et LJN: BR1615 (sentence condemning the man) (See report on the Netherlands). The surrogate mother and her partner (biological parents) were also the subject of penal conviction before Belgian courts of degrading treatment of a child (art. 417 bis, 3<sup>o</sup> Penal code), declaring themselves guilty of substitution of a child through a commercial exchange, a situation that the tribunal analysed as the sale of a child as well as a for-profit surrogacy, both contrary to the human dignity of the child. The correctional court of Ghent condemned them to a year of suspended imprisonment, imposed them a fine of 550 EUR and an amount of 7.500 EUR to be paid to the child for damages (Corr. Ghent, 14<sup>th</sup> of May 2012, inedited. An account of the facts can be found in this site: [ww.jeugdenkinderrechten.be](http://ww.jeugdenkinderrechten.be)).

- Ghent, 5<sup>th</sup> of September 2005: case *Donna*: the surrogacy took place in Belgium with a Belgian surrogate mother and Belgian intended parents. Following the deterioration of the relations between the surrogate mother and the Belgian couple of intended parents, the surrogate mother pretended a stillbirth and sold Donna to a Dutch couple. At first instance, the youth court of Oudenaarde placed Donna under the provisional tutelage of the social service of the Flemish Community after requesting the youth court of Utrecht (Netherlands) to transfer the case to it. In appeal, the Court of Ghent nullifies the decision of the youth court of Oudenaarde on the basis of the territorial incompetence of the Belgian courts. Indeed, the transfer of the Dutch courts to the Belgian courts was not in conformity with the article 15, § 2 of the regulation Brussels n<sup>o</sup> 2201/2003 of the Council of the 27<sup>th</sup> of November on the competence, the recognition and the execution of decisions in matters of wedlock and in matters of parentage, abrogating regulation (CE) n<sup>o</sup> 1347/2000, so-called Regulation Brussels II bis. The case was transferred to the tribunal of Utrecht (see report on the Netherlands).

2. The analysis of the case law presented before demonstrates that the Belgian courts are confronted to questions of very diverse nature in matters of surrogacy.

In the domestic cases of surrogacy, the legal action is almost systematically undertaken by the intended parents seeking to establish parentage in relation to the child, either through a procedure of adoption, undertaken by the intended mother<sup>334</sup> or by both of the

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<sup>334</sup> Youth court Brussels, 4<sup>th</sup> of June 1996, Jurisprudence de Liège, Mons et Brussels, 1996, p. 1182 ; Antwerp (16<sup>th</sup> ch. bis), 14<sup>th</sup> of January 2008, RechtskundigWeekblad, 2007-2008, p. 1774, note F. SWENNEN, « Adoptie na draagmoederschap revisited » ; Youth court Brussels, 6<sup>th</sup> of May 2009, J.L.M.B., 2009, p. 1083 ; Ghent (15<sup>th</sup> ch.), 30<sup>th</sup> of April 2012, Tijdschrift voor Belgisch Burgelijk Recht, 2012, p. 261, note L. PLUYM reforming Youth court Bruges, 19<sup>th</sup> of January 2012 and Youth court Ghent, 13<sup>th</sup> of June 2012, 590.B.2011/57, unpublished.



intended parents<sup>335</sup>, or by a procedure of approval of the acknowledgement of paternity by the intended father<sup>336</sup>. One of the published cases concerns, however, a different hypothesis; that of the contestation of paternity, introduced by the husband of the surrogate mother, on the basis of the absence of his consent to the insemination of his wife by the sperm of the intended father<sup>337</sup>. As, by definition, the surrogacy contract is illegal, no action has been undertaken, until today, with the purpose of requesting the enforcement of an eventual contract concluded between the parties.

In the disputes implicating a surrogacy taking place abroad, the action undertaking can aim to condemn the Belgian State into delivering the travel documents to the child<sup>338</sup>, or to obtain the recognition of a birth certificate established in a foreign country (State non-member of the EU)<sup>339</sup>. Of the three sentences concerning the deliverance of a travel document to the child, only one succeeds, allowing the child born from surrogacy to join his/her intended father. When it comes to actions undertaken to obtain the recognition of birth certificates, the tribunal accept to recognise these not as *birth certificates* (on the basis that these certificates mention either the name of the intended mother or do not indicate any name, which is contrary to Belgian law according to which the name of the woman giving birth has to be mentioned in the birth certificate), but as *authentic and legally valid certificates*, from which results the recognition of the paternity in relation to the child born from the surrogate mother<sup>340</sup>. However, the courts refuse to consider that a foreign birth certificate could establish the maternal parentage of the intended mother when her name is mentioned, as it is the case in Ukrainian law<sup>341</sup>, or a double paternal filiation with regards to the spouse of the intended father, as the Californian law allows it<sup>342</sup>. It would seem that after the partial recognition of the foreign certificate establishing the parentage of the intended father, the Ministry of Foreign Affairs accepts to deliver a passport to the child allowing him/her to travel to Belgium. As a consequence, the child can always, it would seem, to join his/her intended parents either at the state of the procedure of interim relief through the conviction of the Belgian State into delivering urgently the travel documents, or at the state of the main proceedings through the partial recognition of the foreign certificate establishing the parentage of the intended father.

In one of the cases implicating a surrogacy taking place on Belgian territory but concluded with foreign intended parents, the action was undertaken by the surrogate

<sup>335</sup> Ghent (15<sup>th</sup> ch.), 16<sup>th</sup> of January 1989, *T.G.R.*, 1989, p. 52 ; Youth court Turnhout, 4<sup>th</sup> of October 2000, *RechtskundigWeekblad*, 2001-2002, p. 206, note F. SWENNEN, « Volle adoptie na draagmoederschap: nihil obstat ? ».

<sup>336</sup> Brussels (3<sup>rd</sup> ch.), 1<sup>st</sup> of March 2007, *Revue trimestrielle de droit familial*, 2007, p. 754 et Civ. Hasselt (1<sup>st</sup> ch.), 27<sup>th</sup> of March 2001, *Limb. Rechtsl.*, 2001, p. 323.

<sup>337</sup> Civ. Ghent (3<sup>rd</sup> ch.), 31<sup>st</sup> of May 2001, *Revue générale de droit civil*, 2002, p. 27, note G. VERSCHULDEN.

<sup>338</sup> Civ. Brussels (interim), 4<sup>th</sup> of February 2010, RR 09/1694/C, unpublished (birth certificate established in Ukraine); Civ. Brussels (interim), 9<sup>th</sup> of July 2010, RG 10/830/C, unpublished (birth certificate established in Ukraine) ; Civ. Brussels (interim), 6<sup>th</sup> of April 2010, *Revue trimestrielle de droit familial*, 2010, p. 1164 (birth certificate established in India)

<sup>339</sup> Civ. Antwerp, 19<sup>th</sup> of December 2008, *Revue@dipr.be*, 2010, liv. 4, p. 140 (birth certificate established in Ukraine); Civ. Brussels, 15<sup>th</sup> of February 2011, *Revue@dipr.be*, 2011, p. 125 (birth certificate established in Ukraine); Civ. Huy, 22<sup>nd</sup> of March 2010, *Journal des tribunaux*, 2010, p. 420, note N. GALLUS ; *Jurisprudence de Liège, Mons et Brussels*, 2010, n° 38, p. 1815, note P. WAUTELET et Liège, 6<sup>th</sup> of September 2010, *Revue trimestrielle de droit familial*, 2010, n° 4, p. 1139, note C. HENRICOT, S. SAROLÉA et J. SOSSON ; *Jurisprudence de Liège, Mons et Brussels*, 2011, n° 2, p. 52, note P. WAUTELET ; *Journal des tribunaux*, 2010, p. 634 (birth certificates established in California as a result of a sentence) ; Civ. Nivelles, 6<sup>th</sup> of April 2011, *Rev. trim. dr. fam.*, 2011, p. 695, note C. HENRICOT (birth certificate established in India) and Civ Brussels, 18 December 20120, unpublished and non-final.

<sup>340</sup> Cf. however the isolated decision given by the First Court in Brussels on 18 December 2012 : the Court refused to recognise the Indian birth certificate on the grounds that, in its opinion, Belgian law would not have allowed the establishment of the father of intent's parentage. The argument developed by the Court is not convincing as it seems that, contrary to the opinion of the Court, Belgian law did allow the father of intent to establish his filiation despite the fact that the child was born from a surrogacy agreement. Cf. Civ. Brussels, 18 December 2012, unpublished and non-final.

<sup>341</sup> Civ. Antwerp, 19<sup>th</sup> of December 2008, *Revue@dipr.be*, 2010, liv. 4, p. 140.

<sup>342</sup> Liège, 6<sup>th</sup> of September 2010, *Revue trimestrielle de droit familial*, 2010, n° 4, p. 1139.

mother to contest the parentage of the intended mother (the parentage of the intended mother had been established from the birth of the child by the surrogate mother who had lied about her identity, the reason for the name of the intended mother to appear on the birth certificate)<sup>343</sup>. By settling in favour of the request of the surrogate mother and re-establishing her maternal parentage, the tribunal also nullified the paternal parentage of the intended father that had been established in conformity to the principle of presumption of paternity of the husband of the mother.

Concerning the nationality of the child, it results from the establishment of the parentage of the intended father (when it is established through the recognition of the foreign birth certificate), which explains that no action undertaken has as direct objective the transmission of the Belgian citizenship to the child.

3. Amongst the decisions taken in matters of surrogacy, most of them have been settled by civil courts through substantive proceedings or, through interim relief actions when the request concerns the deliverance of travel documents.

The only case leading to a penal conviction is the *Donna* case, in which both the surrogate and the Belgian and Dutch intended parents were judged by a correctional court for inflicting “inhuman and degrading treatment” to the child. On the 12<sup>th</sup> of October 2012, the correctional court of Oudenaarde sentenced the surrogate mother and her husband to a year of suspended prison as well as to pay a fine of 1.650 EUR. The Dutch couple that had bought the child was equally condemned to a fine of 1.650 EUR while the sentence for the Belgian intended couple was suspended.

A case of surrogacy led to the application of the youth protection law. In this case, the surrogate mother had given the child to the intended mother after a surrogacy convention convened before childbirth. At first instance, the youth court considered that it was not necessary to pronounce an enforceable pedagogical measure with regards to the child<sup>344</sup>. In appeal, this decision was, however, reformed<sup>345</sup>. The Court of appeals granted the child to an adoption family for a period of six months, considering necessary to take an enforceable pedagogical measure in urgency in application of article 37, 2° of the decree on specialised assistance to the youth<sup>346</sup>. The child was then placed in a childcare and family assistance centre. While initially the placement was extended as demanded by the public prosecutor<sup>347</sup>, the youth court settled in favour of the request of the social service, requesting the attribution of the child to the intended mother, in whose household the child currently lives<sup>348</sup>.

#### 4. Best interest of the child

The notion of best interest of the child takes a considerable importance in the cases of surrogacy, both in the domestic and the international cases.

Thus, in a domestic case, the interests of the child was invoked by the judge in order to justify the approval of the adoption requested by the intended mother in order for the legal situation to correspond to the social reality, the child being reared by the intended mother and not by the surrogate mother<sup>349</sup>. In a case leading to the adoption of an

<sup>343</sup> Civ. Ghent, 24<sup>th</sup> of December 2009, *Revue@dipr.be*, 2010, n° 4, p. 133, note J. VERHELLEN, « Draagmoederschap: het internationaal privaatrecht uitgedaagd », p. 17.

<sup>344</sup> Youth court Ghent (27<sup>th</sup> ch.), 31<sup>st</sup> of March 2009, unpublished.

<sup>345</sup> Ghent (15<sup>th</sup> ch.), 18<sup>th</sup> of May 2009, 2009/JZ/39, unpublished, available at [www.juridat.be](http://www.juridat.be).

<sup>346</sup> Decree Fl. Cons., of the 7<sup>th</sup> of March 2008, on the special assistance to youth, *M.B.*, 15<sup>th</sup> of April 2008, p. 19977.

<sup>347</sup> Youth court Ghent (27<sup>th</sup> ch.), 4<sup>th</sup> of November 2009, unpublished.

<sup>348</sup> Youth court Ghent (27<sup>th</sup> ch.), 31 December 2009, unpublished.

<sup>349</sup> Civ. Brussels (youth), 4<sup>th</sup> of June 1996, *Jurisprudence de Liège, Mons et Brussels*, 1996, p. 1182:

“Genetically, Ivo is the son of the plaintiff and he is considered as such in social life. It would seem thus in his *interest* that the law matches the fact. The split of the parentage with the surrogate mother constitutes an

enforceable pedagogical measure, taken in the frame of the assistance to the youth, the best interests of the child led the Court of Appeals of Ghent to withdraw the child from the intended mother in order to trust it to an adoption family for a period of six months<sup>350</sup> (subsequently, the child was returned to the household of the intended mother).

The best interests of the child has also been invoked in international cases to justify the deliverance of travel documents to a child born in India in order to allow him to join his intended father in Belgium (in the framework of an interim relief action)<sup>351</sup>, to justify the establishment of the parentage of the biological father in relation to the children born in California, independently of the nullity of the contract of surrogacy<sup>352</sup> or even to justify the adoption of the child by the intended mother after a surrogacy concluded in Ukraine in order to match the legal reality with the genetic and social-psychological reality<sup>353</sup>. In a strange and perhaps somewhat inconsistent way, the best interest of the child was invoked by the Court of First Instance of Brussels to justify the non-recognition of an Indian birth certificate and a recognition of paternity on the basis that it would not be "in the interest of child C. to establish his filiation based on acts drawn up in India, as the latter contravene to the fundamental principles of the protection of the interests of all children, since they spring from commercial transactions that are not concerned with the interests of the child" before finally agreeing to establish, on the basis of the Belgian law, filiation from the father of intent with respect to the child on the grounds that "this paternity would match the one established in India and would be in the interest of the child"<sup>354</sup>. This isolated decision does however not reflect the dominant position that the Belgian Courts seem to be developing.

Thus: In domestic cases, the control of the best interest of the child serves as a basis for the legal decision pronouncing the adoption to the extent that the court before which the action is undertaken has to verify if the adoption is founded on "fair basis", within which is included the best interest of the child<sup>355</sup>. When this notion is invoked in an international case dealing with a request for the recognition of birth certificates established abroad, it seems to allow to "neutralise" the illegality of the surrogacy contract<sup>356</sup> without constituting by doing so the autonomous foundation of the recognition of parentage. Indeed, it is because the parentage of the biological father can

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element of legal security, in particular for the case in which the surrogate mother would wish one day to exert rights in relation to the child"

<sup>350</sup> Ghent (15<sup>th</sup> ch.), 18<sup>th</sup> May 2009, 2009/JZ/39, unpublished, available on [www.juridat.be](http://www.juridat.be).

<sup>351</sup> Civ. Brussels (interim), 6<sup>th</sup> of April 2010, *Revue trimestrielle de droit familial*, 2010, p. 1164: "That the *best interest of the child* does not appear to be, in view of these elements, to stay in India – country in which he does not seem to have any link – without M. R., a situation that appears contrary to the article 8 of the European Convention of Human Rights".

<sup>352</sup> Liège, 6<sup>th</sup> of September 2010, *Revue trimestrielle de droit familial*, 2010, n° 4, p. 1139, note C. HENRICOT, S. SAROLÉA et J. SOSSON: " In what concerns the relation of parentage with relation to the biological father, A.J., we can however consider that the illegality of the surrogacy contract – from which result the birth certificates of which recognition is requested – cannot harm the *best interest of the children* M. and M. guaranteed by article 3 of the Convention on the rights of children as well as article 22bis of the Constitution. The refusal of recognising the birth certificates to the extent they concern the establishment of the parentage relation with the biological father would deprive the children from any relation to him while at the same time the maternal parentage is not recognised in the country of the surrogate mother. This situation would be greatly harmful for them" In the same sense, See Civ. Brussels, 15<sup>th</sup> of February 2011, *Revue@dipr.be*, 2011, p. 125 and Civ. Nivelles, 6<sup>th</sup> of April 2011, *Rev. trim. dr. fam.*, 2011, p. 695, note C. HENRICOT.

<sup>353</sup> Youth court Antwerp, 22<sup>nd</sup> of April 2010, *Tijdschrift voor Familierecht*, 2012, p. 43, note L. PLUYM ; [Revue@dipr.be](http://Revue@dipr.be), 2012, p. 22.

<sup>354</sup> Civ Brussels, 18 December 20120, unpublished and non-final

<sup>355</sup> Art. 344.1 Civil code: "All adoptions have to be founded on fair basis and, if it concerns a child, they cannot take place outside of his/her *best interests* and respecting the fundamental rights that are recognised as his/hers by international law".

<sup>356</sup> Cf. however *contra* Civ Brussels, 18 December 20120, unpublished and non-final.

be established by rules on the acknowledgement of paternity, that the tribunal admits to recognise this parentage as it is established by the birth certificates<sup>357</sup>.

### 5. Family life

The notion of family life seems to be invoked by courts to support the reference to the principle of the best interest of the child<sup>358</sup>. Thus, it seems to play a complementary role in order to, for example, justify the issuance of travel documents to a child born abroad<sup>359</sup>.

### 6. Donation of ovules and importance of the genetic link

In the cases of surrogacy concerning questions of international nature (recognising the parentage established by a foreign birth certificate), the reasoning of the courts does not change, whether there was ovule donation or the intended mother is the genetic mother, as the case-law refuses systematically to recognise the parentage of the intended mother because in Belgian law the maternal parentage is established by childbirth<sup>360</sup>. The circumstance in which the intended mother is the genetic mother does not modify at all the outcome of the dispute. In all cases, she will have to engage a procedure of adoption in order to establish parentage in relation to the child born from a surrogate mother<sup>361</sup>.

When surrogacy raises questions of domestic nature (i.e. request for adoption in Belgium following a surrogacy taking place in Belgium or abroad), it seems, on the contrary, that the genetic reality influences strongly the outcome of the dispute. The bias towards genetic reality seems to justify a settlement favourable to adoption in cases where the intended mother is also the genetic mother even when an amount of money is suspected to have been given to the surrogate mother<sup>362</sup> but, on the opposite case, a refusal is given to the request of adoption if the intended mother has no genetic relation to the child in the framework of a for-profit surrogacy<sup>363</sup>. Could we consider, thus, that it is always in the best interest of the child to have parentage maintained or established in relation to his/her genetic mother, surrogate in some cases, intended mother in others? This seems to be the current position of the Belgian courts confronted to adoption requests in the framework of surrogacy. Indeed, in the two decisions deciding to refuse to pronounce the adoption of the child by the intended mother, the surrogate mother was the genetic mother of the child (traditional surrogacy) while in the cases in which the intended other is the genetic mother (gestational surrogacy), the courts pronounced the adoption even when it would seem that a sum of money, exceeding the costs related to surrogacy, was paid to the surrogate mother.

<sup>357</sup> J. SOSSON, « La filiation d'enfants nés d'une gestation pour autrui à l'étranger », note on Liège, 6<sup>th</sup> of September 2010, *Revue trimestrielle de droit familial*, 2010, n° 4, p. 1153.

<sup>358</sup> Civ. Brussels (interim), 6 April 2010, *Revue trimestrielle de droit familial*, 2010, p. 1171: "Considering that it is appropriate to take into account the fact that M.R. takes care of C. from childbirth; that it is, thus, evident that a privileged link exists between the child and M.R. and that a situation of family life has come to being (we know the importance of the links created during the first weeks of life).

<sup>359</sup> *Ibidem*.

<sup>360</sup> For an example of the intended mother being also the genetic mother of the children, see Civ. Antwerp, 19<sup>th</sup> of December 2008, *Revue@dipr.be*, 2010, liv. 4, p. 140. For an example of the intended mother not being the genetic mother of the children, see Civ. Nivelles, 6<sup>th</sup> of April 2011, *Rev. trim. dr. fam.*, 2011, p. 695.

<sup>361</sup> For cases of adoption in a case of domestic surrogacy, see Brussels (3<sup>rd</sup> ch.), 1<sup>st</sup> of March 2007, *Revue trimestrielle de droit familial*, 2007, p. 754 ; Antwerp (16<sup>th</sup> ch. bis), 14<sup>th</sup> of January 2008, *RechtskundigWeekblad*, 2007-2008, p. 1774, note F. SWENNEN, « Adoptie na draagmoederschap revisited » ; Civ. Brussels (youth ch.), 4<sup>th</sup> of June 1996, *Jurisprudence de Liège, Mons et Brussels*, 1996, p. 1182 ; Civ. Turnhout (youth ch.), 4<sup>th</sup> of October 2000, *RechtskundigWeekblad*, 2001-2002, p. 206, note F. SWENNEN, « Volle adoptie na draagmoederschap: nihil obstat ? » ; Civ. Brussels (youth ch.) 6<sup>th</sup> of May 2009, J.L.M.B., 2009, p. 1083.

<sup>362</sup> Youth court Antwerp, 22<sup>nd</sup> of April 2010, *Tijdschrift voor Familierecht*, 2012, p. 43, note L. PLUYM ; *Revue@dipr.be*, 2012, p. 22.

<sup>363</sup> Ghent (15<sup>th</sup> ch.), 30<sup>th</sup> of April 2012, *Tijdschrift voor Belgisch Burgelijk Recht*, 2012, p. 261, note L. PLUYM ; *Tijdschrift voor Belgisch Burgelijk Recht*, 2012, p. 372, note G. VERSCHULDEN.

## **7. The translation into the Belgian legal order of parentage established following a case of surrogacy taking place abroad**

The cross-border aspect of surrogacy triggers the application of rules of international private law, which leads Belgian courts to apply their rules of conflict of laws or of indirect competence to translate into the Belgian legal order parentage established abroad following a case of surrogacy. In the absence of a specific disposition to surrogacy in the Code of international private law, the translation into the Belgian legal order of parentage established abroad following a case of surrogacy is done taking into account distinct rules whether the question is to recognise a *birth certificate* established following a case of surrogacy **(a)** or if the question is to recognise a *sentence* establishing parentage following a case of surrogacy **(b)**.

### **(a) The recognition of a birth certificate established following a case of surrogacy taking place abroad**

A birth certificate established abroad following a case of surrogacy is recognised in Belgium if its validity is established in conformity with the *national law* of the persons in relation to whom parentage is being established. This solution results from the combined application of articles 27 and 62 of the Code of international private law, dealing respectively with the recognition of foreign authentic certificates<sup>364</sup> and with the law applicable to parentage<sup>365</sup>. In other words, in order to recognise parentage as established by a foreign birth certificate, the validity of the parentage has to be verified in relation to the *national law of the intended parents*.

In the current state of the case law on the question, if the intended parents are Belgian, parentage is established in relation to the intended father if the latter is also the biological father<sup>366</sup>, while his spouse (homosexual or heterosexual) should have to engage an adoption procedure.

If the intended parents are foreigners, the foreign law has to be verified to determine its provisions:

- if the foreign law prohibits the establishment of parentage following a case of surrogacy, as the French law, for example, parentage cannot be established, unless the foreign law is considered contrary to Belgian international public order (in the absence of legislation framing surrogacy in Belgium, it would seem difficult, currently, to affirm that a foreign law ignoring surrogacy can be discarded for being contrary to the Belgian international public order),
- if the foreign law admits the establishment of parentage by surrogacy, the conditions of parentage need to be verified to determine if it can be established and if this foreign law is not contrary to the Belgian international public order,
- moreover, it will be needed to verify that the parties have not attempted to escape the law normally applicable by travelling abroad

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<sup>364</sup> Art. 27, § 1<sup>st</sup>, al. 1 Code of IPL: "An authentic foreign certificate is recognised in Belgium by any authority without it being necessary to engage in a procedure if its validity is established in conformity to the applicable law established by the current law, taking especially into account articles 18 [fraudulent evasion of the law] and 21 [public order]".

<sup>365</sup> Art. 62, § 1<sup>st</sup> Code of IPL: "The establishment and the contestation of paternity or maternity of a person are ruled by the law of the state from which the person is a citizen of at the moment of birth of the child or, if this establishment result from a voluntary act, at the moment of the act".

<sup>366</sup> Liège, 6<sup>th</sup> of September 2010, *Revue trimestrielle de droit familial*, 2010, n° 4, p. 1139 ; Civ. Brussels, 15<sup>th</sup> of February 2011, *Revue@dipr.be*, 2011, p. 125 et Civ. Nivelles, 6<sup>th</sup> of April 2011, *Rev. trim. dr. fam.*, 2011, p. 695.



999to obtain the establishment of a right they could not have obtained otherwise (fraudulent evasion of the law).

In the cases dealt with by the Belgian courts, the intended parents had systematically the Belgian nationality, which explains that the validity of parentage established by the birth certificate was verified in the light of the Belgian law of parentage (designed by the rule of conflict of law in matters of parentage), allowing this way the establishment of the parental parentage of the biological father but refusing the establishment of the maternal parentage of the intended mother (as she didn't give birth) as well as the establishment of a double paternal parentage in relation to the homosexual spouse of the biological father, the latter having to engage an adoption procedure to establish parentage in relation to the child.

As the Belgian law is designed by the rule of conflict of laws, there is no need to invoke the exception of public order to discard the maternal parentage established by the foreign law as the engagement of this mechanism is conditioned to the application of the foreign law<sup>367</sup>. Taking this into account, the result to which the application of Belgian law conduces is the same as with regards to the intended mother, no parentage can be established without engaging a procedure of adoption.

It is, however, probable, that the following years will allow to question the application of the exception of public order if, for example, the surrogacy takes place abroad by foreign intended parents residing in Belgium and aiming at parentage to be recognised in Belgium. It is, nevertheless, delicate, currently, to predict the content of the exception of public order, as there is no Belgian legislation on the issue. To be applied, the public order exception requires for a legal order of reference, of which the content is inexistent today in the Belgian legal order. The application of the exception of Belgian international legal order will depend, thus, of the position to be taken by the Belgian legislator on the issue: total prohibition or regulation, under certain conditions, of surrogacy?

Contrary to the position assumed by courts accepting a partial recognition of birth certificates, Belgium embassies seem to categorically refuse to recognise birth certificates established as a result of surrogacy, without distinguishing between the father and the intended mother and without analysing the certificate under the light of the principles currently resulting from the case law<sup>368</sup>.

### ***(b) The recognition of a foreign sentence establishing parentage following a contract of surrogacy***

When parentage from a surrogacy is established as a result of a sentence, the court before which the action is undertaken has to verify the absence of basis for refusal

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<sup>367</sup> Art. 21, al. 1: "The application of a disposition of *foreign law* specified by this law is discarded to the extent it would produce an effect evidently incompatible with the public order".

<sup>368</sup> See the warning that can be read on the website of the Belgium embassy in Kiev: "In the current state of texts, the Belgian legislation does not treat the question of surrogacy or of children born to a surrogate mother. Facing this legal gap, our services are obliged not to recognise any effect to foreign documents produced in this frame (birth certificates, sentences,...). This position is adopted even if the legal procedure as provided for locally has been scrupulously followed. The effects produced abroad by this do not produce any in our domestic legal order. If a Belgian citizen decides to engage a procedure of surrogacy in Ukraine, even if following the local law, there is no assurance that his/her paternity/maternity will be recognised by the Belgian law, or that the child will be delivered a document of travel. The services of the Public Federal Service of Foreign Affairs will refuse to recognise their paternity/maternity, will not deliver any travel documents and will invite applicants to go before the competent court of first instance (ref. articles 23 and 27 of the Belgian Code of international private law). In light of the aforementioned and faced with the difficulties to which a Belgian citizen will be confronted if he/she decides to engage a procedure of surrogacy, we would like to remind you that adoption is provided for by the Belgian law and constitutes, thus, a possible alternative". The same warning is found on the sites of the embassies of Belgium in New Delhi, Atlanta, New York and Los Angeles, a situation that raised questions by some parliamentarians.. See Written question n° 5-2661 of the 1<sup>st</sup> of July 2011, *Parl. doc.*, Sen., n° 5-2661 (question asked by Mrs S. de Bethune).



opposed to the recognition of the sentence by the Belgian legal order, in conformity with the rules of indirect competence disposed by articles 22 and 25 of the Code of international private law<sup>369</sup>. These dispositions could apply if the parentage of the intended parents results from a sentence, as it is the case in the United Kingdom<sup>370</sup> and in Greece<sup>371</sup> in Europe as well as, in the states of California<sup>372</sup>, Texas<sup>373</sup>, Utah<sup>374</sup> and Virginia<sup>375</sup> in the United States.

The only case brought before the Belgian courts that would have probably required for the application of rules on the recognition of foreign sentences is the Californian case (case *Maïa and Maureen*)<sup>376</sup>. In the case, the court before which the action was undertaken preferred, however, (by mistake?) to reason on the basis of birth certificates established following the Californian sentence, which triggered the application of the rule of conflict of laws in matters of parentage (see *supra*: art. 62 of the Code of PIL). The biological father being of Belgian nationality, the judge recognised the Californian birth certificate, after verifying that the paternal filiation could be established in relation to the Belgian law of parentage.

## 8. Language

The terms used by the case law do not change: the judges use the terms "convention of surrogacy" or "convention of substitution of maternity". The francophone case law seems to avoid naming the intended parents and qualify them simply as "applicants" while the

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<sup>369</sup> Art. 22, § 1st, al. 2: "A foreign judicial decision is recognised in Belgium, fully or partially, without it being necessary to engage the procedure provided for by article 23" and art. 25: « § 1st. "A foreign judicial decision is not recognised or declared enforceable if:

1° the effect of the recognition or the declaration of enforceability is incompatible with the public order; this incompatibility is considered taking into account, namely, the intensity of similarity of the situation with the Belgium legal order and the gravity of the effect produced;

2° the rights of defence have been violated;

3° the decision was obtained, in a way such that the persons do not dispose freely of their rights, only to escape the application of the law specified by this law;

4° without prejudice to article 23, § 4, it can still be the subject of an ordinary proceeding based on the law of the State where it was issued

5° it is irreconcilable with a decision issues in Belgium or with a decision issues before abroad and susceptible to be recognised in Belgium;

6° the request was introduced abroad after the introduction in Belgium of a request, still unresolved, by the same parties and with the same object;

7° the Belgian courts were the only competent to settle the question;

8° the competence of the foreign court was based only on the presence of the defendant or on goods without direct relation to the dispute in the State to which the court is attached to; or

9° the recognition or the declaration of the enforceability clashes with one of the basis of refusal foreseen by articles 39, 57, 72, 95, 115 et 121 ».

<sup>370</sup> Human Fertilisation and Embryology Act 2008 s 54 (1).

<sup>371</sup> Greek Civil code, art. 1458.

<sup>372</sup> While California does not dispose of a specific legislation on surrogacy, the validity of a surrogacy contract results from the case law (*Johnson v. Calvert*, 851 P 2d 776, 783, 5 Cal. 4th 84, 95 (Cal. 1993): « the surrogacy agreement is not, on its face, inconsistent with public policy »). The intended parents will have to undertake action before the courts before the birth of the child in order to obtain a "pre-birth judgement" establishing their parentage with regards to the child to be born of the contract of surrogacy.

<sup>373</sup> Tex. Fam. Code §§ 160.756 (c): « If the court finds that the requirements of Subsection (b) are satisfied, the court may render an order validating the gestational agreement and declaring that the intended parents will be the parents of a child born under the agreement ».

<sup>374</sup> Utah Code Ann. §78B-15-803 (1): « Hearing to validate gestational agreement: (1) If the requirements of Subsection (2) are satisfied, a tribunal may issue an order validating the gestational agreement and declaring that the intended parents will be the parents of a child born during the term of the agreement ».

<sup>375</sup> Va. Code Ann. § 20-160 D: « Within seven days of the birth of any resulting child, the intended parents shall file a written notice with the court that the child was born to the surrogate within 300 days after the last performance of assisted conception. Upon the filing of this notice and a finding that at least one of the intended parents is the genetic parent of the resulting child as substantiated by medical evidence, the court shall enter an order directing the State Registrar of Vital Records to issue a new birth certificate naming the intended parents as the parents of the child pursuant to § 32.1-261 ».

<sup>376</sup> Liège, 6<sup>th</sup> of September 2010, *Revue trimestrielle de droit familial*, 2010, n° 4, p. 1139.

Dutch-speaking case law refers to a « wensmoeder » (intended mother) and a « wensvader » (intended father)<sup>377</sup>.

### **9. Need to legislate**

In certain sentences, the judges highlight the absence of Belgian legislation on the matter. Thus, when they are called to approve a request of adoption introduced by the intended mother, the judges point to the gaps in the law<sup>378</sup> and specify that it is not their duty to make a fundamental political choice in lieu of the legislator<sup>379</sup>. However, it is mostly doctrine, and not case law, that denounces the absence of legislation and insists on the urgency of legislating on the matter.

### **10. Case law reference**

When sentencing on cases of surrogacy, judges refer exclusively to the case law relating to similar causes and seem to avoid inspiring themselves on case law from other fields of law, such as adoption or IVF cases.

### **11. Financial aspects**

The financial aspects related to a contract of for-profit surrogacy are rarely debated by Belgian courts. In the case Hanne and Elke (surrogacy taking place in Ukraine by heterosexual intended parents), it was revealed that an amount of 30.000 EUR was paid by the intended parents to the Ukrainian law firm. According to the parties, these costs aimed at covering not only judicial advice but also all practical aspects of surrogacy: fees related to travels, translations, contact with professionals in a private clinic of fertilisation, attempts to perform IVF, ultrasounds, medical follow-up of the surrogate mother, etc... When the procedure of adoption was engaged by the adopting mother, the tribunal considered it did not possess enough objective information to know if the amount exceeded the normal amount of compensation concerning the costs resulting from surrogacy and concluded that the parties acted without the intention to make profit<sup>380</sup>.

In the case of a domestic case of surrogacy, the Court of Appeal of Ghent took a more severe position. Realising that an amount of 1.600 EUR per month was paid monthly by the parents to the surrogate mother, the Court refused to approve the adoption, considering that an adoption resulting from a contract of for-profit surrogacy could not be based on fair basis, regardless of the de facto parents-child relation existing between the child and the intended mother. The Court considers that a contract of for-profit surrogacy is contrary to human dignity and that an adoption aiming at dissimulating the buy/sale of a child is illegal<sup>381</sup>. In the case, it must be highlighted that the surrogate mother was also the genetic mother of the child, which seems to justify the position taken by the Court more than the fact that a for-profit surrogacy contract was concluded.

### **12. Margin of manoeuvre**

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<sup>377</sup> Civ. Antwerp, 19<sup>th</sup> of December 2008, *Revue@dipr.be*, 2010, liv. 4, p. 140.

<sup>378</sup> Civ. Brussels (youth), 4<sup>th</sup> of June 1996, *Jurisprudence de Liège, Mons et Brussels*, 1996, p. 1183: "In these circumstances, the adoption is used to some extent to fill a gap in the law or, at least, to solve a hypothesis that the law has not foreseen". In the same sense, See Civ. Brussels (youth ch.), 6<sup>th</sup> of May 2009, *J.L.M.B.*, 2009, p. 1083.

<sup>379</sup> Civ. Antwerp (youth ch.) 22<sup>nd</sup> of April 2010, *Tijdschrift voor Familierecht*, 2012, p. 43, note L. PLUYM ; *Revue@dipr.be*, 2012, p. 22: "The Court considers that it is not in its jurisdiction to make such fundamental policy choices in the place of the legislator".

<sup>380</sup> Youth court Antwerp, 22<sup>nd</sup> of April 2010, *Tijdschrift voor Familierecht*, 2012, p. 43, note L. PLUYM ; *Revue@dipr.be*, 2012, p. 22.

<sup>381</sup> Ghent (15<sup>th</sup> ch.), 30<sup>th</sup> of April 2012, *Tijdschrift voor Belgisch Burgelijk Recht*, 2012, p. 261, note L. PLUYM ; *Tijdschrift voor Belgisch Burgelijk Recht*, 2012, p. 372, note G. VERSCHULDEN.

The margin of manoeuvre that the judges have in the cases of surrogacy of international nature is limited by the rigorous application of the rules of international private law. To this extent, the Californian case is quite significant: at first instance, the tribunal refused to recognise the birth certificates from California on the basis of public order and fraudulent evasion of the law<sup>382</sup> while the correct reasoning, developed afterwards by appeal, consisted to verify the validity of the birth certificate in relation to the national law of the person in relation to whom the parentage was being established<sup>383</sup>. In this case, the intended father being Belgian, the Belgian law was applicable, which precludes the execution of an exception of public order for which the triggering is conditioned to the application of a foreign law. It is the same case when it is the case to established the parentage of the intended mother of Belgian nationality as the courts systematically refuse to recognise a foreign birth certificate mentioning the name of the intended mother on the basis that in the Belgian law, the mother is the woman who gives birth to the child, namely the surrogate mother. In other words, when the Belgian law is called for by the rule of conflict of laws, the judges do not dispose but a very limited margin of appreciation. It is only in the hypothesis of a foreign law being designed by the rule of conflict of laws that the judges would find a certain margin of appreciation by examining the exception of public order. This would also be the case if the judges would have to sentence on parentage established following a sentence, hypothesis that has not still been brought up before Belgian courts.

The only instrument that judges have as a resource is that of the "fraudulent evasion of the law", enshrined by article 18 of the Code of IPL<sup>384</sup>. While this mechanism could be invoked to sanction the behaviour of the intended parents aiming at obtaining abroad the establishment of parentage following a case of surrogacy thus bypassing the Belgian law<sup>385</sup>, the courts seem to refuse to apply the instrument too strictly. Thus, some courts have considered that it was not demonstrated that the travel of the parties abroad had as a unique objective to obtain birth certificates mentioning the intended mother as the legal mother and have, as a result, concluded that there was an absence of fraudulent evasion of the law<sup>386</sup>. Other courts consider that when the Belgian law is applied, as designed by the rule of conflict of laws, there is no place to evoke the question of fraudulent evasion of the law, the triggering of this mechanism being conditioned to the designation of a foreign law<sup>387</sup>. This position results from a restrictive interpretation of the notion of fraudulent evasion of the law according to which the application of this mechanism depends on the modification of the connecting factor of the rule of conflict of

<sup>382</sup> Civ. Huy, 22<sup>nd</sup> of March 2010, *Journal des tribunaux*, 2010, p. 420, note N. GALLUS.

<sup>383</sup> Liège, 6<sup>th</sup> of September 2010, *Revue trimestrielle de droit familial*, 2010, n° 4, p. 1139, note C. HENRICOT, S. SAROLEA et J. SOSSON.

<sup>384</sup> Art. 18 Code IPL: "To determine the law applicable in a matter in which persons do not dispose freely of their rights, facts and acts are not taken into account if their sole objective is to escape the application of the law designed by this law".

<sup>385</sup> A position defended by a segment of the doctrine: P. WAUTELET, « Un nouvel épisode dans la saga de la surrogacy transfrontière », note on Liège (1<sup>st</sup> ch.), 6<sup>th</sup> of September 2010, *J.L.M.B.*, 2011, p. 61; J. VERHELLEN, « Draagmoederschap: het internationaal privaatrecht uitgedaagd », note sous Civ. Antwerp, 19<sup>th</sup> of December 2008, *Revue@dipr.be*, 2010, p. 169 et S. PFEIFF, « Surrogacy et procréation médicalement assistée – T. II L'accueil en Belgique d'un lien de filiation issu d'une surrogacy réalisée à l'étranger », in *Chronique de jurisprudence (2005-2010), Les Dossiers du Journal des Tribunaux*, Brussels, Larcier, 2011, pp. 365-368.

<sup>386</sup> Civ. Antwerp, 19<sup>th</sup> of December 2008, *Revue@dipr.be*, 2010, liv. 4, p. 144: "The theory of law evasion must be approached with caution. There can only be a case of law evasion if there is proof that *the only aim* of the applicants was to escape the Belgian law. It is not proven that the applicants have sought refuge in a hospital in Ukraine, with the sole aim of obtaining a birth certificate in which the first applicant would be declared as the mother of the child instead of the surrogate mother. The main objective of the applicants was undoubtedly to fulfil their explicit and long-time desire to have children of their own, genetically speaking". See also Civ. Brussels, 15<sup>th</sup> of February 2011, *Revue@dipr.be*, 2011, p. 130: "There can only be fraud to the law if it can be proven that applicant's only purpose was to escape the Belgian law, quod non; The unfortunate and even illegal attempt by the applicant to collect the child in Ukraine is not an element that should be taken into consideration when examining the validity and legality of the birth certificate".

<sup>387</sup> See for ex. Civ. Nivelles, 6<sup>th</sup> of April 2011, *Rev. trim. dr. fam.*, 2011, p. 695: "There is no reason to examine the validity of disputes in relation to the exception of public order of private international law (article 21 of the Code of international private law) or the fraudulent evasion of the law (article 18 of the Code of international private law), as the application of these mechanisms is conditions to the designation of a foreign law"

laws, in matters of parentage, on the modification of the nationality of the parties. This stricter interpretation of the notion of fraudulent evasion of the law could be justified by the realisation that it would be incongruous to sanction a behaviour as aiming to escape Belgian law if, *in fine*, the Belgian law is applicable.

When surrogacy requires an adoption, the judges dispose of a certain margin of appreciation through the notion of the best interest of the child of which the control is required by law. Thus, it has been judged that it was in the best interest of the child to be adopted by the intended mother (also the genetic mother) regardless of the amount of money probably paid to the surrogate mother (case *Hanne and Elke*)<sup>388</sup>, while other court refused to pronounce the adoption, requested by the intended mother (not genetically related to the child) in the framework of a for-profit surrogacy, regardless of the *de facto* child-parent relation existing between the child and the intended mother<sup>389</sup>. This assessment could allow to conclude that Belgian courts consider that it is in the interest of the child to see his/her parentage maintained or establish in relation to his/her genetic parents, regardless of the for-profit or non-profit nature of the surrogacy.

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<sup>388</sup> Youth court Antwerp, 22<sup>nd</sup> of April 2010, *Tijdschrift voor Familierecht*, 2012, p. 43, note L. PLUYM ; [Revue@dipr.be](mailto:Revue@dipr.be), 2012, p. 22. In this case, the tribunal considered, however, that the parties acted without the intention of making profit.

<sup>389</sup> Ghent (15<sup>th</sup> ch.), 30<sup>th</sup> of April 2012, *Tijdschrift voor Belgisch Burgelijk Recht*, 2012, p. 261, note L. PLUYM ; *Tijdschrift voor Belgisch Burgelijk Recht*, 2012, p. 372, note G. VERSCHULDEN.

### 6.3. BULGARIA

This report examines the issue of surrogacy, particularly, the arrangements for its legalisation in Bulgaria, which is currently being considered. The report is divided into six parts. Part One describes the current regulatory framework of surrogacy in Bulgaria and the origin of the initiative concerning possible future legalisation. Part Two examines the provisions contained in the draft bills presented for the first reading before the National Assembly of the Republic of Bulgaria (hereinafter cited as the National Assembly). Part Three presents the preliminary discussions held by different parliamentary committees. Part Four reviews the most important issues discussed at the Plenary Sessions for the first reading of the draft bills before the National Assembly. Part Five contains various proposals put forward by experts and lawyers regarding the provisions included in the draft bills between the first and second reading. Part Six summarises the main arguments for and against the legalisation of surrogacy as presented in the Bulgarian debates.

#### Note on terminology:

As is explained below, the terminology of “surrogate mother” has a negative connotation in Bulgaria, with proposals for draft legislation adopting instead the terminology of “substitute mother”. It appears, however, that the term “surrogacy” is still used to refer to the phenomenon generally, even if “substitute mother” is preferred to “surrogate mother”.

### PART ONE

#### Background Information

Current Bulgarian legislation contains a series of restrictive and prohibitive provisions relating to surrogacy. Article 60(1) of the Bulgarian Family Code indicates that the status of the child is decided upon birth, and article 60(2) states that a mother is the woman who gave birth to the child even in cases of *assisted reproduction*.<sup>390</sup> Furthermore, surrogacy has been criminalised in accordance with article 182 of the Bulgarian Penal Code and Part IV, article 5(14) of the Ordinance Number 28 on Assisted Reproduction from 20 June 2007, which prohibits in vitro fertilisation for the purpose of a surrogacy arrangement.<sup>391</sup> More specifically, Article 182(a)(3) provides that:

‘The one who acts as an intermediary, with a view to obtain (sic) an illegal pecuniary benefit, between a person or a family wishing to adopt a child, and a parent, wishing to abandon a child, or a woman, who agrees to carry in her womb a child to surrender for adoption, shall be punished by deprivation of liberty of up to two years and a fine of up to BGN [3,000 (€1,531)].’<sup>392</sup>

Article 130(4)(4) of the Health Act, states that ovum from one woman can be taken and placed into the body of another one.<sup>393</sup> While this Article is clearly designed to permit

<sup>390</sup> See article 60 Family Code (Семеен Кодекс, Произход на детето, член 60) <<http://lex.bg/bg/laws/ldoc/2135637484>> accessed on 21 November 2012.

<sup>391</sup> See Bulgarian Penal Code, Chapter 4: Crimes against Marriage, Family and You, Article 182 available in English, <[http://www.vks.bg/english/vksen\\_p04\\_04.htm](http://www.vks.bg/english/vksen_p04_04.htm)> accessed on 02 November 2012 and Наказателен Кодекс, <<http://lex.bg/bg/laws/ldoc/1589654529>>. See also, Ordinance Number 28 for Assisted Reproduction from 20 June 2007 (Наредба №28 от 20 юни 2007 г. за дейности по асистирана репродукция), Раздел IV <[http://bgtransplant.bg/iat/regulations.php?target\\_f=ordinances.htm](http://bgtransplant.bg/iat/regulations.php?target_f=ordinances.htm)> accessed on 3 November 2012.

<sup>392</sup> See Article 182(3) of the Bulgarian Penal Code, (n 2). See also, exchange rate of the European Central Bank, (€1=BGN 1.9558), <<http://www.ecb.int/stats/exchange/eurofxref/html/index.en.html>> accessed on 30 November 2012

<sup>393</sup> Health Act (Закон за здравето, Раздел III, Асистирана репродукция) <<http://lex.bg/bg/laws/ldoc/2135489147>> accessed on 03 November 2012. За и против сурогатството, <<http://www.dailymotion.com/video/>> accessed on 03 November 2012.

ovum donation, the provisions mentioned above mean that it is not extended to gestational surrogacy arrangements.

Although all types of surrogacy are presently prohibited by Bulgarian law, there are, nevertheless, medical centres in Bulgaria where surrogacy is allegedly being practiced. Typically, a couple with reproductive problems finds a woman who gives birth to their genetic child. The father acknowledges formally the paternity of the child and then the genetic mother adopts the child. This usually but not always happens between family members and it is altruistic.<sup>394</sup> A simple search on the Internet shows that there are a lot of advertisements of people looking for surrogate mothers and women who are willing to become surrogate mothers.<sup>395</sup>

Specialists claim that, unfortunately, the legalisation on techniques related to the reproductive health and methods for assisted reproduction appears to be somewhat untimely when compared to the development of modern medicine. The same is true for the relevant family law legislation which does not seem to take into account new methods of assisted reproduction. The Family Code needs to be updated in order to be in pace with modern methods of assisted reproduction. A detailed analysis of the Bulgarian legislation shows that the laws and codes prevent couples who are infertile from having a child of their own. Consequently, the only way to become parents in such cases is to adopt a child. But the procedures for adoption in Bulgaria are cumbersome, lengthy and more often than not unsuccessful.

In modern society the problems related to infertility are increasing and thus the number of couples who cannot have offspring increases as well. The *perception* in Bulgaria is that more and more European Union (EU) Member States are legalising surrogacy and that Bulgarian legislation needs to be harmonised with the laws of Western European countries.<sup>396</sup> However, as this study indicates, few Western European countries have explicit legal frameworks for surrogacy.

At present, there is no case-law on surrogacy in Bulgaria as the bill has not been passed, and it is therefore outside the realms of the law and the current jurisdiction of the courts.

### Legislative Initiative

In Bulgaria, the idea of legalising surrogacy arose in 2009 when Kalina Krumova, the then MP from АТАКА<sup>397</sup>, met a woman who had reproductive problems and who was not afraid to admit publicly that she could not have children. Kalina Krumova became aware of the current situation in the country and the main problems related to the "renting of wombs" on the black market (where the price varies between BGN 15,000 - 25,000

<sup>394</sup> See Гергана Котсакиева, "Текст от Семейния кодекс възпрепятства сурогатното майчинство у нас", <<http://www.zdrave.net/Portal/News/Default.aspx?page=0&evntid=31671>> accessed 24 November 2012. Д-р Иван Козовски, "Законът разрешава сурогатството", <<http://www.narodnodelo.bg/news.php?news=42326>> accessed 24 November 2012. Капитал, <[http://www.capital.bg/politika\\_i\\_ikonomika/obshtestvo/2012/08/03/1880869\\_edno\\_bebe\\_molia/](http://www.capital.bg/politika_i_ikonomika/obshtestvo/2012/08/03/1880869_edno_bebe_molia/)> accessed on 26 November 2012. "Родител търси майка", an article in the newspaper which talks about a 22 year old woman who decided to become a substitute mother after seeing an advertisement online. There was no contract for substitute motherhood and all the relationships were based on mutual trust, however, she was paid for the "service" and she received BGN 23,000 [€11,700]. Вестник Капитал, <[http://www.capital.bg/politika\\_i\\_ikonomika/obshtestvo/2011/11/04/1196126\\_roditel\\_tursi\\_maika/](http://www.capital.bg/politika_i_ikonomika/obshtestvo/2011/11/04/1196126_roditel_tursi_maika/)> accessed on 26 November 2012.

<sup>395</sup> Мама под наем, Темата на Нова ТВ, <<http://play.novatv.bg/play/264930/?autostart=true>> accessed on 28 November 2012.

<sup>396</sup> Вестник Атака, Сурогатното майчинство спира търговията с бебета, <<http://www.arhiv.vestnikataka.bg/archive.php?broi=1334&text=&fromDate=&toDate=&newsID=75360>> accessed 23 November 2012.

<sup>397</sup> At the time when she made the proposals for the draft bills she was an АТАКА MP but now she is an independent MP (she resigned from АТАКА after she was disappointed that the parliamentary party will not support the draft bills for legalising surrogacy).



(€7,700 – €12,700)<sup>398</sup> and above), and the constraint for couples with reproductive problems to travel to other countries, in particular, to Ukraine where surrogacy is legal and foreign couples can benefit from the procedure, but where the price is much higher (between €20, 000 - €25,000 and above).

After doing extensive research on the subject matter, consulting doctors, lawyers, patients with reproductive problems, psychiatrists, psychologists, and experts in different areas, and organising public debates for almost two years, Kalina Krumova submitted the draft bills presented in Part Two before the National Assembly.<sup>399</sup> It is important to note that the working group on the draft bills decided that the terms “substitute mother” and “substitute motherhood” are more suitable for Bulgaria and these terms will be hereinafter used referring to the draft legislation in Bulgaria and “surrogate mother” and “surrogacy” when taking about the phenomenon in general.<sup>400</sup> More importantly, the draft legislation deals only with altruistic gestational surrogacy. It is understood as a purely voluntary act where the services of the substitute mother are seen as a gift and only reasonable costs related to the carrying and giving birth of a child are covered.

On 30 March 2010 a roundtable discussion entitled “Surrogate Pregnancy’s Legal Regulation and Debate on the Age Limit for Performing In Vitro Fertilization Procedures in Bulgaria” was held in the National Assembly under the auspices of Dr. Lachezar Ivanov, chair of the parliamentary Health Committee.<sup>401</sup> At this discussion Kalina Krumova announced the plan for legalising surrogacy in Bulgaria. The main reasons behind the initiative were the demographic crisis, the aging of the population, immigration of young people and an increase in the number of families who experience reproductive problems. As a consequence of all these factors there is a decrease in the number of Bulgarian citizens. In order to encourage childbirth and help the couples who wish to have children the state needs to make different instruments and methods available for its citizens.<sup>402</sup>

The public opinion is divided between those who support the initiative and those who firmly oppose it. The reactions vary from the emotional and touching appeal to give a chance to the childless couples who wish to be parents and for whom surrogacy is the only chance to have a genetic heir, to stopping the illegal business of buying and selling children as goods.<sup>403</sup> For instance, both the Bulgarian Association of Obstetricians and Gynaecologists and the Bulgarian Association for Sterility and Reproductive Health confirmed that surrogacy is a fundamental technique that needs to find its place in Bulgaria.<sup>404</sup> Also, they expressed their support for the organisations and the patients behind the legislative initiative.<sup>405</sup> The main political parties, namely, Citizens for European Development of Bulgaria (*Граждани за европейско развитие на България-ГЕРБ*), Bulgarian Socialist Party (*Българска социалистическа партия-БСП*), and the

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<sup>398</sup> See exchange rate of the European Central Bank (n 3).

<sup>399</sup> Интервю с Калина Крумова (23.01.2012), <<http://media.famar.bg/>> accessed on 13 November 2012. Елена Кодинова, “Сурогатното майчинство и опасността да се легализира търговията с бебета”, <<http://www.segabg.com/article.php?id=590714>> accessed on 12 November 2012.

<sup>400</sup> Surrogacy is a term which is foreign to the Bulgarian culture and conveys a negative connotation. It can be understood as a product or something which is of not good quality or even counterfeited. Note, however, that in the Bulgarian-Bulgarian dictionary (2001) ‘surrogate’ means ‘substitute who does not possess the same qualities, same substance or material’, and the definition does not use the word “product”.

<sup>401</sup> National Assembly, Press Release, <<http://www.parliament.bg/en/news/ID/2003>> accessed on 10 November 2012. See also, News Section of the Bulgarian Association for Sterility and Assisted Reproduction, (< [http://www.basrh.org/?p=3&m=4&news\\_id=3](http://www.basrh.org/?p=3&m=4&news_id=3)> accessed on 10 November 2012.

<sup>402</sup> See Part VI.

<sup>403</sup> Василена Доркова, “Близко до бебето”, <<http://www.blizodobebeto.com/2010/05/11/surrogacy/>> accessed on 17 November 2012.

<sup>404</sup> Novinited.bg, <<http://novinite.bg/articles/18319/Akusheri-Decata-ot-suroqatni-majki-ne-sa-produkt>> accessed on 21 November 2012.

<sup>405</sup> БГНЕС Информационна агенция, Общество, Д-р Щерев: “Няма по-свято от това да помагаш”, <<http://news.bgnes.com/view/975570>> accessed on 8 November 2012.

Movement for Rights and Freedoms (*Движение за права и свободи-ДПС*) support the draft bills as we shall see from the Plenary Session of the National Assembly in Part Four.<sup>406</sup> The Ombudsman, Konstantin Penchev, confirmed that the bills have been drafted in such a way as to prevent blackmailing of couples with reproductive problems and the business of selling children.<sup>407</sup> There were several online surveys on whether people agree or not with the legalisation of surrogacy and the results show that 58.8% are in favour of its legalisation. Those who are “for” believe that it should be done when there are specific medical conditions and reasons to use it.<sup>408</sup>

On 16 December 2011, the Holy Synod of the Bulgarian Orthodox Church-Bulgarian Patriarchate voted and announced that it was “against” the methods for assisted reproduction, and in particular, against surrogacy. The statement published on the official website of the Holy Synod was 25 pages long and contained insulting expressions such as calling the children born via methods for assisted reproduction “impure” and the people making use of such methods “infidels”.<sup>409</sup> Nickolay, Bishop of Plovdiv, went as far as saying that gestational surrogacy is the same as prostitution.<sup>410</sup> These statements were perhaps not surprising given religious objection to assisted reproduction, around the world, particularly collaborative techniques such as surrogacy. However, what shocked the Bulgarian civil society were the rude remarks about couples with reproductive problems, the false accusations and misleading information, which provoked a big scandal between the citizens and the high representatives of the Church.

In light of this, a campaign arose against the publication of the statement led by Maria Cherneva, a journalist from the Bulgarian National Television, and as a result the Church had no choice but to apologise publicly to these couples, amend its statement and clarify that it was against the use of genetic material from donors.<sup>411</sup> The other religious groups in Bulgaria such as Judaism, Islam, Catholicism, amongst others, expressed opinions against surrogacy as well.<sup>412</sup> In addition, various organisations protecting the rights and interests of children and women filed petitions addressed to the National Assembly in order to show their position against the legalisation of surrogacy at the second reading. Their main concerns were that the assisted reproduction is a lucrative business and the draft bills were only defending the interests of certain lobby groups.<sup>413</sup>

<sup>406</sup> Лидия Чобанова, “Заместващото майчинство е единствен шанс при някои здравословни проблеми”, <<http://argumenti-bg.com/18297/lidiya-chorbanova-zamestvashtoto-majchinstvo-ne-e-kapriz-a-edinstven-shans-pri-tezhki-zdravoslovni-problemi/>> accessed on 27 November 2012.

<sup>407</sup> See Bulgarian National Television (BTV) News, Сурогатно майчинство <[http://bnt.bg/bg/news/view/61085/zamestvashto\\_majchinstvo](http://bnt.bg/bg/news/view/61085/zamestvashto_majchinstvo)> accessed on 10 November 2012.

<sup>408</sup> “Анкета: Одобрявате ли приемането на закона?”, <<http://www.bg-mamma.com/index.php?topic=619163.2415>> accessed on 12 November 2012. See also, “За или против утроба на заем”, <<http://forum.rozali.com/viewtopic.php?p=951567>> accessed on 12 November 2012.

<sup>409</sup> “Становище на Светия Синод на Българската Православна Църква-Българска Патриаршия Относно Методите На Асистирана Репродукция и Заместващото Майчинство” <[http://dostoinoest.com/bg/index.php?option=com\\_content&view=article&id=414:2011-12-30-17-02-55&catid=34:novini&Itemid=116](http://dostoinoest.com/bg/index.php?option=com_content&view=article&id=414:2011-12-30-17-02-55&catid=34:novini&Itemid=116)> accessed on 5 November 2012.

<sup>410</sup> Globa IVF, “Views About Gestational Surrogacy from Around the World”, <<http://www.globalivf.com/blog/?tag=bulgaria>> accessed on 7 November 2012. Обръщение на Пловдивския Митрополит Николай, <<http://www.bg-patriarshia.bg/news.php?id=83947>> accessed on 7 November 2012.

<sup>411</sup> БНТ Продукции, Местно-време 12 Януари 2012, <[http://bnt.bg/bg/productions/143/edition/19338/mestno\\_vreme\\_13\\_januari\\_2012](http://bnt.bg/bg/productions/143/edition/19338/mestno_vreme_13_januari_2012)> accessed on 15 November 2012. See also, БНТ, Денят отблизо с Мира, 11.01.2012,

<[http://bnt.bg/bg/productions/136/edition/19242/denjat\\_otblizo\\_s\\_mira\\_11\\_januari\\_2012](http://bnt.bg/bg/productions/136/edition/19242/denjat_otblizo_s_mira_11_januari_2012)> accessed on 26 November 2012 and БНТ Новини, Църквата поиска прошка, 14.01.2012, <<http://bnt.bg/bg/news/view/67252/>> accessed on 25 November 2012.

<sup>412</sup> Новинар, Църкви и религии против сурогатното майчинство, <[http://novinar.bg/news/tcarkvi-i-religii-protiv-surogatnoto-majchinstvo\\_Mzc5Njs3Mw==.html](http://novinar.bg/news/tcarkvi-i-religii-protiv-surogatnoto-majchinstvo_Mzc5Njs3Mw==.html)> accessed on 11 November 2012. See also, Деница Пеева, “Майка под Наем”, (2011) 3(3) Вестник Фрамар, стр. 1-2. The article discusses that there is nothing new about the fact that the Orthodox Churches and Islam are against surrogacy. In Islam surrogacy is seen as a sin. The Catholic Church and Judaism are also firmly against surrogacy because it is against anyone who “tries to play God”. And yet, people with reproductive problems believe in God and visit the Church to try and find support and blessing.

<sup>413</sup> Елена Кодинова, Сурогатното майчинство и опасността да се легализира търговията с бебета (п 7).

## PART TWO

### Draft Bills

The legislative initiative consisted of five draft bills which aim at amending and supplementing existing Bulgarian legislation, namely, (1) a Draft Bill Amending and Supplementing the Family Code;<sup>414</sup> (2) a Draft Bill Amending and Supplementing the Citizen Registration Act;<sup>415</sup> (3) a Draft Bill Amending and Supplementing the Social Security Act;<sup>416</sup> (4) a Draft Bill Amending and Supplementing the Employment Code,<sup>417</sup> and (5) a Draft Bill Amending and Supplementing the Health Act.<sup>418</sup> The idea was to have several bills governing different aspects related to this issue and not a special law on substitute motherhood, so that it was more easily and quickly integrated in the Bulgarian legal system and accepted by the society.<sup>419</sup> While it was said the provisions had been inspired and taken from the legislation of more than 20 different countries where substitute motherhood is legal, only England and Russia were mentioned in the specific in the introduction of the draft legislation.<sup>420</sup>

On 29 July 2011 Kalina Krumova put forward the five draft bills before the National Assembly. It is important to note that on 8 November 2011 the Draft Bill Amending and Supplementing the Citizen Registration Act was withdrawn and, consequently, it will not be included in the present report.<sup>421</sup>

### Draft Bill Amending and Supplementing the Family Code

The draft bill contains the following new articles 60(a), 73(a), 73(b) and 73(c), Articles 61 and 62 were supplemented.

#### Article 60(a) – Origin of the Mother in Substitute Motherhood

(1) The mother of the child, in substitute motherhood, is considered to be the woman whose ovum has been inseminated in order to conceive a child through the method of assisted reproduction.

(2) The mother of the child, in substitute motherhood where there is an ovum donor, is considered to be the woman who is making use of the substitute motherhood.

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<sup>414</sup> Draft Bill Amending and Supplementing the Family Code (Законопроект за изменение и допълнение на Семейния кодекс № 154-01-84) <<http://www.parliament.bg/bg/bills/ID/13655/>> accessed on 4 November 2012.

<sup>415</sup> Draft Bill Amending and Supplementing the Citizen Registration Act (Законопроект за изменение и допълнение на Закона за гражданската регистрация № 154-01-85) <<http://www.parliament.bg/bg/bills/ID/13657/>> accessed on 4 November 2012.

<sup>416</sup> Draft Bill Amending and Supplementing the Social Security Act (Законопроект за изменение и допълнение на Кодекса за социалното осигуряване № 154-01-86) <<http://www.parliament.bg/bg/bills/ID/13658/>> accessed on 4 November 2012.

<sup>417</sup> Draft Bill Amending and Supplementing the Employment Code (Законопроект за изменение и допълнение на Кодекса на труда № 154-01-87) <<http://www.parliament.bg/bg/bills/ID/13659/>> accessed on 4 November 2012.

<sup>418</sup> Draft Bill Amending and Supplementing the Health Act (Законопроект за изменение и допълнение на Закона за здравето № 154-01-88) <<http://www.parliament.bg/bg/bills/ID/13660/>> accessed on 4 November 2012.

<sup>419</sup> Стоян Ставру, "Тази новост-сурогатното майчинство", (2011) Правен свят 49-55, 51.

<sup>420</sup> Вестник Атака, Заместващото майчинство спира търговията с бебета, <<http://www.arhiv.vestnikataka.bg/archive.php?broi=1334&text=&fromDate=&toDate=&newsID=75360>> accessed on 7 November 2012.

<sup>421</sup> It was discussed at a preliminary meeting of the Committee for Regional Development and Local Self-Government, summary discussion and report are available on: <http://www.parliament.bg/bg/parliamentarycommittees/members/227/reports/ID/2929>

(3) In cases of substitute motherhood, article 60 sections (2) and (5) do not apply.<sup>422</sup>

(4) The substitute mother, the ovum donor and the husband cannot challenge the origin of the child from the wife making use of the substitute motherhood.

#### **Article 61 – Origin of the Father**

(1) The husband of the mother is considered to be the father of the child who was born during the marriage or 300 days after the end of the marriage.

(2) If the child is born before the elapse of 300 days after the end of the marriage, but the mother has re-married then the father of the child is the new husband.

(3) In case of a declared absence of the husband sections 1 and 2 do not apply if the child is born after 300 days from the last notification from him and in case of death – from the date of the death.

(4) Sections 1-3 apply in cases where the child is born via techniques for assisted reproduction according to Article 60(2) or in cases of substitute motherhood according to Article 60(a)(1) and (2).

#### **Article 62 – Challenge of Paternity**

(1) The husband of the mother can challenge his paternity if he proves that the child could not have been conceived by him. Such a challenge shall be made within one year after finding out the birth.

(2) The mother can challenge the paternity of her husband if she proves that the child could not have been conceived by him. Such a challenge shall be made within one year after finding out the birth.

(3) In cases covered by Article 61(2), if the challenge of paternity made by the second husband is proven, the father of the child is the first husband. The first husband and the mother can contest the challenge of paternity up to one year after they find out the decision, but no later than three years after the decision has been enforced.

(4) The child can challenge the paternity within one year of its coming of age.

(5) Challenges as to the paternity are not allowed in cases where the child is born via techniques for assisted reproduction or in cases of substitute motherhood including the cases of ovum donor if the husband of the mother has given a written agreement for the assisted reproduction or the substitute motherhood.

#### **Article 73(a) – Substitute Motherhood**

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<sup>422</sup> Article 60(2): The mother of the child is the woman who gave birth to the child including in cases of assisted reproduction. Article 60(5): The origin of the child from the woman who gave birth to her/him in cases of assisted reproduction cannot be challenged based on such a procedure. See article 60(2) Family Code, <<http://www.lex.bg/bg/laws/ldoc/2135637484>> accessed on 25 November 2012.

Article 73(a)(1): Substitute motherhood is motherhood where a married couples entrusts, by means of a contract, another woman with the task of carrying and giving birth to a child who has been conceived by means of assisted reproduction with genetic material from the spouses or with semen from the husband and a donor ovum.

### **Article 73(b) – Contract for Substitute Motherhood**

Article 73(b)(1): The relationship between the substitute mother and the spouses making use of the substitute motherhood is governed by a contract for substitute motherhood.

Article 73(b)(2): A contract for substitute motherhood can be entered into only by people who have the capacity to enter into contract and only when the requirements for substitute motherhood have been satisfied.

Article 73(b)(3): The substitute mother can only benefit from reasonable costs related to health matters in connection with the pregnancy, the fees for recovery after the birth and reimbursement for loss of earnings due to her temporary inability to work during the pregnancy.

### **Article 73(c) Format and Contents of the Contract for Substitute Motherhood**

Article 73(c)(1): The contract for substitute motherhood deals solely with one procedure of assisted reproduction and it shall include the following matters:

1. The consent of the substitute mother to carry and give birth to a child who will be raised by the married couples who have entered into contract for substitute motherhood;
2. The consent of the substitute mother and the spouses making use of the substitute motherhood for the carrying out of the assisted reproduction with generic material from the spouses or with semen from the husband and a donor ovum;
3. The consent of the substitute mother that all decisions related to the pregnancy and the conceived child, except for those related to the health condition of the substitute mother, will be taken by the spouses making use of the substitute motherhood;
4. An estimate of reasonable costs incurred by the substitute mother which will be paid by the spouses during the pregnancy and the recovery period immediately after the birth, including the expenses for insurance according to article 136(b)(1) of the Health Act;
5. Any other property relations as long as they do not contradict with the provisions of this code.

Article 73(c)(2): The contract for substitute motherhood becomes enforceable after the formal approval by a court and only thereafter the procedure for assisted reproduction can begin. The court will approve the contract only if the requirements have been satisfied.

### **Draft Bill Amending and Supplementing the Social Security Act**

**Article 9(7):** Upon retirement, the periods when a mother who is not working and taking care of a child up to three years of age, as well as the period of time of bearing the child in cases of substitute mother from the transfer of the embryo up to 42 weeks after the birth are considered as periods covered by social security. For this period the insurance allowance is paid by the republican budget in Fund "Pensions" on the basis of a minimum salary calculated towards the date of the pension.

**Article 50(2):** When the birth takes place before the 45 days of the start of the allowance, the allowance from section (1) and the rest of the 45 days shall be used after the birth.

**Article 50(3):** When the child is born dead, dies or is given into a public child care institution or for adoption, the mother has the right for a monetary compensation up to 42 days after the birth, and the allowance for the biological mother in cases of substitute motherhood is terminated the next day. If the woman has not recovered and regained her capacity to work after the 42nd day, the period for compensation can be extended, after a consultation with a medical expert, until she regains it. Until the end of the period according to section (1) or section (9), this allowance is paid as a grant for the pregnancy and birth.

**Article 50(4):** When the child is given into a public child care institution or for adoption or dies after the 42nd day of the birth, the allowance under sections (1) and (9) are terminated next day. In these cases, if the mother has not recovered and regained her capacity to work after the birth, section 3 sentences two and three apply.

**Article 50(8):** The insured biological mother in substitute motherhood for maternity and general sickness has a right to monetary compensation for a period of 365 days, which is equal to the grant for pregnancy and birth.

**Article 50(9):** The insured biological mother in substitute motherhood for maternity and general sickness has a right to monetary compensation, equal to the grant for pregnancy and birth for 87 days, 45 out of which have counted before the birth.

**Article 52a:** Insured individuals for sickness and motherhood, with the exception of substitute mothers, have a right to monetary compensation for raising a child, if they have 12 months social insurance for such a risk.

### **Draft Bill Amending and Supplementing the Employment Code**

**Article 163(1):** A female employee has a right of annual leave up to 410 days for each child, 45 days out of which have to be taken before the child is born. The reason for the annual leave is the carrying and giving birth to a child. A female employee who is the legal mother in cases of substitute motherhood has the right to take annual leave for 365 days after the day the child is born.

**Article 163(2):** A female employee who is a substitute mother has a right of 87 days annual leave for each child, 45 days out of which have



to be used before the child is born. In these cases section 3 does not apply and section 4, second and third sentence do not apply.<sup>423</sup>

**Article 163(4):** When the child is born dead, or is given into a public child care institution or for adoption, the mother has the right for an annual leave of 42 days from the date of birth, and the annual leave provided for in article 163(1) will terminate on the following day. If the woman has not recovered and regained her capacity to work after the 42nd day, the annual leave will be extended, after a consultation with a medical expert, until she regains it. The annual leave is paid as a maternity leave.

**Article 163(5):** When the child is given for adoption, or is placed in a public child institution or dies after the 42nd day of the birth, the annual leave provided for in article 163(1) is terminated on the following day.

**Article 163(7):** When the mother and the father are married and live together, the father has the right of a 15 day annual leave after the child is discharged from the hospital or medical centre, including in cases of substitute motherhood.

**Article 163(8):** With the agreement of the mother and the father who adopt the child, when the child is six months old, the father can take what is left of the 410 days annual leave of the mother, and in cases of substitute motherhood, what is left from the 365 days annual leave.

**Article 164(6):** Article 164 does not apply to an employee who is a substitute mother.<sup>424</sup>

**Article 165(3):** Article 165 does not apply to an employee who is a substitute mother.<sup>425</sup>

**Article 313(a) (3):** The employer and the colleagues/employees in the working place are obliged to keep confidential the circumstances in subsections (1) and (2) as well as circumstances related to substitute motherhood.<sup>426</sup>

**Article 333(5):** The pregnant employee who has signed a contract for substitute motherhood as well as a woman in an advanced stage of her in-vitro fertilisation, can be made redundant only with a notice on the basis of article 328(1) subsections (1), (7), (8), (12)<sup>427</sup> and without

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<sup>423</sup> Article 163(3) states that in cases of miscalculation for the due date where the birth occurs 45 days before the annual leave, the rest of the 45 days will be taken after the birth. Article 163(4) [...]If the woman has not recovered and regained her capacity to work after the 42nd day, the annual leave will be extended, after a consultation with a medical expert, until she regains it. The annual leave is paid as a maternity leave. See article 163(3) Employment Code (Кодекс на труда), <<http://www.lex.bg/bg/laws/ldoc/1594373121>> accessed on 25 November 2012.

<sup>424</sup> Article 164 deals with provisions governing the annual leave for raising a child until s/he is 2 years old. See article 164 Employment Code (Кодекс на труда), <<http://www.lex.bg/bg/laws/ldoc/1594373121>> accessed on 25 November 2012.

<sup>425</sup> Article 165 deals with provisions governing the unpaid leave for raising a child. See article 165 Employment Code (Кодекс на труда), <<http://www.lex.bg/bg/laws/ldoc/1594373121>> accessed on 25 November 2012.

<sup>426</sup> Article 313(a)(1) The pregnant employee is undertaking an advanced stage in the in-vitro fertilisation procedure needs to inform the employer of her situation and present documents by the competent medical clinic or hospital. Article 313(a)(2) In cases of pregnancy interruption the employee shall inform the employer of her situation within seven days. See article 313 Employment Code (Кодекс на труда), <<http://www.lex.bg/bg/laws/ldoc/1594373121>> accessed on 25 November 2012.

<sup>427</sup> Article 328(1) states that the employer can terminate the employment contract with a written notice in the time periods provided for in article 326(2) in the following cases: 1. When the company closes down; 7. In cases of refusal by the employee to continue working for the company when the company itself or the

notice on the basis of article 330(1) and (2).<sup>428</sup> In cases of article 330(2) subsection (6), the woman can be made redundant only after a decision based on a preliminary labour inspection.

**Article 354(1)(8):** in cases of substitute motherhood the carrying of a child for the time from the embryo transfer to the end of the annual leave according to article 163(2) will be considered as employment even though there were no employment relations during that period.

### **Draft Bill Amending and Supplementing the Health Act**

#### **Article 136a:**

(1) Only a married couple can make use of the substitute motherhood and solely if the following requirements are fulfilled:

1. The wife is sterile and this has been determined beyond doubt according to Section 2 below dealing with sterility.
2. At least one of the spouses is a Bulgarian citizen and the other one has a permanent residence in the Republic of Bulgaria.
3. The spouses are registered in the List of Couples Willing to Make Use of Substitute Motherhood kept in accordance with Article 136(b)(5).
4. Each spouse has a certificate for completed first stage of the Programme on Psychological Help in Substitute Motherhood issued from the Ministry of Health.
5. Each spouse has to present a written declaration certified by a notary that s/he agrees and that hereby s/he is obliged to continue his/her participation in the Programme on Psychological Help in Substitute Motherhood at the Ministry of Health.
6. The husband has agreed to Article 62(5) from the Family Code.<sup>429</sup>

(2) Sterility exists if one of the following disorders or diseases is present:

1. Agenesis of the uterus or a serious hypoplasia of the uterus;
2. Women in their reproductive age whose uterus has been removed after an operation, regardless of the reasons for that;

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department where s/he works is moved to another city or region; 8. When the employee has to be fired in order to make free his/her position for a previous employee who has been illegally fired; 12. In cases of objective impossibility to carry out the responsibilities under the employment contract. See Article 328(1) Employment Code (Кодекс на труда), <<http://www.lex.bg/bg/laws/ldoc/1594373121>> accessed on 25 November 2012.

<sup>428</sup> Article 330(1) states that the employer can terminate the contract of employment without any written notice when the employee is arrested for serving time for a committed crime. Article 330(2) enumerates other cases when the employer can terminate the contract of employment without notice, for instance, subsection 6 deals with cases of disciplinary procedures against the employee. For more information, see article 330(1) Employment Code (Кодекс на труда), <<http://www.lex.bg/bg/laws/ldoc/1594373121>> accessed on 25 November 2012.

<sup>429</sup> Article 62(5) provides that challenges of paternity are not allowed in cases of assisted reproduction when the husband of the mother gave his written agreement for the procedure. See article 62(5) Family Code (Семеен кодекс), <<http://www.lex.bg/bg/laws/ldoc/2135637484>> accessed on 24 November 2012.

3. Partial or complete obliteration of the uterine cavity which cannot be cured;

4. Grave innate or gained hypoplasia of the endometrium, which cannot be cured;

5. Concomitant general disorders incompatible with the carrying of a child.

(3) The sterility is determined by medical experts who are members of the Public Committee of Centre "Fund for Assisted Reproduction" on the basis of a conclusive and comprehensive medical documentation.

(4) Substitute motherhood with a donor ovum is allowed in cases where the woman making use of this procedure is no older than 45 and has:

1. Oncological genetic disorder;

2. Removed uterus or ovaries; or

3. Has survived and recovered from a successful oncological treatment, but cannot carry a child, because the stimulation of the ovaries and the carrying of a child will have a negative impact on her health.

(5) Substitute motherhood with a donor ovum from the substitute mother is not allowed.

**Article 136(b):**

(1) The substitute mother can be only a woman who is:

1. a Bulgarian citizen;

2. is between 21 and 43 years old;

3. Has given birth to at least one child born alive;

4. is clinically healthy and is capable of carrying a child, in accordance with an opinion confirming it of a medical team consisting of an obstetrician and an internal organs doctor according to a list prepared by the Ministry of Health;

5. has a good mental health, in accordance with an opinion confirming it of a team consisting of two psychologists according to a list prepared by the Ministry of Health;

6. has a certificate for completed first stage of the Programme on Psychological help in substitute motherhood as a substitute mother issued from the Ministry of Health;

7. has presented a written declaration certified by a notary that she agrees and that hereby is obliged to continue her participation in the Programme on Psychological Help in Substitute Motherhood as a substitute mother.

8. has not been a substitute mother more than twice;

9. has health insurance and life insurance at the beginning and throughout the procedures for assisted reproduction and until 90 days after the birth or the termination of the substitute motherhood.

(2) Any other requirements in section (1) or the requirements for the decisions of the medical teams in subsections (4) and (5) are determined by an ordinance issued from the Ministry of Health.

(3) The requirements of section (1)2 do not apply in case that the substitute mother is a relative in the direct line of descent or collateral line of forth degree of one of the spouses willing to make use of the substitute motherhood. In this case, the permissible age of the substitute mother is 50 years old in case that there is a positive assessment made by the Public Committee of Centre "Fund for Assisted Reproduction".

(4) The husband of the substitute mother gives a declaration which is certified by a notary that he agrees that his wife will act as a substitute mother. The declaration applies only for one specific procedure.

(5) A List of Couples Willing to Make Use of Substitute Motherhood is created in accordance with an Ordinance of the Ministry of Health.

## **PART THREE**

### **PRELIMINARY DISCUSSIONS**

#### **Discussion and Report by the Health Committee**

The Health Committee discussed the draft bill amending and supplementing the Family Code and issued a report on 29 July 2011.<sup>430</sup>

The Health Committee pointed out the gaps in the provisions governing the protection of the substitute mother and expressed concerns in relation to the provisions that all decisions regarding the carrying and keeping of the child, except the ones dealing with the health condition of the substitute mother will be made by the intended parents. It was also noted that the protection of the intended couple against careless and negligent activities on behalf of the substitute mother does not make part of the legal framework. In addition, the Health Committee addressed the necessity to define loose terms such as "reasonable costs" and "necessary expenses" which appear in the draft bill. Furthermore, the content of the contract for substitute motherhood needs to be further discussed and others aspects should be included in order to make it more detailed and avoid future disputes due to the unclear provisions.

Overall, the Health Committee agreed that the initiative is timely, adequate and is keeping in pace with the development of modern medicine; however, they suggested that there remained a lot of work to be done and that the provisions of the draft bills need to be further specified and improved. The Health Committee adopted the draft bill with 10 votes "in favour", 1 "abstained" and none "against" and suggested that the National Assembly should hear and vote at the first reading above-mentioned bill.

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<sup>430</sup> Парламентарна комисия по здравеопазването, Доклад за първо гласуване относно законопроект за изменение и допълнение на Семейния кодекс, № 154-01-84, <<http://www.parliament.bg/bg/parliamentarycommittees/members/233/reports/ID/2984>> accessed on 16 November 2012. Стенограма от Пленарно заседание, <<http://www.parliament.bg/bg/plenaryst/ID/2660>> accessed on 16 November 2012.

In addition, the Health Committee discussed the draft bill amending and supplementing the Health Act on 29 September 2011. The Committee agreed that the Draft Bill is adequate and timely, however, it emphasised the need for more work on the following points:

- 1) The possibility to permit substitute motherhood in cases of a semen donor on the condition that the ovum belongs to the wife. If this is accepted it will be helpful to remove all uncertainties for gender discrimination;
- 2) The possibility to use existing agencies and foundations such as, for instance, the Centre "Fund for Assisted Reproduction" instead of creating new clinics which will be in charge of holding a List of Couples Willing to Make Use of Substitute Motherhood, offering psychological support for the intended parents and the substitute mother, etc. The advantage of using the institutions which are already in place will be to make use of the professionalism and the experience of those working in the area and to reduce the amount of money and time to find and train new staff;
- 3) The substitute motherhood procedures will need the financial help from the state;
- 4) The Committee discussed the necessity to have a "compulsory" participation in the Programme for Psychological Help for both the spouses and the substitute mother. It emphasised on the point that the substitute mother will need additional psychological help after the birth of the child. There must be some kind of sanctions in cases of non-participation; and
- 5) The steps or procedures that need to be done in cases when the child is born with chronic disease or disorder and the intended couple will no longer want the child.

As with the draft bill amending and supplementing the Family Code, the Health Committee adopted the draft bill amending and supplementing the Health Act with 10 votes "in favour", 1 "abstained" and none "against" and suggested that the National Assembly should hear and vote at the first reading the draft Bill amending and supplementing the Health Act.

### **Discussion and Report by the Legal Affairs Committee**

The Legal Affairs Committee discussed the draft bill amending and supplementing the Family Code on 14 September 2011 and issued a report.<sup>431</sup> At the meeting the Deputy Minister of Justice—Ms Daniela Masheva—agreed with the need for regulation of the relationships in substitute motherhood. However, she expressed some concerns relating to the comprehensiveness of the draft bills and she suggested that perhaps a special law on the matter would be a better option to govern its multiple aspects.

The Committee also expressed concerns regarding the illegal practices for substitute motherhood due to the great number of couples who have reproductive problems as well as regarding the demographic crisis in the country. It was agreed that the legalisation of substitute motherhood is one of the possible solutions to both problems relating to the reproductive health as well as the tendency of demographic decrease in the country. The Legal Affairs Committee saw the establishment of a legal basis and regulatory regime for substitute motherhood as a necessary measure, but in order for it to function effectively, it would need to have the support and the understanding of families and be part of the country's social and national policies.

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<sup>431</sup> Комисия по правни въпроси, Доклад за първо четене относно Законопроект за изменение и допълнение на Семейния кодекс, № 154-01-84, <<http://www.parliament.bg/bg/parliamentarycommittees/members/226/reports/ID/2954>> accessed on 16 November 2012. Стенограма от Пленарно заседание <<http://www.parliament.bg/bg/plenaryst/ID/2660>> accessed on 16 November 2012.

The draft bill, as it stands now, does not deal with certain hypotheses, for instance, it seems to create a discrimination against people who are not married as well as other individuals who have problems with reproduction.

Moreover, it deals only with altruistic surrogacy as opposed to commercial surrogacy, and maybe this is not the best option as altruistic surrogacy can also involve an exchange of money. This is referred to as "reasonable costs", but the term "reasonable" is very broad.

The draft bill confirms the importance of the well-established institution and notion of "mother", it does not contradict the determination of paternity (i.e. origin of the father); substitute motherhood will have a special status and will be treated as an exception allowing diversion from the traditional definitions of "mother", "father", "family", etc. and their modification in relation to the substitute motherhood.

One of the MPs—Luchezar Toshev (Blue Coalition)—expressed his disagreement with legalising substitute motherhood because it goes against the basic Christian and democratic values. According to them, the family is a basic institution where motherhood is inextricably linked with giving birth to a child and it is also a basic principle in family law. In his opinion, legalising what is often called "renting a womb" is a big exception for Bulgarian society and as such, it calls for a serious public discussion in the context of what measures should be taken so that the country protects "the family". His main criticism was that the preliminary debate on the matter was not sufficient and that the issue needed to be more widely discussed.

The President of the Legal Affairs Committee concluded that it might be useful to have an additional draft bill supplementing the one which is being discussed in order to have a more comprehensive regulatory regime for such a delicate and complex subject matter. In the end, the Legal Affairs Committee adopted the draft bill amending and supplementing the Family Code with 16 votes "in favour" and 3 votes "abstained" and suggested that it should be put forward and discussed before the National Assembly.

### **Discussion and Report by the Employment and Social Policy Committee**

The Employment and Social Policy Committee discussed the draft bill amending and supplementing the Employment Code and issued its report on 28 September 2011.<sup>432</sup> The fundamental purpose of this bill is to regulate the employment rights of the substitute mother. The bill provides for the right to take time off due to her pregnancy. The substitute mother will be entitled to 87 days, 45 out of which have to be before the birth. The substitute mother, however, does not benefit from an entitlement to annual leave until the child becomes 2 years old and does not benefit from unpaid annual leave for raising a child until s/he is two years old. The legal mother in the case of substitute motherhood has the right to 365 days annual leave after the child is born. In cases of substitute motherhood, the father can benefit from a leave up to 15 days when the child is born as well as the possibility to use the annual leave of the mother after the child has 6 months until s/he becomes one year old. The Draft Bill includes a provision for confidentiality which applies to the employer and all colleagues of the substitute mother regarding the circumstances related to the substitute motherhood.

Moreover, it has been proposed that the biological mother who signed a contract for substitute motherhood will benefit from a special protection in case of dismissal from work provided for by law for pregnant women and women in an advanced stage of an in-

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<sup>432</sup> Комисия по труда и социалната политика, Доклад относно Законопроект за изменение и допълнение на Кодекса за социално осигуряване, № 154-01-86, <<http://www.parliament.bg/bq/parliamentarycommittees/members/231/reports/ID/2978>> accessed on 5 November 2012. Стенограма от Пленарно заседание <<http://www.parliament.bg/bq/plenaryst/ID/2660>> accessed on 5 November 2012.



vitro fertilisation procedure. At the same time, in cases of substitute motherhood, the time for carrying the child will be considered as a work experience even though in reality there were no work relations.

The bill has been sent to the National Committee for Tripartite Cooperation (NCTC) on the basis of Article 69 of the Rules for the Organisation and Activity of the National Assembly. In its statement the NCTC supports the need for regulating the so-called substitute motherhood in general and considers that the discussion in relation to the rights for work and annual leave of the substitute motherhood need to be regulated after the changes of the Family Code and many other bills and normative acts.

The Employment and Social Policy Committee adopted the draft bill amending and supplementing the Employment Code with 13 votes "for", 0 "abstained" and 0 "against" and suggested that it should be put forward and discussed before the Parliament.

## **PART FOUR**

### **PLENARY SESSIONS**

#### **Plenary Session of the National Assembly and the Debate on the Draft Bills**

On 26 October 2011 the Bulgarian National Assembly held a Plenary Session on the (1) Draft bill amending and supplementing the Family Code, (2) Draft bill amending and supplementing the Employment Code, and (3) Draft Bill amending and supplementing the Health Act.<sup>433</sup> A Plenary Session on the draft bill amending and supplementing the Social Security Code was held on 2 November 2011. During the discussion different opinions and arguments "for" and "against" were advanced by politicians from various parties. The most important points and issues as presented by the politicians are summarised below. Please note that what is summarised below is the opinion of the politicians speaking, as opposed to data that can be confirmed as accurate by this report.

**Luben Kornezov (Coalition for Bulgaria):** The substitute motherhood is one of the most delicate and complex issues not only in Bulgaria but around the world. The draft bills talk about "donor ovum" which means that the following case scenario is possible in that there may be up to three women involved in the process: one who donates the ovum, another one who carries and gives birth to a child and a third one who is making use of the substitute motherhood and will raise the child. Sometimes it may be even more complicated when the donor of the ova is anonymous. The child who is born will be confused and his/her life will be a mess.

In those countries where surrogacy or substitute motherhood is legal it is also paid. The matter of payment and expenses always come into question no matter whether we talk about altruistic or commercial surrogacy. Of course, the price varies, for instance, in the USA it is between \$100, 000 and \$150,000 (€76,550 and €115,000); in Russia it is between \$17,000 and \$21,000 (€13,000 and €16,000). It seems to me that this will mean to introduce a market for children. The draft bills talk about a contract. This contract is nothing more than a contract for the sale of children, and the child is treated as a product. The important question is who will deal with the expenses and whether the state is ready to pay and if it is, how much it can allocate. Neither in the

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<sup>433</sup> Стенограма от Пленарно заседание, <<http://www.parliament.bg/bg/plenaryst/ID/2660>> accessed 5 November 2012 accessed on 5 November 2012. Стенограма от пленарно заседание, <<http://www.parliament.bg/bg/plenaryst/ID/2661>> accessed on 7 November 2012.

Reasons Section nor in the draft bill there is a provision explicitly dealing with the expenses. Moreover, if we read the draft bill carefully, we will see that there are five types of costs that the intended couple has to pay. The bill provides for (1) reasonable costs, (2) necessary costs, (3) financial securities, (4) insurances and (5) any other property relations. The contract needs to state in detail how much each of these costs. This is not an altruistic and humane act because, in practice, it is nothing more but a contract for a sale of a child, which is against Bulgarian morals and values. No matter how hard we try to ban the so-called "commercial surrogacy" it would be impossible to do so.

It creates discrimination among poor and rich because the rich couples will be in a better position and will have the means to pay for the "reasonable costs" whilst poor couples seem to be left aside and will not be able to benefit from such a method;

In the countries which allow substitute motherhood (UK, USA) there are multiple cases where the woman carrying and giving birth to the child refuses to give the child to the intended couple at birth giving rise to disputes. Usually the courts protect "the interests of the child". But in practice protecting the interests of the child means different things in different circumstances, sometimes the substitute mother is allowed to keep the child and some other times the woman who is making use of the substitute motherhood is allowed to keep it. There are even cases where the pregnant woman flees to another country, so that no one can find her or the child. Thus the main questions which arise are who will decide such disputes in Bulgaria and how will these decisions be enforced?

Another problem is when there is a "refusal" on behalf of the participants in substitute motherhood. Luben Kurnezov cited a survey in Russia which indicated that in 75% of the cases, children born by means of in vitro fertilisation or other assisted reproduction techniques, have some kind of disorder and that in the end none of the women (who participated in the method) wanted to raise and take care of the child. What happens in such cases? What court will have jurisdiction to decide such cases? There is a lacuna in the draft bills and they do not address such issues.

The Bulgarian Orthodox Church is against the legalisation of the substitute motherhood.

Moreover, according to the new Article 73(b)(2) in the Family Code the contract will enter into force after approval by the court, however, the draft bill does not expressly stipulate which courts will be competent in case of substitute motherhood. This may give rise to problems in practice since there are multiple courts in Bulgaria: regional, county, administrative, appellate, supreme, etc. In addition, the main task of the courts is to decide disputes and not to approve contracts; such a task is carried out by the notaries.

Article 136a of the draft bill amending and supplementing the Health Act provides that only "spouses" can make use of the substitute motherhood. But why will it be legal only between spouses? Nowadays around 50% of the young couples live together without being married. Why is the substitute motherhood limited in such a way? Perhaps we should give the chance to unmarried young couples who are willing to

make use of such a procedure? Is it possible for a gay couple to make use of it as well? He reminded Parliament that in Bulgaria marriage is understood as a union between a woman and a man. In certain countries this is not the case; are we going that far? He cited UK as an example where any woman married or not married can make use of surrogacy. Moreover, in the US it is very common that celebrities make use of surrogacy.

If we look at Article 365(2)(1) "any other requirements will be done with an Ordinance by the Ministry of Health." This seems to be a double regime because on the one hand, we vote a bill and then we leave the Health Minister to write and decide the rest of the law. We cannot allow a secondary legislation to play the role of a bill. This is completely wrong.

In short, the bill is not well drafted and leaves a lot of gaps which give raise to important debates and disputes.

Taking into account all the criticism mentioned above, it seems to me that substitute motherhood should be legalised, however, it should be done by means of a special law on the matter governing genetic, biological and medical problems; also, governing the legal problems related to determining the mother and the father of the child; it should cover any other administrative, social and labour issues connected to the substitute motherhood. More importantly, it should contain provisions regarding the punitive issues.

**Luchezar Ivanov (Citizens for European Development of Bulgaria):** Even though I agree with what was said by Luben Kurnezov when it comes to the need for more clear and specific provisions and his criticisms as to the legal issues, I am "for" the draft bills. It is important to say that the assisted reproduction procedures carried out in Bulgaria are done according to high standards and can be compared to the ones in developed countries that have experience with donation of semen, ova, etc. In Bulgaria around 70% of the procedures for assisted reproduction are successful according to data from the medical centres. Also, we can use the Committee at the Fund for Assisted Reproduction which has been established in Bulgaria. This will eliminate any possible discrimination between rich and poor families. Right now the state gives BGN 5,000 (€2,555) and the couples can make use of different procedures up to three times. We should develop different programs and procedures to those families who want to have a child. If we have them in place in Bulgaria, the child will be conceived, born and raised in Bulgaria.

Our laws have to go hand in hand with the developments of modern science and medicine. Thus, Bulgarian science and medicine will develop as well. Moreover, our doctors are as good as the foreign ones and are certainly capable of performing such procedures.

Overall, the draft bills have many shortcomings, mainly legal but at the same time it is innovative and I admire the initiative and I believe that it has its place in the Bulgarian legal system.

**Luchezar Toshev (Blue Coalition):** I am firmly against surrogacy or substitute motherhood. My main concern is that these draft bills will confuse the relationships between people. In the case of substitute

motherhood, there are several mothers and each one of them has her own problems. The child who is born will be confused and all his life will be messed up. This is also the main reason for all religious groups in Bulgaria to be against its legalisation. The position of the Bulgarian Orthodox Church is not some kind of esoteric position. The Russian and the Greek Orthodox Churches, for instance, have similar positions and condemn substitute motherhood because it traumatises the substitute mother and the child.

Kalina Krumova states that not only the substitute mother but also all the other participants will have to take part in psychological help programs. In the end, it will mean that the children have to participate as well because they will have identity problems. I really doubt that such programs will solve the problems. Such programs are a relatively recent phenomenon and we do not have data of their success.

In connection with the fragile psyche of a child, I would like to mention the problem with children who commit suicide due to problems in the family such as divorce. This is an issue that no one talks about or talks about it very rarely. In Bulgaria, there are more than 100 cases of children who commit suicide because of the divorce of their parents. The data may be somewhat old but the problem is still the same. *A fortiori*, such problems are even more serious and can further traumatise the child when the s/he finds out that, for instance, his/her grandmother or his/her aunt is his/her real mother because the draft bills provides for such a possibility.

Overall, legalising substitute motherhood will confuse the fundamental social and civil relations. Our society will never be the same again if we vote "for" the draft bills. Substitute motherhood should never be legalised.

**Chetin Kazak (Movement for Rights and Freedoms):** I personally will vote "for" the proposed draft bills. The draft bills are far from perfect but they suggest a solution for a very important social problem. Substitute motherhood is a phenomenon which can solve problems related to infertility. Currently, the procedure is anyway *de facto* used by Bulgarian families and Bulgarian mothers outside any legal framework on a national level. However, it is currently used only by rich families who can afford to go abroad to India, Russia or Ukraine and pay the costs. In my opinion, the draft bill will allow more families with reproductive problems to use the procedure at a more affordable price and more importantly they will not be obliged to go abroad or to commit a crime.

The only suitable and acceptable legal framework for legalising the substitute motherhood in Bulgaria is the one presented before the Parliament. There is no need for additional or special laws. The matter of substitute motherhood deals with different issues and they are covered in several codes and the only way to enforce it is to have a draft bill (or several draft bills as it is the case) amending and supplementing existing laws and codes. We cannot have a single piece of legislation dealing only with surrogacy because a separate law cannot change the provisions contained in a code; these must be amended and supplemented by specific legislation. What matters here is not the technique that we are using but rather to adopt a legal mechanism which is adequate and can be applied in practice.

I believe that the necessary legal changes and improvements can be done between the first and second reading and then we can approve a working and efficient legislation regulating the matter.

**Emil Radev (Citizens for European Development of Bulgaria):** I consider the draft bills presented before us today are timely and meet the requirements of 21st century. There are a lot of couples with a reproductive problem and their problem has to be solved. In Bulgaria, the black market for buying children, the illegal use of substitute motherhood and the use of a different name when giving birth exist. But this market exists because the law does not deal adequately with, and does not allow such types of relations. Moreover, the draft bills propose altruistic surrogacy which is a very reasonable and acceptable hypothesis. Such a model is developed in developed European states such as Denmark, UK, Netherlands, and Spain. We are not following the model of Russia or Ukraine where commercial surrogacy is legalised. The latter is too extreme. Of course there will be costs. We talk here about "reasonable" and "necessary" costs. There is case law and norms that interpret and give directions on how to decide the reasonable costs. So, these types of relations are not new to the Bulgarian legislation. We should not be afraid of the word "contract". Contract exists in various provisions in the Family Code.

If we accept that the wife making use of the substitute mother is the mother upon birth of the child, there will not be disputes. Everyone will have a free will to decide whether or not to use substitute motherhood. The law does not impose the use of such a procedure.

Also, if we do not legalise such relations then we will not be able to create funds such as, for instance, Fund "In Vitro" which will be subsidised by the state and will help people with reproductive problems who do not have sufficient means. Once we have a legal regime for such procedures the state can intervene and help the couples in need.

I will vote "for" and I urge you to do the same.

**Dimitur Chukarski (Independent MP):** Mr Toshev stated that the child who is born by a substitute mother will be traumatised. I would like to ask you: Is it better that the child is not born at all? What about the mother who knows that modern medicine can allow her to deal with her physical problem and become a parent but we took this from her. Don't you think that this will be traumatising because this is exactly what will happen if we do not allow the legalisation of the substitute motherhood.

Regarding the substitute mother and her rights I believe that the altruistic nature guarantees her rights and her emotional stability. When the medicine is able to cope with such problems why should we be the ones to limit the possibility for those with reproductive problems to have their children?! Let us accept the substitute motherhood as part of the progress of our society and support the draft bills.

**Cveta Georgieva (ATAKA):** I was surprised to hear that it is horrible to conceive children by the means of a contract. Let us not forget that the marriage is also a contract between the parents so that they can raise their children within a family.

The absence of such legislation in Bulgaria makes people go abroad (mainly Ukraine) where they sign contracts for substitute motherhood and where the child is born. Thus, we become witnesses to the export of human resources, capitals and moreover people have to break the law simply because they desire to have a child. I am against the arguments emphasising that the Church is against it. The Church, as any other institution develops with time, and there are examples of where it was against certain phenomena and now it has accepted them because it understood that they were beneficial to society. I firmly believe that the arguments that at present the Church refuses to accept substitute motherhood cannot be sustained.

**Emilia Maslarova (Coalition for Bulgaria):** First of all, I would like to say, that as many other people sitting here today, I am uncertain about my personal position on the matter. First of all, I believe that a much broader discussion should have been organised on the issue of substitute motherhood. Also, after reading all the materials from the specialised committees I saw different positions “for” and “against”.

I do not think that substitute motherhood is a panacea for the demographic crisis in the country. There are many other ways to stimulate the demographic increase. Also, there are many children who were abandoned in orphanages and who cannot find their parents. So those couples who cannot have a child should adopt one since there are many orphanages and many children who are abandoned.

As a woman and a person who works in the social affairs, I feel deeply for those people who cannot have their own child. I believe in the progress of medicine but I also believe that the moral, the human and the social aspects trump medicine. In my opinion, the genetic mother and the social mother have to be the same woman.

**Sveta Georgieva (Citizens for European Development of Bulgaria):** Under no circumstances should substitute motherhood and adoption be linked together because they are two completely different phenomena. In substitute motherhood the child is born by the genetic material of one or both intended parents, whereas in adoption the responsibilities are completely different. In adoption usually the state has a responsibility to make sure that the adopted child will be raised by a good family. Even if the mother who gave birth to a child and subsequently abandoned her/him for adoption tries to find the child, she does not have any rights as she already gave them up and they have been delegated. In the case of surrogacy, the surrogate or substitute mother is fully aware that she has to give up the child at birth and the child has not been conceived with her genetic material (most of the time). It is simply a humane and altruistic act and she is expected to act in *bona fide*.

**Lubomila Stanislavova (Citizens for European Development of Bulgaria):** I consider that those who are willing to use substitute motherhood are doing it as a last resort. Usually, they are people who have tried different in-vitro fertilisation methods but without success. Thus the legalisation of substitute motherhood is a new chance for them. So when we are thinking whether or not to support the draft bills, we have to think whether or not we support the new chance and the new choice of those people who agreed to such a procedure. We have to look from the point of view of the intended parents, namely, the point of



view of the mother and her new chance to have a child and not from the point of view of the substitute mother. As Ms Krumova mentioned the substitute mother knows very well the conditions and the requirements when engaging in such relations. If the substitute mother does not agree with them she should not accept the procedure.

**Luchezar Toshev (Blue Coalition):** In order to eliminate and deal with psychological, emotional and ethical problems the substitute mother is required to attend a programme for psychological help. After the birth the substitute mother has to continue to participate in that programme. In case she does not attend, she has to pay a fine between BGN 1000 and 3000 (€500 and €1,530), and in case of further non-attendance the fine is between BGN 3500 and 5000 (€1,788 and €2,550). The provisions show that those behind the draft bill realise that the non-attendance is a plausible scenario. However, I do not believe that attendance at such a programme will resolve the issues at stake. I actually believe that the problem will remain unresolved and I am concerned because it seems to me that in the end all the people who participate in this procedure will be miserable and unhappy. He further added that the provisions allowing members of the family from direct or collateral line of forth degree is a very serious violation of the widely accepted relations within a family.

**Hasan Ademov (Movement for Rights and Freedoms):** First of all, I would like to mention that it is a very good idea to deal with the matter of substitute motherhood by amending and supplementing existing legislation. However, when talking about social security, the approach is completely wrong and unsuitable.

First of all, in cases of substitute motherhood the legal mother will benefit from a monetary compensation for 365 days. But what happens when the child turns one year? All other mothers benefit from the annual leave for raising a child up to 2 years.

What happens with the substitute mother in such a case? Does she have the right to the same annual leave? This question has not been resolved in the present draft bill.

The substitute mother has the right to monetary compensation for pregnancy and birth as all other mothers, but it applies for 45 days before the birth and 42 days after the birth. However, the social security payment is based on a minimum salary and when the substitute mother retires she will have a period with a low income based simply on the fact that she was receiving social security. This means that the substitute mother is deprived of a real compensation, of real payment.

What if there are twins born? How are the compensations paid and what compensations should be paid? This has not been provided in any of the draft bills and the right place to be included is the Family Allowances for children Act.

In case, the child or children who are born with a disorder, what will happen then? How much should they be paid, 80% of the minimum salary?

What if the substitute mother is a student? How has this issue been regulated? As of today, there is no law dealing with this matter.

What will happen with the monthly allowances for children up to 20 years and what if they continue to study up to age 26? All these questions have to be addressed. All women who give birth to a child receive a monetary allowance for the birth as a one-time child contribution at birth. Will this apply to substitute mothers? You know that if there is no such provision in the text explicitly allowing them to receive the same monetary allowance, they will not have the right to claim it. Such allowances are received regardless of the income of the mother. How will this be estimated in the case of substitute motherhood?

I believe that there are a lot of things that need to be changed and improved and perhaps the period of 21 days between the first and second reading is not sufficient to make them all.

All these questions have to be seriously considered and the relevant changes have to be made before the draft bill is accepted in its present state. That is why between the first and second reading of the draft bill, many changes have to be made otherwise the law will not be useful in practice. The social security, social care and the policies for helping child are very complex and they are interdependent.

**Kalina Krumova (ATAKA):** First of all, I would like to reply to those who cite the failure of assisted reproduction and substitute motherhood. If this is correct then why do many countries, including Russia and India, allow it? If it is unsuccessful they would not have such a procedure in place. More importantly, the substitute motherhood procedures in the UK and Russia are some of the best in the world. It is not such a dangerous thing when there is a working legislation containing the exact requirements for such procedures in order to avoid problems.

Also, when we talk about children born with disorders we know that unfortunately this happens even with normal pregnancies and no one can predict and no one can say what exactly will happen when the child is born.

Moreover, adoption and substitute motherhood cannot be compared. In fact, some of the couples who are willing to make use of this method already have adopted a child or are in the process of adopting one, and they can benefit from both methods.

Substitute motherhood is not a panacea to the demographic crisis in Bulgaria. Nevertheless the state should show its desire to encourage childbirth and this can be done by helping the families who want children but cannot have them without our help. However, legalising substitute motherhood will be a clear sign that everyone who wants to be a parent in Bulgaria is encouraged, irrespective of whether or not they have reproductive problems.

Also, I would like to point out that there is no such thing as three mothers as mentioned above. When there is an ovum donor it is completely anonymous and we do not know who the mother is.<sup>434</sup>

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<sup>434</sup> The ovum and semen donation is legal and anonymous in accordance with Ordinance Number 28 for Assisted Reproduction from 20 June 2007. Part IV, article 5.8 states that it is illegal to give information regarding the identity of the donors or any other information which might lead to their identification by the recipients or third parties; article 5.9 prohibits the commercialisation of the donation and provides that the

Moreover, the donor is used only in cases when there is an oncological problem. In all other cases, the ovum belongs to the mother.

We heard some analogies between substitute motherhood and adoption. Most of the families who want to make use of the substitute motherhood have already at least one adopted child or are in the process of adopting one. The substitute motherhood and adoption are in fact complimentary.

We also talked about the women who give birth to their children and abandon them and then they look for them. These are the biological mothers and the child is their biological material. The substitute mother is not the biological mother because it is not her ovum which has been inseminated and furthermore it has not been inseminated by her partner or husband. The substitute mother is simply the mother who carries the child and the child does not possess her genes. She is entirely aware of the procedure and she knows that the child that she is carrying is not hers. Why would she keep the child when she has a clear mind that it belongs to other people?

Another point which has been made is the limitation of the draft bill that only spouses can benefit from the substitute motherhood. First of all, at present, in Bulgaria there is no institution of "civil partnership" or "cohabitation", there is only "married" or "single". The substitute motherhood does not aim at regulating the relationship between people. The idea is to have a good and healthy environment for the raising of the child.

The compulsory programme for psychological help will be changed between the first and second reading and we will add a requirement for a social worker to be present in it as well. We will follow the example of the structure in place for adoption.

The amendments to the Social Security Code and the Labour Code aim at giving the substitute mother and the intended mother right to an annual leave, social security and others, rights which all parents have.

The children born with assisted reproduction are like all the other children. The only difference is that they are born by means of a medical procedure. The biological parents are the ones who will decide when, how and whether to tell their child that they are born in this way. This is the only difference. Trust me when I say that the children born by means of assisted reproduction are some of the most wanted and most loved children.

The Bulgarian Parliament adopted at first reading the draft bills legalising surrogacy with 64 votes "in favour", 6 votes "against" and 17 "abstained".<sup>435</sup>

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present Ordinance allows only compensation by means of reasonable costs related to the act of donation. See Ordinance Number 28 for Assisted Reproduction from 20 June 2007 (n 2).

<sup>435</sup> Стенограма от пленарно заседание, <<http://www.parliament.bg/bg/plenaryst/ID/2660>> accessed on 08 November 2012. See a general information how a bill becomes an act, see <<http://www.parliament.bg/en/billbecomeact>> accessed on 08 November 2012 (available in English).

## PART FIVE

### LEGISLATIVE PROPOSALS

Between the first and second readings of the draft bills, further proposals for changes were advanced. On 3 November 2011, Stojan Stavru, a lawyer specialised in Family and Medical Law who also participated in the preparation of the draft bills, made the proposals for changes in a meeting with Karina Krumova which are presented below.<sup>436</sup>

- 1) To abandon the term "biological mother" and use the term "wife or woman who is making use of substitute motherhood." At the moment in certain provisions the terms "biological mother" and "woman making use of the procedure i.e. intended parent" are used synonymously. However, it seems that there is a biological relationship between the substitute mother and the child since the bearing and giving birth to a child is a biological process. The woman who is making use of the process is the genetic mother (for the cases when her ovum was inseminated and used). The existence of a marriage and husband and wife relationship has to be determined at the moment when the contract for substitute motherhood is decided by the court.
- 2) To add as a requirement for the availability of a positive statement on behalf of the regional directorates for Social Care regarding the capacity of the substitute motherhood and the intended parents to participate in such a procedure. This statement will be issued on the basis of a social survey and will be made by experts. The experts will be the same ones who decide whether certain individual can adopt a child or not (according article 86(2) of the Family Code and for foster families (article 27(5) Child Protection Act).<sup>437</sup> It will be annexed to the contract for substitute motherhood and will be assessed by the court when they approve the contract. This will allow the use of existing resources from the state administration that have experience when dealing with such social surveys regarding the capacity of individuals to become parents.
- 3) To add a requirement that the contract should be signed personally and without any representatives if not for the intended couple at least for the substitute mother. This is necessary because the substitute motherhood concerns the integrity and inviolability of the substitute mother and as a result the contract can be signed only when the substitute mother personally agrees to it. This will also guarantee the importance of the agreement.
- 4) To expressly provide that the county courts which are dealing with family disputes will have jurisdiction to homologise the contract for substitute motherhood as the relationships arising out of the substitute motherhood are complex and can be categorised as family matters.

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<sup>436</sup> Стоян Ставру, 12 конкретни предложения във връзка със заместващото майчинство, <<http://challengingthelaw.com/semеino-i-nasledstveno-pravo/zamestvashto-maichinstvo-predlojenia/>> accessed 3 November 2012.

<sup>437</sup> Article 86(2): Directorate "Social Aid" carries out a survey whether the person is suitable to adopt a child. See article 86(2) Family Code, <<http://www.lex.bg/bg/laws/ldoc/2135637484>> accessed on 25 November 2012.

- 5) The contract for substitute motherhood is confidential and should not be made public. The aim of the keeping a record of the contracts for substitute motherhood is to allow the courts and health clinics to have access in cases they need to check the existence of such a contract, the date when it was made and the parties to it. However, when there is no such record its absence should not have negative consequences for the parties.
- 6) The courts will also check that there are no simultaneous or several contracts for substitute motherhood at the same time benefiting the same couple. This will be done at the beginning of the procedure when the court is asked to consider whether or not to allow the contract for substitute motherhood. The signing of several contracts for substitute motherhood is possible only if it is subsequent regardless of the success or failure of the procedure. In other words, each procedure requires a new contract on condition that the same woman cannot be a surrogate mother more than twice. However, there is no prohibition that the same woman acts as a substitute mother twice for the same couple.
- 7) There needs to be a clear regulation of who can take decisions related to the pregnancy and the birth, including: (a) the decisions concerning the continuation of the pregnancy will be made by the intended parents as long as such a decision does not impact on the health of the substitute mother; (b) the decisions regarding the birth, for instance, natural birth or caesarean will be made by the substitute mother. The birth concerns to a high degree the pregnant woman and her body and that is why she has the right to decide how it should be made. Of course, the decision will depend on a statement made by a doctor and whether the method chosen by the mother is dangerous for her or the child. The doctor will decide in all cases based on objective medical criteria.
- 8) Prohibition for the intended couples to make a decision for the termination of the pregnancy. Once the couple has commenced such a procedure and the pregnancy has started, the intended parents have to take all the legal consequences from parenthood. The only exception is if the commission couples and the substitute mother agreed for the termination of pregnancy within the legal deadline which is 12th week from the pregnancy (article 7(1) of Ordinance Number 2 for the Conditions and Order for Artificial Termination of Pregnancy from 1 February 1990).<sup>438</sup> After the 12th week, the abortion is allowed subject to medical approval (article 12(1) and (2) Ordinance Number 2 from 1 February 1990 for the Conditions and Order for Artificial Termination of Pregnancy from 1 February 1990).<sup>439</sup>

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<sup>438</sup> Article 7(1): Abortion requested by any pregnant woman can be made within the 12 weeks from her pregnancy. See Ordinance Number 2 for the Conditions and Order for Artificial Termination of Pregnancy from 1 February 1990 (Наредба № 2 от 1 февруари 1990 г. за условията и реда за изкуствено прекъсване на бременност), <<http://www.lex.bg/bg/laws/ldoc/-552069119>> accessed on 25 November 2012.

<sup>439</sup> Article 12(1): Abortion on medical grounds requested by the pregnant woman in the case of a disease, proven beyond doubt and presented in documents, when the continuation of pregnancy can or will jeopardise the life and health of the woman or the life of the child as per appendix 2 and within no more than 20 weeks from the pregnancy. In cases where the disease is not included in appendix 2, the abortion can be allowed in certain exceptional circumstances. Article 12(2): Abortion within more weeks than the provided ones in section 1 is allowed only if there are urgent reasons for the saving of the life of the woman or in cases of proven morphological changes or grave genetic disorder of the foetus. See Ordinance Number 2 for the Conditions and Order for Artificial Termination of Pregnancy from 1 February 1990 (n 49).

A possible termination of the pregnancy on mutual agreement of the intended parents and the substitute mother will have to be taken into account when assessing the aptitude and suitability for any future use of the substitute motherhood procedure.

- 9) Prohibition that the substitute mother can decide to get an abortion unilaterally. Unilateral abortion i.e. without the agreement of the intended parents is allowed only according to medical criteria according to Ordinance № 2 from 1 February 1990 for the Conditions and Order for Artificial Termination of Pregnancy. The substitute mother accepts "the child" of the intended parents and takes the responsibility to carry and give birth on behalf on them. In case that there is no compliance with the medical criteria for termination of abortion mentioned above the substitute mother infringes not only the rights and the interests of the intended parents but also that of the conceived child. That is why it is considered that the substitute mother takes specific responsibility towards the conceived child.

In order to guarantee that such a prohibition is implemented, the woman who has an abortion must give a declaration that she is not a substitute mother. Moreover, the hospital or the clinic which carries out the abortion will have the responsibility to check whether the woman is listed in the Register for Substitute Mothers and whether she has signed a contract for substitute motherhood.

The question which is somewhat left out is the criminalisation of a possible abortion in cases of substitute motherhood. The answer depends on whether the criminalisation will protect the private rights of the intended parents i.e. the right to become parents as a result of substitute motherhood or whether it will protect the public interest for the protection of human life: the right of the embryo to become a human being.

- 10) The need to delete "any other property relations" and leave the provision with reasonable costs connected to the pregnancy and the recovery after the birth. The court will decide what is reasonable on a case-to-case basis. Moreover, in order to keep the altruistic nature of the substitute motherhood the term "reasonable" must be changed with "necessary". The term "reasonable" is very broad whilst the term "necessary" is more limited and has a more objective nature. In order to guarantee the gratuity of the relationship between the intended parents and the substitute mother, all forms of advertisement or intermediary should be prohibited. When signing the contract for substitute motherhood, the substitute mother should give a declaration which is certified by notary (article 89(6) of the Family Code) that the given agreement is not bound with any financial compensation.<sup>440</sup> Thus this declaration will be the basis for existence of the criminal liability on the basis of article 313 of the Penal Code.<sup>441</sup> The presence of such a declaration will be on the basis of the court's approval for the contract.

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<sup>440</sup> See Article 89(6) Agreement for Adoption in the Family Code which provides that the people who agree for adoption have to give a declaration that they agree to do so without any financial compensation. Article 89(6) Family Code (Семеен кодекс), <<http://lex.bg/bg/laws/ldoc/2135637484>> accessed on 21 November 2012.

<sup>441</sup> Article 313 deals with the penalty and fine of people who have given false information in a written declaration or written message including a message sent via online medium of communication. The penalty is three years of prisons or a fine between BGN 100 to 300 (€50 to 153). See Penal Code, <<http://lex.bg/bg/laws/ldoc/1589654529>> accessed on 25 November 2012.



- 11) The contract can be terminated at the beginning of the pregnancy or by mutual agreement of all parties. The contract otherwise applies until the birth. The consequences for the origin of the child will not depend on the existence and provisions of the contract for substitute motherhood. The aim of the contract is to be the objective basis for agreement and to regulate their relations, but the approval of the court is more important as it decides whether or not to allow the substitute motherhood. Any changes of the contract will allowed only with approval from the court.
- 12) In case that the spouses making use of the substitute motherhood divorce during the pregnancy but before the birth of the child and the marriage of the woman making use of the substitute motherhood, a paternity issue arises. The paternity presumption follows the man who is making use of the substitute motherhood and it follows that article 61(2) of the Family Code does not apply in such instances. This article provides that if the child is born 300 days before the divorce, but after the mother re-married, the father of the child is the husband from the second marriage.<sup>442</sup> This is a presumption that if the woman divorces and re-marries during that period she does it namely because the father of the child is her new husband. This presumption however is not adequate when applied to cases of substitute motherhood. It is the first husband who has given his agreement for the assisted reproduction procedure in a written declaration which is certified by a notary. This agreement is the basis for the impossibility to challenge his paternity and it trumps the presumption that the second husband is the father. Moreover, the genetic material of the first husband has been used for the insemination.

## **PART SIX**

### **ARGUMENTS FOR AND AGAINST**

#### **Arguments in Favour**

The proponents of the legalisation of substitute motherhood support the idea that since modern medicine offers a solution for couples with reproductive problems they should be given a chance to make use of such methods. We cannot simply say that it is "God's will" and "We should not go against nature" when we talk about couples with reproductive problems because humans have developed non-traditional procedures and methods in medicine to give people a chance to live (such as an artificial heart valve) or conceive a child and there is nothing unnatural and horrendous to use them.<sup>443</sup>

The bills do not impose the procedure on couples with reproductive problems but rather give them the opportunity to decide whether or not to participate in it. Moreover, the bills defend a fundamental human right i.e. the right to be a parent and substitute motherhood is sometimes the only way to have a genetic child. Such couples usually try different methods to cure or overcome their reproductive problems (treatment of infertility if this is possible, in vitro fertilisation, adoption, use of donor semen and ovum) but sometimes without success. For instance, the success rate for in vitro fertilisation is between 20-25% and the most common reason for that is rejection of the

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<sup>442</sup> See Family Code, Article 61(2) (Семеен кодекс), <<http://www.lex.bg/bg/laws/ldoc/2135637484>> accessed on 25 November 2012.

<sup>443</sup> Деница Никова, Сурогатна майка - законът, църквата и природата срещу желанието да се възпроизведеш, <[www.framar.bg](http://www.framar.bg)> accessed on 26 November 2012.

inseminated ovum by the immune system of the mother.<sup>444</sup> In addition, in Bulgaria, the procedures for adoption are very cumbersome and after a long wait people do not get a child. For them substitute motherhood is their only chance to become parents.

One of the most frequently advanced arguments against substitute motherhood is that the woman who carries and gives birth to the child falls into severe depression after she gives the child away. Research, however, shows that in practice the majority of the substitute mothers do not experience depression, anxiety and pain after the birth of the child. They are aware of the fact that the child is not their own. Moreover, the child is given immediately to the biological family and the substitute mother does not have time to consider and appreciate the child as hers.<sup>445</sup> The general impression of such a method is that the child will have two mothers (or even three) but this is not true. The substitute mother is not a mother; she is simply a woman bearing the child of another woman. In Bulgaria, the substitute motherhood will be first encouraged within the family i.e. between relatives, for instance, sisters, and of course if this is not possible the couple will have the right to look for a woman who is ready to be substitute motherhood outside the family.<sup>446</sup>

The psychologist Vania Savova from Foundation "I Want a Baby" states that the acceptance of surrogacy shows the maturity of the society in a given country. Bulgarian society is now ready to legalise surrogacy and it has already taken the first steps with the establishment of the Fund for Assisted Reproduction and the engagement in the public debate on the draft bills presented before the National Assembly.<sup>447</sup> Kalina Krumova stated that success should not be measured by the number of couples who will be making use of this procedure. What really matters is to have such a procedure in place and allow couples to consider such an option.<sup>448</sup>

Radina Velcheva, the Director of Foundation "I Want a Baby", is convinced that the proposed regulatory framework will have positive effects in Bulgaria. According to her, the legalisation of substitute motherhood will be beneficial because it will help society to (1) understand that in altruistic surrogacy the substitute mother is not a "mother for rent", (2) the advertisement for payment for substitute motherhood will gradually disappear (they have actually considerably decreased since the draft bills have been put forward before the National Assembly), (3) couples with reproductive problems will not be coerced to make use of the procedure illegally and break the law, and more importantly, (4) substitute motherhood will have a regulatory framework which will not allow it to be a lucrative business on the black market for selling and buying babies which is exactly what is happening at the moment and (5) there will not be blackmailing of biological parents after the substitute mother gives birth which happens at the moment as there is no legal protection for those making use of the procedure.<sup>449</sup>

Moreover, a section entitled "Reasons" in the Draft Bill Amending and Supplementing the Family Code, the Draft Bill Amending and Supplementing the Citizen Registration Act, the Draft Bill Amending and Supplementing the Social Security Act, the Draft Bill Amending and Supplementing the Employment Code, and the Draft Bill Amending and

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<sup>444</sup> Професор Иван Тодоров и Адвокат Николай Вълков, Готова ли е България за сурогатството?

<[www.framar.bg](http://www.framar.bg)> accessed on 26 November 2012. Ваня Савова, <<http://www.savova.org/vandaradina.php>> accessed on 26 November 2012.

<sup>445</sup> Професор Иван Тодоров и Адвокат Николай Вълков (п 50).

<sup>446</sup> Антония Първанова, Етична и правна реалност на заместващото майчинство, <<http://parvanova.eu/blog.php?id=31>> accessed on 23 November 2012.

<sup>447</sup> Ваня Савова (п 50).

<sup>448</sup> За и против сурогатството (п 3).

<sup>449</sup> Радина Велчева, Председател на УС на фондация "Искам бебе", "Сурогатното майчинство няма да е платено", <<http://www.monitor.bg/article?id=310288>> accessed on 28 November 2012. Боряна: Не успях с инвитро, търся сурогатна майка, <<http://www.24chasa.bg/Article.asp?ArticleId=552811>> accessed on 28 November 2012.

Supplementing the Health Act, gives a more detailed explanation of the reasons behind the initiative and summarise the main arguments in favour of its legalisation.

The data gathered from the latest census in Bulgaria show that the demographic crisis in Bulgaria is becoming more and more serious with every year. The aging of the population, the immigration of young people and the increase of the number of families experiencing reproductive problems predetermine the drastic decrease of Bulgarian citizens. It is necessary to find and use effectively all possible means to encourage births and to help the couples who are willing to become parents.

According to the World Health Organisation (WHO) in Bulgaria there are 270, 000 couples who have reproductive problems. The statistics show that in one third of the cases the man is infertile, in one third- the woman is infertile, and one third-the infertility is due to multiple factors.

In the EU Member States the treatment of infertility is a matter of national policy. The Ministry of Health, the Ministry of Labour and Social Policy, the Ministry of Finance have to develop a long term strategy for resolving problems with infertility, the same way as it is done in other countries. In Bulgaria, where we experience problems with an aging population and increased immigration, the efforts should be directed towards resolving the demographic problem. This problem can be solved by taking care of the huge number of couples who would like to have children but cannot become parents due to a variety of reasons. Fortunately, we already have the financial means for the in-vitro fertilisation programmes, so now we need an adequate and purposeful national policy.

One of the possible solutions is the legalisation of surrogacy but in the Bulgarian context it is more acceptable to use the word "substitute". The internationally accepted terminology and use of the term of "surrogacy" is known since 1985, when the Brussels Declaration of the World Medical Association set up the beginning of the legal regulation of the substitute motherhood. The same year the first law governing the surrogacy was enacted, namely, the Surrogacy Arrangement Act 1985, which is applicable in the United Kingdom.

The institution of substitute motherhood is now 26 years old and different countries around the world have developed a practice and gained experience in it, now it has proven to be a success and it can be widely applied in our society and country. For the very first time, hundreds of families have acknowledged publicly that surrogacy happens in the black market and that there is such practice already in place, however it is outside the realm of the law or often the couples have to go to Ukraine where it is legal and where it is permitted for foreigners to make use of the practice in place.

In order to make Bulgaria a country where couples are not ashamed and not afraid to recognise their reproductive problems and a country where they can be parents and take care and raise their children, the state should be the one taking responsibility for its people.<sup>450</sup>

### **Arguments Against**

The National Network for Children, which comprises 96 organisations and the Foundation "Centre for Research and Policies for Women", expressed their opinion against the substitute motherhood on 25 October 2011 and 22 November 2011 respectively. Moreover, on 16 January 2012, 17 organisations issued a statement in the form of letter before the second reading in order to show that they are against the legalisation of the

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<sup>450</sup> Мотиви към Законопроект за изменение и допълнение на Семейния кодекс № 154-01-84, Законопроект за изменение и допълнение на Кодекса за социалното осигуряване № 154-01-86, Законопроект за изменение и допълнение на Кодекса на труда № 154-01-87, Законопроект за изменение и допълнение на Закона за здравето № 154-01-88.

substitute motherhood. They repeat the majority of the criticisms mentioned by different MPs during the Plenary Sessions before the National Assembly but any additional criticisms are summarised below. Also, some criticisms against the substitute motherhood appear in various online forums, blogs and interviews on diverse Bulgarian websites and the Bulgarian TV.<sup>451</sup>

### **Statement of the National Network for Children**

In the aforementioned roundtable discussion on 30 March 2010, the organisations which were against substitute motherhood were not given the opportunity to attend even though they registered to do so. Instead, only representatives from Association "Conception" and Foundation "I Want a Baby" that support the draft bills were admitted. Later in the preliminary groups, the citizens were given no more than two minutes to express their opinions and the draft bills were accepted very quickly without serious discussions.

If Bulgaria legalises substitute motherhood it will be the only country to do so in the Balkans. Moreover, the draft bills are very liberal; as a result, Bulgaria may become an attractive touristic destination for business with "wombs" as has happened with Russia, India and Ukraine. Even though an attempt to legalise substitute motherhood was made in several countries in our region it was not accepted. For instance, Romania rejected surrogacy in 2005, when a draft bill for reproductive medicine aimed at legalising altruistic surrogacy was vetoed by the President Traian Băsescu. Croatia voted a new law which prohibits surrogacy in 2009. In Serbia, there was a very short debate which ended with the complete prohibition of surrogacy in 2010.

For instance, today, Russia has become an attractive destination for "reproductive tourists" who seek techniques which are not available in their countries of origin. There is a concern that the draft bills in Bulgaria are highly influenced by the liberal legislation in Russia, with the author Kalina Krumova borrowing many ideas from them. Moreover, in India, there are "Baby Farms" where women are kept and used as human incubators for couples from the West. It is even possible to "order" children via email or post without any contact with the substitute mother. There are clinics where the substitute mothers are kept locked and forced to give birth with a caesarean operation which is very risky and may lead to death.

The legalisation of surrogacy will lead to degradation of motherhood because it turns motherhood into mechanical activity and a "job." The relationship between the mother and the baby will lose its value. The bearing of a child is not only a physiological process but also a unique contact and the relationship between the mother and the child continues for a life. In cases of surrogacy this natural contact is broken between the surrogate mother and the child. When surrogacy becomes a legal profession women will be forced to rent their bodies. Just as there is trafficking of women, there will be canals and networks of people who will make money out of "renting someone else's wombs". In Russia, the example that we are using, there is already a profession called "surmama"-surrogate mother.<sup>452</sup>

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<sup>451</sup> Асоциация Обещество и Ценности, Защо сурогатното майчинство не трябва да се узаконява, <<http://www.sva.bg/18/post/2011/10/6.html>> accessed on 12 November 2012; Петър Вълков (психолог), <<http://www.blitz.bg/article/28015>> accessed on 12 November 2012. See also, Василена Доткова, (п 10).

<sup>452</sup> Национална мрежа за децата, "Сурогатно майчинство: риск за правата на децата", <<http://nmd.bg/Position/stanovishte-na-natsionalna-mrezha-za-detsata-otnosno-predlozheniya-zakonoproekt-reqlamentirasht-surogatnoto-maytchinstvo/>> accessed on 18 November 2012. Център за изследвания и политики за жените <<http://www.cwsp.bg/htmls>> accessed on 18 November 2012.

## **Foundation "Centre for Research and Policies for Women"**

There will be chaos and confusion of the family roles as the draft bills allow relatives to become substitute mothers. Thus, a woman who becomes a surrogate mother can bear and give birth to her grandchild in place of her daughter and she will be the child's mother and grandmother. The requirement for substitute mothers to have at least one child has very serious, even traumatising, consequences for the mother and the child itself. These children will witness how their mothers carry and give birth to children that they abandon. They will live in constant fear and insecurity that one day they may be abandoned and more importantly will get a wrong impression from what a motherhood means.

The legalisation of substitute motherhood destroys the traditions of the family and will give way to the legalisation of "cohabitation" and "civil partnership" and even homosexual couples who will be able to make use of it in future.

The author of the draft bills cites on numerous occasions that there are 270,000 families with reproductive problems. But the exact number is unclear. In a 2005 survey made by Professor Ivan Kozovski, founder of the Centre for Assisted Reproduction in Varna, and given to the Ministry of Health, the number is 116,000 and not 270,000. If the number is 270,000 it will mean that Bulgaria has one of the highest, if not the highest, rate of infertility.

In Bulgaria there are more than 7,500 children between one and three years old that are abandoned, battered and injured each year. This positions us in first place for abandoned children in Europe. Can the couples with reproductive problems find another way to become parents? Isn't it better to adopt and take care of an abandoned child and in this way the children who are unwanted and cast out by our society will find a family and the infertile couples will find a better way to have children? First we have to think about how to facilitate and improve the adoption procedures and only after that to talk about substitute motherhood.

Can the substitute motherhood really help us decide the demographic crisis since there are 50,000 abortions made each year. It seems that we have so many children who are killed but at the same time politicians would like to solve the demographic problem with expensive and risky technologies.

Nowadays, we often talk about "making babies" but babies are 'born' they are not 'made'. Even this terminology changes our psychological relationship with our own children because it turns them into a product of our wishes, a good, which today can be placed in one womb and tomorrow in a different one. The children are a gift they are not a right.

The ability to conceive a child has its natural limits, such as age and health. Today, there are so many people who try not to get pregnant together with the early age of sex life, prolonged use of pills, numerous cases of abortion, etc. Then the same people find out that they cannot conceive. Is it better to put our efforts into preventing sterility?

It is surprising that before the writing of the draft bills no survey had been conducted of how many couples in Bulgaria are planning to use the substitute motherhood. Recently, Association "Conception" announced that there are only 20 couples willing to make use of this possibility.<sup>453</sup>

## **Miscellaneous**

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<sup>453</sup> Асоциация Общество и Ценности, Становище относно законопроекта за сурогатното майчинство, <<http://www.sva.bg/18/post/2012/01/4.html>> accessed on 12 November 2012.

There are serious risks associated with the legalisation of surrogacy. According to the draft bill amending and supplementing the Family Code, substitute motherhood is a method where the child is conceived either with the genetic material of the married couple who is making use of the procedure or with a donor ovum inseminated by the husband of the woman who is making use of the substitute motherhood. The latter will have a direct impact on the market for ova. This is an area where abuses are possible because it is a very profitable business. Moreover, Bulgaria has not taken the necessary steps to prevent such abuses. Also, in cases of donor ova there might be instances of incest or illegal hormone stimulation aimed at the selling of the women's ova. Legalising substitute motherhood means that what has been considered as a crime yesterday will become a legal procedure.

The provisions do not seem to guarantee prevention and criminalisation of trafficking of pregnant women and illegal adoption. The lack of rigorous requirements for the contract and the relationship between the substitute mother and the intended parents can easily open "Pandora's box" and lead to blackmailing, manipulation, requests for additional payments, etc. The provisions need to strike a fair balance and defend the rights of all the participants, especially the ones of the children.<sup>454</sup>

In case of substitute motherhood the strong and natural relation between the mother who is carrying the child and the child is broken. The relationship between a child and a mother are the most valuable and important and they cannot be simply agreed by a contract. Carrying a child is not only a physiological process it creates a bond between the child and the mother, which remains for the rest of their lives.

The substitute mother does not have any rights in relation to the child. The intended parents have rights on the substitute mother during the pregnancy. When there is a diagnosis for disorder or disease of the child there are serious problems. The intended parents wish an abortion and might make the substitute mother do it even though it is against her wishes and beliefs.

The substitute motherhood devaluates the importance and the significance of the reproductive activity and makes it a mechanical activity which can be compared to "work".

The substitute motherhood implies serious psychological and physiological risks. It is not clear how the substitute mother will react when the child is given up and what will be the psychological consequences from that.

Legalising substitute motherhood will lead to a physical exploitation of women. Once the substitute motherhood becomes a legal profession, many women will use their bodies in order to sustain their families.

The provisions dealing with "reasonable costs" is unclear and very broad. The black market will still be functioning even if surrogacy is legalised.

The rights of the child are violated. Both the substitute mother and the child are treated as biological goods for which you have to pay. This violates the rights of the child guaranteed in the Declaration for Child's Rights (article 6(9)). Also, there is a violation of the right of the child to know who gave birth to him/her and in case of donor ovum and/or semen to know her/his origin. The substitute motherhood may lead to violation of the right of the child to have a legal mother. There are cases, for instance in Russia, where only the name of the father appears on the birth certificate.<sup>455</sup>

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<sup>454</sup> Антония Първанова, (n 55).

<sup>455</sup> See <<http://www.sva.bg/post/2011/10/6.html>> (n 61) and <<http://www.blitz.bg/article/28015>> (n 61). See also, Василена Доткова, (n 10).



## **CONCLUSION**

Within the past two years, surrogacy has attracted the attention of the media where the issue has been widely discussed in connection with the legislative initiative put forward before the National Assembly. It can be said that surrogacy, despite its numerous criticisms, appeals to both couples with reproductive problems, who would otherwise be unable to have a child of their own, and women who are willing to offer their services and become surrogate mothers. A careful analysis of the draft bills reveals that it is necessary to further improve the language and the wording of the provisions in order to prevent disputes over its interpretation and application in future. The time between the first and second readings of the draft bills before the National Assembly has to be used efficiently because it is the time when provisions can be reshaped and re-written.

The main challenges concerning the legalisation and institutionalisation of surrogacy is to allow a third party i.e. a substitute mother to participate in the traditional two-parent family relations. In addition, the Bulgarian Orthodox Church and certain organisations perceive the changes to the basic principles of family law and definition of the origin of a child as detrimental to society and against public policy. It is believed that further participation by experts in Family Law and Medical Law, doctors, psychologists is needed to enhance the legitimacy of the proposed amendments.

Overall, there seems to be a wide support for the legalisation of substitute motherhood but the debate continues as there is still no official date for the second reading before the National Assembly. It remains to be seen whether surrogacy will be eventually permitted in Bulgaria.

## 6.4. GERMANY

### A LEGISLATION, DRAFT LEGISLATION, FORMAL GUIDELINES

1. In Germany, surrogacy in itself is not explicitly prohibited or punishable. However, the bringing together of the party who is willing to adopt a child born through surrogacy or is in some other way ready to take permanently care of it (ordering parents) with a woman who is willing to serve as a surrogate, is subject to sanctions. Also, surrogacy agreements are ineffectual and unenforceable.

Three legal sources deal with surrogacy (no amendment is under discussion):

i) The German Civil Code (*Bürgerliches Gesetzbuch* – BGB): §134- any legal transaction violating a statutory prohibition is void if the law does not say otherwise; §138(1)- any legal transaction violating the public policy (*bonos mores*) is void.

ii) The Embryo Protection Act 1990<sup>456</sup>: according to §1(1)(7), “anyone will be punished with up to three years imprisonment or a fine, who .... attempts to carry out an artificial fertilisation of a woman who is prepared to give up her child permanently after birth (surrogate mother) or to transfer a human embryo into her”. Under this provision, no “agreement” in a technical sense is required; the mere willingness of the surrogate to relinquish the child to a third party is sufficient.

Neither the surrogate, nor the ordering parents can be punished. According to §1(3)(2), “...the surrogate mother and likewise the person who wishes to take long-term care of the child will not be punished”. If a woman is being inseminated with the sperm of the ordering father with no medical assistance, through sexual intercourse or “home insemination”, this kind of operation will be subject to no sanction.

iii) The Procurement Adoption Act<sup>457</sup>: according to §13(a), the surrogate mother is a woman who by agreement has consented (1) to an artificial or natural insemination, or (2) to having somebody else’s embryo implanted, and, after giving birth to it, to hand the child over in view of an adoption or other permanent accommodation. Once more, this kind of activity is not in itself prohibited. According to §13(b), the procurement of a surrogate mother means the bringing together of the party who is willing to adopt a child born by a surrogate or is in some other way ready to take permanently care of it (ordering parents) with a woman who is willing to serve as a surrogate mother. Such procurement is formally prohibited (§13(c), and even, following §14(b), punishable (imprisonment up to one year or a fine). Any publicity is prohibited (§13(d)). With an imprisonment up to 2 years or a fine can be punished who has a pecuniary benefit or the promise of such a benefit out of the procurement of a surrogate mother. If the offender turns it into a business activity for financial profit or proceeds on commercial basis, the punishment amounts even to an imprisonment of 3 years or to a fine. §14(b)(3) confirms that the surrogate and the ordering parents cannot be sanctioned.

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<sup>456</sup> *Gesetz zum Schutz von Embryonen (Embryonenschutzgesetz – EschG)*, Federal Law Gazette, Part I, n°69, 19.12.1990, p. 2746

<sup>457</sup> *Gesetz über die Vermittlung der Annahme als Kind und über das Verbot der Vermittlung von Ersatzmüttern - Adoptionsvermittlungsgesetz – AdVermiG*, 2001 (BGBl. 2002, I, p. 354), last modified in 2008 (BGBl, I, p. 2403)

2. There is no type of surrogacy (commercial, altruistic, traditional and gestational) legally authorised in Germany; no distinction, nor any reference of "reasonable costs" is made.

3. Given the legal frame of surrogacy, in particular §134 and 138(1), BGB, surrogacy agreements are not enforceable by the courts, and cannot in any way, be pre-approved by a court in order to be considered as enforceable. This has been confirmed by the jurisprudence<sup>458</sup>: the sole fact that a woman has been a part to a surrogacy agreement is not a reason to take back the child to whom she gave birth (this kind of measure can only be pronounced in exceptional circumstances, when the child suffers from a bodily or mental damage<sup>459</sup>), despite the biological relation between the ordering father and the child, and the financial motivation of the surrogate.

#### 4. Laws determining parentage

Under German law, there is a legal presumption, according to which the mother is the woman bearing the child (§1591, BGB). No indication can rebut this presumption, as ovum donation and surrogacy are illegal. The mother's identity has to be mentioned in the act of birth. There is no formal possibility of giving birth anonymously. The child has only one legal mother. In case of surrogacy, the surrogate would be considered as the legal mother.

Under German law, the father is: the husband of a woman while bearing the child (§1592(1) BGB); a man who has recognised his paternity (§1592(2) BGB)<sup>460</sup>; or a man whose paternity has been stated by court (§1592(3) BGB). No specific provisions have been made for the case of surrogacy. If the surrogate was married while the child was born, her husband will be considered as the legal father of the child.

The names entered on the child's birth certificate are exclusively those of his parents also in case of surrogacy.

The ordering parents can adopt the child born through surrogacy under the following conditions: the consent of the surrogate, since the consent of the biological parents in general is mandatory, which cannot be given before the child is 8 weeks old (§1747 BGB). This consent might become unnecessary (§1748 BGB) if the parent has neglected his / her duty to the child permanently or has shown by his / her attitude that he / she doesn't care about the child, and if the child would suffer a disadvantage not being adopted. Also, the consent might be replaced if the child suffers from a serious (although not continuous neglect), or if the parent, suffering from a particularly great emotional disease, or a particularly serious mental or psychological disability, is permanently unable to assume the care and the education of the child.

According to §1741(1) BGB<sup>461</sup>, while deciding upon the adoption, the judge has to take into account the well-being (*Kindeswohl*) of the child, and only if it is to be expected that a parent – child relationship will result between the adopting party and the child. Nevertheless, whoever participates in an unlawful and unethical arrangement or transportation of a child with regard to an adoption, or delegates such an undertaking to a third party against payment, shall only be able to adopt the child, if this is necessary to the welfare of the child. In this context, a surrogacy agreement would not necessarily exclude adoption, and the judge would decide case by case. In any event, the mother is

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<sup>458</sup> KG Berlin, 19.3.1985, 1 W 5729/84, JZ 1985, 1053

<sup>459</sup> §1666, 1666a BGB

<sup>460</sup> A paternity recognition can be made before the child is born (§1594(4) BGB)

<sup>461</sup> « Wer an einer gesetzes- oder sittenwidrigen Vermittlung oder Verbringung eines Kindes zum Zwecke der Annahme mitgewirkt oder einen Dritten hiermit beauftragt oder hierfür belohnt hat, soll ein Kind nur dann annehmen, wenn dies zum Wohl des Kindes erforderlich ist »

allowed to hand over the child to the ordering parents only under the condition that an order has been given by a court.

The child might be adopted by the couple (if the couple is married) or by one parent (§1741(2) BGB). The guardianship court (*Vormundschaftsgericht*) decides on the adoption of the child.

### **5. Donation of gametes**

Germany is one of the very few countries, if not the only one, in which there has never been a rule concerning anonymity of the sperm donor. The anonymity is guaranteed in most Länder. But on 06.02.2013, a regional appeals court in Hamm added legal weight to the claim that sperm donation shouldn't be anonymous with its verdict that the children of anonymous sperm donors have the right to know the names of their fathers. The ruling came in a case involving a 22-year-old plaintiff, Sarah P., who was conceived with sperm donated at a clinic in Essen. Sperm donation is the only kind of donation authorised (in other countries in which access in favour of children to the identity of the gamete or embryo donor is guaranteed, often an anonymity principle has been enacted and eliminated).

The right of children to the knowledge of their origins has been confirmed by the German Federal Constitutional Court in 1989<sup>462</sup>, considered as derivative from another right, a constitutional one, concerning the right to one's own personality development. This right concerns the donation - conceived child in relation to the donor, as an anonymity principle between the donor and the donation receivers has never been contested. There is no official register set, which would insure the realisation of such right. The parents are not obliged to tell their children that they have been conceived through sperm donation.

### **6. Attribution of German citizenship to the child**

A child is considered to be a German citizen if at least one of his parents is German<sup>463</sup>, thus requiring his / her filiation to be determined. According to §19(1) of the Introductory Law of the Civil Code, in respect to the filiation of a child at first the law of the state in which the child has its habitual residence is applicable. However, the filiation, in relation to each parent, can be decided according to the law of the state to which this parent belongs<sup>464</sup>. In the context of surrogacy, the establishment of a filiation is complicated, given that, under German law, the mother is the woman bearing the child (§1591 BGB), and, if she is married, her husband is considered as the legal father (§1592(1) BGB), and not the ordering father.

These kinds of presumptions often do not exist in countries where German citizens choose to make a surrogacy agreement, like India or Ukraine, where the ordering parents are considered as legal parents, and where children born within their territory are not always automatically given the local nationality. This conflict of law can cause painful situations, where these children have neither a filiation in relation to the ordering parents, nor any citizenship, even if the ordering parents (who are, sometimes, also the biological parents) are German. Nevertheless, this state of the law has been confirmed

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<sup>462</sup> BVerfG, 31.1.1989, *FamRZ*, 1989, 255. This decision doesn't deal with ART, but is considered relevant in this field as well

<sup>463</sup> §4(1) *Staatangehörigkeitsgesetz* –StAG : « *Durch die Geburt erwirbt ein Kind die deutsche Staatsangehörigkeit, wenn ein Elternteil die deutsche Staatsangehörigkeit besitzt* »

<sup>464</sup> §19(1) *Einführungsgesetz zum Bürgerlichen Gesetzbuch* – EGBGB: « *Die Abstammung eines Kindes unterliegt dem Recht des Staates, in dem das Kind seinen gewöhnlichen Aufenthalt hat. Sie kann im Verhältnis zu jedem Elternteil auch nach dem Recht des Staates bestimmt werden, dem dieser Elternteil angehört* »

by the Federal State Department, warning that entrance to Germany of these children, who don't have German passports, is impossible<sup>465</sup>.

## B CASE LAW

1. The decisions presented in this report do not include any decision issued by the Federal Constitutional Court (*Bundesverfassungsgericht*) or the federal Court of Justice (*Bundesgerichtshof*) regarding surrogacy; thus explaining the lack of convergence in German case law.

A distinction can be made between the first period – the 80's- where surrogacy agreements have been concluded within the German territory, and a second period- later on, German citizens concluding such agreements abroad. In most cases, German law has been considered applicable, as nationality and filiation being at stake. Also, after a long period of time, where the conclusion of foreign surrogacy agreements by German citizens seems to have been tolerated (we can even find a request for a fiscal deduction of expenses engaged in the context of a foreign surrogacy agreement, to be considered as extra ordinary, request which has been refused<sup>466</sup>), in recent years courts have been more reluctant.

2. In recent years, the question which has raised the most in judicial proceedings has concerned travel documents for the children<sup>467</sup>; this question implicates law of nationality and filiation, in order to determine the legal parentage of the child, and, to establish his / her citizenship (German nationality law being *ius sanguinis*).

Nevertheless, certain cases deal with adoption requests<sup>468</sup>. Other cases examine the recognition in Germany of foreign documents or judgments related to surrogacy: paternity recognition made in Russia<sup>469</sup>, adoption judgment in the US<sup>470</sup>, and birth certificates<sup>471</sup>. We can even find a request for a fiscal deduction of expenses engaged (see question n°1, part B)<sup>472</sup>.

3. The ordering parents, as well as the surrogate, cannot be criminally convicted, as their immunity is set by law<sup>473</sup> (see question n°1, part A). Therefore, no case deals with criminal proceedings.

Surrogacy cases are predominantly dealt with by administrative (*Verwaltungsgericht*) and civil (*Landesgericht, Oberlandesgericht*) courts, whose jurisprudence seems convergent. There is no clear separation of competence between civil and administrative courts.

4. Generally, the "best interest of the child" consideration is used by German judges against surrogacy. In certain cases, the well-being (*Kindeswohl*) of the child was considered to be hurt by the mere fact of him being treated as a subject of an

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<sup>465</sup><http://www.auswaertiges-amt.de/DE/Infoservice/FAQ/GeburtAusland/06-Leihmutterschaft.html?nn=383016>

<sup>466</sup> FG Düsseldorf, 9.5.2003 - 18 K 7931/00 E

<sup>467</sup> AG Nürnberg, 14.12.2009 - UR III 264/09; VG Berlin, 26.11.2009 - VG 11 L 396.09; VG Berlin, 15.4.2011 - VG 23 L 79.11; VG Berlin, 5.9.2012 - VG 23 L 283.12 ; OLG Stuttgart, 7.2.2012 - Az 8 W 46/12

<sup>468</sup> AG Gütersloh, 17.12.1985 - 5 XVI 7/85; AG Hamm, 22.2.2011, Az. XVI 192/08 (confirmed in LG Dortmund, 8.7.2011, Az. 9 T 210/11)

<sup>469</sup> AG Nürnberg, 14.12.2009 - UR III 264/09

<sup>470</sup> LG Düsseldorf, 15.3.2012 - 25 T 758/10

<sup>471</sup> OLG Stuttgart, 7.2.2012 - Az 8 W 46/12

<sup>472</sup> FG Düsseldorf, 9.5.2003 - 18 K 7931/00 E

<sup>473</sup>§1(3)(2) of the Embryo Protection Law 1990, confirmed by 14b(3) of the *Adoptionsvermittlungsgesetz*

agreement, a merchandise<sup>474</sup>, or by his / her impossibility to ever discover the identity of his biological mother, if the surrogacy agreement includes an ovum donation<sup>475</sup>.

On the other hand, this consideration was also used in order to facilitate the child's situation: firstly, it has been judged that adoption was not contrary to the child's best interest because of the sole fact of the existence of a surrogacy agreement; the court was not in charge of pronouncing his vision of *bonos mores*, but only of the question which was submitted, the one which concerns the child's best interest<sup>476</sup>.

Secondly, this consideration was used in a case concerning an adoption request in favour of the partner (an American citizen) of the biological father of a child (a German citizen), the men having concluded a civil partnership in Germany<sup>477</sup>. The couple had concluded a surrogacy agreement in the US, which involved an ovum donation from a third party, and the German citizen's sperm. The American birth certificate mentions the surrogate as the mother, and the German citizen as the father. The men (ordering parents) returned to Germany in order to settle down, and asked for an adoption judgment in favour of the American citizen, partner of the biological father, with the surrogate's consent (which was made before a notary in California). This adoption request was refused in first instance by the *Amtsgericht*, but was admitted by the *Landesgericht*, on the basis of the "best interest of the child" consideration. The court has decided that German law was applicable, as the civil partnership was concluded in Germany: following §19(1)(1) EGBGB, the child's filiation is to be determined according to the law of the state where he / she resides habitually. In German filiation law, the legal mother was the surrogate (§1591 BGB), and, as she wasn't married when she gave birth, and as no paternity recognition has been made, no paternal filiation could be established (the fact that the birth certificate mentioned the biological father was irrelevant). The court has therefore declared, that the paternal filiation would be determined following rules respecting the most the child's best interest. Several "child's best interest theories" could be possible. The one which respects the child's need to determine his paternity as soon as possible, even up to his birth; the one which respects the child's need to access, as soon as possible, the knowledge of his genetic origins. Following both theories, the Californian law was applicable, recognising the German citizen (the biological father) as the father. Nevertheless, the judges decided that in this precise case, §1741(1), al. 2 BGB would be the most respectful of the child's need to have a stable relationship with the people who take care of him, thus an adoption. Also, according to §9(7) of the *Lebenspartnerschaftsgesetz*, under the condition of the child's best interest (which, in this case, is respected, given the harmonious environment in which the child was growing up), the biological child of one of the civil partners could be adopted by the other partner, thus considering both civil partners as legal parents. The judges considered that, in this particular case, the subjective relationship between the parties and the child, and the fact that he would have to face objective difficulties in the future, were sufficient to justify a legal solution, namely an adoption. The child's need for a double filiation would be fulfilled; he would be allowed to inherit and to get other financial rights.

**5.** The "best interest of the child" consideration has never been used to allow the administration of travel documents to children born through foreign surrogacy agreements, this question had to be examined according to nationality and filiation legal provisions. The decisions taken by the administrative court of Berlin<sup>478</sup>, which dealt with the child's right to enter German territory without a visa, don't mention this criteria, and refuse these requests.

<sup>474</sup> OLG Hamm, 2.12.1985, 11 W 18/85; AG Hamm, 22.2.2011, Az. XVI 192/08

<sup>475</sup> AG Hamm, 22.2.2011, Az. XVI 192/08

<sup>476</sup> AG Gütersloh, 17.12.1985 – 5 XVI 7/85

<sup>477</sup> LG Düsseldorf, 15.3.2012 – 25 T 758/10

<sup>478</sup> VG Berlin, 26.11.2009 - VG 11 L 396.09 ; VG Berlin, 15.4.2011- VG 23 L 79.11 ; VG Berlin, 5.9.2012 - VG 23 L 283.12



However, this criteria has been mentioned while considering the request to admit a paternity recognition of a child, which was made in Russia, in order to determine the child's filiation. The judges decided that the interest of the child was that his parents' identity would be established as soon as possible in order to get the German citizenship, and the travel documents<sup>479</sup>.

**6.** The protection of "family life" (as between the child and the intended parents) has never provided an alternative consideration for the courts, nor a challenge for the "best interest of the child" principle.

**7.** In Germany, neither ovum donation, nor surrogacy, are authorised. There is no difference in the judges' way of reasoning if the intended mother is the biological mother or not, the origin of the egg being irrelevant. We can see that the reasoning of the administrative court of Berlin (*Verwaltungsgericht*) is the same in three of its decisions<sup>480</sup>, although only the later concerns a case where the intended parents are also the biological parents. In another case<sup>481</sup>, the judges have mentioned that ovum donation is illegal in Germany (§1(1)(2), Embryo Protection Law), but even if the egg were the one of the intended mother it would not have changed the result.

**8.** The intended parents can adopt a child after he / she has been delivered and handed over to them by the surrogate; this has been confirmed implicitly through legal provisions (see question n°12, Part A), and explicitly by courts: firstly, despite the refusal of an adoption request, the judges declared that adoption was not contrary to the child's best interest because of the sole fact of the existence of a surrogacy agreement; the court was not in charge of pronouncing his vision of *bonos mores*, but only the question which was submitted, the one which concerned the child's best interest<sup>482</sup>. Secondly, the administrative court of Berlin, while dealing with requests for travel documents for children born abroad through surrogacy agreement, proposed twice<sup>483</sup> to the intended parents, in order to establish a filiation for the child with them, to undergo a genetic test, and then to ask for an adoption. This kind of proposition was also made by the Regional Appeal Court (*Oberlandesgericht*) of Stuttgart in 2012<sup>484</sup>. However, adoption has been authorised in favour of the civil partner of the biological father of a child born through surrogacy in the US<sup>485</sup> (see question n° 4, Part B).

Nevertheless, in a decision from 2011, the administrative court of Hamm<sup>486</sup> rejected an adoption request of a child born through surrogacy in the US. The judges justified their decision by declaring that even if §1741(1) BGB might have allowed the adoption in the interest of the child (although surrogacy agreements are contrary to §134 and 138(1) BGB, as well as to §1(1)(7) of the Embryo Protection Law, and to §1(1)(2) when ovum donation is included, as in the present case), the child is growing up under optimal conditions with the care of the intended parents, this situation should continue in the future, and authorising adoption cannot make his situation better. The judges mentioned that the intended parents, along with the surrogate, have planned to continue their cooperation in making an adoption request, and, in full conscience and knowledge, took the decision to undergo such a risk of legal uncertainty for the child, whose only paternal

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<sup>479</sup> AG Nürnberg, 14.12.2009 - UR III 264/09

<sup>480</sup> VG Berlin, 26.11.2009 - VG 11 L 396.09; VG Berlin, 15.4.2011- VG 23 L 79.11; VG Berlin, 5.9.2012 - VG 23 L 283.12

<sup>481</sup> Amtsgericht (AG), Hamm, 22.2.2011, Az. XVI 192/08. This case dealt with a surrogacy agreement in the US, including an anonymous egg donation

<sup>482</sup> AG Gütersloh, 17.12.1985 - 5 XVI 7/85

<sup>483</sup> VG Berlin, 26.11.2009 - VG 11 L 396.09 ; VG Berlin, 5.9.2012 - VG 23 L 283.12

<sup>484</sup> OLG Stuttgart, 7.2.2012 - Az 8 W 46/12

<sup>485</sup> LG Düsseldorf, 15.3.2012 - 25 T 758/10

<sup>486</sup> AG Hamm, 22.2.2011, Az. XVI 192/08 (confirmed LG Dortmund, 8.7.2011, Az. 9 T 210/11. This case concerned a surrogacy agreement in the US, with an anonymous ovum donation and the intended father's sperm, followed by a birth certificate on which the intended parents were mentioned. After going back to Germany, the intended father underwent a genetic test, which confirmed his paternity. He then began an adoption procedure with his spouse, with the consent of the surrogate

filiation could be determined. Adoption is therefore seen as a try to regulate an illegal situation under the Embryo Protection Law. This situation hurts the child's interest, being unable to know the identity of his biological mother, and being conscientious of the fact that he was considered as the object of a commercial agreement. For the abovementioned reasons, the court has decided to refuse this request for adoption, and proposed to take some testimonial dispositions to guarantee the inheritance rights of the child.

**9.** German courts have admitted a paternity recognition act, made by the intended father, and issued in Russia, and considered it not contrary to public policy (*ordre public*)<sup>487</sup>. The judges declared that the document at stake was not a foreign judgment<sup>488</sup>, and even if it were, there would be no contradiction with public policy (*ordre public*), for two reasons: first, because of the right to know one's own origins, considered as derivative from another right, a constitutional one, concerning the right to one's own personality development (§2 and 1 of the German Constitution); this kind of right cannot be void by any party to a surrogacy agreement (intended father, surrogate, etc.). Second, even if this surrogacy agreement would have taken place within the German territory, there would be no infringement to public policy, as §1594 BGB sets conditions to paternity recognition, which do not include any genetic tie between the recognizing father and the child, this provision being possible to use also in a surrogacy context. Accordingly, any foreign decision, which achieved the same result, cannot be considered as contrary to public policy.

On the contrary, German courts do not recognise foreign birth certificates related to surrogacy agreements. A request to recognise a birth certificate issued in California has been refused<sup>489</sup>, on the ground of §36(1) PStG (Personal Status Law), according to which only the transcription of German citizens born abroad is possible. This provision requires German citizenship. §19 EGBGB provides that German law is applicable for questions of nationality. In the present case, the children were not German citizens, as their legal mother is the one who was bearing them (§1591 BGB), and their legal father the husband of the surrogate.

In other cases dealing with surrogacy, foreign birth certificates, even if at least one of the biological and intended parents is mentioned, were not considered as sufficient to establish a filiation. In cases of surrogacy agreements concluded in India<sup>490</sup> or in the US<sup>491</sup>, neither the intended mother, nor the intended father (despite his genetic relation to the child), were able to establish their filiation, even though they were mentioned as legal parents on the foreign birth certificates.

It seems much easier to establish the paternity of the intended father (several court decisions suggested it, and also, establishing the paternity of the sperm donor has never been excluded in German Law), than the maternal filiation of the intended mother, which can only be made through adoption (given §1591 BGB).

As far as we know, there is no case law published concerning a surrogacy agreement where there was no genetic relation between the intended father and the child.

**10.** Birth certificates issued abroad, in the context of surrogacy agreement, were not recognised (see question n° 9, Part B). In different cases dealing with surrogacy concluded abroad, the mere existence of foreign birth certificates was not even taken into consideration in order to establish filiation. Also, §16(a)(4) of the Law of

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<sup>487</sup> AG Nürnberg, 14.12.2009 - UR III 264/09

<sup>488</sup> In the sense of §16(a) FGG, and in particular §107 FamFG

<sup>489</sup> OLG Stuttgart, 7.2.2012 - Az 8 W 46/12. This case dealt with a surrogacy agreement made in the US, where the intended parents had both a genetic relation to the twins.

<sup>490</sup> VG Berlin, 26.11.2009 - VG 11 L 396.09

<sup>491</sup> AG Hamm, 22.2.2011, Az. XVI 192/08

Jurisdiction<sup>492</sup> excludes the recognition in domestic law of any foreign decision if it is in contradiction with the law, and in particular with fundamental rights.

The administrative court of Berlin<sup>493</sup> gave as reason for not recognising the paternity of the intended father, despite the fact that he was mentioned as such in the Indian birth certificate, the contradiction of the regulations published by the *Indian Council for Medical Research* to public policy (*ordre public*), in the sense of §6 EGBGB, because §1591 BGB (the mother is the woman bearing the child) is part of it.

Nevertheless, the notion of « *ordre public* » was used to facilitate the situation of a child conceived through surrogacy, and recognised by the intended father, this act of recognition, made in Russia, being considered as non contradictory with the "ordre public", and thus, recognised<sup>494</sup> (see question n° 9, Part B).

**11.** German judges, while dealing with surrogacy agreements concluded abroad, have to decide about giving travel documents to the children, under the condition of being German citizens. In fact, German Law being *ius sanguinis*, a child whom at least one of his / her parents is a German citizen, can get the German citizenship<sup>495</sup>. According to §19(1) of the Introductory Law of the Civil Code, in respect to the filiation of a child, at first the law of the state in which the child has its habitual residence is applicable. However, the filiation, in relation to each parent, can be decided according to the law of the state to which each parent belongs<sup>496</sup>. In the context of surrogacy, the establishment of a filiation is complicated, given that, under German law, the mother is the woman bearing the child (§1591 BGB), and, if she is married, her husband is considered as the legal father (§1592(1) BGB), and not the ordering father.

German courts have been forced to consider foreign law in cases where the habitual residence of the child, unable to get back to Germany because deprived of travel documents, was abroad. In a case of surrogacy which took place in India<sup>497</sup>, the court disregarded the claim of the intended father to the recognition of his paternity, founded on the genetic relation between him and the child, considering that the question of the nationality has to be determined following Indian law, where the child resides. Under Indian Law, no specific provision has been set in the field of surrogacy, and in general, the mother is the woman bearing the child, even if she doesn't have any genetic relation to the child; the father is this woman's husband<sup>498</sup>, so if the surrogate was married when she gave birth to a child, her husband is the legal father. However, the judges insist on explaining that even under German law, the intended father is not the child's legal father, as he wasn't married to the surrogate when she gave birth to him<sup>499</sup>, nor has he recognised his paternity<sup>500</sup>, nor has his paternity been judicially established<sup>501</sup>.

In the case dealing with the admission of a paternity recognition made in Russia (see question n° 9, Part B), the judges referred to the fact that even though German law was

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<sup>492</sup> According to §16(a)(4) *Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit* – FGG : « Die Anerkennung einer ausländischen Entscheidung ist ausgeschlossen.....wenn die Anerkennung der Entscheidung zu einem Ergebnis führt, das mit wesentlichen Grundsätzen des deutschen Rechts offensichtlich unvereinbar ist, insbesondere wenn die Anerkennung mit den Grundrechten unvereinbar ist »

<sup>493</sup> VG Berlin, 26.11.2009 - VG 11 L 396.09

<sup>494</sup> AG Nürnberg, 14.12.2009 - UR III 264/09

<sup>495</sup> §4(1) *Staatangehörigkeitsgesetz* –StAG (Law of nationality)

<sup>496</sup> §19(1) *Einführungsgesetz zum Bürgerlichen Gesetzbuch* – EGBGB: « Die Abstammung eines Kindes unterliegt dem Recht des Staates, in dem das Kind seinen gewöhnlichen Aufenthalt hat. Sie kann im Verhältnis zu jedem Elternteil auch nach dem Recht des Staates bestimmt werden, dem dieser Elternteil angehört »

<sup>497</sup> VG Berlin, 26.11.2009 - VG 11 L 396.09

<sup>498</sup> §112 of the *Indian Evidence Act*, 1872

<sup>499</sup> §1592 al.1 BGB

<sup>500</sup> §1592 al.2 BGB

<sup>501</sup> §1592 al.3 BGB

applicable, even under Russian law of filiation, the admission of this kind of act would not be considered as contrary to the « *ordre public* »<sup>502</sup>.

The German legislator has never defined the application domain of the Embryo Protection Law, nor the *Adoptionsvermittlungsgesetz*. Therefore, German criminal law is only applicable in regard to offences committed within the national territory.

**12.** Even in cases where surrogacy agreements were considered as void, because of their contradiction with the notion of *bonos mores* (based on §134 and §138(1) BGB)<sup>503</sup>, and as being degradation to the child's status<sup>504</sup>, the judges use the same neutral terms, namely « *Leihmutterschaft* », and sometime « *Ersatzmutterschaft* » (substitution motherhood)<sup>505</sup>. On rare occasions, more negative qualifications are used, the surrogate is named « *Mietmutter* »<sup>506</sup> (rent mother), and the intended parents « *Bestelleltern* »<sup>507</sup> (commanding parents). Generally, the judges prefer to name the intended parents according the place they have in the procedure (adoptive parents, biological father, spouse of the pretender, etc.), or name them by abbreviations (Mrs. X, for example).

**13.** No court decision regarding surrogacy has ever mentioned any need for a legal reform.

**14.** In Germany, a written law country, judges refer to legal provisions, which, in the field of surrogacy, may concern contract law (§134 and 138(1) BGB), filiation law (§19(1), Introductory Law of the Civil Code – EGBGB); §1591-1592 et §1741(1), BGB), and nationality law (§4(1) StAG). They are not guided by any jurisprudential construction.

**15.** German courts have never approved any payments in the context of surrogacy, as surrogacy in itself is not authorised. The judges do mention the existence of this kind of payment, in order to condemn them morally<sup>508</sup>, but the sole fact of paying has never been the main issue, rather nationality and filiation law.

**16.** Despite the legal frame of surrogacy, German judges have much discretion as adoption rules are flexible, in particular §1741(1) BGB, which can serve as a legal foundation for decisions of adoption, under the condition of respect of the child's best interest, even in cases of surrogacy. Once the paternal filiation established, the intended mother could ask for an adoption, as has been confirmed by several courts.

#### List of cases:

- Kammergericht (KG) 19.3.1985, 1 W 5729/84
- Oberlandesgericht (OLG), Hamm, 2.12.1985, 11 W 18/85 (*FamRZ* 1986, 159 ; *JZ* 1986, 441 ; *NJW* 986, 781)
- Amtsgericht (AG), Gütersloh, 17.12.1985 – 5 XVI 7/85
- Finanzgericht (FG), Düsseldorf du 9.5.2003 (18 K 7931/00 E)
- Amtsgericht (AG), Nürnberg, 14.12.2009 - UR III 264/09

<sup>502</sup> AG Nürnberg, 14.12.2009 - UR III 264/09

<sup>503</sup> OLG Hamm, 2.12.1985, 11 W 18/85; LG Freiburg, *NJW* 1987, 1486, 1488

<sup>504</sup> OLG Hamm, 2.12.1985, 11 W 18/85 ; AG Hamm, 22.2.2011, Az. XVI 192/08

<sup>505</sup> AG, Nürnberg, 14.12.2009 - UR III 264/09

<sup>506</sup> OLG Hamm, 2.12.1985, 11 W 18/85

<sup>507</sup> VG Berlin, 26.11.2009 - VG 11 L 396.09

<sup>508</sup> KG 19.3.1985, 1 W 5729/84; AG Hamm, 22.2.2011, Az. XVI 192/08

- Verwaltungsgericht (VG) Berlin, 26.11.2009 - VG 11 L 396.09
- Amtsgericht (AG), Hamm, 22.2.2011, Az. XVI 192/08 (confirmed - Landesgericht (LG), Dortmund, 8.7.2011, Az. 9 T 210/11)
- Verwaltungsgericht (VG) Berlin, 15.4.2011- VG 23 L 79.11
- Oberlandesgericht (OLG) Stuttgart, 7.2.2012 – Az 8 W 46/12
- Landesgericht (LG), Düsseldorf, 15.3.2012 – 25 T 758/10
- Verwaltungsgericht (VG) Berlin, 5.9.2012 – VG 23 L 283.12

## 6.5. GREECE

### ABSTRACT

The purpose of this report is the investigation, illustration and critical analysis of the main legal issues that arise from the regulation of surrogate motherhood in Greece. In 2002 the Greek legislature introduced the Law 3089/2002 on medically assisted human reproduction, which – among the government of other issues of reproductive medicine – included specific rules concerning the permissibility of the practice of surrogacy, the legal status and the enforceability of surrogacy agreements, and the transfer of parentage. This Law was the cause for a radical reform of the Greek Civil Code, and especially of Family Law. Three years later, Law 3305/2005 stipulated the concept and meaning of the “reasonable expenses” paid to a surrogate, and criminalised any act that violated the letter of the law. Drawing on the relevant legal sources and the literature available to date, this report presents the Greek regime of surrogacy, which can be used as a solid base for the legal reform of other jurisdictions in the EU with regards to the issue of surrogate motherhood.

### INTRODUCTION

While the majority of jurisdictions have accepted and recognized reproductive technologies (RTs) as a way to “cure” infertility, implementing legislative regimes accordingly, surrogacy in most jurisdictions remains on the margins of the protective scope of the law. As a result, all the parties of a surrogacy agreement – the intended parents, the surrogate mother, and the child born through this method – are in a legal limbo. In other jurisdictions, the practice of surrogacy is prohibited, or it is allowed but constrained by various conditions. At a European level, the regulatory frameworks among the Member States are diverse, and as a rule ‘surrogacy contracts are not enforceable’ by law.<sup>509</sup>

In fact, Greece is one of the very few countries, and evidently the only country within the European Union (EU),<sup>510</sup> which has introduced a complete and comprehensive regulatory framework with regards to surrogacy. The Greek legislation came into force in 2002 by Law 3089/2002 for the regulation of the medically assisted human reproduction; it was amended in 2005 by Law 3305/2005, and has been described as one of the most progressive regimes in the modern legal world.<sup>511</sup> The Law includes provisions for a variety of issues, such as human cloning, artificial insemination, cryopreservation of embryos, gamete donation, as well as specific provisions for the permissibility of surrogacy. In addition, Law 3305/2005 makes a declaration for civil and criminal sanctions, thus discouraging any effort to violate the law.

The Greek law for medically assisted human reproduction sets the limits of the ethical practice in biomedicine and RTs. First and foremost, it aims to protect the rights and interests of any resulting child,<sup>512</sup> and secondly the individuals’ right to personal freedom and autonomy, and their right to procreate.<sup>513</sup> Consequently, Laws 3089/2002 and

<sup>509</sup> Hatzis, A.N., ‘From soft to hard paternalism and back: the regulation of surrogate motherhood in Greece’, Portuguese Economic Journal (2009) 8, page 207

<sup>510</sup> ESHRE, 2010. Comparative Analysis of Medically Assisted Reproduction in the EU: Regulation and Technologies (SANCO/2008/C6/051). Available from: [http://ec.europa.eu/health/blood\\_tissues\\_organs/docs/study\\_eshre\\_en.pdf](http://ec.europa.eu/health/blood_tissues_organs/docs/study_eshre_en.pdf) .

<sup>511</sup> See Kounougeri-Manoledaki, E., ‘Artificial insemination and family law. The Greek legislation: statutes 3089/2002 and 3305/2005’, Sakkoulas Publications, Athens-Thessaloniki (2005), p. 6 (in Greek); Panagos, K., ‘Surrogate motherhood. The Greek regulatory framework and the extension to criminal law’, Sakkoulas Publications, Athens-Thessaloniki (2011), page 9 (in Greek); Hatzis, A.N., ‘From soft to hard paternalism and back: the regulation of surrogate motherhood in Greece’, Portuguese Economic Journal (2009) 8, page 207.

<sup>512</sup> Article 1 paragraph 2 Law 3305/2005: ‘When applying the techniques for the medically assisted human reproduction, the best interests of the child to be born should be taken into consideration’.

<sup>513</sup> Article 1 paragraph 1 Law 3305/2005: ‘The technologies of assisted reproduction are applied in such a way that ensures the respect for the individual’s personal freedom and personal development, and for [the



3305/2005 are in harmony with the national legislation in general, as well as the moral principles, rights and obligations incorporated into the Greek Constitution, while at the same time they are consistent with the European and international laws and inter-countries' agreements on Human Rights and on the protection of and respect for the children's welfare.<sup>514</sup>

The purpose of this paper is to provide the reader with an insight into the Greek regulatory framework on surrogate motherhood. I will first refer to the background of the regulation of surrogacy and then move to an extensive analysis of the provisions of the law. Reference will be made to important legal cases which have raised legal issues and social concerns relating to surrogacy that have been discussed by the Greek courts, as well as to sociological studies that have been performed throughout the years in Greece with regards to surrogacy.

However, only three sociological studies were accessed with regards to surrogacy in Greece, and two of them were conducted at a time before the passing of the Law 3089/2002.<sup>515</sup> The third is a small-scale study on students of the Aristotle University of Thessaloniki in Greece, and cannot possibly provide a solid base for any kind of generalisations or extract data that will lead to any valid and accurate remarks.<sup>516</sup> As a result we can only guess that the recent law on surrogacy is indeed successful in Greece.

It should, however, be noted that it is not only the sociological research and the considerable lack of data towards the effects of the law on surrogacy on the social realm that should concern us. The relevant academic literature can also be described as scant and inadequate. It is only recently that surrogacy has been inserted into the Greek literature, and some of this work will be referenced in this report. Despite this burgeoning commentary, it is important to note that the Greek legislation on surrogacy has not gathered the attention of international commentators. Given that Greece is the only country in the EU that has adopted a legislation which expressly facilitates surrogacy and regulates its conditions, it is both surprising and concerning that the Greek legal regime has not garnered more attention in academic, policy and legal debates across the globe.

There is, therefore, an absolute need for future researchers to dedicate their work on the issue of surrogacy, the conditions of the legislation, and its effects on the Greek legal and social world. Moreover, during the research for the formation of this report, difficulties were encountered in gaining access to relevant information; the legal cases

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individual[s] right to procreate, in accordance with the medical and biological facts, and the principles of bioethics'.

<sup>514</sup> More specifically, the Greek laws on assisted reproduction are in line with the provisions of the European Convention of Human Rights (ECHR), the Directive of the EU Parliament and of the Council of 31 March 2004 (2004/23/EC), and the European Convention on the Exercise of Children's Rights CETS No.:160, which are inserted into the national legislation, as well as the UN Convention on the Rights of the Child. See also Mitrosyli, M., 'Medically assisted reproduction. "Application of medically assisted reproduction" act 3305/2005, Greece): Presentation and comments', *Archives of Hellenic Medicine*, (2007), 24(6): 612-622 (Article written in Greek. Abstract in English available at <http://www.mednet.gr/archives/2007-6/612abs.html>).

<sup>515</sup> Chliaoutakis, J.E., Koukouli, S., Papadaki, M., 'Using attitudinal indicators to explain the public's intention to have recourse to gamete donation and surrogacy', *Human Reproduction*, 17 (11), 2002: 2995-3002; Chliaoutakis, J.E., 'A relationship between traditionally motivated patterns and gamete donation and surrogacy in urban areas of Greece', *Human Reproduction*, 17 (8), 2002:2187-2191. These studies were published in August and November 2002 respectively, and, hence, before the issuance of Law 3089/2002 (it came into force on 19 December, 2002).

<sup>516</sup> Panagos, K., 'Surrogate motherhood. The Greek regulatory framework and the extension to criminal law', Sakkoulas Publications, Athens-Thessaloniki (2011), pages 113-128. The students showed knowledge of the issue of surrogacy and stated that they are likely to view surrogacy as a legitimate and positive way of reproduction when there is a physical inability for it. However, they did express their preference towards the method of adoption rather than that of surrogacy. What certainly became apparent was the fact that the young people educated at an academic level are socially conscious and that the matter of surrogacy slowly but steadily gains recognition in the public discourse.

could not always be found on publically accessible sources.<sup>517</sup> The Greek authorities should, therefore, work towards making this information readily available to everyone, so as to avoid future legal disputes created by incomplete knowledge of the requirements and provisions of the law coming before the Greek judges.

### **General presentation of the Greek legislation**

The Greek law on surrogacy includes rules that facilitate the practice of surrogate motherhood, define the ethically acceptable character of surrogacy in the Greek reality, present the terms and conditions for the judicial license for the artificial insemination of the surrogate mother, and provide legal force to preconception surrogacy agreements, which in the end lead to the automatic attribution of legal parenthood to the intended parents immediately after the birth of the child.

As becomes apparent, the Greek legislature made a bold and unprecedented move – if compared to the legal situation of other EU Member States – and introduced an innovative and certainly controversial regime to the otherwise conservative society of Greece, which is still significantly under the influence of the Orthodox Church (Ecclesia) and the doctrine of 'tradition'. The Greek society is generally described as having strong regard for the traditional norms of family, morality and religion, and for the value of strong inter-familial bonds. According to the norm, the 'traditional family' essentially consists of two heterosexual parents in a married union and one or more children genetically related to their parents and brought to life through natural conception and birth.<sup>518</sup>

The legislature, however, decided that it was time to change the norm of 'the family' and follow the example of other jurisdictions, by introducing regulations concerning advances in biomedicine, similar to those of the Human Fertilisation and Embryology Act (HFE Act) in the United Kingdom (UK), which has become a law of the country since 1990 and was amended in 2008.

On November 22, 2000 the Minister of Justice, at the time Mihail Stathopoulos, a leading academic of Law at Athens Law School, and a man with a progressive mind, appointed a Committee to evaluate the effects of the RTs and genetics to family law.<sup>519</sup> The result of this project was the formation and the passing of the Law 3089/2002 on December 19, 2002.

The above mentioned Law brought about major changes in the legal reality, and more specifically in Family Law and the Greek Civil Code (GCC), and was instigated by the case of the Multi-member Court of First Instance of Heracleion no. 31/1999, whereby the court approved the application of the intended parents to adopt twins that were born by a surrogate. The honorable judges of the court highlighted the legal vacuum that existed concerning the attainment of legal parenthood through the practice of surrogacy and recommended a law reform. Moreover, they found that the stimulation of the adoption process was inappropriate for the particular case, as well as unacceptable as a means to

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<sup>517</sup> Indeed the court decisions were not able to be accessed by someone without a subscription on the Greek legal research engines (for example the research tool "NOMOS"). The information is only available to Greek lawyers and legal interns who are registered in the Bar Association as practitioners of the legal profession.

<sup>518</sup> For further information about the authoritative power of the Greek Orthodox Church over the devoted followers of the movement and its influence on their perceptions of family, tradition and the new reproductive technologies read Paxson, H., 'Reproduction as spiritual kin work: Orthodoxy, IVF, and the moral economy of motherhood in Greece', *Culture, Medicine and Psychiatry* (2006) 30: 481-505. For an opinion on the influence of the Catholic doctrine on women's rights in Italy and the law of reproductive medicine see Fenton, R.A., 'Catholic doctrine versus women's rights: The new Italian law on assisted reproduction', *Medical Law Review*, 14, Spring 2006: 73-107.

<sup>519</sup> See also Hatzis, A.N., 'From soft to hard paternalism and back: the regulation of surrogate motherhood in Greece', *Portuguese Economic Journal* (2009) 8: 205-220. In this paper, the writer argues that Law 3089/2002 was a product of legal paternalism and an effect of legal formalism.

create family relationships, even artificial ones, since there is a biological connection between the parents and the child.

In this case the genetic material of both of the parents was collected, and an embryo was created and inserted into the uterus of the surrogate mother in vitro. Consequently, the children were genetically related only to the intended parents, but gestated by the surrogate, because the intended mother was unable for medical reasons to become impregnated and give birth to a child. This was a landmark case for the Greek courts and the first application for the licensing of parental rights to a woman who was the genetic mother of the twins, since her genetic material was used for their creation in vitro, but not the gestational mother of the twins by gestation and birth. Under the then applicable law, parental rights could only be acknowledged to the birth mother, and no exception to this rule was provided.

As a result, the case no. 31/1999 was a milestone for the challenge of the legal norm of the biological attainment of motherhood, as described by the previous Civil Code and article 1463. This rule had its origins in Roman law ("mater semper certa est", meaning "the mother is always certain"), and dictated that motherhood is attained by the event of birth. The rule is still valid in many contemporary regimes, including that of the UK,<sup>520</sup> although, due to the wide use and availability of RTs today, it does not entirely respond to the modern social, medical, and legal reality. For the case in question the application of the above-mentioned rule to the intended mother would be contrary to the law, as the legal requirement of birth was not satisfied by her.

The judges of the First Instance Court of Heracleion realised that even if they resorted to alternative legal methods that offered them flexibility against the letter of the law – namely the reliance on the constitutional principles, or the general ethical principles of Civil law (such as that of "good faith", and of "moral goodness") which give rise to an interpretation according to the social perceptions of the time – such methods would prove insufficient.

Additionally, they recognized the impracticalities and difficulties of the law as it stood. The legal father of the child and husband of the surrogate mother would have to contest his parental rights, which would allow the intended and genetic father to willingly acknowledge the child as his own. Finally, the wife of the latter would apply for adoption. However, the attainment of parentage by the intended parents would not be possible without the consent of the surrogate mother; thus, there was the imminent danger that the intended parents would never accomplish to gain the right to raise their child.

For this reason, the judges of the Court urged the authorities to introduce legislation that would provide a satisfactory level of protection to all the parties involved in surrogacy agreements. Three years after this court decision was published, and with the recommendations and draft legislation of the Committee assigned by minister Stathopoulos,<sup>521</sup> the Parliament issued the Law no. 3089/2002 for "The medically assisted human reproduction", and reformed the articles 1455-1460 of the Greek Civil

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<sup>520</sup> Section 33 of the Human Fertilisation and Embryology Act 2008: 'The woman, who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child'.

<sup>521</sup> The negative form of the constitutional right to self-determination and personal development encompasses the right not to procreate, where the right to an abortion can be accommodated. For further details on the matter read Kounougeri-Manoledaki, E., 'Assisted reproduction and Civil Law: Draft Legislation for the "Law on Medically Assisted Human Reproduction"', as appeared in Kounougeri-Manoledaki, E. (ed.), 'Assisted reproduction and genetic technologies: ethico-legal approach', Sakkoulas Publications, Athens-Thessaloniki (2003), p. 88 onwards (in Greek).

Code. This reform has been considered as the most important and radical one in the Greek legal history 'after the reform in 1983, enforcing the equality of the sexes'.<sup>522</sup>

The issuance of a law that facilitates surrogacy agreements was justified by the constitutional recognition of the right to procreate, which was portrayed as an essential component of the right of personal development, including the right to autonomy and self-determination. More specifically, the right to procreate is guaranteed by article 5 paragraph 1 of the Greek Constitution, which can be further referred to in order to indicate the right to have a child (positive form), even through the use of RTs<sup>523</sup>. The state sought to empower the respect for the individual's desire to achieve self-fulfillment through parenthood, even in its modern form of "social parenting", where the parent-child relationship is based on emotions of love instead of biological ties, and embraced a regulatory approach to the issues of the assisted reproduction.

Law 3089/2002 came into force to regulate the circumstances, whereby a person or couple places great importance on having a child that is (at least partially) genetically related to the intended mother/parents<sup>524</sup> and, due to his/her inability to procreate by natural means, he/she will have to resort to the help of RTs. Additionally, the law recognizes the case of full "social parenthood", where the child has no genetic relationship with his/her parents, and where the family relationships are based merely on intent.<sup>525</sup> The statute of 2002 enforced the reform of Article 1458 of the Greek Civil Code and regulated surrogacy.

Three years after this reform, Law 3305/2005 was introduced to amend the provisions of the Law 3089/2002. The character of the new law was purely complementary to that of 2002; it clarified some issues concerning the maximum age limit of the women seeking medically assisted reproduction (the age of fifty),<sup>526</sup> introduced criminal and civil sanctions in cases of the violation of the law, and established the National Authority of Medically Assisted Reproduction (NAMAR) to control and regulate ethical and legal issues arising from the advances in the field of biomedicine.<sup>527</sup> Unfortunately, NAMAR has not yet come into operation.

### **Analysis of the specific conditions of the Greek law on surrogate motherhood**

The issue of surrogate motherhood in Greece is regulated by the combination of the articles 1458 and 1464 of the Civil Code, article 8 of Law 3089/2002 (domicile in Greece), and article 13 of the Law 3305/2005. It is described as a method of assisted reproduction of complementary nature that is provided in order to tackle the inability to procreate with natural means. The intended parents must be able to prove to the court, which will license the fertilization of the surrogate mother and approve the surrogacy

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<sup>522</sup> Hatzis, A.N., 'From soft to hard paternalism and back: the regulation of surrogate motherhood in Greece', Portuguese Economic Journal (2009) 8, page 206.

<sup>523</sup> It has been contended, though, that the right to procreate can alternatively be founded on the right to personal freedom (article 5 paragraph 2 of the Constitution), on the principle of the protection of the individual's private life (article 9 paragraph 1 of the Constitution), on the principle for the protection of the family life (article 21 paragraph 1), as well as the principle for the protection of health (right to medical treatment) regarding the use of ARTs (article 5 paragraph 5, and article 21 paragraph 3 of the Constitution). For a more extensive analysis see Panagos, K., 'Surrogate motherhood. The Greek regulatory framework and the extension to criminal law', Sakkoulas Publications, Athens-Thessaloniki (2011), pages 71-83 (in Greek).

<sup>524</sup> See also Olga van den Akker, 'The importance of a genetic link in mothers commissioning a surrogate baby in the UK', Human Reproduction, 15 (8), 2000: 1849-1855.

<sup>525</sup> Indeed the law refers only to the requirement that the ova will not belong to the surrogate. Hence, it offers the right for surrogacy to a single woman, who will have to use the sperm from a donor and possibly the ova from a donor as well, if she is unable to provide one (derived from article 1458 GCC).

<sup>526</sup> The previous law (3089/2002) referred vaguely to the "age of biological ability to reproduce" and created great ambiguities concerning the upper limit of age until which the use of ARTs was ethically and legally permissible.

<sup>527</sup> See also Leon, G., Papetta, A., Spiliopoulou, C., 'Overview of the Greek legislation regarding assisted reproduction and comparison with the EU legal framework', Reproductive BioMedicine Online (2011) 23, 820-823.

agreement, that there is a reason of medical necessity that forces them to proceed to the particular method. Therefore, the choice of surrogacy for social reasons is not acceptable by law.

More specifically, the Law of 2002 states that surrogacy is defined as

*[t]he transfer of fertilized eggs, which do not belong to the surrogate mother herself, into the body of another woman, so as to gestate them. This is allowed when there is a written agreement, without any financial benefit, between the parties involved, meaning the person(s) wishing to have a child and the surrogate mother, and her husband, if she has one. The court authorization is issued before the transfer and following an application of the woman who wants to have a child, provided that evidence is adduced proving that the intentional mother is unable (for medical reasons) to bear a child, and that the woman offering to become the surrogate is, with regards to her (physical and mental) health status, suitable for it.<sup>528</sup>*

As we can see, the legislature allowed only the case of gestational surrogacy, where the surrogate mother has no genetic relation to the child, since the egg does not come from her.<sup>529</sup> In other words, the law gives permission only to the “letting of the womb” on behalf of the surrogate mother, and prohibits cases of traditional surrogacy. Moreover, surrogacy is provided only for altruistic reasons, where no financial benefit will be derived from the agreement. The procedure for the attainment of pre-conception judicial approval has to be followed, and there is also a clause concerning the health of the surrogate mother.<sup>530</sup>

Due to the fact that surrogacy in Greece is limited strictly to cases where the egg does not belong to the surrogate – hence it will either come from the intended mother, if she is able to produce one, or from a third donor – it is necessary for the woman who wishes to have a child through surrogacy to resort to medical treatment and request an IVF procedure. Consequently, the general conditions for the permissibility for the use of the methods of medically assisted reproduction will also apply.

According to article 1455 paragraph 1 GCC, the person(s) seeking treatment through the use of RTs should be recognized as infertile. Alternatively, there should be another valid reason which prevents the individual(s) from having a child through natural conception, as for example the avoidance of the transmission of a serious hereditary medical condition (for example sickle cell anaemia) to the child. Furthermore, the individual that needs assistance to procreate should be of an age when the attainment of a pregnancy is still possible. Law 3305/2005 states that the upper age limit for the use of RTs is the fiftieth year of age for the woman who seeks treatment.<sup>531</sup>

As can be derived from article 1456 paragraph 1 of the GCC, medical assistance in human reproduction can be requested by married or unmarried heterosexual couples, or

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<sup>528</sup> Article 1458 of the GCC.

<sup>529</sup> Also incorporated into article 3 paragraph 9 of Law 3305/2005.

<sup>530</sup> Hatzis, A.N., ‘From soft to hard paternalism and back: the regulation of surrogate motherhood in Greece’, Portuguese Economic Journal (2009) 8, page 216. For an opinion on the permissibility of surrogacy of commercial nature read further the article under the title ‘Just the Oven: Law and Economics Approach to Gestational Surrogacy Contracts’, same author, in Katharina Boele-Woelki (ed.), ‘Perspectives for the unification or harmonisation of family law in Europe, Antwerp: Intersentia, 2003.

<sup>531</sup> From the combination of the articles 1455 of the GCC and 4 paragraph 1 of Law 3305/2005. The rationale of this provision is the avoidance of the phenomenon of the provision of fertility treatment to post-menopausal women, which was deemed not to serve the interests of the child, as he/she would grow up without a mother. What strikes the reader of the Greek law is that an age limit is not provided for the surrogate mother. The courts seem, however, to have adopted a flexible approach to this issue, and have approved the request of an older woman, aged 52, to bear the child of her daughter and her husband (One Member Court of First Instance of Korinthos no. 224/2006). For the matter of the post-menopausal pregnancies see Dew, J. et al., ‘The Influence of Advanced Age on the Outcome of Assisted Reproduction’, J Ass Reprod Genet, 4, 1998: 210.



heterosexual couples living in a civil partnership, as well as unmarried women who do not have a partner. Consequently, RTs are not available to same-sex couples, or single men in Greece.

Furthermore, the law sets out the requirement for a valid written consent on behalf of all the parties involved in the fertility treatment (articles 1456 GCC and 5 of Law 3305/2005). A further analysis on the issue of consent will be provided in due course.

We will now proceed to an evaluation of the specific conditions that are incorporated in the Greek regulatory framework regarding surrogate motherhood.

- **The pre-conception judicial approval**

**The requirements of the judicial approval:**

The law states that a woman who desires to have a child, but who is unable to carry a pregnancy to term, is entitled to apply to the court and request the granting of permission to use a surrogate mother. This will then enable her to gain parental rights immediately after the birth of the child. It is necessary for the intended mother to seek the permission of the court prior to the transfer of the fertilized egg into the surrogate's uterus.

However, there is a legal precedent that includes the granting of parental rights retrospectively to a woman that made the relevant application to the court after the surrogate was fertilized with an embryo created from the genetic material of the intended couple. The One Member Court of First Instance of Thessaloniki (case no. 27035/2003) accepted that in the particular case there were exceptional reasons that compelled the parties involved in the surrogacy agreement and the medical professional who performed the IVF on the surrogate to act fast, and proceed without the permission of the court.

As this case was indeed the first one that came before the court almost immediately after the issuance of the Law 3089/2002 that allowed surrogacy, it was dealt with some flexibility and the judges showed a great deal of legal discretion and empathy. The reason why the intended mother failed to apply to the court for the approval of the surrogacy contract at the time dictated by law was that both the intended and the surrogate mother were close to the maximum age limit as presented by the legal framework. This was accepted as a valid reason for not seeking the judicial approval at an earlier stage, and the judicial acknowledgement of parental rights in retrospect to the intended mother were granted. This exception is now recognized by all national courts dealing with matters of surrogacy.

*-Issues of procedural law*

The court responsible for the review of such cases is the One Member Court of First Instance (article 470 of the Code of Civil Procedure) of the residency of either the intended mother or the surrogate mother (article 499 paragraph 1 of the Code of Civil Procedure, as added by article 6 of law 3089/2002). It is a civil court and it follows the procedure of the voluntary jurisdiction. The judge possesses the discretionary power to order the case to be discussed behind closed doors, if deemed that its publicity could be detrimental for the social morality, or that there are compelling reasons for the protection of the private or familial life of the parties (article 799 paragraph 2 of the Code of Civil Procedure).

The judge's power can be described as very restricted: he/she can only review the validity of the agreement and determine whether the legal conditions have been met, without investigating the reasons for choosing this method and the moral character of



the agreement. Consequently, the court approval can be depicted as more of a procedural requirement, a 'formal bureaucratic procedure'<sup>532</sup> rather than a judicial review of the cases relating to surrogacy.

The judge is bound to abide by the law and has little discretionary power. He/she will not perform a deep investigation into the true reasons for choosing this method other than requesting proof of the biological inability of the intended mother to procreate; he/she will not even look for the existence of a true altruistic motive on behalf of the surrogate mother, or for any evidence of a close relationship between the contracting parties.

As might be expected, there are cases which raise a variety of concerns and doubts regarding the true nature of altruism; the financial and social imbalances between the contracting parties; the possible exploitation of the surrogate mothers; the existence of a true consent to the surrogacy agreement; as well as the possibility of payments "under the table" that mistakenly escape the attention of the judge, who is more preoccupied with the bureaucratic/ procedural side of the matter.

The research conducted for this report on the Greek case law showed that in reality many of the cases of surrogate motherhood were a result of an agreement between Greek women, who were the intended mothers, and surrogate mothers of foreign origins (although domiciled in Greece as the law requests), who, in some cases belonged to the domestic staff (mostly cleaners or nurses) of the intended parents or a member of their family. The surrogate mothers in these cases were mostly of low social standing (considerably lower than that of the intending parents), of low wage, and came from countries which were in chronic financial decline (see Tables 1 and 2 below).

To exemplify this, the researcher for this report collected as many applications to the One Member Court of Thessaloniki as she was able to gain access to (17 in total) and investigated how many of the surrogates were of foreign, as opposed to Greek origin. These cases refer to the period of 2007-2010. As will be noted from Table 2, in the most recent year that data was collected for, eight out of nine approved surrogacy arrangements involved non-Greek surrogate mothers.

**Table 1**

<b>Court</b>	<b>One Member Court of Thessaloniki</b>
<b>Examined Period</b>	2007 – 2010
<b>Total Number of Cases</b>	17
<b>Greek Surrogates</b>	2
<b>Foreign Surrogates</b>	11 (1 from Philippines, 1 from Georgia, 2 from Russia, 3 from Poland, 4 from Bulgaria)
<b>No mention of the surrogate's citizenship status</b>	3
<b>Other (surrogate's name indicates foreign origin but no specific information about her citizenship)</b>	1

<sup>532</sup> Hatzis, A., 'The Regulation of Surrogate Motherhood in Greece' (working paper, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1689774](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1689774).

**Table 2**

<b>One Member Court of Thessaloniki</b>			
<b>Total Number of Cases : 17</b>			
2007	2008	2009	2010
No. 39636/2007 → No mention of citizenship status	No. 1522/2008 → Greek Surrogate	No. 13707/2009 → No mention of citizenship status	No. 838/2010 → Russian Surrogate No. 2721/2010 → Polish Surrogate No. 3967/2010 → Bulgarian Surrogate
No. 40820/2007 → No mention of citizenship status	No. 33558/2008 → Bulgarian Surrogate	No. 395/2009 → Philippine Surrogate	No. 4981/2010 → Bulgarian Surrogate No. 10350/2010 → Polish Surrogate No. 10351/2010 → Russian Surrogate
		No. 16574/2009 → Bulgarian Surrogate	No. 14681/2010 → Georgian Surrogate No. 14682/2010 → Greek Surrogate No. 14946/2010 → Polish Surrogate
		No. 25790/2009 → surrogate's name indicates foreign origin but no specific information about her citizenship	

The judge has merely both the right and the obligation (articles 744 and 759 paragraph 3 of the Code of Civil Procedure) to investigate the marital status of the two women-contractors, and ensure the protection of the legal rights of their husbands/partners, who might be considered as fathers of the child (according to the rules of articles 1465-1471 of the GCC) possibly without their previous consent<sup>533</sup>. This would be contrary to the negative expression of the constitutional right for procreation (right not to procreate), and their right to self-determination.

- *Who can submit an application for surrogate motherhood to the court?*

The process of the judicial approval is, as mentioned above, set in motion by the intended mother. Article 1458 GCC refers to two women, one wishing to have a child and another offering her gestational services. The (male) partner of the intended woman, if she has one, is not entitled to start the process of the judicial review of the surrogacy agreement, and can attain fatherhood only indirectly based on the fact that his wife/partner is the legal mother of the child; provided that he has consented to the surrogacy contract beforehand (article 5 of Law 3305/2005).

Furthermore, based on the letter of the law, a single man's application to the court requesting the authorization of a surrogacy agreement will not be accepted. However, recent case law defined this provision as unconstitutional and contrary to the spirit and the general principles of the law. The judges argued that this rule created inequalities between the sexes that cannot be tolerated by the modern legal theory and judicial

<sup>533</sup> See also Panagos, K., 'Surrogate motherhood. The Greek regulatory framework and the extension to criminal law', Sakkoulas Publications, Athens-Thessaloniki (2011), page 57 (in Greek).

practice, and considered it discriminatory against men, who do not have a female partner and who are unable for medical reasons to have a child. The most significant examples of such content in Greece were the cases of the One Member Court of First Instance of Athens no. 2827/2008 and of the One Member Court of First Instance of Thessaloniki no.13707/2009.<sup>534</sup>

The above mentioned cases raised controversy in the Greek legal and social reality and caught the attention of the national media. Some commentators appeared to have a negative view towards the approval of the single man's application for surrogacy by the court. Influenced by traditional ideas of family formation, they argued that the child's upbringing should include stimuli from both sexes; hence, it was not in the best interests of the child to be raised by only a father.

However, the need for the protection of the right to procreate, guaranteed by article 5 paragraph 1 of the Greek Constitution, in conjunction with the respect for the principle of gender equality, declared by article 4 paragraph 1 of the Constitution, prevailed, and the permission for the fertilisation of the surrogate mother with the sperm of the single man was granted.

Nevertheless, the possibility of a contrasting future court decision cannot be excluded, since the Greek judge, as compared to the judicial practice in common law countries (e.g. UK), is not obliged to follow the judgement of another court on a case with similar content and legal facts. In another case the judge may consider the request of a single man for surrogacy as not serving the best interests of the child, which must be taken into consideration.<sup>535</sup> Each case is in fact judged on its own merits. However, the court's reasoning should be very careful to make mention of the specific and exceptional circumstances that justify the refusal of the constitutional right to procreate to a single man.

Furthermore, the provision of the law for the availability of surrogacy to a woman without a husband, or a heterosexual partner, has been criticised as discriminatory against couples of the same sex. Surrogacy is indeed not allowed to take place in cases where the intended couple consists of two men, one of whom is able to provide sperm with the aim of inseminating the surrogate mother. The same applies for lesbian women. If one of them is infertile, she does not have the right to apply to the court requesting the fertilization of her female partner with donated sperm, and gain parental rights to the resulting child.<sup>536</sup>

*-The content of the application to the court for surrogate motherhood:*

- **The prerequisite of medical necessity**

With regards to the Greek law on surrogacy, a woman is entitled to resort to surrogacy if and only if she is unable to conceive a child, or bring a pregnancy to term. This requirement is also expressed by article 1455 paragraph 1 GCC as a general proviso for the use of the various ARTs. The rationale for this repetition is that surrogacy is

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<sup>534</sup> For further comments read Kounougeri-Manoledaki, E., 'Medically Assisted Reproduction: The Right of an Unmarried and Single Man to Have a Child through Surrogacy', *Medical Law and Bioethics*, 9, January-March 2010, Sakkoulas Publications, pages 2-3 (in Greek).

<sup>535</sup> Article 1 paragraph 2 Law 3305/2005: 'When applying the techniques for the medically assisted human reproduction, the best interests of the child to be born should be taken into consideration'.

<sup>536</sup> This differentiation among same-sex and heterosexual couples is based on the more general reluctance towards the legal recognition of homosexual relationships. Especially in Greece, homosexuality is still an issue of great controversy (see for example Pavlou, M., 'Homophobia in Greece. Love for equality', Institute for

recognized as an extreme method of fertility treatment, and thus, emphasizes its prohibition for cosmetic or social reasons, or even reasons of limited free time due to professional or any other kind of commitment of the intended mother. These reasons have been expressly condemned as legally and morally intolerable.<sup>537</sup>

Moreover, special mention for the prerequisite of a medical need has to be made, since surrogacy is not available generally to women who are just unable to reproduce by natural means, but more specifically to women who are unable to gestate a child. The woman who applies to the court for surrogacy has to possess sufficient medical proof (an affidavit by an obstetrician-gynecologist) of her inability to either achieve a pregnancy or bring it to term.

It should be mentioned that the indications for the permissibility of surrogacy consist of the following conditions:<sup>538</sup>

1. congenital absence of uterus (Mayer-Rokitansky syndrome);<sup>539</sup>
2. congenital anomalies of the uterus;
3. multiple uterus fibromyomas;
4. certain medical diseases rendering pregnancy dangerous for a woman's life, such as congenital heart diseases;
5. cases of multiple pregnancy losses;
6. selected cases of multiple failures in previous IVF attempts.<sup>540</sup>

Moreover, it is now accepted<sup>541</sup> that the method of surrogacy can be used in cases where there is an imminent danger for the transmission of a serious hereditary disease, for example if the intended mother suffers from HIV/AIDS,<sup>542</sup> Hepatitis B and C or syphilis. The woman must attach to her application medical tests to prove this (article 13 para. 3 and article 4 paras. 2 and 3 of Law 3305/2005).

It should be noted that the law does not differentiate between the primary or secondary type of the inability to produce a child with regards to the intended mother. She may have been able to reproduce in the past, and even have given birth to one or more children. What is important is that at the time of the submission and discussion of her application to the court requesting permission for surrogacy, she is biologically unable to have a child.

- **The surrogate mother's "suitability" for fertilization**

Article 1458 GCC declares a further limitation that relates to the suitability of the woman chosen to act as a surrogate mother. The judge will request to see medical evidence which specifically indicate the surrogate's good physical health; the doctor's affidavit should state that the surrogate mother is strong and healthy enough to deal with the inherent difficulties and risks of pregnancy and childbirth. The surrogate mother, in particular, will undergo multiple medical tests that ascertain her fertility, and her general

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<sup>537</sup> See Panagos, K., 'Surrogate motherhood: The Greek legislation, the constitutionality of the law [on surrogacy] when compared with and contrasted to the constitutional right to procreate and the socio-political issues raising', in the Magazine of the Young Group of the Maragkopoulou Institution for Human Rights, Issue 2, November 2008, pages 13-37 (in Greek).

<sup>538</sup> As stated by the Fertility Centre IAKENTRO, based in Thessaloniki and specialised in the fertilisation of surrogate mothers (<http://www.iakentro.com/en/assisted/gestational-surrogacy>).

<sup>539</sup> Read the case of the One Member Court of First Instance of Korinthos 224/2006.

<sup>540</sup> Read the case of the One Member Court of First Instance of Athens no.1320/2004.

<sup>541</sup> Panagos, K., 'Surrogate motherhood. The Greek regulatory framework and the extension to criminal law', Sakkoulas Publications, Athens-Thessaloniki (2011), page 9 (in Greek); Hatzis, A.N., 'From soft to hard paternalism and back: the regulation of surrogate motherhood in Greece', Portuguese Economic Journal (2009) 8, page 47.

<sup>542</sup> Read also Merry, A., Smith, A., 'Errors, Medicine and the Law', Cambridge University Press, Cambridge (2001), page 192 onwards; Rojansky, N., Schenker, J., 'Ethical aspects of assisted reproduction in AIDS patients', J Ass Reprod Genet, 8 (1995), page 537 onwards.

health, as well as tests that prove her not to be suffering from any sexually transmitted diseases that can be transferred to the child, such as HIV/AIDS, Hepatitis and syphilis (art. 4 paras. 2 and 3 of Law 3305/2005).

Although no upper age limit is mentioned for the surrogate, the judge should take into consideration the fact that pregnancy after a certain age is extremely risky for the life and health of both the pregnant woman and the child. An indicative upper age limit is the age of 52, as approved by the judge of the Court of First Instance of Korinthos no. 224/2006, whereby the surrogate was the mother of the intended mother and was still physically able and healthy enough to gestate a child on her behalf. The surrogate was found to be of good health that would enable her to accomplish a pregnancy and bring it to term.

In addition to the above mentioned medical tests, the law requires (article 13 para. 2 of Law 3305/2005) the performance of a psychological assessment to prove the surrogate's good mental state and her emotional stability. In the event that an affidavit that declares the good psychological state of the surrogate is not submitted to the court by the time of the hearing of the case, the discussion is rescheduled for a future date.<sup>543</sup>

- **The egg does not belong to the surrogate mother: egg donation and the anonymity of the donor**

Great emphasis should be given to the provision of the law (art. 1458 GCC) which prohibits the surrogate mother from having a genetic link to the child. As derives from the letter of the law, 'the ova to be fertilized should either belong to the woman interested in becoming the legal mother of the child or a third woman'<sup>544</sup> who will donate her genetic material according to the legal requirements for egg donation. This is based on the rule that for a woman to be forced to relinquish a child, with whom she has not only a gestational but also a biological bond, is excessively limiting, and, therefore, socially, morally and legally intolerable. If this would be permissible by law, it would have been contrary to the general principle of fairness and social ethos (art. 179 GCC), and would render the agreement invalid on the basis that it was immoral. Therefore, the surrogacy contract would not have any force, and the mother of the child would be the one who gave birth to him/her (art. 1463 GCC).

However, it is not required by law for the application to the court to mention whether the ova belongs to the intended mother or a third donor, as long as it is made clear that it does not come from the surrogate mother.

Hence, article 1458 GCC redirects us to the regulatory framework of gamete donation in cases where the egg used is from a third party donor. As article 1460 GCC states, the identity of the donor will remain undisclosed, thus guaranteeing the anonymity and the respect for privacy of the donor. Only information that relates to the medical history of the donor will be made public, and the child is the only person entitled to access the confidential medical files of the donor.<sup>545</sup>

- **The fully medicalised fertilization procedure**

The practice of surrogacy in Greece can be portrayed as a "fully medicalised" act. According to art. 16 of Law 3305/2005, only qualified medical facilities may engage fertility treatment procedures such as IVF. As a result, surrogate procedures must be

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<sup>543</sup> See for example the case of the One Member Court of First Instance of Thessaloniki no.838/2010, and (same court) no. 2721/2010.

<sup>544</sup> Garoufalia, M., 'Medically Assisted Human Reproduction: The Legal Framework in Greece', *International Legal Practitioner*, 28 (52), 2003: 52-55 and 60, page 53.

<sup>545</sup> Leon, G., Papetta, A., Spiliopoulou, C., 'Overview of the Greek legislation regarding assisted reproduction and comparison with the EU legal framework', *Reproductive BioMedicine Online* (2011) 23, page 821.

carried out by a medical practitioner, specialized in IVF, either in a hospital (public or private) or a private fertility centre licensed to perform IVF and other fertility treatments.

- **Domicile of both women in Greece**

Both the women who participate in the surrogacy agreement are legally required to be domiciled in Greece (art. 8 of Law 3089/2002). A similar condition appears in the legislation of other countries and is justified by the state's intention to prohibit possible "reproductive tourism" and cross-border surrogacy arrangements, which bring about various problems relating to the laws on citizenship, and to delays in issuing the necessary travel documents for the return of the child in its country. There is, then, the imminent danger that the child will in the end be rendered stateless and parentless.<sup>546</sup> This is what the Greek legislature tried to avoid by inserting the particular rule.

The judges are further limited to their interpretation of "domicile". The two women should have lived in Greece for a sufficient period of time in the past and prove their intention to stay there for a long time in the future.<sup>547</sup> Nevertheless, it can be contended that the latter requirement is not deemed very significant during the process of the judicial authorization of the surrogacy agreement. From the research conducted for this report on the recent case law, no judge requested proof of the surrogate's intention to stay and live in Greece for a long period of time.

Additionally, according to articles 49 and 50 of the TEU (freedom of establishment), the law on surrogacy is not violated when the intended mother is a citizen of one of the EU Member States and domiciles in Greece.

Furthermore, no cross-border surrogacy arrangements have been reported in Greece or in the Greek courts. However, even if the rule of article 8 of Law 3089/2002 is violated, the establishment of familial relationships will not be influenced since the regulations of private international law may be applicable. The only legal case in Greece for the decision of which private international laws were called to be applied was that of the One Member Court of First Instance of Chania no. 122/2008, which referred to a child to be born through surrogacy from Greek biological parents who lived in the country and an Albanian surrogate mother.

The judge of the case took into account the Albanian law on international adoptions, which required the registration of the child in the list of the Albanian Adoption Committee for a period of 6 months, during which time the child would have to reside in Albania. The Albanian law also dictated that all efforts would have been made for the adoption of the child in Albania first, before the authorization of the adoption of the child by the foreign couple. The best interests of the child were considered primary and the rules of the Albanian law inapplicable and as contrary to the Greek legislation on assisted reproduction.

In the end, however, the decision for the authorisation of the particular surrogacy agreement and the fertilisation of the Albanian surrogate never took place. The surrogate's husband had not given his consent for the fertilization of his wife and the trial was rescheduled for another date so that the surrogate's husband could provide his consent.

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<sup>546</sup> Read further Trimmings, K., Beaumont, P., 'International Surrogacy Arrangements: An Urgent Need for Law Reform at the International Level', *Journal of Private International Law*, 7 (3), 2011: 627; Blyth, E., Farrand, A., 'Reproductive Tourism- a price worth paying for reproductive autonomy?', *Crit Soc Pol*, 1 (2005), page 91 onwards.

<sup>547</sup> Panagos, K., 'Surrogate motherhood. The Greek regulatory framework and the extension to criminal law', Sakkoulas Publications, Athens-Thessaloniki (2011), page 9 (in Greek); Hatzis, A.N., 'From soft to hard paternalism and back: the regulation of surrogate motherhood in Greece', *Portuguese Economic Journal* (2009) 8, page 50.



- **The surrogacy contract, the transfer of the legal parentage and the issue of consent**

The rule that greatly differentiates the Greek regulatory framework on surrogacy to the majority of jurisdictions around the world is the enforceability of the surrogacy contract. The agreement takes a written form (art. 1458 GCC) and is signed by the intended mother, and her husband or her (male) civil partner if she has one, and the surrogate mother, as well as her husband or partner if she has one. The contract does not need to follow any formality, although in common practice it is often requested for the document to be a notarised document, which provides a more complete legal protection to the contracting parties.

If the male partners of the contracting mothers are not married to their female partners, they must turn to a notary and give their consent in writing. This is required because their signature on the notarial document of the surrogacy contract will not only function as the provision of their consent to the fertilization for surrogacy purposes, but also as a proof of a voluntary recognition of their paternal obligations towards the child (art. 1475 para. 2 GCC). If the woman proceeds to the fertilization without her husband's consent, then he is entitled to legal compensation due to the violation of his personal rights. Moreover, he also maintains a legal right to request a divorce to the disadvantage of his wife (art. 1439 GCC).<sup>548</sup>

*-The legal type of the surrogacy agreement*

The legal character of a surrogacy arrangement in Greece is described as a contract for the provision of services and operates as a mandate to the surrogate to conform to her commitments. Any clause that imposes extreme safety measures to be taken by the surrogate during her pregnancy is invalid, because they violate her right to self-determination and her private freedom. The legal basis for this rule is the general legal principle of fairness guaranteed by article 179 of the GCC. Also invalid as immoral and illegal is any clause that prohibits the surrogate's right to a lawful abortion.<sup>549</sup> Such a clause would be unacceptable due to the fact that it infringes the surrogate's right to her bodily integrity. Whether the illegality of these clauses will influence the illegality of the surrogacy contract as a whole will be deemed on the basis of the article 181 of the GCC.<sup>550</sup>

The document of the agreement will be submitted to the court for review. During the discussion of the case the judge will ask the contracting parties once again to verify their consent to the surrogate motherhood arrangement. This is the ultimate point, the "point of no return", after which, and if the court gives its permission, the fertilization of the surrogate mother can be performed. The surrogate mother loses her right to change her mind<sup>551</sup> and she is from then on forced to comply with the terms of the agreement and give the child to up the intended mother and her husband/partner, if she has one, or to the single man,<sup>552</sup> who has been granted the judicial permission, immediately after the birth.

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<sup>548</sup> This may constitute an irretrievable breakdown of marriage on the fault of the wife.

<sup>549</sup> The requirements to a lawful abortion are set out in article 304 of the Criminal Code.

<sup>550</sup> Article 181 GCC: 'The invalidity of a part of an agreement brings about the invalidity of the agreement as a whole, if it is indicated that the parties would never have agreed to it if they knew about the invalid part'. Consequently, if the invalid clause is one of the most important clauses of the agreement, without the existence of which no agreement would have been made in the first place, then the contract as a whole is also invalid.

<sup>551</sup> No room for the event of a "change of heart" is given by in the Greek legislation. The surrogate's consent can be recalled only before the transfer of the embryo into her uterus. The same applies for the intended mother as well. If she refuses to take the child after he/she is born, she is obligated to take care of the child and be responsible for his/her upbringing, as set out in the articles 1510 and onwards of the GCC.

<sup>552</sup> According to the decision of the court of Athens no. 2827/2008.

The surrogacy contract can operate as a safety net even after the birth of the child. In the event that the surrogate mother fails to relinquish the child, the intended and now legal mother of the child can apply to the court and force her to adhere to the terms of the agreement (article 946 Code of Civil Procedure). The legal mother is also entitled to compensation due to breach of contract.

#### -The transfer of parental rights

The time of birth is defined as the cut-off point for the acquisition of legal parenthood. If the intended woman has succeeded in her application to the court for the approval of the surrogacy agreement, then immediately after the birth the surrogacy contract is enforced and she is considered as the legal mother of the child. The surrogate has no parental rights to the child. All this information must have been made very clear to the surrogate before she signs the agreement and her consent to her fertilization must be free from coercion (art. 5 of Law 3305/2005).

The judicial approval of the surrogacy arrangement creates a presumption of motherhood on behalf of the intended mother after the birth of the child (art. 1464 para.1 GCC). The presumption of motherhood can, however, be rebutted in court if the surrogate presents sufficient proof that the child is genetically related to her and her partner/husband. The deadline for the rebuttal of the maternal rights expires six months after the birth of the child (art. 1464 par. 2 GCC).

This provision has been harshly criticised as against the best interests of the child and contrary to the national laws (art. 1 para. 2 of Law 3305/2005), the Constitution (art. 21 para. 1), and the European Convention for the Protection of the Children's Rights. This is due to the fact that by the time of the court hearing the child would have already lived with the intended parents for at least one or two years and then he/she may be forced to leave them and be returned to the former surrogate mother. For this reason, it has been argued that a DNA test should take place after the birth of the child to verify the child's genetic origins from either of the contracting parties.<sup>553</sup>

In the total absence of the court's permission, the general rule with regards to the establishment of motherhood in retrospect applies, which states that the mother of the child is the one who gives birth to him/her (art. 1463 GCC). After this point, the intended mother can only apply for the adoption of the child. However, this will only be made real if the former surrogate mother and now legal mother of the child consents to it.

With regards to the paternity rights, the law provides that the father of the child will be the husband of the legal mother of the child and he has no right to apply to the court and refuse his status as the legal father of the child, if he consented to the surrogate's fertilisation. This presumption is justified by the "best interests of the child" principle and it is not acceptable in Greece for the child not to have a legal father when the legal mother is married.<sup>554</sup> Article 21 paragraph 1 of the Greek Constitution creates an obligation on the state authorities to take reasonable measures to protect the rights of children, and ensure that the child will be raised under the best possible conditions, and this is thought to be impossible in the existence of a single parent.<sup>555</sup> However, as

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<sup>553</sup> Panagos, K., 'Parentheti mitrotita. Elliniko nomiko kathestos kai egklimatologikes proektaseis' (Surrogate motherhood. The Greek regulatory framework and the extension to criminal law'), Sakkoulas Publications, Athens-Thessaloniki (2011), page65 (in Greek).

<sup>554</sup> See also the Introductory Report of the draft legislation of Law 3305/2005, as well as the cases of the One Member Court of First Instance of Thessaloniki no. 40820/2007; (same court) no. 838/2010; (same court) no. 10350/2010; (same court) no. 14946/2010; Multi Member Court of First Instance of Chania 122/2008, among others.

<sup>555</sup> The courts seem to have also accepted as valid criteria for the evaluation of the welfare of the child born through surrogacy the social and financial status of the intended parents, as well as their strong desire to have

mentioned above, the courts have authorized parenthood rights to single women (which is also acceptable by art. 1458 GCC) and single men (One Member Court of First Instance of Athens no. 2827/2008; One Member Court of First Instance of Thessaloniki no. 13707/2009).

- **The lack of financial benefit and the content of the concept of “reasonable expenses”**

Article 1458 GCC refers to the lack of financial benefit from the surrogacy agreement. The law declares that any payments made or promised to be made to the surrogate as a compensation for the offering of her gestational services as illegal, and, therefore, allows only ‘altruistic’ surrogacy arrangements. It is indeed unacceptable according to the morals of the Greek legal theory for familial relationships to be formed on a commercial basis.

The legislature tried to avoid being criticised for introducing legislation that allegedly facilitates the practice of “baby-selling” and the commodification of both the surrogate and the children.<sup>556</sup> Nevertheless, it has been contended that commercial surrogacy would not lead to such problems if satisfactory and suitable regulations were in place. In fact ‘an economic analysis of law’<sup>557</sup> in the case of surrogacy would be beneficial for the ‘infertile married couples [trying] to maximize their utility by exploring all options in an effort to have a baby’.<sup>558</sup> This was, however, considered contrary to the spirit of the law and the right to procreate.

Article 13 para. 4 of Law 3305/2005 inserts an exception to the general prohibition of financial benefits and allows payment for “reasonable expenses”. According to the letter of the law, the only reason for payment within a surrogacy agreement is the coverage of the expenses relating to the accomplishment of pregnancy through the use of RTs, namely the costs of IVF, for the pregnancy, and the childbirth, namely the costs of pregnancy clothing, drugs and any other medical treatment of the pregnant woman, the costs of the hospital for the birth of the child and for the treatment of the woman who has given birth and for the treatment of the newborn baby, as well as any wage losses of the surrogate due to her inability to work during the pregnancy and childbirth.

Then amount of money to be paid is to be overseen by the National Authority of the Medically Assisted Reproduction. However, this authority has not yet operated in Greece, and the danger of payments “under the table” to the surrogate exists. Reports of commercial surrogacies have been made,<sup>559</sup> but no case of commercial surrogacy has yet been examined by the Greek courts.

- **Registration of the child born through surrogacy in the National Registry Office**

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and raise a child. See for example the case of the One Member Court of First Instance of Thessaloniki no. 14946/2010.

<sup>556</sup> Read further Anton van Niekerk and Liezl van Zyl, ‘The ethics of surrogacy: women’s reproductive labour’, *Journal of medical ethics*, 1995, vol.21, pp.345-349; Elisabeth S. Anderson, ‘Is women’s labor a commodity?’, *Philosophy and Public Affairs*, vol. 19, no. 1, 1990, pp. 71-92; Arneson, ‘Commodification and commercial surrogacy’, *Philosophy and public affairs*, 1992; 21, 2: 132-164; M. M. Tieu, ‘Altruistic surrogacy: the necessary objectification of surrogate mothers’, *Journal of Medical Ethics*, 2009; 35: 171-175.

<sup>557</sup> Term used by Hatzis, A.N., ‘From soft to hard paternalism and back: the regulation of surrogate motherhood in Greece’, *Portuguese Economic Journal*, 8, 2009, page 207.

<sup>558</sup> *Ibid.*, page 208. See also by the same author ‘Just the Oven: Law and Economics Approach to Gestational Surrogacy Contracts’, same author, in Katharina Boele-Woelki (edt.), ‘Perspectives for the unification or harmonisation of family law in Europe, Antwerp: Intersentia, 2003.

<sup>559</sup> News reports: ‘Egg Trafficking’, *Eleytherotpia Online Newspaper* (last updated: 14 November 2010): <http://www.enet.gr/?i=news.el.article&id=223596>; ‘Criminal group of persons from Romania selling eggs’, *Ta Nea Online Newspaper* (last updated: 21 September 2010): <http://www.tanea.gr/ellada/article/?aid=4595175>.

The registration of every child in Greece in the National Registry is governed by Law 344/1976. The legal parent(s) of the child must enter the name of the child into the Registry of Births within the days after the birth of the child. The case of surrogacy is no exception to the rule. The name of the legal mother of the child should be stated on the document. There is no provision in the law that requires the name of the surrogate mother to be included in the document for the registration of the child as a Greek citizen. In order for the intended mother to be considered as the legal mother of the child by the National Registry Office, the court approval should be submitted to the Office at the time of the child's registration (art. 7 of Law 3089/2002). The judgment of the court that authorized the application for surrogacy should be definitive, meaning that the deadline for all remedies has already expired. As opposed to that, for the "renting of the womb" (the fertilization of the surrogate mother) to be allowed, it suffices for the court decision to be final, namely an appeal is still possible to be made (art. 763 para. 1 of Code of Civil Procedure).<sup>560</sup>

- **Civil and Criminal sanctions**

If the doctor and the two women proceed to the fertilization of the surrogate without the court's approval, the mother of the child is the surrogate, according to the general rule of the article 1463 GCC. The non-existence of the court's permission creates a criminal liability against all the parties involved in the illegal action, according to article 26 paragraph 8 of Law 3305/2005. The penalty includes the possibility for the personal imprisonment of all the actors to the crime for two years at least, as well as the payment of damages of at least 1,500 Euros. The same sanction applies against the person who operates as a mediator who is getting paid for bringing intended parents in touch with candidate surrogates, or against advertisers of surrogacy services. However, no case has been reported where the judges have actually imposed the above mentioned legal sanctions. The significance of the "best interests of the child" principle for judicial deliberations makes it very unlikely for any surrogacy contract not to be approved even in retrospect, or for any actions to be considered as willingly circumventing the law.

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<sup>560</sup> Koutsouradis, A., 'issues of surrogate motherhood, especially after the introduction of the Law 3305/2005', Legal Library Publications, 2006, page 353, footnote no. 74.

## 6.6. ITALY

### A. Legislation

1) In Italy all forms of surrogacy are forbidden, whether it be traditional or gestational, commercial or altruistic. The Italian parliament provided very strict guidelines in matters of assisted reproduction. **Act n. 40 of 19/2/2004**, entitled *Rules about medically assisted reproduction*, introduces a prohibition on employing gametes from donors, and specifically decrees: “Anyone who, in any form, realizes, organizes or commercializes gametes or embryos or surrogate motherhood is sentenced to 3 months to 2 years’ imprisonment and to pay a 600,000 to 1,000,000 euro fine” (**art. 12, par. 6**).

According to the main interpretation<sup>561</sup>, this article incriminates not only intermediary agencies and clinics practising surrogacy, but also the intended parents and the surrogate mother too. This interpretation is found out *ab contrariis* from paragraph 8: “The men and the women subject to the reproduction techniques forbidden by par. 1 [assisted reproduction with gametes from donors], 2 [application of Assisted Reproductive Technology (ART) post mortem, or to underage, single, or homosexual couples], 4 [application of ART without the patient’s consent] and 5 [application of ART in unauthorized clinics] cannot be condemned”. This list does not include paragraph 6, so the doctrine supports the theory of punishability of the patients subject to the application of surrogacy technology. Furthermore, paragraph 9 of the same article provides an accessory penalty for doctors: “the forced interruption of professional practise by 1-3 years”.

Before the Parliamentary Act of 2004, there was no legislation explicitly condemning or banning surrogacy. Most jurists agree that the current doctrine on surrogacy should accept the rules of the Doctors’ Deontological Code, in force since 1995, forbidding the practise of surrogate motherhood “to protect the interest of the soon-to-be-born baby”<sup>562</sup>. Before 2004, there were also some legal rules punishing surrogacy agreements with regard to their most important effect: the “transfer” of the child. Art. 71 par. 1, act n. 184 of 4/5/1983 on adoption punishes “illegal foster care”<sup>563</sup> (i.e. foster care in violation of legislative rules on adoption) by 1-3 years imprisonment; Art. 567 of Italian Penal Code condemns those who falsify a child’s original birth certificate to 5-15 years imprisonment. This rule protects the individual’s right to obtain legal status in accordance with its own biological identity. According to the main, traditional understanding of art. 567, *status filiationis* needs to reflect the genetic reality<sup>564</sup>.

It is worth noting that this guarantee and the punishment of art. 567 can be connected only with traditional surrogacy. With regard to gestational surrogacy, some jurists before 2004 found legal grounds to reject such arrangements, without any legislator’s specific condemnation. These jurists focused on the link between art. 5 and art. 269, par. 3, of the Italian Civil Code. The first forbids using one’s own body as the object of a transaction, if it is potentially dangerous for one’s own well-being, or if it is against the law, the public order, or good customs. The second article includes a sort of “principle of presumption” of motherhood: it assumes that the mother is the woman bearing the child. This is a traditional rule, mentioned both in the first Italian Civil Code of 1865 (art.

<sup>561</sup> See R. Villani, *L. 19 febbraio 2004, n. 40*, in A. Zaccaria, *Commentario breve al diritto di famiglia*, 2008, pp. 1828-1834; M. Sesta, *Procreazione medicalmente assistita e status del figlio*, in *Rivista dell’Associazione italiana degli avvocati per la famiglia e per i minori*, 2, 2006, pp.77-92.

<sup>562</sup> Art. 42, *Codice deontologico della Federazione degli ordini dei medici*. See R. Villani, *L. 19 febbraio 2004, n. 40*, in A. Zaccaria, *Commentario breve al diritto di famiglia*, 2008, pp. 1828-1834; M. Sesta, *La maternità surrogata tra deontologia, regole etiche e diritto giurisprudenziale*, in *Il Corriere giuridico*, 4, 2002, pp. 488-495.

<sup>563</sup> See D. Terracina, art. 71, l. 4 maggio 1983, n. 184, in A. Zaccaria, *Commentario breve al diritto di famiglia*, 2008, pp. 1721-1724.

<sup>564</sup> See L. de Rosa, *Dei delitti contro lo stato di famiglia*, in A. Zaccaria, *Commentario breve al diritto di famiglia*, 2008, pp. 2264-2269.

190) and in the first formulation of the Civil Code of 1942 (art. 270). The present family law was reformed in 1975, but the rules about motherhood were not changed.

Therefore, according to the conservative understanding, surrogacy agreements had to be avoided. On the one hand these agreements seem to be dangerous for the surrogate mother and the child's well-being, and on other hand they appear to be against the law because they confer motherhood to the intended mother rather than the woman who bears the child<sup>565</sup>.

Act n. 40 on medically assisted reproduction closed a 20-year-old legislative *iter legislativo* (the process to get a parliament's act passed), characterized by a deep difference of opinion in Parliament, mirroring the different tendencies in society. There were a lot of legislative proposals from all the parties, but the final, approved text is a very "restrictive"<sup>566</sup> act, justified by the clear aim to limit access to ART<sup>567</sup>. The most liberal expectations were let down and some eminent jurists denounced the purely "ideological foundation"<sup>568</sup> of the Act. The legislator, with a catholic model of the family in mind, made a conservative choice in order to protect "the stability of traditional values and relationship structures"<sup>569</sup>. The liveliest debate focused on some particular points of the Act. The aim to protect the conceived child as a subject of rights (art. 1), contrasting with the principle of connection between legal capacity and birth (art. 1 Italian Civil Code), creates a problem of balance and protection of the mother's right to be healthy. The ban of donor insemination (art. 4 par. 3, 12 par. 1) in order to guarantee the sameness of social and genetic parenthood was condemned by some of the public, as the presence of different parents (genetic, social, surrogate) is not dangerous for the child's wellbeing<sup>570</sup>. At the same time the introduction of subjective and objective limits on access to ART (art. 1, art 4) appears too difficult, strict, as the Italian Bill of rights does not protect natural reproduction<sup>571</sup>.

In this theoretical framework, little space is devoted to surrogacy. Indeed, neither the Italian jurists nor the legislature have dealt with this matter to any great degree. We can trace the ratio of the current ban to the following traditional assumption that the division between biological and social parents is dangerous for the child's well-being, and to the new demand of "right to truth" about one's genetic origins<sup>572</sup>. In particular, with reference to gestational surrogacy, the legal reason of the ban seems to be the same as before 2004, and directly flows from the system: the link between and art. 5 and art. 269 par. 3 of the Italian Civil Code.

<sup>565</sup> See M. Sesta, *La maternità surrogata tra deontologia, regole etiche e diritto giurisprudenziale*, in *Il Corriere giuridico*, 4, 2002, pp. 488-495.

<sup>566</sup> "Restrictive" is the word used to indicate the act n.40/2004 by a lot of jurists, with different opinion. For example, according to M. Sesta, *Dalla libertà ai divieti: quale futuro per la legge sulla procreazione medicalmente assistita*, in *Il Corriere giuridico*, 11, 2004, pp. 1405-1409, this "restrictive" law generally is good; G. Ferrando, *La nuova legge in materia di procreazione medicalmente assistita: perplessità e critiche*, in *Il Corriere giuridico*, 6, 2004, pp. 810-816, and P. Rescigno, *Una legge annunciata sulla procreazione assistita*, in *Il Corriere giuridico*, 8, 2002, pp. 981-983, look at the act with diffidence.

<sup>567</sup> See M. Sesta, *Dalla libertà ai divieti: quale futuro per la legge sulla procreazione medicalmente assistita*, in *Il Corriere giuridico*, 11, 2004, pp. 1405-1409.

<sup>568</sup> A. Dogliotti, M. Figone, *Procreazione assistita Fonti, orientamenti, linee di tendenza - Commento alla legge 19 febbraio 2004, n. 40*, 2004, p. 123; see P. Rescigno, *Una legge annunciata sulla procreazione assistita*, in *Il Corriere giuridico*, 8, 2002, pp. 981-983; M. Dell'Utri, *La fecondazione eterologa nel sistema dei diritti fondamentali*, in *Giurisprudenza di merito*, 1, 2011, pp. 381-404.

<sup>569</sup> M. Dell'Utri, *La fecondazione eterologa nel sistema dei diritti fondamentali*, in *Giurisprudenza di merito*, 1, 2011, p. 392. See G. Ferrando, *La nuova legge in materia di procreazione medicalmente assistita: perplessità e critiche*, in *Il Corriere giuridico*, 6, 2004, p. 815.

<sup>570</sup> See M. Dell'Utri, *La fecondazione eterologa nel sistema dei diritti fondamentali*, in *Giurisprudenza di merito*, 1, 2011, p. 398.

<sup>571</sup> See A. Dogliotti, M. Figone, *Procreazione assistita Fonti, orientamenti, linee di tendenza - Commento alla legge 19 febbraio 2004, n. 40*, 2004, p. 123.

<sup>572</sup> See M. Sesta, *Dalla libertà ai divieti: quale futuro per la legge sulla procreazione medicalmente assistita*, in *Il Corriere giuridico*, 11, 2004, pp. 1405-1409.



Two unsuccessful legislative proposals<sup>573</sup>, alternatives to the traditional model, provide interesting points of view about the analysis of the surrogacy phenomenon. They put great stress on the need for protection of the woman's right to health, condemned the representation of the woman as an "embryos container", promoted a cultural alternative to the idea of "a child at any cost". Following this perspective, which focused on a novel view of the female body and its freedom from traditional values, they did not promote legalizing surrogacy agreements because they were against any intrusion of the legislator in such intimate decisions.

After the promulgation of the act, a popular movement asked for and obtained a referendum on whether to abrogate the most conservative aspects of the decree. Among the issues up for debate was a proposal which would grant homosexual couples access to assisted reproduction. The result was disappointing. The new instances did not pass because the referendum questions did not get to the *quorum* stipulated by Italian law.

Nevertheless, a very important issue is still open to different interpretations. The Act 40/2004 does not provide a solution about the *status filiationis* of the child born to a surrogate arrangement in violation of the law: who is his/her legal mother?<sup>574</sup>

2) The Italian Act 40/2004, forbidding the surrogacy totally, also provides very strict "*subjective requisites*" for access to the assisted reproduction technology: only adult and heterosexual couples, married or live-in partners, both potentially fertile-aged, both living, are eligible (art. 5).

3) Neither commercial nor altruistic surrogacy is permitted in Italy. Before 2004, when the law did not forbid the practice explicitly, the courts did not adopt or develop the idea of "reasonable cost".

4) As surrogacy is legally banned, the surrogacy agreement is not enforceable by the Italian courts. However the last sentences (after 2004) deal with one of the most relevant consequences of such arrangements: the legal parentage of the child born in another country with Italian intended parents.

5) In Italy provisions such as "birth orders" have never existed.

6) There are no specific legislative rules aimed at protecting parties involved in surrogacy.

7) A principle of presumption of motherhood has been drafted by the Italian Civil Code (art. 269, par. 3): the mother is the woman bearing the child. The same idea inspires the Act n. 40/2004 and there are no legislative provisions which rebut such a principle. Last year, the Italian courts tried to introduce different indications in the set of rules, such as the legal recognition of "social parenthood" in order to protect the child's interest<sup>575</sup>. In cases of surrogacy, arranged in violation of legal prohibition, the legislature doesn't provide any criterion to assign legal motherhood, causing an involved conflict of interpretations.

8) Generally, the presumed legal father is the surrogate mother's husband, when the child is conceived during the marriage (art. 231 Italian Civil Code). Out of the marriage the father can recognise the child with a personal declaration, or such a declaration can be demanded of the child.

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<sup>573</sup> See relazione Valpiana and relazione Cossutta, 26 marzo 2002;

<sup>574</sup> See R. Villani, *L. 19 febbraio 2004, n. 40*, in A. Zaccaria, *Commentario breve al diritto di famiglia*, 2008, p. 1833; G. Ferrando, *La nuova legge in materia di procreazione medicalmente assistita: perplessità e critiche*, in *Il Corriere giuridico*, 6, 2004, p. 816.

<sup>575</sup> See b) Case law

In the contest of surrogacy, the establishment of legal fatherhood has no specific rule. According to most interpretations, if the intended father is also the genetic father, he could obtain legal fatherhood through a simple act of recognition<sup>576</sup>.

9) Generally, the legal parents are named on the birth certificate. The Italian set of rules deals neither with cases of surrogacy, nor with the regulation of birth certificates.

10) No legislative provision employs adoption as an instrument to allow the intended parents to become legal parents — though nothing forbids this. The intended parents can adopt the child after he/she has been delivered and handed over to them by the surrogate mother. Also, there has been a judicial decision (see below: Civil Court of Monza, 1989) which indicated such a solution. The intended parents need to follow the ordinary – very strict – procedure of adoption and they don't need to have a genetic relationship with the child. In Italy only married couples can adopt a child (art. 6 act 184/1983). Nevertheless, there are a few special cases where a single person is allowed to adopt: a spouse separated or widowed during the adoption proceedings (art. 25 par. 4, par. 5); a spouse who is not separated who wants to adopt his/her spouse's child (art. 44 par. 1b); a single person linked to the child by a relationship (art. 44 par. 1a).

11) Italian citizenship is based on the principle of *ius sanguinis*: the child of Italian parents is an Italian citizen. Foreigners can obtain Italian citizenship through two types of concession: marriage and residence.

12) According to Italian law, surrogacy agreements are illegal and invalid.

13) In spite of the absolute prohibition of surrogacy, with a simple internet search it is possible to find a lot of agencies promoting so-called "procreative tourism", indicating different arrangements and prices.

## **b) Case Law**

Today, the Italian legislature on the one hand **forbids any form of surrogacy**, and on the other hand leaves a *legal vacuum* around the legal consequences, within the domestic set of rules, of surrogacy arrangements made by Italian citizens abroad.

1) So far the regime of surrogacy restrictions, providing an absolute ban with penal consequences, has not been applied; no criminal case has emerged; no intended parents or surrogate mothers have ever been criminally convicted. The questions which have arisen in judicial proceedings have dealt only with the recognition in Italy of some documents relating to surrogacy, issued in foreign countries (such as birth certificates or birth orders); they are questions of "private international law".

The following is a draft of most important decisions about surrogacy issued in Italy.

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It's interesting to consider the case law before the promulgation of the current legal regime, when surrogacy was not regulated. From the few decisions about surrogacy before 2004, two opposing tendencies emerged: one against surrogacy agreements and one in favour of them. All the following rulings are domestic case-law:

- The first judicial decision about surrogacy – and the first legal definition of a surrogacy agreement, too – in Italy was by the **Civil Court of first instance of Monza in 27/10/1989**. The judge declared invalid the surrogacy agreement

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<sup>576</sup> See R. Villani, *L. 19 febbraio 2004, n. 40*, in A. Zaccaria, *Commentario breve al diritto di famiglia*, 2008, p. 1834.

between a woman, the genetic and surrogate mother, and a couple of intended parents. According to the court, a commercial agreement to rent one's own body, in order to bear a child for other parents taking part in the agreement, violates art. 5 of the Italian civil code, because it contrasts with the law, public order and "good customs". In this case, the arrangements took place in Italy and the child was also born in Italy. The intended parents asked the court to 1) compel the surrogate mother to respect the agreement, to deliver the child and to renounce all legal rights in relation to him; 2) recognise the legal parenthood to the social couple. The judge defeated the petition and defended the principle of presumption of legal motherhood: the mother is the woman bearing the child (art. 269, par. 3, Italian civil code). The decision decreed that 1) the legal parental relation is only between a child and his "blood's parents"; 2) the best interest of the child is to grow up with its legal parents; 3) an individual "right of reproduction" does not exist; 4) because of these reasons, the legal mother is the surrogate one, the genetic/intended father could obtain the legal fatherhood through a recognition<sup>577</sup>, the "social mother" has the residual possibility of adopting the child, in compliance with Italian rules. It is also worth noting that the surrogate mother's refusal to consent to the adoption does not influence the real possibility to give the child up for adoption. Indeed, this possibility depends only on a special declaration of the Court, according to the Italian Act about adoption (ar. 7 and art. 8).

- The second approach taken by Italian jurisprudence regarding surrogacy, before Act n. 40, was represented by the decision of the **Civil Court of first instance of Rome in 17/02/2000**, which reverses the reading of the Monza ruling. An Italian couple entered into a surrogacy agreement with a woman and in a contract for a FIVET (Fertilizzazione In Vitro con Embryo Transfer- IVF with embryo transfer) professional service with an Italian doctor. As a consequence of ratification of the Doctors' Deontological Code forbidding surrogacy, the doctor refused his service.

The committing Italian couple asked the judge to authorize the doctor (who refused) to implant an embryo in the uterus of surrogate mother, according to an "altruistic" agreement drawn up by the couple and the gestational mother. The judge authorized the doctor to do so, focusing on: 1) the importance of the solidarity features in the agreement; 2) the need for the protection of the individual right of reproduction; 3) the new "*anthropological and cultural dimension of parenthood*", developed thanks to innovative arrangements; 4) the fact that parental status is linked to one's own "*will*" to be a mother or father.

The doctor could not be forced to cooperate because the Court passed only a declaratory judgment – not a conviction. Nevertheless this decision was shocking in Italy: it broke with the traditional understanding of family law<sup>578</sup>. It was so radical that the legislature of 2004 did not follow the recommended protocol.

After 2004, only two relevant cases arose in the courts, both dealing with the recognition of documents issued by foreign authorities. Indeed, Act 40/2004 forbade surrogacy in Italy, causing an increase in "procreative tourism".

- The decision taken by **the Civil Court of second instance of Bari<sup>579</sup>, in 13/2/2009**, is very interesting. A couple (an English husband and an Italian wife), who were resident in Bari, drew up two surrogate agreements in Great

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<sup>577</sup> See point 8 of "Legislation".

<sup>578</sup> See G. Ciani, *C. App. Roma 17/2/2000. Nota*, in «Foro Italiano», I, 2000, pp. 1697-1702

<sup>579</sup> It's a Court of second degree as the case has dealt with the registration of a foreign judicial decision (see art. 67, act. N. 218/1995)

Britain with the same Englishwoman (the genetic and surrogate mother), who bore two children: one in 1998 and one in 2001. She gave up her parental rights and, pursuant to two different parental orders, British authorities recognised the commissioning couple as legal parents. As Italian children's birth certificates indicate only the genetic parents, the "social mother" asked the judges to order the Bari mayor to change these documents, effectively enforcing in Italy the parental orders issued by British judges. The Civil Court of Bari approved the instance. The decision is based on some principles that are very progressive in the Italian legal context: 1) surrogate motherhood, as it is permitted in some Member countries, does not contrast with international public order; 2) the best interest of the child is a primary consideration for every judicial decision (according to the Convention on the Rights of the Child of New York, 20 November 1989) and 3) in the case of Bari, the best interest of child is the recognition of the "social mother" as the legal mother; finally, 5) *favor filiationis* can be a higher priority than *favor veritatis*.

[There was no referral to the Cassation Court]

- The latest case arose in the **Civil Court of first instance of Napoli in 1/7/2011**. A single man benefited from a surrogacy arrangement in Colorado and became the father (both the genetic, and legal father according to Colorado rulings) of two children<sup>580</sup>.

He asked the Neapolitan judge to recognize his parental *status*. In this case, the Court also approved the instance, decreeing that "*the forbidding of surrogacy is not found in the need to guarantee the constitutional principles about child protection, but this forbidding is based on a legislator's choice*". So, a child's birth certificate which is issued abroad does not contrast with the Italian public order, as it is possible to "*harmonize the domestic ban of using surrogacy arrangements in Italy with the recognition of the parental relation between the social father and the child born due to surrogacy in the U.S.A*". [There was no appeal.]

It's also worth noting one last case which is presently in front of the European Court of Human Rights : the Paradiso and Campanelli v. Italy case, introduced on 27 April 2012. A surrogacy contract was agreed between an Italian couple and a Russian company, « Rosjurconsulting ». A child was born from a Russian woman. The birth certificate states that the child is the son of the Italian couple of intent. Upon their return to Italy, the parents asked to have the birth certificate transcribed, but the Italian administration (Ufficiale di Stato civile) refused to do so under the premise that the birth certificate did not state the name of the real parents.

It dealt with a very special case of surrogacy, because neither the intended father nor the intended mother were the genetic parents of the child born through the Russian woman. Biological tests were indeed carried out.

This couple avoided not only the ban on reproduction with gametes from donors, but the rules about the adoption too. The Court for minors had to declare a state of abandon (and adoptability) regarding the child, because the biological parents were unknown and the intended parents could not be considered parents – according to Italian law – without any genetic or legal ties to the minor. The Court refused to foster the child to the intended parents. The judgment denying the foster is related to the discretion of the judges, as it is generally employed in the

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<sup>580</sup> It was not possible to know who was mentioned as the mother in the birth certificate and if the father lived with a partner.

Italian Court of minors. The Court of Appeal confirmed the first judgment<sup>581</sup>. The child was entrusted to the social services and placed in foster care. The couple has no contact with him.

It will be interesting to know the ruling of the Civil Court called to decide about the transcription of the child's birth certificate. But neither the civil sentence nor the Penal Court's sentence (about the violation of the art. 567 of Italian Penal Code) has yet been published.

2) The best interest of the child is a principle recalled by judges with different opinions, in different ways. The Court of Monza (1989), using a too restrictive interpretation of art. 30 of the Italian Bill of Rights, refers to the right to grow up with one's genetic parents. This argument does not appear very important when it comes to making a decision, as the judges focus on the invalidity of the agreement according to rules pertaining to contracts in civil code.

The Court of Bari (2009) found its decision on the best interest of the child as a primary consideration and used such a notion to allow the enforcing of the British parental order in Italy. The interpretation of the judges of Bari underlay the need for analysis, in each single case, of the material, deep, real issues of the child, supporting the innovative conception of the prominence, in some case, of the *favor filiationis* over the *favor veritatis*. The proceedings, rather than affirm the truth at any cost, have to guarantee above all the well-being of the child. So, in the case of Bari, the children require: 1) to have a definite *status filiationis* and not two different statuses, one in Britain, one in Italy; 2) to continue to live with their social mother even if the genetic reality indicates another woman.

*Favor filiationis* is a notion generally used in decisions about divorce. It was considered the main principle to be followed when the divorcing couple has children and it was necessary to solve capital and practical issues related to them.

There is no real difference between the notions "best interest of the child" and *favor filiationis*. The Italian judges used both expressions with the same meaning. Nevertheless, the second one could be thought more precise and immediately related to the condition of the child within the family: the child considered as a member of a parental group, the child to be protected as a daughter or a son. There is a new, heavy, question for Italian jurists: following the introduction of special technology such as ART and surrogacy, what is the best interest of the sons and the daughters born due to these arrangements? Is it more important to protect the right to the genetic truth or the right to grow up with the intended parents? The last two Italian decisions (Bari and Napoli) gave a clear answer to this issue.

3) The protection of the "family life" emerged in the decision of Bari (2009). In this case, the children had lived with the intended mother since their birth, and the family was founded on social ties only. According to the judges' interpretation, the interest of the children to live "at home", within the only family they knew, is the first interest to protect. In this case, the principle of respect of family life mirrored the notion of *favor filiationis*.

4) In the cases analysed, if the intended mother is also the genetic mother, it does not make a difference to the judicial reasoning. Italian judges have never focused on these two different situations because of the presence of art. 269 par. 3 ("*the mother is the woman who bears the child*"), so the most important point in the judicial reasoning has always been the difference between "social" and "bearing" mother.

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<sup>581</sup> These cases were not publicised and they are not described in the most famous generalist legal reviews.

5) In Italy, the intended parents can adopt a child after he/she has been delivered and handed over to them by the surrogate mother in order to obtain legal parenthood<sup>582</sup>. In particular, the judge of Monza (1989) proposed that the intended mother adopt the child as solution to the case.

6) The cases of Bari (2009) and Napoli (2011) deal with the recognition of documents relating to the surrogacy arrangement and issued in another country. In the first case, the document is a judicial one: a parental order attributing legal motherhood to the Italian intended mother. In the case of Napoli, the document is a birth certificate. In both situations the intended parents had petitioned the relevant administrative office for the registration of each document. As a consequence of the refusal, both the intended mother of Bari and the intended father of Napoli have commenced judicial proceedings. The judges accepted to recognise both types of document at all. So, we could say that paternal genetic connection is no more a favoured condition than intended motherhood.

7) The administrative office in charge refused to recognise the foreign documents for reasons of "public order", following a strict interpretation of art. 16 act 218/1995: "*Foreign law is not enforceable if its effects contrast with the public order*", it identified the public order with the domestic law. In Italy surrogacy is banned, so such foreign documents are not legal.

In a broader interpretation of the rulings of Bari and Napoli, the "public order" has to mean a notion of international order, that is the need to guarantee that human rights and dignity are universally recognised. According to such reasoning, neither the British parental orders nor American birth certificate damage the public order, even if in Italy surrogacy is illegal<sup>583</sup>.

8) It seems the Italian judges use a consistent language.

9) In the context of surrogacy cases, the Courts appeared more able to accept the issues coming from public opinion rather than legislative or administrative institutions. In the context of surrogacy cases, Italian judges don't have more discretion or more freedom to decide; they are ordinary judges in ordinary courts; they have the power to apply the law following a complex procedure of interpretation. On the one hand they suggest the need for legal reform, on the other hand they take on a substitute creative role, and through more liberal decisions they can bring new principles into the Italian set of rules. Unfortunately the Cassation Court has not even decided about surrogacy cases; we have to wait for a statement of the Unified Sections of Cassation in order to discern the main determining tendency of Italian jurisprudence. The power of such a decision could really influence the legislature's next choices.

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<sup>582</sup> See point 10 of "Legislation"

<sup>583</sup> See M. Castellaneta, *Dietro l'interesse del minore si nasconde il rischio di un turismo procreativo*, in *Famiglia e minori*, 5, 2005, pp. 66-69; L. Mazzanti, G. Pavan, [http://www.studiocataldi.it/news\\_giuridiche.asp/news\\_giuridica\\_11416.asp](http://www.studiocataldi.it/news_giuridiche.asp/news_giuridica_11416.asp)



## 6.7. THE NETHERLANDS

### A Legislation

#### 1. The legal framework of gestational surrogacy

There is no specific legislation setting out guidelines for questions raised by surrogacy in the Netherlands. Non-commercial gestational surrogacy was first regulated at the initiative of the Dutch Health Minister. The Act adopted on 1 April 1998 relative to the institutions that practice in vitro fertilization (IVF)<sup>584</sup> sets out that gestational or high-technology surrogacy should respect the directives adopted by the Dutch Society for Obstetrics and Gynaecology<sup>585</sup>. This regulation also states that surrogacy by IVF can only take place if the surrogate mother has already given birth to at least one child and information on the (psycho-social and legal) consequences of resorting to surrogacy have been clearly communicated to the interested parties. However, in the absence of legislation specifically addressing surrogacy, the civil aspects of surrogacy are not regulated. As a consequence, no legal provision regulates the transfer of parenthood between the surrogate mother and the intended parents<sup>586</sup>.

At the criminal level, certain provisions criminalize the commission of certain acts committed as part of a commercial surrogacy. The Dutch legislator's objective to fight against commercial surrogacy has thus resulted in the introduction in 1993 of article 151(b) in the Dutch Criminal Code<sup>587</sup>.

At present, the Dutch legislator is among others facing two questions: should Dutch family law be adapted to oversee the civil aspects of a surrogacy procedure performed on the national territory and facilitate the transfer of parenthood between the surrogate mother and the intended parents? Should he further tweak Dutch private international law rules to facilitate the recognition of the parent-child relationship established abroad as a result of a surrogacy?<sup>588</sup>

<sup>584</sup> Act on In Vitro Fertilization of 1 April 1998, *Staatscourant* 1998/95, pp. 14-18 (« Planningsbesluit In Vitro Fertilisatie »).

<sup>585</sup> « Hoogtechnologisch draagmoederschap », Richtlijn Nederlandse Vereniging voor Obstetrie en Gynaecologie, n° 18 January 1999, [www.nvog.nl](http://www.nvog.nl). See the explicit reference made to the directives adopted by the Dutch Society for Obstetrics and Gynaecology in its annex, point 2.4 : "Application of in-vitro fertilisation in combination with surrogacy takes place in accordance with the rules laid down in the protocol that should be in accordance with the directive "High-technology surrogacy" ("*Hoogtechnologische draagmoederschap*") of the Dutch Society for Obstetrics and Gynaecology of 1999, and occurs solely if the mother already has one or more children".

<sup>586</sup> M. J. VONK, « Netherlands: Maternity for another : a double dutch approach », in *Gestation pour autrui : Surrogate motherhood* (dir. F. MONÉGER), coll. Colloques, vol. 14, Proceedings of the 8<sup>th</sup> Congress of international comparative law, held in Washington DC from 25 to 31 July 2010, Paris, Society of Comparative Legislation, 2011, p. 206, citing the Minister for Health : « Transfer from one set of parents to another set of parents must take place by means of voluntary divestment of parental responsibility of one set of parents, after which the intended parents can be vested with parental responsibilities and will eventually have to adopt the child » (Dutch Second Chamber 1996-1997, 25 000-XVI, n° 62, p. 13).

<sup>587</sup> Act of 16 September 1993, *Staatsblad* 486 and M. J. VONK, « Netherlands: Maternity for another : a double dutch approach », in *Gestation pour autrui : Surrogate motherhood* (dir. F. MONÉGER), coll. Colloques, vol. 14, Proceedings of the 8<sup>th</sup> Congress of international comparative law, held in Washington DC from 25 to 31 July 2010, Paris, Society of Comparative Legislation, 2011, p. 205. In reality, there is no provision of the Dutch Criminal Code explicitly punishing the resort to commercial surrogacy. The Criminal Code punishes only certain acts committed in the framework of a contract of surrogacy performed in exchange of a fee. Voy. K. BOELE-WOELKI, I. CURRY-SUMNER, W. SCHRAMA and M.J. VONK, *Draagmoederschap en illegale opnemng van kinderen (Surrogacy and illegal placement of children)*, Utrecht, Utrecht Centre for European research into Family Law, 2011, p. 36 ([www.rijksoverheid.nl](http://www.rijksoverheid.nl)).

<sup>588</sup> M.J. VONK and K. BOELE-WOELKI, « Surrogacy and Same-Sex Couples in the Netherlands », in *Legal Recognition of Same-Sex Relationships in Europe. National, Cross-border and European Perspectives* (ed. K. Boele-Woelki and A. Fuchs), 2<sup>nd</sup> ed., Cambridge, Antwerp, Portland, Intersentia, 2012, p. 138.

## **2. Types of surrogacy**

There are only provisions to oversee non-commercial gestational surrogacy in the Netherlands. There are no provisions on traditional or low-technology surrogacy – i.e. surrogacy that doesn't require IVF – although it isn't forbidden.

### **3. Access to surrogacy: profile of applicant parents and medical indications**

The Act of 1 April 1998 relating to institutions engaged in in vitro fertilization provides that recourse to gestational surrogacy must comply with the guidelines established by the Society for Obstetrics and Gynaecology, including the requirement that the intended parents (married or not, in a partnership or not) are able to provide all of the genetic material necessary to the conception of the child. As a result, only heterosexual couples have access to gestational surrogacy, since same-sex couples and single persons are not able to provide all of the genetic material necessary to the conception of a child. In practice, surrogacy centres reserve access to surrogacy to married heterosexual couples who come together with their surrogate mother<sup>589</sup>. Nothing prevents same-sex couples or a single man to resort to traditional or low-technology surrogacy, which would in this instance be performed outside of any legal framework. As long as surrogacy is not for profit, the interested parties do not violate Dutch law. Under these assumptions, the surrogate mother is the child's genetic and biological mother.

The Act of 1 April 1998 relating to institutions engaged in in vitro fertilization further requires a medical certificate establishing that surrogacy is the only option for the intended mother to have a child to which it would be genetically related, because a pregnancy would be impossible (due to the congenital absence of a uterus or due to a hysterectomy performed following a malignant infection) or dangerous for her. The guidelines of the Society for Obstetrics and Gynaecology specify in which medical context the intended mother can turn to surrogacy, whilst excluding the possibility of using surrogacy for simple reasons of personal convenience.

### **4. Repression of commercial surrogacy**

To combat commercial surrogacy, the Dutch Parliament introduced article 151(b) in the Dutch Criminal Code in 1993.

Under article 151(b) of the Criminal Code, it is an offence to cause or promote, as part of his/her professional activity, the contact, direct or not, between, on the one hand, a surrogate mother, or a woman who wants to become one, and, on the other hand, another person. The perpetrator of such an offence shall be liable to a prison sentence of maximum one year or a fourth category fine, i.e. a fine of 6,701 to 16,750 €.

Article 151(c) can be applied to surrogacy, even though it doesn't mention it, and punishes anyone who causes or promotes, as part of his/her professional activity, the fact that a mother agrees, directly or not, to give her child to another person so that the latter takes care of it durably. The perpetrator of such an offence shall be liable to a prison sentence of maximum six months or a third category fine, i.e. a fine of 3,351 to 6,700 €.

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<sup>589</sup> M.J. VONK and K. BOELE-WOELKI, « Surrogacy and Same-Sex Couples in the Netherlands », in *Legal Recognition of Same-Sex Relationships in Europe. National, Cross-border and European Perspectives* (ed. K. Boele-Woelki and A. Fuchs), 2<sup>nd</sup> ed., Cambridge, Antwerp, Portland, Intersentia, 2012, p. 126.

### **5. Financial aspects of altruistic surrogacy**

Altruistic surrogacy implies that the parents must take care of the expenses related to IVF, to the pregnancy and to the delivery, if those are not covered by insurance, as well as the expenses relating to the adoption procedure, to the insurance, and to the legal charges<sup>590</sup>.

### **6. Absence of forced execution of surrogacy agreements**

Any surrogacy agreement providing that the surrogate mother has the obligation to hand over the child to the intended parents is null as it contravenes to public order and good morals and can therefore not be enforced. However, the centres supervising surrogacy by IVF ask the parties to sign a contract whereby they agree to a series of clauses, including potential rights to claim damages, which in the doctrine are controversial as to their validity and the possibility of their execution. The legality of the contract is controversial; however it helps the judge in charge of the adoption procedure to understand what the intentions of the parties were at the time of signature of the contract<sup>591</sup>.

### **7. Absence of a pre-birth judgement system**

There is no pre-birth judgment system in the Netherlands. The intended parents' parenthood is established after the birth of the child through a judicial adoption procedure.

### **8. Standards of protection of the surrogate mother and the intended parents**

The guidelines of the Dutch Society for Obstetrics and Gynaecology pose a series of conditions with among others the objective of protecting the parties involved in a surrogacy agreement.

- **Age of the surrogate mother:** according to the guidelines of the Dutch Society for Obstetrics and Gynaecology, the surrogate mother should be no older than 44 (aligned to the age limit for an IVF with egg donation)<sup>592</sup>;

- **Condition linked to the fact that the surrogate mother should have already given birth to a healthy child:** the Act of 1 April 1998 relative to the institutions that practice in vitro fertilization requires that the surrogate mother has already given birth to a healthy child, whilst the guidelines set by the Dutch Society for Obstetrics and Gynaecology also provide that the surrogate mother should consider that her family is complete;

- **Verification of the free and informed consent given by the surrogate mother:** according to the guidelines of the Dutch Society for Obstetrics and Gynaecology, all parties involved – that is the intended parents, the surrogate mother as well as her partner, if appropriate – must be informed orally and in writing of all the potential consequences of this undertaking, be it on the medical, psychological or judicial fronts, which should allow to verify the free and informed consent of the surrogate mother;

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<sup>590</sup> S. DERMOUT, H. VAN DE WIEL, P. HEINTZ, K. JANSEN and W. ANKUM, « Non-commercial surrogacy : an account of patient management in the first Dutch Centre for IVF Surrogacy from 1997 to 2004 », *Human Reproduction*, 2010, vol. 25, n° 2, p. 448.

<sup>591</sup> M. J. VONK, « Netherlands: Maternity for another : a double dutch approach », in *Gestation pour autrui : Surrogate motherhood* (dir. F. MONÉGER), coll. Colloques, vol. 14, Proceedings of the 8<sup>th</sup> Congress of international comparative law, held in Washington DC from 25 to 31 July 2010, Paris, Society of Comparative Legislation, 2011, p. 208.

<sup>592</sup> Beyond this age limit, there is uncertainty on the obstetric risks to the surrogate mother.

- **Medical and psychological examination of the surrogate mother:** according to the guidelines of the Dutch Society for Obstetrics and Gynaecology, the parties involved should benefit from psychological support during and after the procedure. Moreover, on a medical level, the guidelines stipulate that the number of embryos implanted into the surrogate mother should be limited to two in order to avoid the risks of multiple pregnancies;

- **Age of the intended parents:** according to the guidelines of the Dutch Society for Obstetrics and Gynaecology, the intended mother should be no older than 40<sup>593</sup>;

- **Measures to make sure that it is impossible for the intended parents to withdraw their consent:** there seems to be no specific provision to make sure that the parents do not withdraw their consent. However, the procedure to be followed by the intended parents and the conditions imposed on them seem to be so strict that it seems very unlikely that intended parents would withdraw their consent;

- **Conditions linked to the place of residence, home and/or nationality of the intended parents and/or of the surrogate mother:** the guidelines of the Dutch Society for Obstetrics and Gynaecology don't formulate any requirements in terms of place of residence, home or nationality. However, certain surrogacy centres lay down additional requirements to those stipulated in the guidelines, and require for example that the parties hold Dutch nationality and residence in the Netherlands<sup>594</sup>;

- **Counselling requirement:** the guidelines of the Dutch Society for Obstetrics and Gynaecology dedicate a paragraph to the requirement of counselling. It provides that all parties, that is both the intended parents and the surrogate mother and her partner, should be informed in writing and orally of all aspects, risks and disadvantages of the treatment, be on the medical, psychological or legal levels. The counselling is carried out by a psycho-medical team who tries to bring out an informed consent, which will be recorded in an agreement bringing together all parties involved, but also separately consulting with, on the one hand, the intended parents, and on the other hand, the surrogate mother and her partner. The agreement among others stipulates the number of IVF attempts accepted by the surrogate mother as well as the moment and manner in which the child will be handed over to the intended parents.

### **9. Rules determining parenthood**

In the absence of regulation governing the civil aspects of surrogacy, common law rules apply. Maternal filiation is therefore established for the surrogate mother, as she is the woman who gave birth to the child, no matter whether she is genetically related to the child or not (art. 1:198 DCC) while the paternal filiation is established with respect to her husband if she is married (art. 1:199(a) DCC). If the surrogate mother is not married, the father of intent can recognize the child with the consent of the surrogate mother and provided that there is a close personal relationship between the child and the father of intent (art. 1:204(1)(e) DCC).

To establish parenthood of the child, the intended parents must turn to the adoption procedure after the "surrogate parents" have been deprived of parental authority over the child. In practice, the intended parents must report the situation to their municipality, which then refers the case to the Child Protection Council (authority from whom permission to adopt must be requested) so that a social investigation can be performed. If the Council validates the parents' request, the latter can initiate an

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<sup>593</sup> This age limit is based on the expected results of the ovarian stimulation and the small chance of success of a pregnancy through IVF for women aged over 40, due to the aging of their ovula.

<sup>594</sup> French Senate, Comparative legislation study n° 182 relative to surrogacy, January 2008, available on the following webpage: [www.senat.fr](http://www.senat.fr), p. 25.

adoption procedure under the condition that they have been living together for 3 years and that they have been raising and taking care of the child for at least one year, period during which they exercise joint guardianship (*gezamenlijke voogdij*) with respect to the child (art. 1:228 DCC). No genetic link is required between the child and the parents who want to adopt it. Moreover, a single person can also adopt a child.

In concrete terms, in situations involving surrogacy, the Child Protection Council refers to the competent courts to seek the forfeiture of parental authority of legal parents ('surrogate parents') and the designation of the parents of intent as tutors. The request for revocation of the parental authority of the 'surrogate parents' can only be introduced by the Child Protection Council and not by the parents of intent (art. 1:267 DCC). Most courts revoke the parental authority of 'surrogate parents' because of their inability to care for the child as they did not intend to have it for themselves<sup>595</sup>. After caring for the child for a year, the parents of intent can then introduce an adoption procedure<sup>596</sup>. According to a study, this period is inappropriate as it subjects parents of intent and surrogate mother alike to uncertainty for a year. This study therefore recommends the abolishment of this period to allow the parents of intent to adopt the child at birth<sup>597</sup>.

### **10. Determination of the surname of the child**

Since the Act of 10 April 1997, which amended the rules in the Netherlands relating to the assignment of the name, parents can choose to give their child its mother's name or that of its father. Failing a choice, the child born during marriage receives the name of the father. If the child is born out of wedlock, it keeps the name of its mother, unless the father recognises the paternity of the child and gives it his name (art. 1:5, al. 2 DCC)<sup>598</sup>.

These rules also apply if the child has been born out of surrogacy. Some jurisprudence decisions listed below are used to illustrate the allocation of the name in case of surrogacy. Thus, during a procedure of adoption started in the Netherlands as a result of the forfeiture of parental authority of the surrogate mother and the designation of the parents of intent as tutors, the parents of intent, who were unmarried, chose to assign the name of the father of intent to the child<sup>599</sup>. When surrogacy is carried out abroad and the child's surname is specified on a foreign birth certificate, it is recognized by the Dutch authorities provided that the name has been established in accordance with the child's national law, which is designated by the rules on conflict of law on names (art. 1 *Wet conflictenrecht namen* or *Private International Law (Names) Act*)<sup>600</sup>. In one case, the surrogacy was conducted in India and the child received the surname of the father of intent, in accordance with the choice made by the legal parents of the child: the father of intent and the surrogate mother<sup>601</sup>.

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<sup>595</sup> M. J. VONK, « Netherlands: Maternity for another : a double dutch approach », in *Gestation pour autrui : Surrogate motherhood* (dir. F. MONÉGER), coll. Colloques, vol. 14, Proceedings of the 8<sup>th</sup> Congress of international comparative law, held in Washington DC from 25 to 31 July 2010, Paris, Society of Comparative Legislation, 2011, p. 212.

<sup>596</sup> M. ANDRE, A. MILON, H. DE RICHEMONT, *Contribution à la réflexion sur la maternité pour autrui*, Information Report n° 421, 25 June 2008, French Senate, p. 27, available online: [www.senat.fr/rap/r07-421/r07-4211.pdf](http://www.senat.fr/rap/r07-421/r07-4211.pdf).

<sup>597</sup> S. DERMOUT, H. VAN DE WIEL, P. HEINTZ, K. JANSEN and W. ANKUM, « Non-commercial surrogacy : an account of patient management in the first Dutch Centre for IVF Surrogacy from 1997 to 2004 », *Human Reproduction*, 2010, vol. 25, n° 2, p. 448.

<sup>598</sup> Law of 10 April 1997 amending articles 5 and 9 of Book 1 of the Civil Code and in respect of any other articles of this Code, *Staatsblad* 161.

<sup>599</sup> Rechtbank Arnhem, 19 May 2009, LJN: BI5039.

<sup>600</sup> Rechtbank 's-Gravenhage, 11 December 2007, LJN BB9844 : the surname of the child, as it was stated on the British birth certificate, was recognised by the Dutch authorities in enforcement of the rules on conflict of law on names (art. 1 *Wet conflictenrecht namen*). In this case, the surname of the parents of intent was awarded to the child, in accordance with article 1:5, al. 3 and al. 8 of the Dutch Civil Code.

<sup>601</sup> Rechtbank 's-Gravenhage, 24 October 2011, LJN: BU 3627.

### **11. Gamete donation**

Since 2002, the donation of gametes is not anonymous anymore in the Netherlands. The law of 25 April 2002 on the gamete donor's information abandons the double system of gamete donation that allowed donors to remain anonymous<sup>602</sup>. This Act applies to donations made after 1 June 2004<sup>603</sup>. It provides that within sixty weeks of the last insemination, the following information must be sent to the 'Landelijke Stichting Donorgegevens Kunstmatige Bevruchting' (National Foundation for information on donors for artificial insemination):

- Medical information on the donor, such as any relevant disease and the detailed typology of the blood group;
- Information that is non-constituent of the identity of the donor, such as physical characteristics, personality, social and family data;
- The identity of the donor, such as his date of birth, his address, etc.

When a child reaches the age of 16, a child conceived through medically assisted reproduction with sperm donation has the possibility of obtaining the identity of the third-party donor, with the consent of the latter. However, if the donor refuses to reveal his identity, only decisive reasons can justify the maintenance of anonymity because the interest of the child is considered as a priority.

### **12. Granting of Dutch citizenship to the child**

In the Netherlands, the nationality law is based on the principle of *ius sanguinis* and is codified in the *Rijkswet op het Nederlanderschap* (RWN)<sup>604</sup>.

A child can be given full Dutch citizenship in different circumstances:

- Attribution by rights ("van rechtswege") of the Dutch nationality as a consequence of the father's/mother's nationality and regardless of the child's place of birth (art. 3§1 RWN);
- Attribution by rights ("van rechtswege") of the Dutch nationality due to the birth of the child in the Netherlands: a child found on Dutch territory whose parents are unknown is granted Dutch citizenship if, within five years following its discovery, the child is deemed to have no other nationality (art. 3§2 RWN); a child born in the Netherlands of at least one parent of foreign nationality residing on Dutch territory is awarded the Dutch nationality if at least one of his grandparents was also born in the Netherlands to a Dutch parent residing on Dutch territory (art. 3§3 RWN);
- Attribution by rights ("van rechtswege") of the Dutch nationality to a child whose parent has been legally given parentage over the child (art. 4§1 RWN)
- Attribution by rights ("van rechtswege") of the Dutch nationality to a foreign child recognized by a Dutch citizen before the age of 7 (art. 4§2 RWN);

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<sup>602</sup> Law of 25 April 2002 on the gamete donor's information (Wet Donorgegevens Kunstmatige Bevruchting), *Staatsblad* 240, 28 mai 2002.

<sup>603</sup> French Senate, study of comparative legislation no. 182 concerning surrogacy, January 2008, available at: [www.senat.fr](http://www.senat.fr).

<sup>604</sup> Rijkswet op het Nederlanderschap 19 December 1984, *Staatsblad* 628.



- Attribution by rights ("van rechtswege") of the Dutch nationality to a foreign child recognized by a Dutch citizen who demonstrates that he is his biological father within one year following the child's recognition (art. 4§4 RWN);
- Attribution by rights ("van rechtswege") of the Dutch nationality to a foreign child adopted in the Netherlands if the child is a minor on the date of the pronouncement of the adoption and if at least one of the adoptive parents is Dutch. The Dutch citizenship is awarded to the child within a period of three months following the judicial decision declaring the adoption or, if an appeal is lodged, within a period of three months following the judgment of the appeal court (art. 5 RWN);
- Attribution by rights ("van rechtswege") of the Dutch nationality to a foreign child adopted abroad under certain conditions, including the fact that one of his adoptive parents have Dutch nationality (art. 5a RWN: adoption falling within the scope of the Hague Convention of 29 May 1993 on the protection of children and cooperation in respect of intercountry adoption; and 5b RWN: adoption governed by the law applicable to the recognition of adoptions in the Netherlands: *Wet conflictenrecht adoptie*).

### **13. Model of surrogacy agreement**

While any agreement relating to surrogacy is null and void due to its affront of morality and public decency, some institutions ask the parties to sign an agreement in which interested parties agreed on different points to, inter alia, preclude issues that may arise during the pregnancy and to agree on the responsibilities of all the parties after the birth<sup>605</sup>.

In collaboration with the Dutch Centre for Non-commercial IVF Surrogacy, which functioned from 1997 to 2004, lawyers thus met with the intended parents and the surrogate mother to discuss various points concerning the child (for example, what to do in the case of multiple pregnancies or miscarriage) and the surrogate mother (for example, in case of complications during pregnancy or childbirth, on the behaviour of the surrogate mother if she smokes, drinks or works, as well as the support provided by the parents of intent to the surrogate mother). The list of issues to be addressed also concerns legal questions (interview with a lawyer, adoption proceedings, drafting of a will), financial aspects (insurance, support for the charges paid by the parents of intent), different terms (what should be revealed to the parents, children, friends and colleagues; whether surrogacy should be disclosed or not) as well as on what to do in the event of conflict<sup>606</sup>.

### **14. Organization governing the use of surrogacy**

A surrogacy centre was created in Zaandam following the 1994 legislative changes punishing only commercial surrogacy: the Dutch Centre for Non-commercial IVF Surrogacy. From 1997 to 2004, all parents of intent wishing to use surrogacy had to verify their eligibility to the surrogacy with the Centre from a medical, psychological and legal point of view. After this first stage, candidates for surrogacy were sent to one of the three clinics practicing IVF in the Netherlands (the Reiner de Graaf Hospital in Voorburg, the Academic Medical Center University Hospital in Amsterdam, or the University Hospital in Groningen)<sup>607</sup>. In 2004, the Dutch Centre for Non-commercial IVF

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<sup>605</sup> French Senate, study of comparative legislation no. 182 concerning surrogacy, January 2008, available at: [www.senat.fr](http://www.senat.fr), p. 25

<sup>606</sup> S. DERMOUT, H. VAN DE WIEL, P. HEINTZ, K. JANSEN and W. ANKUM, "Non-commercial surrogacy: year of patient account management in the first Dutch Centre for IVF Surrogacy from 1997 to 2004", *Human Reproduction*, 2010, vol. 25, no. 2, p. 445

<sup>607</sup> S. DERMOUT, H. VAN DE WIEL, P. HEINTZ, K. JANSEN and W. ANKUM, "Non-commercial surrogacy: year of patient account management in the first Dutch Centre for IVF Surrogacy from 1997 to 2004", *Human Reproduction*, 2010, vol. 25, no. 2, p. 444.

Surrogacy was forced to close because none of the IVF clinics in the Netherlands wished to participate in a surrogacy program. In 2006, the surrogacy program was however revived by the Free University Medical Centre in Amsterdam, which is therefore at present the second centre for surrogacy by IVF in the Netherlands (Dutch Centre for IVF Surrogacy)<sup>608</sup>. This Center reserves access to surrogacy only to married heterosexual couples who arrive with their own surrogate mother<sup>609</sup>.

## **B Case law**

1. The legal proceedings relating to surrogacy cases concern both internal situations<sup>610</sup> and international situations involving a surrogacy carried out in a Member State (Belgium<sup>611</sup> or the United Kingdom<sup>612</sup>) or in a non-Member State (Russia<sup>613</sup>, the United States<sup>614</sup>, Ukraine<sup>615</sup>, India<sup>616</sup>), or a surrogacy carried out in the Netherlands but followed by an anonymous childbirth ("accouchement sous X") in France<sup>617</sup>.

The Dutch jurisprudence on cases of surrogacy can be consulted at the address [www.rechtspraak.nl](http://www.rechtspraak.nl). Most of the decisions cited in this study are available on this website.

### **(a) Internal cases of surrogacy**

In some of the internal cases of surrogacy, the father of intent files a paternity claim in which he seeks to establish parentage through proof of a close personal relationship with the child.

- Rechtbank Almelo, 24 October 2000, FJR, 2001 (3) 91, cited by M.J. Vonk<sup>618</sup>: acknowledgment of paternity of a child born to a surrogate mother by a married father of intent. The tribunal granted demand as soon as it appeared that there was a close personal relationship between the father of intent and the child established by the fact that the child was living in the home of the parents of intent since birth.
- Rechtbank Assen, 15 June 2006, LJN AY7247 cited by M.J. Vonk<sup>619</sup>: filing of a prenatal recognition of paternity of a child carried by a surrogate mother (sister

<sup>608</sup> *Ibid.*, p. 449.

<sup>609</sup> M.J. VONK and K. BOELE-WOELKI, « Surrogacy and Same-Sex Couples in the Netherlands », in *Legal Recognition of Same-Sex Relationships in Europe. National, Cross-border and European Perspectives* (ed. K. Boele-Woelki and A. Fuchs), 2<sup>nd</sup> ed., Cambridge, Antwerp, Portland, Intersentia, 2012, p. 126.

<sup>610</sup> See e.g. Rechtbank 's-Gravenhage, 21 June 2010, LJN: BN1309; Rechtbank 's-Hertogenbosch, 18 August 2011, LJN: BR 5334 and Centrale Raad van Beroep, 7 December 2011, LJN: BU7192.

<sup>611</sup> Rechtbank Groningen, 20 July 2004, Rechtbank Utrecht, 26 October 2005, Rechtbank Utrecht, October 24, 2007, Rechtbank Utrecht, 7 May 2008, Gerechtshof Amsterdam, 25 November 2008, Rechtbank Utrecht, 10 June 2009, Gerechtshof Amsterdam, February 2, 2010 (case *gave*) and Rechtbank Alkmaar, 29 October 2008, LJN: BG8903.

<sup>612</sup> Rechtbank 's-Gravenhage, 11 December 2007, LJN BB9844.

<sup>613</sup> Rechtbank Arnhem, 20 February 2008, LJN: BC8012 and Rechtbank Arnhem, 19 May 2009, LJN: BI5039.

<sup>614</sup> Rechtbank 's-Gravenhage, 23 November 2009 (328511/FA RK 09-317), unreleased (cited by J.S. KEES, *European private international law on legal parenting?*) *Thoughts on a European instrument implementing the principle of mutual recognition in legal parenting*, 2010, no. 7.2.1.3.3, p. 238, available at: <http://arno.unimaas.nl/show.cgi?fid=19540>).

<sup>615</sup> Rechtbank 's-Gravenhage (Interlocutory proceedings - *Voorzieningenrechter*), 9 November 2010, LJN: BP 3764

<sup>616</sup> Rechtbank Haarlem (Interlocutory proceedings - *Voorzieningenrechter*), 10 January 2011, LJN: BP0426; Rechtbank 's-Gravenhage, 24 October 2011, LJN : BU 3627. Rechtbank Haarlem, 28 November 2012, LJN: BY4231.

<sup>617</sup> Rechtbank 's-Gravenhage, 14 September 2009, LJN: BK1197.

<sup>618</sup> M. J. VONK, « Netherlands: Maternity for another : a double dutch approach », in *Gestation pour autrui : Surrogate motherhood* (dir. F. MONÉGER), coll. Colloques, vol. 14, Proceedings of the 8<sup>th</sup> Congress of international comparative law, held in Washington DC from 25 to 31 July 2010, Paris, Society of Comparative Legislation, 2011, p. 210.

<sup>619</sup> M. J. VONK, « Netherlands: Maternity for another : a double dutch approach », in *Gestation pour autrui : Surrogate motherhood* (dir. F. MONÉGER), coll. Colloques, vol. 14, Proceedings of the 8<sup>th</sup> Congress of

of the mother of intent) by a married father of intent (biological father). The tribunal refused to grant his application on the ground that there can be no close personal relationship between a man and an unborn child.

In other situations, the Dutch courts were seized of cases designed to challenge paternity of the husband of the surrogate mother to establish filiation from the father of intent.

- Rechtbank 's-Gravenhage, 21 June 2010, LJN: BN1309: surrogacy was carried out in the Netherlands between parents of intent of Dutch nationality and a surrogate mother of Dutch nationality who is related to the parents of intent (sister of the mother of intent). The surrogate mother was inseminated with sperm from the father of intent. She is therefore the genetic mother of the child (traditional or low-technology surrogacy). The filiation of the child is established with the surrogate mother and her husband. The case initiated on behalf of the child (by a *guardian* or *bijzonder curator*) aims to challenge the paternal filiation of the husband of the surrogate mother and to establish the paternity of the child's father of intent. In accordance with the rule of conflict of laws on filiation (art. 2, al. 1 and art. 1 WCA), the action in contestation of paternity is governed by Dutch law as soon as it comes to the common nationality of the legal parents (*i.e.* the surrogate mother and her husband). Dutch law is also applicable to the issue of the establishment of paternal filiation of the biological father whenever it comes to the law of the common nationality of the mother and biological father having validly challenged the legal father's filiation (art. 6 WCA). As a consequence, the Court refers to article 1:207, al. 1 of the Dutch Civil Code according to which the father of a child is the one that has "created it". Having established that a "sperm donor" cannot be described as "progenitor" within the remit of the Dutch law, the tribunal refers to the case-law of the European Court of Human Rights relating to article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms and notes that the European Court ignores the distinction made by the Dutch legislator between a "progenitor father" and a "sperm donor father". What matters is the combination of blood ties and the concrete circumstances of a family life. Therefore, the Court accepts the relationship of filiation of the biological father on the grounds that, under the circumstances of the case, the latter maintains a "family life" with the child. This is the reason why he is entitled to the protection afforded by article 8 of the ECHR. The tribunal grants the request and establishes the filiation of the biological father to the child.

As explained above in the section on the Dutch legislation, to establish their parentage with respect to the child, the parents of intent will have to wait until the legal parents or 'surrogate parents' to be deprived of parental authority over the child, and until they are themselves appointed as guardians. Providing they have lived together for at least three years, the parents of intent will be able to introduce a procedure for adoption after having raised and cared for the child for a year. The Child Protection Council (*Raad voor Kinderbescherming*) will initiate the case for the revocation of the legal parents' parental authority.

- Rechtbank 's-Hertogenbosch, 18 August 2011, LJN: 5334 BR: surrogacy was carried out in the Netherlands between a surrogate mother and a married same-sex couple. A friend of one of the fathers of intent gave the egg that was fertilized by the sperm of the other father of intent to then be implanted in a surrogate mother (gestational surrogacy with egg donation). The action is brought by the *Raad voor de Kinderbescherming* (Child Protection Council) in order to withdraw

parental authority from the surrogate mother and her husband (legal parents) and to place the children under the joint custody of the parents of intent (homosexual couple). The Court granted the application and nominated the parents of intent guardians with regard to different elements: the interest of the children, the absence of financial stakes, the excellent relationship between the parents of intent and the "surrogate parents", the emotional bonding between the parents of intent and the children, the biological link between the children and one of the two fathers of intent, the parents of intent's desire for a child and the absence of pressure on the surrogate mother.

Lastly, one of the decisions was made on social matters: the mother of intent was seeking maternity leave allowances.

- Centrale Raad van Beroep, 7 December 2011, LJN: BU7192: surrogacy was carried out in the Netherlands between parents of intent of Dutch nationality and a surrogate mother of Dutch nationality who is related to the parents of intent (sister-in-law of the mother of intent). The action brought by the mother of intent is to be awarded compensation during maternity leave ("zwangerschaps- en bevallingsuitkering"). The Court refused to grant her application on the ground that the right to these allowances is only open to the legal mother, or to woman who has given birth. The legislation on work and health (*Wet arbeid en zorg - Wazo*) does not have formal legal effect on surrogate motherhood.

#### **b) International cases of surrogacy**

The Dutch courts face a number of situations where surrogacy is conducted abroad, whether in a European Union Member State, such as Belgium or the United Kingdom, or in a non-Member State, such as Russia, the Ukraine, the United States or India. If Dutch nationals go abroad despite the existence of a framework regulating surrogacy in the Netherlands, it is probably because of the strict conditions laid down by the guidelines of the Dutch Dutch Society for Obstetrics and Gynaecology. It seems that few couples who started a surrogacy proceeding in the Netherlands were declared eligible in the end. According to data on the 500 initial applications, only 13 couples have a child born as a result of surrogacy<sup>620</sup>. For all same-sex couples who are unable to provide all of the gametes or who know no surrogate mother, the realization of a surrogacy abroad is the only way to have a child genetically related to one of the parents of intent.

A decision in which surrogacy was carried out on the Dutch territory is classified among the decisions of international nature as childbirth took place anonymously in France ("accouchement sous X"), which led the Dutch courts to examine the recognition of French birth certificate in the Dutch legal order.

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<sup>620</sup> See figures cited by S. DERMOUT, H. VAN DE WIEL, P. HEINTZ, K. JANSEN and W. ANKUM, "Non-commercial surrogacy: year of patient account management in the first Dutch Centre for IVF Surrogacy from 1997 to 2004", *Human Reproduction*, 2010, vol. 25, no. 2, p.445-446. 300 (<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2806181/>): mothers of intent out of 500 applications have seen their application dismissed on the ground that they did not fulfil the basic conditions (those with no surrogate mother, single mothers of intent, infertile couples who have already unsuccessfully tried IVF on several occasions). Out of the 202 remaining couples, only 105 were retained on the grounds that the other 97 did not meet other conditions (mother of intend over 41 years-old, no medical contraindication of pregnancy for the mother of intent, medical contraindication for the surrogate mother, surrogate mother aged over 45, etc.). Out of the 105 parents of intent, 58 withdrew their application or have not been accepted for medical reasons. 47 couples attended the second meeting. Among the 47 couples, 10 withdrew their application or have seen their application dismissed. In the end, only 35 couples have started a surrogacy with IVF procedure. For various reasons, only 24 surrogates were inseminated, which resulted in 13 pregnancies. In conclusion, of the 500 requests, only 13 couples managed to have a child through the surrogacy program.

## **France**

- Rechtbank 's-Gravenhage, 14 September 2009, LJN: BK1197: surrogacy was realized between a Dutch surrogate mother and a homosexual couple whose spouses, Dutch nationals living in the Netherlands, had been married since 2001 (previously bound by a registered partnership (*geregistreerd partnerschap*), later transformed into marriage). Surrogacy was done by artificial insemination of a surrogate mother, who is therefore the genetic mother of the child (traditional surrogacy). The birth of the child was anonymously in France. The French birth certificate only mentions the name of the biological father as the father of the child. The Dutch civil registry officer refused to transcribe the birth certificate due to the absence of the name of the mother on it. The action is primarily filed with the view of having the French birth certificate transcribed in the civil registry and set out in legal terms that the surrogate mother has given her consent to the recognition of paternity by the biological father. The second aim of the filing is to establish the paternity of the biological father. The Court considers that the absence of the name of the mother in the birth certificate is contrary to Dutch public order, which is why it refuses to recognise the French birth certificate. The Court also refuses to declare that the surrogate mother has validly consented to the recognition of paternity by the biological father on the grounds that the surrogate mother had already declared this in the contract of surrogacy, while at that time she was not yet pregnant. With regards to the paternal filiation of the biological father, requested as an alternative, the tribunal refers to article 1:207, al. 1 of the Dutch Civil Code according to which the father of a child is the one that has "created it". Having established that a "sperm donor" cannot be described as "progenitor" within the remit of the Dutch law, the tribunal refers to the case-law of the European Court of Human Rights relating to article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms and notes that the European Court ignores the distinction made by the Dutch legislator between a "progenitor father" and a "sperm donor father". What matters is the combination of blood ties and the concrete circumstances of a family life. Therefore, the Court accepts the relationship of filiation of the biological father on the grounds that, under the circumstances of the case, the latter maintains a "family life" with the child. This is the reason why he is entitled to the protection afforded by article 8 of the ECHR.

In the three following cases involving international cases of surrogacy (two conducted in Belgium and the third in Russia), Dutch courts have had to rule on questions of law: in the first case, on the question of the maintenance of the child in the home of the Dutch couple who want to adopt it; in the two latter cases, the delivery had taken place in the Netherlands and the Court was seized of the matter of forfeiture of parental authority of the legal parents and the designation of the parents of intent as guardians.

## **Belgium**

- Rechtbank Groningen, 20 July 2004, Rechtbank Utrecht, 26 October 2005, Rechtbank Utrecht, 24 October 2007, Rechtbank Utrecht, 7 May 2008, Gerechtshof Amsterdam, 25 November 2008, Rechtbank Utrecht, 10 June 2009, Gerechtshof Amsterdam, February 2, 2010: case *Donna*: surrogacy was carried out in Belgium between a Belgian surrogate mother and a Belgian couple of intent. The surrogate mother was inseminated with sperm from the father of intent (traditional surrogacy). As a result of the deterioration of the relationship between the surrogate mother and the couple, the surrogate mother pretended that she had a miscarriage. After the birth, the surrogate mother entrusted baby Donna to a Dutch couple, in return of payment. The Dutch couple informed the Dutch authorities that a newborn would soon arrive in their family and that they would like to adopt it, without specifying that the child is coming from abroad.



The case was referred to the Court of Utrecht, which has had to decide whether the child could stay with the Dutch couple despite the fact that they had not honoured the rules applicable to the adoption procedure when the child to be adopted is foreign. Noting that there was a "family life" between the child and the couple insofar as Donna had been living in the home of the Dutch couple since her birth, the Court allowed the couple to keep Donna. Meanwhile, the Belgian parents of intent had realised that the surrogate mother had lied to them and had given birth to 'their' child. More than two years after the birth of the child, a DNA test showed that the Belgian father of intent was the biological father of the child. Following this test, the Belgian father of intent started various procedures before the Dutch courts to get the child back and to be granted visitation rights. The courts however felt that it was not in Donna's interest to leave the home in which she had been growing up since birth, nor to grant her biological father a right of access. The various protagonists of the *Donna* case were convicted in Belgium: 12 October 2012, the Criminal Court of Oudenaarde sentenced the surrogate mother and her husband to a deferred imprisonment of one year and a fine of 1.650 EUR for inhumane and degrading treatment, it also sentenced the Dutch couple to a fine of 1.650 EUR while the Belgian couple of intent benefited from a suspended sentence.

- Rechtbank Alkmaar, 29 October 2008 LJN: BG8903: surrogacy was carried out in Belgium with the gametes of intended parents implanted via IVF in the surrogate, who is the sister-in-law (brother's wife) of the mother of intent (gestational surrogacy). Surrogacy has been carried out in Belgium and not in the Netherlands because of the age limit that the Dutch legislation subjects the mother of intent to. The proceedings are instituted by the *Raad voor de Kinderbescherming* (Child Protection Council) in order to remove parental authority of the surrogate mother and her husband (legal parents) and to place the child under the joint custody of the parents of intent so that they can adopt the children in one year's time, in accordance with Dutch law. The Court granted the application on the ground that it is in the interest of the children that the parents of intent be appointed as their guardians.

### **Russia**

- Rechtbank Arnhem, 20 February 2008, LJN: BC8012 and Rechtbank Arnhem, 19 May 2009, LJN: BI5039: surrogacy was carried out in Russia with the gametes of the intended parents implanted via IVF into the surrogate, who is the mother of the mother of intent (gestational surrogacy). The proceedings are instituted by the *Raad voor de Kinderbescherming* (Child Protection Council) in order to remove parental authority of the surrogate mother and her husband (legal parents) and to place the child under the joint custody of the parents of intent. The Court granted the application on the ground that it is in the interest of the children that the parents of intent be appointed as their guardians. In accordance with Dutch law, the genetic parents filed an application to adopt the children one year after having been designated as guardians. The Court granted their request and orders the adoption of the children by the parents of intent, on the grounds that it is in the best interest of the children to have their filiation established with their genetic parents. During the adoption procedure, the (unmarried) parents of intent agreed to give the children the surname of their father of intent.

Finally, in other international cases of surrogacy, the Dutch courts must usually look into the recognition of foreign birth certificates or into the issuance of travel documents to children. In one case of surrogacy conducted in the United Kingdom however, the action brought before the Dutch courts was to accede to the adoption of the child by the parents of intent.



### **United Kingdom**

- Rechtbank 's-Gravenhage, 11 December 2007, LJN BB9844: surrogacy was carried out in the United Kingdom with the gametes of the intended parents implanted through IVF in the surrogate mother (gestational surrogacy). The father of intent is a Dutch-Austrian national and the intended mother is of Austrian nationality. Although both are resident in the Netherlands, they decided to carry out the surrogacy in the United Kingdom because they did not know anyone in the Netherlands who would have agreed to be surrogate mother. They therefore called upon an English organisation (Childlessness Overcome Through Surrogacy, COTS) that put them in contact with a surrogate mother. The child was born in the United Kingdom and received British citizenship. The parents of intention file a procedure of adoption in the Netherlands. The Court states that article 2 of the *Wobka* (*Wet opening Therefore buitenlandse pleegkinderen ter adoptie*), applicable to the adoption of foreign children, requires that prospective adoptive parents must obtain the approval of the Minister of Justice (*beginseltoestemming*) to be able to adopt a foreign child. In this case, such an agreement was lacking. However, the Court held that by adopting the *Wobka*, the Dutch legislation did not intend to target children conceived with the genetic material of the adoptive parents. This is why candidates Dutch law shall apply to an application for adoption sought as a result of an IVF surrogacy, and not the *Wobka*. As such, the Court grants adoption to the parents of intent after verifying that the surrogacy had been carried out in accordance with English law and met the conditions laid down by Dutch law, namely that it was not a commercial surrogacy and that the surrogacy complied with the guidelines laid down by the Society for Obstetrics and Gynaecology (medical indications, age of the surrogate mother and the mother of intent, surrogate mother having already given birth to a living child, counseling, etc.). The name of the child, such as shown on the British birth certificate (family name of the parents of intent) was recognized by the Dutch authorities in accordance with the law applicable in respect of names (art. 1 *Wet conflictenrecht namen* conflict rule).

### **United States**

- Rechtbank 's-Gravenhage, 23 November 2009 (328511/FA RK 09-317), unreleased<sup>621</sup>: surrogacy was carried out in California between a same-sex Dutch-American couple residing in the United States and a US national. The Californian birth certificates only mention the identity of the two fathers of intent as being the legal parents. Back in the Netherlands, the Dutch courts have refused to recognize the paternity of the two fathers on the grounds that the Californian authorities had not established the maternity of the woman who gave birth to the children.

### **Ukraine**

- Rechtbank 's-Gravenhage (Interlocutory proceedings - *Voorzieningenrechter*), 9 November 2010, LJN: BP 3764: surrogacy was carried out in Ukraine with the gametes of the Dutch parents of intent implanted through IVF into the Ukrainian surrogate mother (gestational surrogacy). The action filed for interim proceedings concerns the issuance of travel documents to the children. This is rejected by the Dutch Foreign Ministry on the grounds that the surrogacy done in Ukraine has of commercial nature, which is contrary to the Dutch public order. The Court in interlocutory proceedings sentences the Dutch State to issue the travel

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<sup>621</sup> Cited by J.S. KEES, *European private international law on legal parenting?* Thoughts on a European instrument implementing the principle of mutual recognition in legal parenting, 2010, no. 7.2.1.3.3, p. 238, available at: <http://arno.unimaas.nl/show.cgi?fid=19540>

documents to the children after finding out that the parents of intent already have a "family life" with the children under article 8 of the ECHR and that it is in the interest of the parents and children that this "family life" is respected.

### **India**

- Rechtbank Haarlem (Interlocutory proceedings - *Voorzieningenrechter*), 10 January 2011, LJN: BP0426: surrogacy was done in India between an Indian surrogate and a Dutch same-sex couple, with an egg donation from an anonymous Indian woman. The ovum is fertilized by the sperm of one of the fathers of intent and is then implemented into the Indian surrogate mother (gestational surrogacy). The birth certificate of the child mentions the name of the surrogate mother and the name of the biological father. The action filed for interim proceedings concerns the issuance of travel documents to the child. The Dutch Foreign Ministry refused on the ground that the child does not have the Dutch nationality, as no relationship of parentage exists between the biological father and him. According to the Ministry of Foreign Affairs, the fact that the biological father's name appears on the birth certificate does not mean that he should be regarded as the father of the child in Dutch law. The Court in interlocutory proceedings sentences the Dutch State to issue the travel documents to the child after establishing that the father of intent already has a "family life" with the child and that as such, he is entitled to the respect of article 8 of the ECHR. The Court also notes that it is likely that, as a result of this interim judgment, the filiation of the child will be established with the father of intent, which will allow the child to receive a Dutch passport. After balancing the various interests at stake, the Court finds that in the present case, the interests of the child and of the father of intent must take precedence over the interests of the Dutch state.
- Rechtbank 's-Gravenhage, 24 October 2011, LJN: BU 3627: surrogacy was conducted in India between an Indian surrogate mother, a Dutch father of intent and an Irish mother of intent. The parents of intent are residing in the United Arab Emirates. Surrogacy was conducted with anonymous egg donation and sperm from the father of intent. The surrogate mother is not the genetic mother (gestational surrogacy). The Indian birth certificates mention the parents of intent as the legal parents. Back in the Netherlands, the mother of intent seeks to transcribe the Indian birth certificates in the Dutch civil registry. The Registrar refuses the transcription on the grounds that the mother of intent cannot be mentioned in the birth certificate as being the legal mother since she did not give birth to the child. The action brought by the parents of intent aims at sentencing the Registrar to record the birth in the registers of civil status, to establish the Dutch nationality of the child and the legal parentage of the parents of intent. The Court confirmed that it had jurisdiction over the dispute on the grounds that the mother of intent and the child reside in the Netherlands, that the father of intent has the Dutch nationality, and that the child will receive Dutch citizenship due to the establishment of the paternal filiation by the Court (art. 3 *Wetboek van Burgerlijke Rechtsvordering*). In accordance with the rule of conflict of laws on filiation, the Indian law shall apply to the determination of parentage of the surrogate mother to the child (art. 3 *Wet conflictenrecht afstamming*<sup>622</sup> - WCA: the determination of the relationship between a woman and a child born out of wedlock is determined by this woman's national law). According to Indian law, when a child is born of a surrogacy with anonymous egg donation fertilized by the sperm of the father of intent, the surrogate mother and the father of intent are the legal parents of the child. As a result, the Indian birth certificate mentioning the parents of intent as being both the genetic and the child's legal parents is

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<sup>622</sup> Parentage (Conflict of Laws) Act.

contrary to the Indian law and to reality and therefore contrary to public order as far as, in Dutch law, the legal mother is the woman who gives birth to a child or who adopted it (art. 1: 198 DCC). This legal provision must be regarded as a fundamental principle of the legal Dutch order. The mother of intent must use the adoption procedure, as long as the Dutch legislation offers no alternative to establish a relationship between a mother of intent and a child born out of surrogacy. The Court therefore confirms the position of the Registrar and refuses to sentence him to transcribe the birth certificate in the Dutch civil registry.

To determine the paternal filiation from the father of intent, the Court applies the Dutch law, designated by the rule of conflict of laws on filiation from the moment the child's usual residence is located in the Netherlands and has spent most of his life there (art. 6 WCA: determination of paternal filiation is governed by the law of the residence of the child, in the absence of a common nationality between the father and the mother and failing for the father and the mother to have a common usual residence). In accordance with Dutch law, the paternal filiation is established if the father is the progenitor of the child (art. 1: 207, 1<sup>st</sup> § DCC). In this case, when the child was conceived by IVF, the father of intent is the genetic father of the child and not its progenitor. Having established that a "sperm donor" cannot be described as "progenitor" within the remit of the Dutch law, the tribunal refers to the case-law of the European Court of Human Rights relating to article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms and notes that the European Court ignores the distinction made by the Dutch legislator between a "progenitor father" and a "sperm donor father". What matters is the combination of blood ties and the concrete circumstances of a family life. The Court states that, under the concrete circumstances of the case, the biological father has a "family life" with the child and that as such, he is entitled to the protection afforded by article 8 of the ECHR. As such, the Court admits to establish the paternal filiation of the father of intent. In accordance with article 1: 5, § 2 of the Dutch Civil Code, the child bears the surname of the father of intent, chosen by the surrogate mother and the father of intent who are the legal parents of the child.

With regard to parental authority and the temporary guardianship, the Dutch Court confirmed that it had jurisdiction over the case according to article 8 of the Brussels II *bis* regulation, on the grounds that the child has its usual residence on Dutch territory. As the child usually resides in the Netherlands, Dutch law is applicable in accordance with article 16 of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children. According to Dutch law, the surrogate mother has exclusive parental authority over the child. Insofar as the paternal filiation from the father of intent will be established only after a period of three months following the decision by the Court, provided that an appeal is not lodged against this decision, he may not be vested with parental authority over the child. The case is postponed to a later date to allow the Court to rule on parental authority and the temporary guardianship.

- Haarlem Rechtbank, 28 November 2012, LJN: BY4231: surrogacy has been performed in India between an Indian surrogate mother and Dutch parents of intent, who entered into a partnership registered in the Netherlands. Surrogacy was conducted using an anonymous egg donation. The ovum is fertilized by the sperm of the father of intent and is then implemented in the Indian surrogate mother (gestational surrogacy). The Indian birth certificate mentions the names of the surrogate mother and of the biological father as the child's legal parents. Shortly after birth, the father of intent obtained a judgment from an Indian Court stating that he is the child's legal father. The father of intent then asked his

Consulate in Mumbai for a Dutch passport for the child. When the Consulate refused to issue a passport, he filed an interlocutory application. On 10 January 2011, the Judge sentenced the Mumbai Consulate to issue a travel document to the child. Once the child arrived on Dutch territory, the biological father filed a declaration of paternity (November 2011). The juvenile court subsequently appointed the father of intent as guardian of the child. In May 2012, a Dutch passport was issued to the child. The proceedings introduced by the father of intent before the Court of first instance aim to establish that the Consulate wrongly refused to issue a Dutch passport to the child. The Court refuses to follow the father of intent and confirms the position of the Consulate as it considers that the refusal to issue the passport was based on proper reasons since no parent-child relationship existed between the child and the father of intent at the time of the passport application. The father of intent indeed declared his paternity of the child upon the child's arrival on the Dutch territory. In the Court's view, filiation with the father of intent was therefore established by this recognition of paternity and not by the Indian birth certificate mentioning his name. Furthermore, referring to a report by the International Law Institute (IJI: Internationaal Juridisch Instituut)<sup>623</sup> according to which Indian law cannot establish paternity by law, the Court refuses to acknowledge the relationship established by the Indian Court. According to the same report, the mention of the name of the father of intent in the Indian birth certificate doesn't establish with certainty his filiation with respect to the child.

2. Analysis of the case law identified above demonstrates that the Dutch courts are faced with very diverse issues in surrogacy cases.

In internal affairs, the Courts must often decide on the paternity claims by the father of intent or on cases challenging the legal father's paternity. Many cases concern the revocation of the parental authority of the legal parents followed by the designation of the parents of intent as tutors. In this respect, certain decisions classified under the heading of International Affairs (because the surrogacy was carried out abroad) actually concern questions of internal law as the action does concern the recognition of a foreign birth certificate but the revocation of the legal parents' parental authority to entrust the guardianship of the children to the parents of intent<sup>624</sup>.

In international surrogacy cases, the Dutch Courts had to decide on the issuance of travel documents<sup>625</sup>, the issuance of a Dutch passport<sup>626</sup>, the recognition of foreign birth certificates<sup>627</sup> or even the adoption of a child born out of high-technology surrogacy<sup>628</sup>.

The courts must also address other issues arising from the main action, such as that of the citizenship of the child<sup>629</sup> or the allocation of a surname<sup>630</sup>.

<sup>623</sup> The decision of 28 novembre 2012 refers to a "report by the International Law Institute of the Hague from 27 March 2011", but does not provide a specific reference.

<sup>624</sup> See for example: Rechtbank Alkmaar, 29 October, 2008 LJN: BG8903 (surrogate motherhood in Belgium), Rechtbank Arnhem, 20 February 2008, LJN: BC8012 and Rechtbank Arnhem, 19 May 2009, LJN: BI5039 (surrogacy carried out in Russia).

<sup>625</sup> Rechtbank 's-Gravenhage (Interlocutory proceedings - *Voorzieningenrechter*), 9 November 2010, LJN: BP 3764 and Rechtbank Haarlem (Interlocutory proceedings - *Voorzieningenrechter*), 10 January 2011, LJN: BP0426.

<sup>626</sup> Rechtbank Haarlem, 28 November 2012, LJN: BY4231.

<sup>627</sup> Rechtbank 's-Gravenhage, 24 October 2011, LJN: BU 3627 and Rechtbank 's-Gravenhage, 23 November 2009 (328511/FA RK 09-317), unreleased (cited by J.S. KEES, *European private international law on legal parenting?*) *Thoughts on a European instrument implementing the principle of mutual recognition in legal parenting*, 2010, no. 7.2.1.3.3, p. 238, available at: <http://arno.unimaas.nl/show.cgi?fid=19540>).

<sup>628</sup> Rechtbank 's-Gravenhage, 11 December 2007, LJN BB9844.

<sup>629</sup> Rechtbank 's-Gravenhage, 24 October 2011, LJN: BU 3627: in this case, the assignment of the Dutch citizenship to the child depended on the establishment of paternal filiation from the father of intent. However, it could only be established after a period of three months following the Court decision, and provided that the

Under no circumstances do the proceedings aim at request the enforcement of the contract, since the doctrine seems to consider that the clauses relating to the core obligations of the contract – i.e. the surrogate mother's obligation to hand over the child to the parents of intent – are null and void. The question remains open for other clauses, such as those relating to the parents of intent's coverage of costs related to the pregnancy and childbirth. No proceedings have been filed to date relating to the implementation of such clauses.

3. Most of the decisions on surrogacy have been made by Civil Courts ruling on the merits or, for interim measures when the action is aimed at sentencing the Dutch state to issue travel documents before ruling on the merits of the parent-child relationship.

Some cases however gave rise to criminal proceedings. In the case of *Baby J.*, a Belgian mother sold the child she was carrying to Dutch parents of intent for an amount of 7.500 EUR (see Belgian report). The Dutch couple was prosecuted by the public prosecutor and was sentenced by the Dutch courts to an 8 months prison sentence, 240-hours of community service and a fine of 1000 EUR with a two-years suspended sentence for forgery and illegal adoption (because they had not received written permission of the Minister of Justice prior to the arrival of the child in the Netherlands, which is contrary to article 2 of the law on the adoption of children from abroad / *Wet opnemng buitenlandse kinderen ter adoptie*)<sup>631</sup>.

Finally, a case was conducted on matters of social security: the mother of intent was seeking pregnancy and childbirth allowances. However, the tribunal refused to grant her request, stating that the relevant legislation applied to the legal mother, being the woman who gave birth to children<sup>632</sup>.

#### 4. *Best interest of the child*

The interest of the child is taken into account in cases concerning revocation of custody of the surrogate mother and her husband and the designation of the parents of intent as tutors. On several occasions, the Dutch courts thus felt that it was in the interest of the children to be entrusted to the parents of intent's joint guardianship to then be able to be adopted by the latter<sup>633</sup>. In principle, this procedure for revocation of parental authority is a measure for the protection of children when parents are no longer able to care properly for their children, which is the reason why only the Child Protection Council may initiate the legal action, and not the parents of intent<sup>634</sup>. In the absence of a more

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judgment was not appealed. In the decision, the Court establishes however that it is very likely that the child will receive Dutch citizenship, considering that the filiation from the Dutch father of intent was recognised.

<sup>630</sup> Rechtbank 's-Gravenhage, 24 October 2011, LJN: BU 3627: in this case, the surname of the father of intent was awarded to the child, in accordance with article 1: 5, § 2 of the Dutch Civil Code, which states that the name should be chosen by the legal parents, in this case by the Indian surrogate mother and the Dutch father of intent. See also Rechtbank Arnhem, 19 May 2009, LJN: BI5039: under the procedure for the adoption of children born of surrogacy, the parents of intent agreed to give the children the surname of the father of intent; and Rechtbank 's-Gravenhage, 11 December 2007, LJN BB9844: the name of the child, such as shown on the English birth certificate (family name of the parents of intent) was recognized by the Dutch authorities under the rules of conflict of laws on names (art. 1 *Wet conflictenrecht namen*).

<sup>631</sup> Rechtbank Zwolle, 14 July 2011, LJN: BR1608 (judgment condemning the woman) and LJN: BR1615 (judgment condemning the man).

<sup>632</sup> Centrale Raad van Beroep, 7 December 2011, LJN: BU7192.

<sup>633</sup> Rechtbank Arnhem, 20 February 2008, LJN: BC8012 and Rechtbank Arnhem, 19 May 2009, LJN: BI5039: "The Court grants the adoption in the apparent interest of the minors. It is in the interest of the minors that they are allowed a family relationship with their biological parents"; and Rechtbank Alkmaar, 29 October 2008: "The Court considers that seeing the particular circumstances in which the [child] finds itself, and the associated inaptitude and/or incapacity of the surrogate parents, the appointment of the parents of intent as guardians of the [child] will be the best guarantee of upholding the interests of [child]. The Court considers that the following provision is in the best interest of the child [child]". See also Rechtbank 's-Hertogenbosch, 18 August 2011, LJN: BR 5334.

<sup>634</sup> M. J. VONK, « Netherlands: Maternity for another : a double dutch approach », in *Gestation pour autrui : Surrogate motherhood* (dir. F. MONÉGER), coll. Colloques, vol. 14, Proceedings of the 8<sup>th</sup> Congres of



suitable procedure for these special situations, the procedure is also used in surrogacy cases. In these cases, the Courts deprive the surrogate parents of parental authority on the ground that they are not able to care properly for the child, whom they did not conceive for themselves.

The Dutch courts also refer to the best interest of the child when they put forward the existence of a "family life" between parents of intent and the child (see below). These two concepts are then referred to concurrently by the courts to establish or recognize the parenthood of the parents of intent.

### **5. Family life**

The Dutch Courts refer to the concept of "family life" to establish<sup>635</sup> or recognize<sup>636</sup> the parentage of the father of intent, also the biological father, in respect of a child born out of surrogacy, on the grounds that a biological father is entitled to the protection of the "family life" he has with his child under article 8 of the ECHR, no matter the circumstances of the pregnancy. In other words, the Dutch jurisprudence refers to article 8 of the ECHR and the concept of "family life" to disregard the distinction made in Dutch law between a "progenitor father" and a "sperm donor father", according to which the paternal filiation may only be established with the man who "created" the child (art. 1:207 DCC) and not with the man who only gave his semen. The Dutch courts have found that the European Court was unaware of this distinction. What matters is the combination of blood ties and concrete circumstances that there is a family life, which the Courts check on basis of factual circumstances<sup>637</sup>.

The Dutch courts also refer to the ECHR's article 8 concept of "family life" to sentence the Dutch state to issue travel documents to children born of a surrogacy in Ukraine<sup>638</sup> and India<sup>639</sup> as soon as they discover that the parents of intent have already a family life with the child.

Finally, in the case of *Donna*, the Dutch courts decided to let Donna stay in the home of the parents of intent on the grounds that a "family life" – as defined in article 8 of the ECHR – existed between the parents and Donna, who had been living in the home of the Dutch couple since she was three days old<sup>640</sup>.

### **6. Egg donation and genetic reality**

The fact that the surrogacy was carried out through egg donation doesn't seem to change the reasoning of the Courts, either because the actions concern the establishment of the mother of intent's maternal filiation (the parents of intent are a

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international comparative law, held in Washington DC from 25 to 31 July 2010, Paris, Society of Comparative Legislation, 2011, p. 212.

<sup>635</sup> Rechtbank 's-Gravenhage, June 21, 2010, LJN: BN1309.

<sup>636</sup> Rechtbank 's-Gravenhage, 14 September 2009, LJN: BK1197 (surrogate motherhood in the Netherlands with anonymous delivery in France) and Rechtbank 's-Gravenhage, 24 October 2011, LJN: BU 3627 (surrogate motherhood in India).

<sup>637</sup> Rechtbank 's-Gravenhage, 14 September 2009, LJN: BK1197: "Under this article [art. 8 ECHR], the biological father who has a "family life" with his child has the right on the "right to protection of family life", irrespective of the way in which the pregnancy was incurred. The Court must thus determine whether in the present case there are sufficient concrete circumstances on the basis of which the existence of "family life" can be assumed. Considering that the minor was included in the family of the man and [Mr C] after his birth and that they have since then taken on the care and upbringing of the minor, the Court considers that it is established that there is a "family life" between the man and the minor. Considering that the man is the biological father and that there is "family life", the Court is of the opinion that the man in this case should be equated with the parent, so that the request of the "particular guardian" ("bijzondere curator") can be received".

<sup>638</sup> Rechtbank 's-Gravenhage, 9 November 2010, LJN: BP 3764.

<sup>639</sup> Rechtbank Haarlem (Interlocutory proceedings - *Voorzieningenrechter*), 10 January 2011, LJN: BP0426.

<sup>640</sup> Rechtbank Utrecht, 26 October 2005, LJN: AU4934.



homosexual couple<sup>641</sup>), or because, in any event, the legal mother is the woman who gives birth regardless of whether she is the genetic mother of the child or not<sup>642</sup>. The Dutch Courts never accept to recognize the parentage of the mother of intent (even if she is the genetic mother), as they consider the rule recognising filiation to the woman who gives birth as being of public order (see below). To establish filiation, the mother of intent must always introduce a procedure of adoption.

However, the fact that the mother of intent is also the genetic mother of the child seems to have been taken into account in a case where the parents of intent did not follow the rules applicable to a procedure for adoption of a foreign child. The Court indeed held that the Dutch law did not intend to apply the law on the adoption of a foreign child (*Wet opnemng buitenlandse pleegkinderen ter adoptie*) when this child is conceived with the genetic material of the parents of intent. The Court therefore granted the adoption despite the fact that the parents did not respect the procedure, namely that they had not obtained the agreement of the Minister of Justice<sup>643</sup>.

7. As explained above, the mother of intent may adopt a child born out of surrogacy provided that the legal parents or "surrogate parents" have been deprived of their parental authority and the child has been placed under her supervision for at least a year. If she meets the other conditions set out by the law, the Court will confirm the adoption.

#### ***8. The establishment of parentage in the Dutch legal order following a surrogacy conducted abroad***

When surrogacy presents a cross-border aspect, the Dutch courts apply their rules of private international law to decide of the parent-child relationship established abroad in the Dutch legal order.

Two different scenarios should however be considered: on the one hand, where the parents of intents' parentage is established in accordance with the parentage law of the country where the child is born, either directly in the birth certificate or as a result of a judicial decision; on the other hand, where the parentage of the parents of intent is the result of an adoption pronounced abroad. These two situations must be distinguished because the rules for determining the law applicable to the recognition of parentage will be different.

In the first case, Dutch private international law rules on filiation are applicable. These are codified in the Parentage (Conflict of Laws) Act (*Wet conflictenrecht afstamming*). Where specific private international law rules on surrogacy are missing, the general rules are used. With regards to parentage, section 10 of the Parentage (Conflict of Laws) Act establishes the rules with regards to the recognition of a legal act (e.g. the paternity recognition made abroad for a child born to a surrogate mother) or of a legal fact (e.g. a legal fact established by a foreign birth certificate). The Dutch civil registry officer will thus have to check whether the parent-child relationship mentioned in a foreign filiation act was validly established under foreign law and if the Dutch public order has not been violated. According to article 10(2) of the Parentage (Conflict of Laws) Act, a foreign act establishing a recognition of paternity is contrary to Dutch public order if, in particular, this recognition was made by a Dutchman who did not have the right to recognize the

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<sup>641</sup> See e.g., Rechtbank 's-Hertogenbosch, 18 August 2011, LJN: BR5334: the fact that surrogacy has been completed with an egg donation had no impact on the procedure that was designed to remove parental authority from the legal parents and invest the parents of intent of a guardianship over the child; and Rechtbank Haarlem, 10 January 2011, LJN: BP0426: the action was aimed at the issuance of travel documents to a child born of a surrogacy acrried out in India, in which the parents of intent are a homosexual couple, which explains the fact that the Court is not attached to the fact that there was an egg donation.

<sup>642</sup> Rechtbank 's-Gravenhage, 24 October 2011, LJN: BU 3627.

<sup>643</sup> Rechtbank 's-Gravenhage, 11 December 2007, LJN BB9844.

child according to Dutch law (Art. 1: 204 (1) (e) ACS: conditions for the recognition of paternity). If the parent-child relationship is the result of a Court order, the Dutch civil registry officer must ensure that the conditions laid down by article 9 of the Parentage (Conflict of Laws) Act, including the rule on the Dutch public order exception, have been respected<sup>644</sup>.

In the second case, three instruments are likely to apply: the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, the rules of Dutch private international law on recognition of adoptions (*Wet conflictenrecht adoptie*) and the Dutch law regulating the adoption of foreign children (*Wet opneming buitenlandse pleegkinderen ter adoptie* or *Wobka*)<sup>645</sup>.

One of the decisions listed above is used to illustrate the first scenario. Seized of a request for transcript of Indian birth certificates establishing filiation of the parents of intent, the Court examined its jurisdiction and sought the law applicable under the rules of Dutch private international law. It declared itself competent after finding that the mother of intent and the child reside in the Netherlands, that the father of intent has the Dutch nationality and that the child will most likely receive Dutch citizenship if filiation from the father of intent is established (art. 3 *Wetboek van Burgelijke Rechtsvordering*). Next, it determines that the establishment of the maternal filiation is governed by Indian law, as it is the law of the surrogate mother's nationality (art. 3 *Wet conflictenrecht afstamming, WCA*) while the establishment of paternal filiation is governed by Dutch law, being the law of the State where the child is usually resident and where he has spent most of his life (art. 6 *Wet conflictenrecht afstamming, WCA*)<sup>646</sup>.

The second scenario can be illustrated by the case of a surrogacy carried out in the United Kingdom. The action brought before the Dutch Courts by the parents of intent aimed to see pronounced the adoption of a child born out of IVF surrogacy in the United Kingdom. In this case, the parents should ask for the consent of the Minister of Justice to adopt the child, in accordance with the rules prescribed by the Dutch law regulating the adoption of foreign children (*Wet opneming buitenlandse pleegkinderen ter adoptie* or *Wobka*). However, the Court considered that the situation was outside of the scope of the *Wobka* as the child was conceived with the genetic material of the parents of intent<sup>647</sup>.

### 9. Public order exception

The Dutch courts consider that foreign laws that allow the establishment of maternal parentage towards the mother of intent who has not given birth to the child are contrary to the Dutch public order. In the case of a surrogacy conducted in India, in which the name of the mother of intent was included in the Indian birth certificate, the Court thus stated that the rule according to which the mother of a child is the one that gave birth to this child (art. 1:198 CCD) should be considered as a legal and social principle that is fundamental to Dutch society. As a result, the Court refused to transcribe the Indian birth certificate in the register of births<sup>648</sup>. The Dutch Courts likewise refuse to recognise foreign (Californian) birth certificates that mention the identity of two fathers of intent (homosexual couple) as being the parents of the child without mentioning the identity of

<sup>644</sup> I. CURRY-SUMNER and M.J. VONK, "National and International Surrogacy: an Odyssey", in *The International Survey of Family Law*, 2011, Edition (ed. B. ATKIN), Bristol, Family Law, 2011, pp. 272 – 277.

<sup>645</sup> M. J. VONK, « Netherlands: Maternity for another : a double dutch approach », in *Gestation pour autrui : Surrogate motherhood* (dir. F. MONÉGER), coll. Colloques, vol. 14, Proceedings of the 8<sup>th</sup> Congress of international comparative law, held in Washington DC from 25 to 31 July 2010, Paris, Society of Comparative Legislation, 2011, p. 215.

<sup>646</sup> Rechtbank 's-Gravenhage, 24 October 2011, LJN: BU3627.

<sup>647</sup> Rechtbank 's-Gravenhage, 11 December 2007, LJN: BB9844.

<sup>648</sup> Rechtbank 's-Gravenhage, 24 October 2011, LJN: BU 362: "In the view of the Court, this rule reflects principles of legal and social nature that are considered as fundamental in the Dutch society".

the surrogate mother, on the grounds that the rule *mater semper certa* is of public order<sup>649</sup>.

The Courts reason in the same way when it turns out that the birth certificate does not mention the name of the mother who gave birth. Thus, in case of a surrogacy that involved an anonymous birth in France ("accouchement sous X"), the Court held that the absence of the name of the mother in the birth certificate was contrary to the Dutch public order, which is the reason why it refused to sentence the civil status officer to transcribe the deed in the civil registry<sup>650</sup>. The Court decides on the basis of the Convention on the Rights of the Child, which sets out that a child has the right to know his parents and be cared for by them, whenever possible, and specifies that article 1:198 of the Dutch Civil Code whereby the mother is the woman who gives birth to a child is a fundamental public order principle of family law.

**10.** Judges use the terms of "draagmoederschap" to talk about surrogacy and call the parents of intent "wensmoeder" (mother of intent) and "wensvader" (father of intent) while the surrogate mother and her husband are sometimes referred to as "carrying parents" ("draagouders").

**11.** Surrogacy cases provide an opportunity for judges to point out that, at present, Dutch law does not allow parents of intent to establish a direct relationship with a child born of surrogacy and that they have no choice but to resort to adoption<sup>651</sup>. In none of the cases identified in this report do the Courts however suggest that Parliament should adopt a law governing the civil aspects of surrogacy. Some studies have on the other hand denounced the period of one year during which the parents of intent must wait before they can introduce a procedure of adoption, as they view this time laps as a source of uncertainty and anxiety<sup>652</sup>.

**12.** When ruling surrogacy cases, it seems that the Courts exclusively refer to similar case law and do not draw on cases in other areas of the law, such as adoption or IVF cases.

**13.** The Dutch legislation represses the surrogacy business. As such, the Dutch Prosecutors continue to sue the parents of intent when it turns out that they have "bought" the child. This was the case in the case of *Baby J* where the Dutch couple was

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<sup>649</sup> Rechtbank 's-Gravenhage, 23 November 2009 (328511/FA RK 09-317), unreleased (cited by J.S. KEES, *European private international law on legal parenting?*) *Thoughts on a European instrument implementing the principle of mutual recognition in legal parenting*, 2010, no. 7.2.1.3.3, p. 238, available at: <http://arno.unimaas.nl/show.cgi?fid=19540>) : "The judicial decision from the Superior Court of California of 15th April 2008 cannot be recognised since this is contrary to Dutch public policy, bearing in mind the aforementioned fundamental rule of family law (*mater semper certa* is) and the fact that the judicial decision was ordered without the legal mother first being determined"(translated by I. CURRY-SUMNER and M.J. VONK, "National and International Surrogacy: an Odyssey", in *The International Survey of Family Law*, 2011, Edition (ed. B. ATKIN), Bristol, Family Law, 2011, p. 279).

<sup>650</sup> Rechtbank 's-Gravenhage, 14 September 2009, LJN: BK1197: "Registration of the French birth certificate conflicts with the Dutch public order". In a similar sense, see Rechtbank 's-Gravenhage, 23 November 2009 (328511/FA RK 09-317), unreleased (cited by J.S. KEES, *European private international law on legal parenting?*) *Thoughts on a European instrument implementing the principle of mutual recognition in legal parenting*, 2010, no. 7.2.1.3.3, p. 238, available at: <http://arno.unimaas.nl/show.cgi?fid=19540>) : the Dutch courts have refused to recognize California birth certificates on the grounds that it did not establish the maternity of women who have given birth to children.

<sup>651</sup> Rechtbank 's-Gravenhage, 24 October 2011, LJN: BU 3627: "If the Dutch legislation does not provide other opportunities in that regard, the woman can not be recognised as the legal mother of the minor and the woman should, in the opinion of the Court, adopt the minor, to be able to register as a legal mother in the civil status registries".

<sup>652</sup> S. DERMOUT, H. VAN DE WIEL, P. HEINTZ, K. JANSEN and W. ANKUM, "Non-commercial surrogacy: year of patient account management in the first Dutch Centre for IVF Surrogacy from 1997 to 2004", *Human Reproduction*, 2010, vol. 25, no. 2, p.448

sentenced for having purchased a child to a mother and her husband (the child's biological parents) for an amount of 7.500 EUR<sup>653</sup>.

In international cases, the Dutch courts don't seem to worry about the financial aspects of the agreement. In a case concerning a case of surrogacy in India, Dutch courts agreed that it was not their responsibility to investigate the commercial nature of the agreement; since a child was born, the main objective was to take decisions in its interest<sup>654</sup>. In another case, the courts sentenced the Dutch state to issue the required travel documents despite the commercial nature of the agreement, considering the need to protect the privacy and family life of the people involved on the basis that they already had a "family life" protected by article 8 of the ECHR (the Dutch State was refusing to issue travel documents on the basis that the surrogacy in Ukraine was of a commercial nature and was therefore contrary to Dutch public order)<sup>655</sup>.

**14.** The Dutch courts appear to have some flexibility in the handling of surrogacy cases, as the absence of specific legislation governing the civil aspects of surrogacy in domestic law has led judges to "tinker" legal solutions from laws that were not quite suitable for surrogacy. Thus, the procedure for revocation of parental authority is used to remove parental authority from the "surrogate parents" in order to be able to vest the parents of intent with the guardianship of a child born out of surrogacy, which is a necessary step before starting an adoption procedure.

On the other hand, the courts largely use of the concepts of "best interest of the child" and "family life" to establish or recognize the relationship between the children and the parents of intent. The judges, however, may as well consider that it is not in the interest of the child to see his filiation established towards parents that he is not genetically related to. As long as no specific content is given to the concept of the best interest of the child, judges that refer to it have a lot of power to decide with whom the parentage should be established.

At the international level, the lack of specific provision on surrogacy in private international law also seems to allow the courts some room for the ruling on legal situations decided abroad.

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<sup>653</sup> Rechtbank Zwolle, 14 July 2011, LJN: BR1608 (judgment condemning the woman) and LJN: BR1615 (judgment condemning the man).

<sup>654</sup> Rechtbank 's-Gravenhage, 24 October 2011, LJN: BU 3627: "The court sees no reason to involve in its judgment the question of whether this is commercial surrogacy. The fact is that the minor exists and that the Court considers that the best interest of the minor should inform the decision".

<sup>655</sup> Rechtbank 's-Gravenhage, 9 November 2010, LJN: BP3764.

## 6.8. ROMANIA

### §1. Legal framework

#### 1.1. Legislation in force

- *European Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention for human rights)<sup>656</sup>, Rome, November 4<sup>th</sup> 1950, ratified by *Law no 30/1994* dated May 18<sup>th</sup> 1994
- *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine* (Convention on Human Rights and Biomedicine)<sup>657</sup>, Oviedo, April 4<sup>th</sup> 1997, ratified by *Law no 17/2001* dated January 22<sup>nd</sup> 1997
- *Constitution of Romania*
- *New Civil Code*, in force since October 1<sup>st</sup> 2011<sup>658</sup> as further modified and completed<sup>659</sup>
- *Law on patient rights no 46/2003* dated January 21<sup>st</sup> 2003 as further modified and completed
- *Law on child's rights protection no 272/2004* dated June 21<sup>st</sup> 2006 as further modified and completed
- *Law on adoption no 273/2004* dated June 21<sup>st</sup> 2006 as further modified and completed
- *Law on health sector reform no 95/2006* dated April 14<sup>th</sup> 2006 as further modified and completed
- *Rules of the Supervising Commission for transplants from living donors*<sup>660</sup>

#### 1.2. Bills

- *Bill for assisted reproduction with third-party donation* (PL-x nr. 63/2012), adopted by the 1<sup>st</sup> Chamber of Romanian Parliament on April 4<sup>th</sup> 2012)

#### 1.3. General overview

Presently, the regime of surrogacy is not expressly regulated by the Romanian legislation in force. Nevertheless, the surrogacy issue could be indirectly looked at via medically assisted reproduction. This subject matter was initially regulated in 1998 (*Law no 2/1998*<sup>661</sup> on human organs and tissue transplantation), but at that time the human genetic material or embryo transplantation<sup>662</sup> were not included in such legislation. *Law no 95/2006* broadened the field of application of the previously mentioned legislation, without directly including medically assisted reproduction.

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<sup>656</sup> Hereafter ECHR.

<sup>657</sup> Hereafter CHRB .

<sup>658</sup> Hereafter C.civ.

<sup>659</sup> Translated into French by *Jurisclope* Institute, Poitiers, France.

<sup>660</sup> Approved by the Ministry of Health Order No 1076/2006, issued on September 5<sup>th</sup> 2006.

<sup>661</sup> Abrogated by *Law no. 95/2006*.

<sup>662</sup> *Law no 2/1998*, Art.1 (3) provided the scope of this Law: replacement of compromised cells and tissues with healthy ones.

On another note, the *Law on patient rights no 46/2003* includes a chapter on sexual and reproductive rights, without taking into account the specific legal issues concerning assisted reproduction. Also, the *Rules of the Supervising Commission for transplants from living donors* of September 5<sup>th</sup> 2006 included human sperm transplant, amongst others, in the scope of the above-mentioned Commission activity.

In Romanian legislation there is no specific rule for establishing the filiation of children born from a surrogate mother. The legislation on adoption<sup>663</sup> neither takes into account the medical techniques of human reproduction, nor the issue of surrogacy. The New Civil Code briefly mentions the assisted reproduction with third-party donation in Part II (Family), Title III (Relatedness), Chapter II, Section II, art. 441-447- Filiation. This issue is to be further regulated by a specific legislation<sup>664</sup>, but at present the production of such legislation has been postponed for an undefined period.

A *Bill on healthy reproduction and medically assisted reproduction* was permanently rejected on June 9<sup>th</sup> 2006, after several articles were judged as unconstitutional<sup>665</sup>. Another *Bill on medically assisted reproduction with third-party donation* was recently adopted by one of the two Chambers of the Romanian Parliament.<sup>666</sup> As the title of the Bill indicates, the scope of this law is more limited compared to the previous Bill.

The Bill (currently suspended) does not mention surrogacy at all, contrary to the previous Bill (declared partly unconstitutional and permanently rejected by Parliament).

The *New Criminal Code* didn't adopt the chapter « *Crimes and public offenses in genetic manipulation* », provided by a previous *Draft version* of 2004.<sup>667</sup> No other mention is made concerning the crimes and the public offenses in the specific field of *medically assisted reproduction*.

## **§2. Assisted reproduction with third-party donation**

The *New Civil Code* mentions *assisted reproduction with third-party donation* without providing too many details on the meaning of these terms. At first sight, the meaning of the concept of "third-party donation" doesn't seem to refer to the surrogate mother. Moreover, the systemic interpretation of the *New Civil Code* and the whole legislative evolution cannot offer a clear legal solution to the issue of surrogacy.

Nevertheless, the obvious aim of the provisions concerning assisted reproduction is to give legal consequences of all *in vitro* fertilisation techniques, which technically not only allow artificial insemination, but also the transfer of embryos. This would be a reason that could justify a broad interpretation of the concept of "third-party donation" to include surrogacy in the scope of the future legislation announced by Art. 447 *C.civ.*

### **2.1. Who are the "parents" (of intent)?**

Art. 441 (3) *C.civ* defines "the parents", as a woman and a man (no mention is made of their marital status) or a single woman. The parents of intent must be able to prove their consent before the start of the medical procedure of reproduction. Their written consent must be authenticated by a solicitor. The legal consequence of this consent is that the father accepts the filiation with a child that is not genetically his (Cf. Art. 444 *C.civ.*).

<sup>663</sup> The adoption was initially regulated by the *Family Code*; the *Family Code* provisions concerning the adoption were abrogated by the G.O. 25/1997 and several modifications have been made since; the legislation in force is *Law no 273/2004*.

<sup>664</sup> Art. 447 *New Civil Code*; the provisions concerning the medically assisted reproduction were inspired by the Civil Code of Québec.

<sup>665</sup> Romanian Constitutional Court, Decision 418/2005 of July 18<sup>th</sup> 1997.

<sup>666</sup> There is no estimated date for the end of the adoption and enforcement procedure.

<sup>667</sup> *Law no 301/2004*, not in force.



This act doesn't replace the formal recognition after the child's birth, in case the parents of intent are not married or do not live together.

If the father of intent is not married with the mother of intent or does not live with her, he is required to submit a double declaration of intent. If the parents of intent are married or live together, there is a presumption of paternity; it can be reversed if the presumed father has not agreed to the insemination (see below).

Art. 442 (2) specifies the situations in which the previously expressed consent has no longer effect: in case of death, petition for divorce, and/or separation of fact after the beginning of the medical proceedings. The consent can be withdrawn at any moment, even in front of the doctor called to provide the medical assistance for the reproduction.

## **2.2. Who can be a "third-party donor"?**

Art. 14 of the *Rules of the Supervising Commission for transplants from living donors* provides that the human sperm used in therapeutic purposes is not submitted to the Commission's approval, but must conform to some principles, such as: the evaluation of the donor's state of health, the evaluation of risks, the stakeholder's consent after complete information, the confidentiality, the interdiction of trade of genetic material. The Commission can keep a close watch on the respect of these principles by a random survey.

## **2.3. Impossibility to assimilate the surrogate mother to a "third-party donor"**

Actually, the meaning of the concept of "third-party donor" used by the *New Civil Code* seems to be limited to the donor of genetic material, which is not always the case of the surrogate mother. Moreover, Art. 441-447 C.civ. expressly refer to a male "donor". Nevertheless, Art. 443 (1) provides that "nobody" can contest a child's filiation for reasons related to assisted reproduction. This article could be interpreted as the recognition of the possibility to have a genetic contribution from a feminine "third-party donor". Yet, Art. 446 C.civ. provides that "the father" has the same rights on a child born as a result of medically assisted reproduction as on a naturally conceived child; there is no similar rule with regard to "the mother".<sup>668</sup>

One of the *Draft versions of the New Civil Code* had literally forbidden the "surrogacy agreement"<sup>669</sup>. This ban has been eliminated from the Code in force, which neither forbids nor allows this kind of agreement. Still, the systemic interpretation of all provisions related to assisted reproduction doesn't offer consistent legal solutions for issues related to surrogacy.

Although it is allowed in theory, this kind of agreement doesn't produce legal effects as long as the surrogate mother cannot be forced to forego the legally presumed maternal bond. The legislation in force, if it were to be applied to the particular case of surrogacy, would have a perverse result: the genetic parents would probably be assimilated to the "third-party donors", rather than the "parents of intent"<sup>670</sup>; and the "surrogate mother" would be legally presumed to be the child's mother. On the other hand, the possibility for the genetic father to claim the recognition of the paternal bond between him and the child doesn't eliminate the problem of giving legal effects to the genetic maternal bond.

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<sup>668</sup> The intended parents are simply called « the parents »; a distinction is made between « the third-party donor » (genetic father) and « the father » (the father of intent).

<sup>669</sup> Art. 461 of the *Project for a new Civil Code (Draft version of 11.03.2009)*.

<sup>670</sup> We do not take into account here the case in which the surrogacy would be linked to an egg donation (of a third-party donor): this type of donation is less frequent and not specifically regulated. In theory, egg donation should be subjected to the same regime as sperm donation.

Once again it clearly appears that, without being formally forbidden, surrogacy is not encouraged by Romanian legislation. Another possible solution for the intended (genetic) parents would be to adopt their own child from his legal parent(s). Nevertheless, the adoption procedure is very long and difficult, and there is always a risk that the Court could reject the adoption request. Moreover, the genetic bond between the child and the adopting persons must not be revealed, taking into account that one cannot adopt his own genetic child. There is no written rule forbidding the adoption of one's own genetic child, it would however be absurd to allow the natural parents to adopt their own children. Unless adoption specifically serves the purpose of bypassing a rule that forbids the establishment of "genetic" parentage.

Since the 2000s, the adoption procedure in Romania has become very cumbersome due to public scandals of organ trafficking through international adoptions in the 1990s, when the law on adoptions was very liberal. Adoption remains a valid option to consider: the father of intent admits paternity of the child and, with the consent of the surrogate mother (legally presumed to be the child's mother), the mother of intent can adopt the child of her partner (not immediately but under more flexible conditions than a normal adoption). It is possible, however, that the mother of intent would want to see her genetic link with the child directly recognised.

## **2.4. Filiation**

*Art. 441 C.civ.* provides that the identity of the third-party donor should be anonymous and that there should be no relationship of parentage between the child and the donor.

### **2.4.1. Establishing the paternal bond**

*Art. 414 (1) C.civ* adopts the presumption of paternity for the husband of the child's mother if the child is conceived or born during their marriage. A genetic father who is not married with the mother can either recognise the paternity bond (if the mother is not married), or contest the legal paternity presumption if the mother is married to another man (*Art. 434 C.civ.*). A new legal presumption of paternity is established by the *New Civil Code* for the man who usually lived together with the mother during the period of the conception (*Art. 426*). He must formally recognise paternity of the child; if he refuses, the mother can file a claim to establish his paternity – which is where the presumption of paternity rule intervenes.

Regarding the specific issue of the assisted reproduction with third-party donation, *Art. 446 C.civ.* provides that "the father" has the same rights on a child born as a result of medically assisted reproduction as on a naturally conceived child.

### **2.4.2. Establishing the maternal bond**

Romanian legislation provides that the maternal bond is established by the fact of giving birth to a child - *Art. 408 (1)*. This fact is proved through the medical certificate provided by the medical unity where the child was born. In theory, the presumption of maternity is absolute and cannot be contested.

If the child is not born in a medical establishment and the birth is not declared in due time, *Art. 415 (1) C.civ* provides that the genetic mother can declare the maternal bond to the authorities. In practice, the birth certificate for the child is not delivered in the first year after the birth, unless the mother provides a medical certificate. After one year, the maternal bond can be evidenced by any means (testifying witnesses in front of the Court, DNA tests, etc), according to *Art. 422 C.civ.* Nevertheless, the parties involved in a surrogacy agreement have no interest in avoiding the medical unity for the child's birth; moreover, the child would have no legal status unless he has a birth certificate.

*Art. 416 (1) C.civ* provides that the genetic mother can recognise the maternal bond in an authentic declaration or, *post mortem*, in a testament. In practice, this declaration of maternity is used only if the child already has a birth certificate and has been lost or abandoned by the parents. The parentage recognition by the mother (stipulated in art. 416 C.civ) cannot result in the creation or modification of a birth certificate. The aim of the article is for the mother mentioned in the birth certificate to be able to confirm the identity of the minor who has been lost and found by the authorities. Such a procedure could therefore only serve to establish the parentage of the mother of intent, who didn't give birth to the child but would be the genetic mother of the child carried by another woman.

#### **2.4.3. Contestation of parentage**

*Art. 443 (1)* mentions that nobody can contest a child filiation bonds for reasons related to assisted reproduction, except in the situation provided by *Art. 443 (2) C.civ.* – the absence of valid consent from the father (of intent).

Regarding the common parentage regime, a remarkable difference is made by the new *Art. 430 C. Civ* which recognises the right of a child, his mother and his genetic father to question the legally presumed paternity of the child. Under the former *Family Code*<sup>671</sup>, the legally presumed father was the only person entitled to contest his own paternity of the child born or conceived during his marriage with the child's mother.

#### **2.4.4. International aspects**

According to Romanian legislation (Law 21/1991), a child can obtain the Romanian nationality at birth if one of his parents is Romanian, or if the child was born on Romanian territory from unknown parents. As a consequence, the child's nationality depends on the meaning of the word "parents". *Art. 2.572 C. Civ* mentions that the civil status and the individual rights are regulated by the national law of each individual. Parentage is thus established according to the child's national law. Adoption must obey to the national legislation of both the adopting person and the adopted child (*Art.2.607 C. Civ.*).

*Art. 2564 C. Civ* provides that the foreign law cannot be applied if it contradicts the public order of Romanian private international law or if the applicability of the foreign law results from the intention to bypass Romanian law. Moreover, Romanian private international law expressly includes the fundamental principles of human rights, Romanian and European law.

### **2.5. Confidentiality**

*Art. 445 C.civ.* provides that information on assisted reproduction is confidential towards third parties. The Court can potentially authorise to communicate it to the medical personnel or to other authorities in-charge, if it can prevent the child or his descendants to be faced with serious health-related problem.

## **§ 3. Case-law**

Taking into account that medically assisted reproduction generally remains a very sensitive issue, Romanian judges usually impose a strict privacy policy in this kind of case. Many decisions are not published, except those of the Supreme Court. No decisions on surrogacy can be found on the websites of the Bucharest Courts; the case cited below was extracted from a specialised trimestral magazine. The Case No 7874/302/2009

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<sup>671</sup> At present included in the *New Civil Code*.

submitted to the Sector 5 Bucharest Court<sup>672</sup> is a perfect example of two different solutions to the same legal problem, made possible by the complete lack of legislation on surrogacy issues.

### 3.1. Parties' claims

In contradiction with the Custody Authority (defendant), **the genetic mother** claimed that the surrogate mother (defendant) is not the genetic mother of the child, so that the Court should recognise the effects of:

- the maternal bond between the child and his real genetic mother (the claimant);
- the lack of paternal bond between the surrogate mother's husband and the child;
- the paternal bond between the genetic mother's husband and the child.

Consequently, the Court was asked to authorise the corrections in the child's birth certificate, so as to allow the child to have the name of his genetic parents.

Also in contradiction with the Custody Authority, **the genetic father** brought to justice both the surrogate mother and her husband by a separate application later merged with the first one. He asked the judge to recognise his paternal bond with the child and to authorise the modifications in the child's birth certificate. With regard to the same application, **the legally presumed father** (the surrogate mother's husband, also defendant) formulated a counterclaim of paternity contest.

#### 3.1.1. State of facts

In this decision – the only case to be found on surrogacy in the Romanian courts – all parties were Romanian.

- The claimants asserted to be the genetic parents of the child and asked the Court to confirm the parentage link between them and the child born of the surrogate mother.
- The medical report issued by the Department for Assisted Reproduction of a Hospital from Bucharest confirmed that the child was born as a result of *in vitro* fertilisation. The genetic mother had already had two spontaneous miscarriages and six failed attempts of insemination with the sperm of her husband. The medical report shows her physical incapacity to be inseminated and to give birth to a child. After the failure of the insemination with three *in vitro* embryos, the other 9 embryos obtained were frozen.
- After having given her written consent, the surrogate mother, a married woman, was inseminated with 3 of the 9 embryos obtained following the *in vitro* fertilisation of the two claimant's genetic material. A girl was born.
- The defendant (the surrogate mother) had previously signed a standard "Declaration" provided by the Hospital, in which she was giving up any rights on the child to be born. She also declared that she had received a sum of money and an additional sum was to be paid after the child's birth. It is indeed worth specifying that some private clinics accept to inseminate surrogate mothers. This

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<sup>672</sup> Unpublished; extract from Veronica DOBOZI, *Curierul Judiciar* 10/2011. These Court decisions were anterior to the *New Civil Code* enforcement, which now includes the former *Family Code* as amended and completed. The legal situation of the parties would have been mostly the same under the *New Civil Code* regime, as long as surrogacy issues are not at all regulated. Except the case of the reproduction with a third-party donor (which doesn't include surrogacy), filiation rules essentially didn't change under the *New Civil Code*.

remains however a solution of last resort, when the mother of intent has already been unsuccessfully inseminated several times and/or has had several miscarriages – as is the case of the mother of intent in the present case. The practice of declarations is common in hospitals; it seems to be their way of waiving any responsibility and reassuring the parents of intent who paid for the procedures.

- The DNA test confirmed the genetic bond between the claimants and the child.
- After the birth, the child had been taken in charge and stayed with his genetic parents.
- The surrogate mother and her husband had no claims with regard to the child, neither before, nor during the trial.

### **3.1.2 Legal arguments**

- Regarding the maternal bond: the claimants first invoked *the Family Code*<sup>673</sup> in order to contest the parentage that doesn't correspond to the reality. They also cited a Constitutional Court decision<sup>674</sup> observing that some of the *Family Code* provisions seriously affect the possibility to give legal effects to the genetic reality. Cumulating the above-mentioned arguments with *Art. 8 of the ECHR*, the claimants sustained that the maternity presumption could be overthrown if the genetic reality is different.<sup>675</sup>
- It should be noted that decision 349/2001 of the Constitutional Court referred to the genetic father's impossibility to contest the presumed parentage links (between the child and his mother's husband); this affected the possibility of giving legal effect to the genetic reality and was therefore judged to be unconstitutional. This decision was relevant at the time because the New Civil Code was not yet in effect (the New Civil Code allows the genetic father the possibility of having his paternity established). We shouldn't forget however that at the time, the Constitutional Court's decision 349/2001 did not target assisted procreation and only concerned paternity.
- Regarding the paternal bond: the same arguments prevail (the *Family Code* should be interpreted according to the ECHR, in order to give legal effects to the social and genetic reality, even against legal presumptions).

### **3.2. The First Court's decision: strict application of the national legislation to give limited legal effects to the reality**

By the decision no 1405/2010<sup>676</sup> the Court:

- Rejected the application of the genetic mother.
- Rejected the application of the genetic father.
- Accepted the counterclaim of the presumed father (the only legal application expressly regulated by the Romanian legislation in force at that moment) who contested the paternal bond between himself and the child.

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<sup>673</sup> At present, the *Family Code* was modified, completed and included in the *New Civil Code*.

<sup>674</sup> Constitutional Court, Decision 349/2001.

<sup>675</sup> The genetic reality is a fact and it can be proven by any means of evidence.

<sup>676</sup> Unpublished.

The paternal link between the legally presumed father (surrogate mother's husband) and the child was annihilated and the paternal bond between the genetic father and the child was recognised. The Court authorised the modifications on the child's birth certificate in order to allow her to have the genetic father's name.

- Regarding the maternal bond, the Court mentioned that in the absence of derogatory legislation, the medical reproduction techniques couldn't generate a different parentage regime. As long as Romanian legislation doesn't make a difference between "genetic mother" and "surrogate mother who gives birth to the child", the judge has no power to do it.
- Regarding the discrimination between man and woman (both genetic parents) the Court mentioned a fundamental difference: maternity is closely related to the capacity of giving birth, while paternity can potentially be limited exclusively to the participation with genetic material.
- Regarding the surrogacy convention: the above-mentioned "Declaration" was annulled. Not only did this declaration contravene to the public order, but it also represented an onerous title whose object (the surrogate mother's body) is not in the civil circuit and cannot be rented.
- Regarding the paternal bond: the Court mentioned that the genetic father cannot claim the recognition of parentage between himself and his genetic child if the latter already has a legally presumed father.<sup>677</sup> The only one who could claim the cancellation of the paternal bond between himself and the child was the legally presumed father. Under the legislation in force at that moment, as long as the legally presumed father (surrogate mother's husband) didn't contest his paternity, the genetic father had no means to give legal effect to the genetic reality. Only after the legal presumption of paternity was overthrown (by the DNA test result), the genetic father had the possibility to prove his paternity and recognise the child.

### **3.3. The Bucharest Court of Appeal's decision: application of the national and international law in order to give the maximum of legal effects to the reality**

By the decision 1309 A/2010<sup>678</sup>, the Appeal Court admitted the appeal and partially modified the First Court's decision, by also recognising the legal effects of the maternal bond between the claimant (genetic mother) and the child. The genetic filiations' legal effects become thereby complete.

Regarding the compatibility of Romanian legislation with Art. 8 ECHR:

- **Family life:** The Court of Appeal decided that the bond between the child and the legally presumed parents didn't fit within *Art. 8 ECHR's* meaning of "family", as the child did not live with these people, nor had a close relationship with them.
- All the evidence showed that the claimants had always considered themselves the child's parents and acted accordingly; thus, the relationship between the claimants and their genetic child correspond to the meaning of "family" as provided by Art. 8 ECHR.

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<sup>677</sup> The situation changed, the *New Civil Code* gives the genetic father the possibility to claim the recognition of the real parental bond even if the child has a legally presumed father. The solution would nowadays substantially be the same, except that the genetic father would now be able to file a case to have his rights recognised.

<sup>678</sup> Final decision (no other appeal was made), unpublished.



- **Child's private life:** The protection conferred by *Art. 8 ECHR* is not absolute; nevertheless, the superior interest of the child must overrule the strict application of the national law, in order to guarantee the child's right to an identity and his other personal rights provided by *Art. 8 ECHR*. By ignoring the genetic and social reality for a formalist application of national legislation, the First Court violated *Art. 8 ECHR*.
- With regards to the scope of this decision, we would like to remind the reader that it was not pronounced by the Supreme Court and that the practice varies significantly across Romanian courts of law. This decision wasn't much talked about, even though the debate on surrogate motherhood remains topical; the debate focuses mainly on arguments of social and religious and not so much on the legal aspects of surrogacy, which are too technical for the majority of people.
- Furthermore, surrogate motherhood is not a topic of public interest but rather an "exotic" or "niche" issue. The nature of the topic is such that it only concerns a tiny part of the population and its complexity goes far beyond the comprehension of the general Romanian public.
- The fact that these cases always involve minors commands tremendous discretion, especially in light of the conservative position of the public in terms of surrogacy.
- Because of the complete legislative void, the Courts can choose between adhering strictly to the law (inadequate with the modern living conditions and medical techniques) or to interpret the law more liberally (in particular by applying the principle of the ECHR case-law).
- The two decisions (of the First Court and of the Court of Appeal) mentioned above are fully legitimate considering that there is no European consensus on surrogacy.
- For that reason, the solution of adoption should not be side-lined, even though it doesn't coincide with the biological reality.
- Both procedures (recognition of genetic parentage and adoption) are equally heavy and unpredictable.

## 6.9. RUSSIA

### Legal Sources

Russian legal regulation of assisted reproduction in general and surrogate motherhood specifically, although being permissive on the whole, is fragmentary and not always consistent. The most recent changes in Russian law in this regard were made in 2011 by the Federal Law on the Fundamentals on Protection of Citizens' Health. However this Law did not fill all gaps that existed in the legal regulation of assisted reproduction. Particularly in the part which regulates surrogate motherhood, the Law is contradictory and not always clear. This will be explained in due course when related issues are discussed.

Currently, the main legal sources that govern surrogate motherhood in Russia are the following:

- 1) the Family Code 1995 (as amended), enacted from the 1<sup>st</sup> of March 1996 (hereafter – FC);
- 2) the Federal Law on the Fundamentals of Protection of Citizens' Health in Russian Federation 2011 (hereafter – the Law on Citizens' Health 2011), section that concerns application of assisted reproduction (including surrogate motherhood) enacted from the 1<sup>st</sup> of January 2012 (this Law replaced the Fundamentals of Legislation of RF on Protection of Citizens' Health 1993 – hereafter the Law on Citizens' Health 1993);
- 3) the Federal Law on the Acts of Registration of Civil Status 1997 (as amended), enacted from the day of its official publication;
- 4) Russian Federation (RF) Ministry of Health Order No. 67 of 26.02.2003 "On Application of Assisted Reproductive Technologies (ART) at Therapy of Female and Male Infertility" (hereinafter – the Ministry of Health Order on ART 2003) together with Regulation on application of assisted reproduction methods (replaced RF Ministry of Health Order No. 301 of 28.12.1993 "On application of the method of artificial insemination of women with the donor's sperm by medical indications and of the method of extra-corporeal fertilization and transfer of an embryo to the uterus to treat female infertility" – hereafter RF Ministry of Health Order 1993).

### Definitions and Key Concepts

The first mentioning of surrogate motherhood in Russian law relates to 1995, when the Family Code was adopted, and since enactment of the Code, i.e. from the 1<sup>st</sup> of March 1996, surrogate motherhood became legally available.<sup>679</sup>

The Law on Citizens' Health 2011 defines assisted reproduction technology as the methods of infertility treatment when some or all stages of conception and early development of an embryo are performed outside mother's body (including the use of donor's and (or) frozen gametes, tissues of reproductive organs, and embryos, as well as

<sup>679</sup> V.S. Korsak, E.V. Isaakova, O.A. Vorobjeva, M.B. Tsirul'nikov, O.N. Arzhanova 'The First Experience in Russia of Conducting of a Programme of Surrogate Motherhood' (in Russian) (1996) *Problems of Reproduction*, 2, at 46. In 2009, the number of ART centers carrying out surrogate motherhood programs constituted 44 (compared to 38 centers in 2008), where 524 cycles with participation of surrogate mothers (1,3%) ended in embryo transfer (430 cycles in 2008). Pregnancy occurred in 216 cases (41,2%) and child birth – in 147 cases (79,9%). See: Korsak, V.S. 'ART in Russia in 2009. The 15<sup>th</sup> Report of National Register of ART' (in Russian) – <[http://www.rahr.ru/d\\_registr\\_otchet/vrt2009.pdf](http://www.rahr.ru/d_registr_otchet/vrt2009.pdf)>, visited 19.01.2013; Korsak, V.S. (2010) 'ART in Russia. Report for 2008' (in Russian) 6 *Problems of Reproduction* 15, 15-16.

surrogate motherhood) (s. 55 (1)). This means that use of surrogate motherhood is possible, at least under the law, only by medical indications, as a method of infertility treatment.

The same Law defines surrogate motherhood as gestation and birth of a child (including premature birth) under a contract made between a surrogate mother (woman who gestates a fetus after transfer of a donor's embryo) and prospective parents whose gametes were used for fertilization or a single woman for whom gestation and birth of a child is impossible by medical reasons (s. 55 (9)). To avoid any confusion, the Law specifies in the next sub-section that "a surrogate mother shall not be an oocytes donor" (s. 55 (10)).

From this it particularly follows that Russian Law allows only full, or gestational, surrogacy because it is clearly stated that surrogate mother shall not be genetically related to the fetus she gestates.

Before the Law on Citizens' Health 2011 was enacted, technically there had been no clear prohibition of "partial", or "traditional" surrogacy. However, under the previous legal regime, traditional surrogacy has not anyway been permitted. Instead, what is called "traditional surrogacy" was, in fact, considered an artificial insemination with a donor's sperm, i.e. the "traditional" surrogate mother is a biological or genetic mother of a child she gives birth to. Therefore, she is not a "surrogate" but a true mother in a biological sense. Under Russian law, if a woman does not want to bring up and take care of her child, she may give her consent to her child to be placed for adoption. The adoption procedure is very special and very strict; it is not applicable in cases of surrogate motherhood, and violation of the adoption procedure is a serious offense.

Regulation of surrogate motherhood in Russia is based on a very important and key idea that a surrogate mother has the right to keep the child if she wants.<sup>680</sup> This is considered to be one of the main safeguards against the exploitation of a woman involved in surrogacy arrangements. It is fixed in FC, in s. 51 (para 4, part 2), which states that:

Persons who are married to each other and who gave their consent in a written form to implantation of an embryo in another woman for the purpose of its bearing may be entered as the child's parents only with the consent of the woman who gave birth to the child (surrogate mother).

This provision is based on the concept that the woman who gave birth to a child is considered at law as the mother of this child. In this regard, drafters of the Russian Family Code were guided by the recommendations made by a group of European experts in biomedical science in 1989.<sup>681</sup>

Recently, the constitutionality of FC provision that permits the registration of the intended couple as the child's parents only with the consent of the surrogate mother who gestated and gave birth to the child was questioned in a case considered by RF Constitutional Court (Constitutional Court Ruling of 15.05.2012 No. 880-O). In this case the surrogate mother refused to give her consent to the prospective parents' registration as the legal parents and registered the child herself in a civil status state registry as her own child (accordingly she was registered as the legal mother). The Constitutional Court

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<sup>680</sup> In this regard, Russian legal rules on surrogacy are very different from those in Ukraine, where a surrogate mother cannot keep the child, making Ukraine particularly appealing for foreigners looking for surrogate mother.

<sup>681</sup> Council of Europe. Report on human artificial procreation. Principles set out in the report of the Ad hoc Committee of Experts in the Biomedical Science (CAHBI, 1989). Principle 14. See: [www.coe.int/t/dg3/healthbioethic/texts\\_and\\_documents/default\\_en.asp](http://www.coe.int/t/dg3/healthbioethic/texts_and_documents/default_en.asp). See: Commentary to the Family Code of the Russian Federation / (ed.) I.M. Kuznetsova. Moscow, 2000. P. 183-186 (in Russian).

confirmed the constitutionality of this provision of FC and rejected the application of the intended/prospective parents.

### **Requirements that a potential surrogate mother shall meet**

The Law on Citizens Health 2011 sets out the requirements that a woman who is going to serve as a surrogate mother should meet. Before, they were stipulated at a lower level of regulation (governmental/ministerial) – in the Ministry of Health Order 2003. Thus, under the Law 2011 (s. 55 (10)), a woman who gave her written informed consent to medical intervention may serve as a surrogate mother provided she:

- is between 20 and 35 years old;
- has at least one healthy child; and
- received a medical statement that she is healthy (in 'satisfactory state of health').

The Law does not require a surrogate mother to be married or, on the opposite, to be a single woman. However, if she is married, her husband's consent to her serving as a surrogate mother is required (s. 55 (10)). It should be noted in this regard that by "marriage" the Law means a marriage officially registered in the order stipulated by Russian legislation, i.e. in the state bodies for registration of civil status.

### **Access to assisted reproduction technologies (ART)**

Under Russian law, a man and a woman, married as well as not married,<sup>682</sup> have the right to have access to assisted reproduction technologies, provided they gave their mutual informed consent to medical interference; a single woman also has the right to have access to assisted reproduction technologies if she gave her informed consent to medical interference (the Law on Citizens Health 2011, s. 55 (3)).

Two comments are necessary in this regards.

1. The previous Law on Citizens' Health 1993 spoke only about the right of "every adult woman of reproductive age" to benefit from assisted reproduction technologies (s. 35). This Law did not specify whether a woman should be married or not. However, Family Code 1995, when regulating the order of registration of intended parents as legal parents of a child born for them by a surrogate mother, speaks only about a married couple in s. 51 (para 4, part 2) cited above. As the result of this contradiction, many applications to register the birth of a child born by a surrogate mother presented by cohabitating couples or single women were rejected by the civil status state registries with the reference to this provision of FC. This, in turn, resulted in suits filed to the courts where the intended parents or intended single mothers claimed their right to be registered as legal parents or legal mothers respectively. It is known that in many cases such claims were satisfied, and the registries were ordered to register birth of the children.<sup>683</sup>

The Law on Citizens Health 2011, having stated, firstly, that a man and a woman who are not married (to each other) may benefit from assisted reproduction and, secondly, that a contract on surrogacy contract may be made between a surrogate mother and intended parents (without any reference to their marriage status), clearly indicates that surrogate motherhood is open not only for the spouses but for cohabitating couples as well.

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<sup>682</sup> The wording of this provision is not clear enough, but most probably the Law means here a couple that can be married or not married (meaning married or not married to each other). I will proceed from this in my further reasoning.

<sup>683</sup> See, for instance: RF Supreme Court Ruling on the case No. 78-Φ08-1314 of 8 September 2008.

2. Whether a single man may have access to surrogate motherhood under Russian law is an issue that also raises questions. Literal interpretation of the above-mentioned provisions of the Law on Citizens Health 2011 that concern access to assisted reproduction and define the main terms of a contract on surrogate motherhood suggests a negative answer to this question because neither sub-paragraph 3 nor sub-paragraph 9 of s. 55 name a single man. Therefore, in accordance with this provision a contract on surrogate motherhood shall not be made between a single man and a surrogate mother. At the same time, we can hardly assume that the Law on Citizens' Health 2011 meant to close access to fertility treatment for single men. To claim this would mean to go into contradiction with the principles of Russian Constitution 1993 on equality of rights and freedoms of men and women and equal opportunities for their realization (Art. 19), on the right of everyone to health care and medical help (Art. 41) and with the constitutional provision on state support of the family, maternity, paternity and childhood (Art. 7), not to mention contradiction with the social reality of male infertility. It is enough just to say that methods of medical treatment of male infertility had been already widely applied in medical practice for several decades, and as long as in 1993, the previous Ministry of Health Order on ART stipulated the male fertility as one of the grounds for IVF treatment.<sup>684</sup> Infertility treatment has been conventionally associated with medical treatment of women, and in practice, these were and still are usually couples, which would come to medical clinics, even if male, and not female, infertility was a medical problem. It is not surprising, therefore, that the previous Law on Citizens' Health 1993 spoke only about the right of "every adult woman of reproductive age" to benefit from assisted reproduction technologies, without any mentioning of an adult man (s. 35). This did not raise particular problems before, because same-sex cohabitation was not a topical issue in Russia until recently. Nowadays, the situation is changing, and the sexual equality angle of access to assisted reproduction technologies may certainly turn out to be on the agenda one day.<sup>685</sup>

### **Contract on Surrogate Motherhood v. Donors' Gametes**

The Law on Citizens' Health 2011 is confusing on another important issue, i.e. whether it is possible to use the genetic material of a donor(s) for IVF with surrogate mother participation. To recall, the Law defines surrogate motherhood as gestation and birth of a child under a contract made between a surrogate mother (woman who gestates a fetus after transfer of a donated embryo) and prospective parents whose gametes were used for fertilization or a single woman for whom gestation and birth of a child is impossible by medical reasons (s. 55 (9)).

According to a literal interpretation of this provision, it is clear that the use of a donor's genetic material is available for a single women only but not for couples, whether married or not. Therefore, under this provision prospective parents shall be genetic parents of a child that a surrogate mother will gestate for them and give birth to. It is hard to say now what the idea was behind such wording, as there are still no comments or official explanations of this provision. Before the Law on Citizens' Health 2011 was adopted, there was neither prohibition nor differentiation between these situations in the law, which meant that an infertile couple could use both donated oocytes and sperm in a surrogate motherhood program, if there were medical indications. As far as the author of this report is aware, currently the situation in medical practice is the same as before,

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<sup>684</sup> Order No. 301 of 28 December 1993 "On application of the method of artificial insemination of women with the donor's sperm by medical indications and of the method of extra-corporeal fertilization and transfer of an embryo to the uterus to treat female infertility"

<sup>685</sup> Before the Law on Citizens Health 2011 with its more restrictive provisions on surrogate motherhood was adopted, there were cases, where single "intended fathers" had won the court proceedings and had been registered as the legal fathers of the children born for them by surrogate mothers (with the use of donor's oocytes) See, for instance: <[www.surrogacy.ru/surrogacy\\_news8.php](http://www.surrogacy.ru/surrogacy_news8.php)>; <[www.jurconsult.ru/news/news40.php](http://www.jurconsult.ru/news/news40.php)>, and <[www.jurconsult.ru/news/news39.php](http://www.jurconsult.ru/news/news39.php)> (in Russian).

and if there are medical indications, donor gametes are used in surrogate motherhood programs with regard to infertile couples.

### **Finalizing parents-child relations**

To finalize parental rights with regard to a child born by a surrogate mother no court judgment is required (provided there is no dispute over the child's origin). The child's parents are registered as his or her legal parents at the registration of the child's birth at the civil status registry.

If a surrogate mother gave her written consent to the registration of the intended parent(s) as the legal parents in the birth registry book and on the child's birth certificate, the child birth registration procedure is the same as the registration of a birth of a child conceived in a natural way, with one exception. The Federal Law on the Acts of Registration of Civil Status 1997 (s. 16 (5)) requires that, apart from other documents that should be usually presented to the birth registration body (for instance, parents ID/passports and a medical statement on child's birth), the intended parent(s) also present an "official note" (medical statement) that was issued by a medical clinic and that confirmed that the surrogate mother gave her consent to the registration of the intended parent(s) as the legal parents. Given the registration of the intended parent(s) as the legal parents of a child born by a surrogate mother, a surrogate mother is considered by law as a strange person to this child and does not have any legal right to claim to maintain contact with him or her.

If a surrogate mother used her right to keep the child and did not give her consent the registration of the intended parent(s) as the child's legal parents, she can be registered as the child's mother in the birth registry book and on the child's birth certificate upon presenting to a civil status registration body her passport and a "statement" from the medical clinic certifying that she delivered the child. If she is married, her husband is registered as the child's father (to recall, under the law his consent to his wife serving as a surrogate mother is required).

To finalize parental rights before a child is born is not allowed by Russian law; the child's birth certificate can be issued only after the child's birth. After a child's birth has been officially registered, parent-child relations are considered to be finalized. The child's status in the family is absolutely the same as the status of a child conceived in a natural way.

### **Contesting paternity or maternity**

Although Russian law permits contesting paternity or maternity in general, it does not allow to contest paternity or maternity if it is based on assisted reproduction technology grounds. In this regard, Russian law is straightforward. Particularly on surrogate motherhood, FC (s. 52 (3 (2))) says:

"a married couple who has agreed to implantation of an embryo to another woman, as well as a surrogate mother... when contesting paternity or maternity, cannot refer to these circumstances after registration of the child's parents in a birth registration book."

By "these circumstances", FC means that the child was conceived through IVF with surrogate mother involvement.

If donated genetic material has been used in the course of infertility treatment, it has no legal consequences with regard to parentage for the donors. The Ministry of Health Regulation 2003 (para 6) stipulates that the donors "provide their gametes... to other



persons to overcome infertility and do not undertake parental obligations towards a future child”.

### **Citizenship (nationality) of a child**

The basic principle of Russian law concerning child's nationality/citizenship is that a child shall not be left stateless (the Federal Law on Citizenship of RF 2002, s. 12). With regard to the children born on the territory of Russia, whose parents are foreign citizens, this Law stipulates that these children acquire Russian citizenship by birth only if their parents (foreign citizens) are permanently residing in the Russian Federation, and the country of the parents' citizenship will not provide children born in Russia with the parents' citizenship. Therefore, a child born on the Russian Federation territory acquires the citizenship of its parent(s) under the parent(s)' personal law. Only in cases whereby the state of which the parent(s) are citizens does not provide citizenship to the child, may the child acquire Russian citizenship.

### **Cross-border Surrogate Motherhood Issues**

There is not that much information about cross-border surrogacy arrangements available in legal scholarship and in the mass media; there are no reported cases either. It is known, however, that international programs in surrogate motherhood have started to develop in the country.<sup>686</sup>

As cross-border surrogacy develops in Russia, additional problems connected, for instance, with taking a child born by a surrogate mother abroad or settling disputes between the parties of cross-border surrogacy arrangements will arise.

As far as taking a child abroad, getting entry visa for a child and further legalization of the child in a home country of the child's parents may be a problem. Particularly, to finalize parent-child relations in some countries a court judgment is required. In contrast, in Russia these issues, as has been noted, are administratively regulated (by registration of a child's birth in a state body for registration of civil status), and no court is involved.

As to the private international law context, Russian law does not contain any specific rules that directly regulate cross-border surrogate motherhood issues. General conflict of laws rules are included in Part III of the Russian Civil Code. However, those rules that address family law issues and, particularly, parenthood issues, are contained in the Family Code. Thus, FC refers to nationality/citizenship as a connecting factor with regard to legal parenthood. It is stated in FC that establishment and contest of legal parenthood is determined under the law of the state whose citizenship a child has by birth (s. 162 (1)). Parental rights, however, in accordance with FC, shall be determined under the law of the state where parents and children have common place of residence. The law of the country of the child's nationality/citizenship in such a case is used as a connecting factor only if there is no common place of residence. With regard to child maintenance issues and other parent-child relations, the law also allows, upon a petitioner's request, application of the law of the country where a child permanently resides (s. 163).

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<sup>686</sup> See, for instance: [http://sptimes.ru/index.php?action\\_id=100&story\\_id=36172](http://sptimes.ru/index.php?action_id=100&story_id=36172) visited 14.01.2013.

## 6.10. SOUTH AFRICA

### **The South African regulatory framework on surrogate motherhood: A comparative study between the Greek and the South African law on surrogacy**

#### **ABSTRACT**

This report examines the legal regime of South Africa with regards to the issue of surrogate motherhood. The analysis will involve the presentation of the national law on surrogacy with reference to statutory sources, regulations, guidelines, and case law that govern the issues of the practice, as well as to the contemporary literature and media reports. I will use this research as a compactor to the Greek regime on surrogacy, which is the only example of a comprehensive legal regime for surrogacy amongst the EU Member States.

As will be mentioned in the course of this report, surrogacy has been performed in South Africa before its formal recognition and regulation in 2010 by the Children's Act<sup>687</sup> (which took effect from 1 April 2010). The practice was perfectly legal since 2006, but in 2010 the Parliament adopted new rules that on the one hand facilitated surrogacy, and on the other hand set limits and restrictions on the practice of surrogacy. A landmark decision of the Court of Pretoria in 2011 came to complement the law, and announced guidelines addressed to the South African judges for the treatment of surrogate motherhood cases that would reach the courts in the future.

South Africa is evidently one of the few countries in the global legal reality that has a specific law on surrogacy, as does Greece. A number of the provisions inserted in the legislation of both countries are indeed similar, if not identical, as for example the process of the pre-conception judicial approval; the automatic attribution of legal parenthood to the intended parent(s); the non-commercial nature of the practice; as well as the enforceability of surrogate motherhood contracts. This research, however, also gives emphasis to any variations between the regulatory frameworks of the two countries.

#### **GENERAL OVERVIEW OF THE PROVISIONS OF THE SOUTH AFRICAN (SA) LAW ON SURROGACY**

In this section I briefly present the SA law with regards to surrogacy. A more detailed analysis of the relevant legal requirements that lead to the permissibility of the practice of surrogacy in SA will be offered in the following parts of this research, while comparing these provisions with those incorporated into the Greek law on surrogacy.<sup>688</sup>

The issue of surrogate motherhood finds a statutory recognition in South Africa (SA) 'following the promulgation of Chapter 19 of the Children's Act on 1 April 2010'.<sup>689</sup> Cases

<sup>687</sup> South African Children's Act no. 38 of 2005, as amended in 2010, Chapter 19, titled "Surrogate motherhood".

<sup>688</sup> Law 3089/2002 and 3305/2005.

<sup>689</sup> Slabbert, M.N., 'Legal issues relating to the use of surrogate mothers in the practice of assisted conception', South African Journal of Bioethics and Law, Vol 5, No 1 (2012), available at <http://www.sajbl.org.za/index.php/sajbl/article/view/190/200>. Also, Carnelley, M., Soni, S., 'A tale of two mummies. Providing a womb in South Africa: Surrogacy, the agreement and the legal rights of the parents within the Children's Act 38 of 2005. A brief comparative study with the United Kingdom', 11 Speculum Juris (2008): 36-52; Baby2Mom, 'Every Thing You Need to Know About Surrogacy in South Africa', <http://www.proudparenting.com/node/15956>; and Lewis, S.V., 'The Constitutional and Contractual Implications of the Application of Chapter 19 of the Children's Act 38 of 2005', Thesis submitted in the Department of Private Law, University of the Western Cape, May 2011; Prinslean Mahery, Paula Proudlock, Lucy Jamieson for the SA Children's Institute, 'A guide to the Children's Act for health professionals, Fourth edition (1 June 2010); Desia Colgan for Unicef and the Department of Social Development (South Africa), 'The Children's Act Explained. Booklet 1: Children and parents- rights and responsibilities' (2009).

of surrogacy have, however, been documented in the SA social reality since 2006<sup>690</sup> after the National Health Act of 2003<sup>691</sup> introduced regulations for fertility treatment involving reproductive technologies. The practice has been taking place on the basis of the SA Constitution, which protects the right of self-determination and the right to 'make decisions concerning reproduction',<sup>692</sup> and the general national rules concerning contract law.

A few years afterwards, the Parliament promulgated Chapter 19 of the Children's Act no.38 of 2005 (amended in 2010), which refers specifically to surrogate motherhood. Chapter 19 constitutes a regulatory framework that allows the practice of surrogacy within strict and very distinct limits. The provisions of the Act apply to everyone, and there are no restrictions relating to the person's marital or relationship status,<sup>693</sup> his/ her race, his/her gender, his/ her sexual preferences in place, which is also in accordance with the right to equality as it is expressed in the SA Bill of Rights.<sup>694</sup>

Furthermore, surrogacy is depicted as an alternative and acceptable type of family formation<sup>695</sup> in cases where a person desires to have a child but is unable to have one, either due to his/her biological inability,<sup>696</sup> or his/her sexual orientation towards persons of the same sex.<sup>697</sup> The only prerequisite is that the practice is performed on a non-commercial basis.<sup>698</sup> Both traditional<sup>699</sup> and gestational<sup>700</sup> surrogacy are recognised by the law.

<sup>690</sup> The SA Parliament passed the Children's Bill in August 2006, which, among other issues, dealt with the issue of surrogate motherhood: Kashiefa Ajam, 'Wombs for rent: State to act' (August 26, 2006), available at [http://www.iol.co.za/news/south-africa/wombs-for-rent-state-to-act-1.291108#.UNRAW\\_eQd4](http://www.iol.co.za/news/south-africa/wombs-for-rent-state-to-act-1.291108#.UNRAW_eQd4) ). See also: News article by Andrew Vorzimer, 'South Africa Adopts Tougher International Surrogacy Rules', The Spin Doctor (October 13, 2011), available at <http://www.eggdonor.com/blog/2011/10/13/south-africa-adopts-tougher-international-surrogacy-rules/>; News article by Claudine Renaud, 'SA tightens surrogacy guidelines' (October 13, 2011), available at [http://www.iol.co.za/lifestyle/family/parenting/sa-tightens-surrogacy-guidelines-1.1156632#.UMojDm\\_eT\\_2](http://www.iol.co.za/lifestyle/family/parenting/sa-tightens-surrogacy-guidelines-1.1156632#.UMojDm_eT_2).

<sup>691</sup> The National Health Act was amended in 2012 (2 March, 2012).

<sup>692</sup> S. 12 (2) (a), (b) of the Constitution of the Republic of South Africa Act, No. 108 of 1996.

<sup>693</sup> A single person can employ a surrogate and have a child of his/her own according to the SA law (s.292 (1) (c)). Read further Van der Linde v Van der Linde 1996 (3) SA 509 (O). The judge stated that mothering is also a part of a man's being, thus accepting single-parent family formations.

<sup>694</sup> Section 9 of the Constitution of the Republic of South Africa Act, No. 108 of 1996. See also Satchwell v President of the Republic of SA 2002 (6) SA 1 (CC) para. 15: "Permanent same-sex life partners are entitled to found their relationships in a manner that accord with their sexual orientation: such relationships should not be subject to unfair discrimination". Also: National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC), para.82. Other cases follow the principle of equality for the treatment of the same-sex couples, such as Ex parte Fourie and Another v Minister of Home Affairs and Another (232/2003) [2004] ZASCA 132; [2005] 1All SA 273 (SCA), (3 November, 2004), whereby the judge declared the right of individuals who are homosexuals 'to adopt children, and in the case of lesbians to bear them' (para.13 (g); Du Toit v Minister of Welfare and Population Development

<sup>695</sup> South Africa recognises the right to have a child (s. 12 (2) (a) of the Constitution of the Republic of South Africa Act, No. 108 of 1996, Bill of Rights), even when this can only be attained through the use of artificial means.

<sup>696</sup> S. 295 Ch. 19 of the SA Children's Act no. 38 of 2005.

<sup>697</sup> S. 295 (a) of Ch. 19, Children's Act 2005 (amended in 2010). The Court of Pretoria confirmed that the biological inability to procreate due to the sexual preference of a person towards people of the same sex is in harmony with the provision for the "permanent and irreversible" character of the condition that prevents a person from having a child and is a valid reason for turning to surrogacy. See Ex parte Applications for the confirmation of three surrogate motherhood agreements (2011/153, 2011/154, 2011/679, 2011/1314, 2011/1315, 2011/1316) [2011] ZAGPJHC 9; 2011 (6) SA 22 (GSJ) (1 March 2011), whereby two out of the three couples who made an application to the court for surrogacy were of the same sex and were treated on the exact same way as the heterosexual couple; WH and Others (29935/11) [2011] ZAGPPHC 185; 2011 (6) SA 514 (GNP) (27 September 2011); article by the Leonard Link, 'South African Court Approves Surrogacy Contract for Gay Male Couple', <http://newyorklawschool.typepad.com/leonardlink/2011/10/south-african-court-approves-surrogacy-contract-for-gay-male-couple.html> ; and news report by Andrew Vorzimer, 'South African Court Approves Same-Sex Surrogacy Contract', The Spin Doctor (28 September, 2011), available at <http://www.eggdonor.com/blog/2011/09/28/south-african-court-approves-samesex-surrogacy-contract/> .

<sup>698</sup> S. 301 (1) of Ch. 19, Children's Act 2005 (amended in 2010): payments in respect of surrogacy are prohibited. Subsection 2 of s. 301, however, allows for the payment of reasonable expenses, which are directly related to the surrogate's artificial insemination, her medical care during the pregnancy and childbirth, her

The SA law also provides for surrogate motherhood contracts. The legal procedure for surrogacy primarily involves the drawing up of a contract between the intending parent(s), the surrogate and her husband/partner in a civil union (if she has one), and their agreement on certain matters, such as the consensual and altruistic character of the practice, the payment of "reasonable expenses" to the surrogate mother, and, among others, the attribution of legal parenthood to the intending parent(s) after the birth of the child.

Nevertheless, in order for the agreement to take force and for the person(s) who want to be legally acknowledged as the child's parent(s), an additional procedure must be followed. One of the most significant features of the SA law on surrogacy is the requirement of a confirmation of the surrogacy agreement by the court<sup>701</sup> at a time prior to the implantation of the genetic material of at least one of the intended parents, and in the case where there is only one parent, his/her genetic material, to the surrogate mother's uterus.<sup>702</sup>

The court will only deem the agreement legal and give its permission for the surrogate's fertilisation if and only if there is sufficient evidence to prove the inability of the intending parent(s) to have a child through natural conception and pregnancy; the suitability of both the surrogate and the person(s) that want to raise the child<sup>703</sup>; the lack of commercial motive and of payments either to the surrogate mother or the agency that possibly brought the contracting parties into contact in the first place; as well as the domicile of all the persons involved in the surrogacy arrangement in the SA territory.<sup>704</sup>

More specifically, the surrogate mother must not provide her gestational service with a purpose to earn money for it, but instead her motives must be purely altruistic; namely she must enter into a surrogacy agreement merely to help other people who want to have a child but who are unable to do so. Moreover, she must be healthy and emotionally stable<sup>705</sup>; and she must have had at least one successful pregnancy and viable childbirth and have a living child of her own.<sup>706</sup> As we can see, the law inserts a variety of rigorous criteria that will help the judge in deciding whether she is suitable for the provision of her gestational services and whether she will adhere to the rules of the surrogacy arrangement even before she acts as a surrogate.<sup>707</sup> This set of requirements provides a high level of protection to the intended parents, while ensuring respect for the interests of the child, who will not be rendered parentless. The latter is guaranteed by a

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clothing, her insurance, her loss of earnings due to her inability to present herself to work during the pregnancy and right after the childbirth, as well as the expenses for legalities. For an estimation of the average cost of a surrogacy arrangement see <http://baby2mom.co.za/Page/11609/Every-Thing-You-Need-to-Know-About-Surrogacy-in-South-Africa-#%2FPage%2F11613%2FSurrogacy-Costs>. The total sum of these costs can exceed R80,000 (approximately 6,000GBP).

<sup>699</sup> Stemming from s. 294 in conjunction with s. 298 (1) of the Children's Act no.38 of 2005, as amended in 2010.

<sup>700</sup> S. 294 of the Children's Act no.38 of 2005, as amended in 2010.

<sup>701</sup> S. 295 and 296 of the Children's Act no.38 of 2005, as amended in 2010. The fertilisation of the surrogate mother can only take place after the granting of permission by the court and in any case not after the lapse of eighteen (18) months after the court's confirmation. After this time the consent given by the contracting parties is no longer considered valid.

<sup>702</sup> S. 292 (1) (c) of the Children's Act no.38 of 2005, as amended in 2010.

<sup>703</sup> S. 295 of the Children's Act no.38 of 2005, as amended in 2010.

<sup>704</sup> S. 292 (1) (c), (d) of the Children's Act no.38 of 2005, as amended in 2010.

<sup>705</sup> This will be determined by her medical and psychological assessment by certified medical practitioners (para. 67, WH and Others (29935/11) [2011] ZAGPPHC 185; 2011 (6) SA 514 (GNP) (27 September 2011)).

<sup>706</sup> S. 295 (c) (vi) and (vii) of the Children's Act no.38 of 2005, as amended in 2010.

<sup>707</sup> See also the article by Baby2Mom, 'Everything you need to know about surrogacy in South Africa' (2 June, 2011), available at <http://www.proudparenting.com/node/15956>. Certain surrogacy agencies, which work for no fee and bring the intended parents in contact with the surrogate mother, may introduce additional criteria for the suitability of the woman who will act as a surrogate. For example, the Surrogacy Advisory Group, which operates in SA states that in order for the woman to be chosen to act as a surrogate, on top of the requirements set out by the law, she may also not have had more than 2 caesarean sections, her Body Mass Index (BMI) must be below 35, and she must be between the ages of 21 and 42 (<http://www.surrogacy.co.za/faqs/>).

number of conditions that must be filled by the intended parents as well, as for example, their seriousness and suitability to raise the child, which will be signalled by evidence of both their biological and psychological health, and their financial aptitude to care and provide for all the needs of the child.<sup>708</sup>

It seems fair to say that surrogacy is regarded by the SA legislature and judiciary as extremely complex, and as raising issues that have profound ramifications for the ethical, legal and social reality. Moreover, the SA society seems to place great importance on the institution of family, the protection of the best interests of the child, and the respect for one's right to have and parent a child of one's own. As such, surrogacy cases are seen as requiring the delicate handling that only a judge of the highest legal knowledge and expertise can provide; hence, the court responsible for the investigation of cases of surrogacy is the SA High Court.<sup>709</sup>

If the Deputy Judge of the High Court grants his/her permission to the contracting parties, this gives them the right to proceed with the fertility treatment procedure involving the surrogate mother. Any such procure must comply with the conditions set out by the National Health Act.<sup>710</sup>

In cases where a successful pregnancy and childbirth is achieved, the intended parent(s) will be considered as the legal parent(s) of the child. A right for a "change of heart" is recognised only for the surrogate mother who has a genetic link to the child (i.e. traditional surrogacy, where she has 'donated' her ova for fertilisation for the purpose of surrogacy), and only for the period prior to the lapse of sixty days following the birth of the child.<sup>711</sup> In all other cases, the surrogate mother and her husband/civil partner, if she has one, as well as her and her husband's/partner's relatives, have no right to parent, to care for, or to contact the child, unless so indicated in the surrogate motherhood agreement.<sup>712</sup>

Although the Act seems to provide a comprehensive framework for the regulation of surrogate motherhood practices in SA, some cases that have recently reached the national courts have illustrated that more clarification on the requirements for the permissibility of surrogacy is needed. More specifically, two cases have gathered the interest of the media, legal professionals and the public: the *ex parte applications for the confirmation of three surrogacy agreements* in 2011,<sup>713</sup> which declared the right of same-sex couples to attain parenthood through the use of surrogacy, and the case of *WH and others*,<sup>714</sup> also decided in 2011, which elaborated on the requirements of the law by providing thorough guidance in respect of the terms and conditions that will lead the judge to validate a surrogacy agreement. The above mentioned cases have set an important legal precedent for all the cases of surrogate motherhood that will come before the courts in the future. More extensive reference will be made to these cases in the course of my analysis.

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<sup>708</sup> S. 295 (b) of the Children's Act no.38 of 2005, as amended in 2010, and para. 77.3 in *WH and Others* (29935/11) [2011] ZAGPPHC 185; 2011 (6) SA 514 (GNP) (27 September 2011). This requirement is in line with the constitutionally guaranteed rights of children (s. 28 of the SA Constitution), as well as the spirit of the Children's Act in general. Also, according to paras. 69 and 77.8 in *WH and Others*, any criminal convictions of sexual or violent nature against the commissioning parent (s) should be disclosed to the court, as they will be taken into serious consideration for the confirmation of the surrogacy agreement in question.

<sup>709</sup> S. 292 (1) (e), ch.19 of the Children's Act no.38 of 2005, as amended in 2010.

<sup>710</sup> National Health Act no. 61 of 2003, as amended in 2012.

<sup>711</sup> S.298 (1), ch.19 of the Children's Act no.38 of 2005, as amended in 2010. In this case the surrogate will have to compensate the commissioning parent(s) for the expenses they incurred due to the surrogacy contract (s. 301, ch.19 of the Children's Act no.38 of 2005, as amended in 2010).

<sup>712</sup> S. 297(1) (d), ch.19 of the Children's Act no.38 of 2005, as amended in 2010.

<sup>713</sup> *Ex parte Applications for the confirmation of three surrogate motherhood agreements* (2011/153, 2011/154, 2011/679, 2011/1314, 2011/1315, 2011/1316) [2011] ZAGPJHC 9; 2011 (6) SA 22 (GSJ) (1 March 2011).

<sup>714</sup> *WH and Others* (29935/11) [2011] ZAGPPHC 185; 2011 (6) SA 514 (GNP) (27 September 2011).



## **BACKGROUND INFORMATION- Which cases and/or events have instigated the enactment of Chapter 19 of the Children's Act 2005?**

Surrogacy has featured in the SA social reality many years before its official recognition and regulation by the Children's Act. The first case that was reported and placed in the centre of the public discourse is that of Karen Ferreira-Jorge of Tzaneen back in 1987.<sup>715</sup> Due to her inability to conceive and bear a child, Karen had asked her 48-year old mother to act as her surrogate and bring her child into the world. The birth of the triplets made international headlines, because the practice was outside the protective scope of the law of the time. The laws in existence<sup>716</sup> provided an insufficient basis; the persons involved in the surrogacy arrangement, as well as the child were in a legal limbo, as there was no law that expressly and specifically dealt with the issue of surrogacy. The regulation in force would provide a mere indirect protection and could not lead to an automatic transfer or attribution of legal parenthood to the intended parent(s). As the law stood, the child would belong to the surrogate,<sup>717</sup> who could only act as a surrogate if she was married<sup>718</sup> and the intended parent(s) would have to go through the scrutiny and the time-consuming process of adoption. By analogy with adoption law, payments would be illegal and constitute a criminal offence<sup>719</sup> and in accordance with the law of contracts, surrogacy contracts would be unenforceable as *contra bonos mores*.

In an attempt to tackle the problems raised by the lack of express provision of a legal framework for surrogacy, the South African Law Commission (SALC) began a consultation procedure in 1989, which had as a result the issuance of a Report on Surrogate Motherhood in 1993.<sup>720</sup> The Report and draft legislation were brought before the Ad Hoc Parliamentary Committee (AHPC), which has been discussing the matter until February 1999.<sup>721</sup> In what followed the Report of the AHPC, the Discussion Paper 103 in Review of the Child Care Act in 2001<sup>722</sup> highlighted the legal uncertainty surrounding the issue of legal parenthood with regards to the new reproductive technologies, and surrogacy in particular. This in turn led to the realisation of the need for a reform of the SA Law of Children.

In 2005, the legislature passed the Children's Act no. 38, where it was declared that surrogacy was to be seen as an alternative form of fertility treatment. After the legal reform of 2005, surrogacy was being performed on a regular basis and with the involvement of surrogacy agencies which tried to ensure good practice.<sup>723</sup> However, some commentators continued to stress the importance of more stringent controls on the practice of surrogacy.

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<sup>715</sup> Lewis, S.V., 'The Constitutional and Contractual Implications of the Application of Chapter 19 of the Children's Act 38 of 2005', Thesis submitted in the Department of Private Law, University of the Western Cape, May 2011, p. 17; Article by Kashiefa Ajam, 'Wombs for rent: State to act' (August 26, 2006), available at [http://www.iol.co.za/news/south-africa/wombs-for-rent-state-to-act-1.291108#.UNSRW\\_eQd4](http://www.iol.co.za/news/south-africa/wombs-for-rent-state-to-act-1.291108#.UNSRW_eQd4).

<sup>716</sup> Human Tissue Act 65 of 1983 (amended by Act No. 106 of 1984, further amended by Act No. 51 of 1989 and repealed by Act No. 61 of 2003) and section 5 of the Children's Status Act 82 of 1987, led to the conclusion that the artificial insemination did not include the status of a child born of a surrogacy agreement. Nevertheless, the Act did refer to the situation where a child was carried by a woman with whom he/she had a genetic link. After his/her birth, the child would be legally recognised as the surrogate's child, and the intending mother could only attain motherhood through adoption.

<sup>717</sup> S. 5(1) (a) of the Children's Status Act 82 of 1987.

<sup>718</sup> S. 8.1 of the Regulations of Artificial Insemination 1986.

<sup>719</sup> S. 24 of the Child Care Act 74 of 1983, as amended by s.8 of the Child Care Amendment Act 86 of 1991.

<sup>720</sup> Working Paper of the South African Law Commission no.38: Surrogate Motherhood. For more information read Clark, B., 'Surrogate Motherhood: Comment of the South African Law Commission's Report on Surrogate Motherhood (Project 65)', South African Law Journal, 110: 769-777, 1993.

<sup>721</sup> Read further the Ad Hoc Parliamentary Committee Discussion on Surrogate Motherhood at <http://www.pmg.org.za/minutes/19990210-draft-report-discussion>.

<sup>722</sup> Available at [http://www.westerncape.gov.za/Text/2004/2/child\\_care\\_act\\_review.pdf](http://www.westerncape.gov.za/Text/2004/2/child_care_act_review.pdf).

<sup>723</sup> For example the agency Baby2Mom (<http://baby2mom.co.za/>). See also the article by Baby2Mom, 'Everything you need to know about surrogacy in South Africa' (2 June, 2011), available at <http://www.proudparenting.com/node/15956>.



More recently, in the wake of Madonna's adoptions in Malawi,<sup>724</sup> the SA authorities embraced and implemented tougher rules relating to the process of international adoptions, which were inserted in the Children's Act of 2005 (as amended in 2010). This has galvanised a vivid debate concerning the matter of surrogate motherhood and the need for tighter regulation was recognised. Given high levels of poverty in SA, there was also concern that a commercial surrogacy industry would develop.<sup>725</sup>

In line with the various concerns that illegal payments were taking place and that there was no consistency in the treatment of the issues relevant to surrogate motherhood by the SA courts, Judges Ronel Tolmay and Jody Kollapen decided that it was time for the introduction of appropriate guidance. On 27 September 2011, the court of Pretoria granted permission for surrogacy to a male same-sex couple (who were Dutch and Danish citizens, but who were domiciled in SA and intended to reside there permanently), and laid down rules that govern the matters of same-sex<sup>726</sup> and single<sup>727</sup> parenthood, and describe the meaning and the criteria for the suitability of the parents.<sup>728</sup>

Additionally, the judges dealt with the definition of the 'best interests of the child'. The law states that the interests of the child are of paramount importance<sup>729</sup> when considering the issues relating to a surrogate agreement. The Judges of the *WH and Others* case took this rule one step further and referred to more specific provisions of the law on surrogate motherhood that are thought to guard the interests of the child. To exemplify this, they emphasised the requirement of s. 297 (b) and (c) of the Children's Act for the handing over of the child by the surrogate and her husband/partner, if she has one, to the intended parents at a time 'as soon as reasonably possible', so that the child will not be subjected to the emotional disturbance of developing familial bonds with the surrogate and then being taken from her and given to the intended parent(s).<sup>730</sup>

Moreover, the best interests of the child are protected because the law does not allow for the surrogacy agreement to be terminated after the fertilisation of the surrogate mother has taken place, as per s. 298 (1) of the Children's Act. The only exception to this rule is

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<sup>724</sup> News article by Andrew Vorzimer, 'South Africa Adopts Tougher International Surrogacy Rules', *The Spin Doctor* (October 13, 2011), available at <http://www.eggdonor.com/blog/2011/10/13/south-africa-adopts-tougher-international-surrogacy-rules/>; News article by Claudine Renaud, 'SA tightens surrogacy guidelines' (October 13, 2011), available at [http://www.iol.co.za/lifestyle/family/parenting/sa-tightens-surrogacy-guidelines-1.1156632#.UMojDm\\_eT\\_2](http://www.iol.co.za/lifestyle/family/parenting/sa-tightens-surrogacy-guidelines-1.1156632#.UMojDm_eT_2). Also, articles appeared on BioNews, written by Annabel Christie, 'South Africa shows a way to ensure more predictability in surrogacy arrangements' (9 January, 2012), [http://www.bionews.org.uk/page\\_116639.asp](http://www.bionews.org.uk/page_116639.asp); by Antony Blackburn-Starza, 'South African court sets out guidelines for surrogacy arrangements' (14 November 2011), [http://www.bionews.org.uk/page\\_111585.asp](http://www.bionews.org.uk/page_111585.asp).

<sup>725</sup> See article 'SA to tighten rules for foreigners to do for families' (13 October, 2011), <http://www.faceofmalawi.com/2011/10/sa-to-tighten-the-rules-for-foreigners-to-do-for-families/>. The judges in *WH and Others* (29935/11) [2011] ZAGPPHC 185; 2011 (6) SA 514 (GNP) (27 September 2011) expressed their fear that the already existent social and financial inequalities in SA would increase if appropriate rules to control the lack of payments to the surrogate were not to be put in place.

<sup>726</sup> *WH and Others* (29935/11) [2011] ZAGPPHC 185; 2011 (6) SA 514 (GNP) (27 September 2011), para. 54.1: the SA law does not allow discrimination on grounds of sexual preferences; para. 54.2: "Care should be taken that different tests are not applied to same sex couples that could be discriminatory".

<sup>727</sup> *WH and Others* (29935/11) [2011] ZAGPPHC 185; 2011 (6) SA 514 (GNP) (27 September 2011), para. 55: s. 292 (1) (c) provides that a single person may also be an intended parent, which also complies with s. 9 of the Constitution and the right to equality.

<sup>728</sup> *WH and Others* (29935/11) [2011] ZAGPPHC 185; 2011 (6) SA 514 (GNP) (27 September 2011), para. 70: "Personal and cultural perceptions should not influence any decision of the court... A court should have regard to the personal and character details of a commissioning parent. Details of previous criminal convictions should be disclosed to the court... We would guard against setting unreasonably high standards that are not justifiable for people who choose surrogacy as an option for having a child", as this would come into contrast with the right to equality enshrined in the SA Constitution.

<sup>729</sup> S. 295 (e): "Above all is the interests of the child".

<sup>730</sup> *WH and Others* (29935/11) [2011] ZAGPPHC 185; 2011 (6) SA 514 (GNP) (27 September 2011), para. 56.

in the case of a legal termination of pregnancy, according to the provisions of the Choice on Termination of the Pregnancy Act, no. 92 of 1996.<sup>731</sup>

Nonetheless, the court also stated that the rights of the intended parent(s) should enjoy equal protection to that of the rights of the child when the judge is considering the authorisation of the surrogate agreement. The constitutional rights to privacy, self-determination and non-discrimination of the intended parents should be respected at all times.<sup>732</sup>

Lastly, the Pretoria court emphasised the need for the courts to act as the ultimate controllers and investigators for the non-commercial nature of the surrogacy arrangement.<sup>733</sup> The lack of payments to any person involved (the surrogate mother and the intermediaries) should be proven by an affidavit<sup>734</sup> that supports the application and will be submitted to the court for review. Evidently, the court's confirmation of the agreement is a lot more than a simple administrative procedure. The judge has a central role when it comes to the authorisation of the surrogacy contract and '*should act to advance the spirit and the objectives of the Act without creating or placing additional obstacles in the path of the litigants, and as an upper guardian of all minor children*'.<sup>735</sup>

### **PROVISIONS OF THE SA LAW THAT ARE SIMILAR TO THOSE OF THE GREEK LAW ON SURROGACY**

It can certainly be contended that the legal, judicial and the political systems of Greece and SA are very different, but the research on both legislations proves that the laws introduced to regulate the issue of surrogacy present similarities in a variety of aspects. The Greek legislation was adopted by the Greek society earlier than that of SA<sup>736</sup> and, although it is unlikely that the Greek legislative action and the specific content of the legislation itself have exerted influence on how the SA regime on surrogacy was formulated, it seems that the decisions of the legislatures of both countries were up to a certain degree in parallel.

It is, therefore, interesting from an academic, legal, and socio-political point of view to summarise and compare the provisions of both regimes. This is evidently the only attempt in the contemporary literature to present a comparative analysis of both these regimes. The fact that there is a strong resemblance between the two legislations – despite the social and political differences of the two countries – could be strong evidence that a harmonisation of the legislations of different countries around the world may indeed be possible.

The comparison of the Greek and SA law on surrogacy will be made in the form of a list, and a brief analysis of specific issues will be provided, if and where it is necessary for a better understanding of the two legal regimes.

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<sup>731</sup> S. 300 of the Children's Act.

<sup>732</sup> More specifically, it is unacceptable for the courts to violate the rights guaranteed by the Bill of Rights and the Promotion of Equality and the Prevention of Unfair Discrimination Act, Act no. 4 of 2000 (WH and Others, para. 63). The judges should also remember that every case should be decided on its own merits (see Minister of Welfare and Population Development v Fitzpatrick and Others (CCT08/00) [2000] ZACC 6; 2000 (7) BCLR 713; 2000 (3) SA 422 (CC) (31 May 2000)).

<sup>733</sup> Paras 64-67.

<sup>734</sup> The appropriate content of the affidavit is set out in para. 77, WH and Others. The existence of an affidavit was deemed critical by the judge in the matter of the *Ex parte Applications for the confirmation of three surrogate motherhood agreements* (2011/153, 2011/154, 2011/679, 2011/1314, 2011/1315, 2011/1316) [2011] ZAGPJHC 9; 2011 (6) SA 22 (GSJ) (1 March 2011), para. 24. The judge postponed the decision for all three applications *sine die*, due to the lack or insufficiency of the affidavits concerning the medical and psychological health of the contracting parties.

<sup>735</sup> WH and Others, para. 72.

<sup>736</sup> The Greek law on surrogacy was passed in 2002 (amended in 2005), whereas the SA law in 2005 (amended in 2010).

- The legislations of both countries facilitate surrogacy and regulate its practice under strict provisions.
- The facilitation of surrogacy is based on the recognition of a right to have a child (art. 5 para. 1 of the Greek Constitution, and s.12 (2) (a) of the SA Constitution), even in cases where this can only be accomplished by artificial means and the use of fertility treatment, including surrogacy.
- Surrogacy contracts are valid and enforceable: art. 1458 Greek Civil Code (GCC) and s. 292 Ch. 19 of the SA Children's Act no. 38 of 2005. Both the Greek and SA legislation allow for the drafting of a surrogacy agreement between the individuals involved in the practice of surrogacy (intended parent(s), surrogate mother and her husband/partner, if she has one). The agreement must be in writing, and must be made at a time before the fertilisation of the surrogate mother. Furthermore, in order for the terms of the agreement to be enforced three other prerequisites must be filled: the provision of (informed) consent by all those involved in the arrangement, the evident (by the specific clauses of the contract) lack of financial gain, the court validation and authorisation.
- Consent to the surrogacy agreement: art. 1456 GCC and art. 5 of Law 3305/2005, and s. 293 Ch. 19 of the SA Children's Act no. 38 of 2005. The surrogate motherhood contract must be created by consensual individuals, who were not coerced to make the agreement, and understand and accept the legal consequences of their predicament (their rights and obligations related to the nature of this arrangement, such as the costs of the medical and legal procedures, the lack of payments, the right for a legal abortion, the obligation for the handing over of the resulting child after his/her birth, the terms and conditions of the right to parent and contact the child etc.). The Greek law goes on to say that the parties must also assert that they have been informed about the risks of the fertility treatment, as well as the dangers associated with the pregnancy and childbirth. The parties should also consider the psychological impact that the relinquishment of a child may have on the person's life (art. 5 of Law 3305/2005, and s. 11 (b) of the SA National Health Act 2006, as amended in 2 March, 2012).
- The pre-conception confirmation of the surrogacy agreement by the court: art. 1458 GCC and art. 6 of Law 3089/2002, and s. 295 Ch. 19 of the SA Children's Act no. 38 of 2005. The upper guardian of the rights of the contracting parties and of the interests of the child, as well as the upper authority to deem the agreement valid is the Court. The judges in both countries examine the contract and decide whether the provisions of the law have been followed, and more specifically whether the parties have entered into the agreement in good faith and only for altruistic reasons, whether payments have been made to any existent intermediaries, whether there is a medical necessity on behalf of the individual who wants the child to proceed to the practice of surrogacy in order to have his/her desire for parenthood fulfilled, whether the intended parent(s) and the surrogate mother have been assessed as suitable to execute the terms of the contract, among other issues. The confirmation of the surrogacy arrangement must take place before the surrogate's impregnation. Nevertheless, due to the significance of the child's best interests, it is hard to imagine that the judge will not authorise the surrogacy arrangement in retrospect if the parties failed to ask for the court's permission before the fertility treatment takes place.
- The best interests of the child are crucial to the decision for the confirmation of the surrogacy agreement and the dealing with any issues arising from the arrangement: art. 1 para. 2 of Law 3305/2005, art. 21 para. 1 of the Greek Constitution (protection of the family), s. 295 (e) and 296 (1) (a) Ch. 19 of the SA Children's Act no. 38 of 2005.
- The rule of medical necessity: art. 1458 and 1455 of GCC, and s.295 (a) Ch. 19 of the SA Children's Act no. 38 of 2005. Surrogate motherhood is in both countries only available to persons who are unable to have a child for medical reasons. Furthermore, the SA law considers homosexuality as a biological inability

to procreate, and, hence, same-sex couples may use a surrogate in order to have a child. A provision similar to this one is non-existent in the Greek law.

- Single parenting is acceptable: art. 1458 GCC<sup>737</sup>, and s.292 (1) (c) Ch. 19 of the SA Children's Act no. 38 of 2005. The marital and/or relationship status of the person who wants to have a child through surrogacy is irrelevant.
- Domicile requirement: art. 8 of Law 3089/2002, and s. 292 (c) and (d) Ch. 19 of the SA Children's Act no. 38 of 2005. Both the intended parent(s) and the surrogate mother must be domiciled in the country. However, there is a provision in SA law which states that the court is entitled to allow – on good cause shown – for a woman to become a surrogate even if she is not domiciled in SA (s. 292 (2) Ch. 19 of the SA Children's Act no. 38 of 2005). Such flexibility to the court's powers is not recognised by the Greek Law.
- Altruistic nature of the surrogacy arrangement: art. 1458 GCC, and s. 295 (c) and (v) and s. 301 Ch. 19 of the SA Children's Act no. 38 of 2005. Any payments in relation to surrogacy are prohibited in both countries, including payments towards the donor, the clinic, any surrogacy agencies that brought the intended parent(s) into contact with the surrogate mother, or any third parties involved. The woman who offers her gestational services must not aim to financially benefit from the surrogacy arrangement. An exception to the rule of the lack of payment in both countries is the provision permitting 'reasonable expenses', namely any costs in direct link to the impregnation of the surrogate, the pregnancy, and childbirth costs (art. 13 para. 4 of Law 3305/2005, and s.301 (2) Children's Act no. 38 of 2005). More specifically, the intended parent(s) should provide for the medical care of the surrogate, her clothing, her transportation to and from the medical clinic, the costs of the childbirth and after-birth treatment, the legal costs for the application for the confirmation of the surrogacy agreements by the court, the medical and psychological assessment of the surrogate mother, as well as the loss of wages due to her inability to present herself to work during the last months of pregnancy. The SA law goes a step further and accepts additional payments for the insurance coverage of the surrogate (death and disability insurance).<sup>738</sup> Also, the SA law requires for the legal cases of surrogacy to be managed by lawyers specialised in the specific area of law<sup>739</sup> and the costs for their services are covered by the intended parent(s) (s. 301 (3) Children's Act no. 38 of 2005). Both in SA and in Greece the court must be satisfied – based on affidavits that must be submitted to the court – that no payments other than for reasonable expenses have been made to the surrogate or any agencies involved.
- Requirement for the psychological assessment of the surrogate: article 13 para. 2 of Law 3305/2005, and s. 7 (j) (ii) of the National Health Act of 2003 (as amended in 2012) and WH and Others (29935/11) [2011] ZAGPPHC 185; 2011 (6) SA 514 (GNP) (27 September 2011), para. 67. Before applying to the court for its authorisation of the surrogacy agreement, the intended parent(s) should make sure that the good emotional state of the surrogate and her intention to comply with the terms and conditions of the surrogacy arrangement and the law have been evaluated by an experienced psychologist and have been deemed satisfactory.

<sup>737</sup> Art. 1458 of the GCC recognises the right of a single woman to have a child through surrogacy. The right of a single man to use a surrogate for the attainment of parenthood to a child was recently acknowledged by the Greek court (One Member Court of First Instance of Athens no. 2827/2008 and One Member Court of First Instance of Thessaloniki no.13707/2009). For a comment on the SA law of parenthood see also Louw, A., 'The Constitutionality of a Biological Father's Recognition as a Parent', Per/PeLJ 13 (3) 2010: 156-206.

<sup>738</sup> S. 301 (2) (c) Ch. 19 of the SA Children's Act no. 38 of 2005. Read Slabbert, M.N., 'Legal issues relating to the use of surrogate mothers in the practice of assisted conception', South African Journal of Bioethics and Law, Vol 5, No 1 (2012), available at <http://www.sajbl.org.za/index.php/sajbl/article/view/190/200>. Also, the article by Baby2Mom, 'Every Thing You Need to Know about Surrogacy in South Africa', <http://www.proudparenting.com/node/15956>.

<sup>739</sup> Article by Baby2Mom, 'Every Thing You Need to Know about Surrogacy in South Africa', <http://www.proudparenting.com/node/15956>.

- No right to terminate the agreement after the impregnation of the surrogate mother: art. 1456 para.2 GCC, s. 297 (1) (e) Ch. 19 of the SA Children's Act no. 38 of 2005.
- The fully medicalised fertilisation procedure: art. 16 of Law 3305/2005, and s. 9 (1) National Health Act of 2003. The impregnation of the woman who acts as a surrogate on behalf of the intended parent(s) is strictly performed in medical institutions which are authorised to provide fertility treatments and by medical practitioners-gynaecologists specialised in human reproduction and reproductive technologies.
- Anonymity of the donor, if donated gametes are used: article 1460 GCC, s. 8 (2) (d) of National Health Act 2003 and WH and Others case, para. 68. In cases where the gametes of another person are used, the identity of the donor will remain undisclosed. Only access to the donor's medical files is permitted by law.
- Surrogate mother's right to terminate the pregnancy: art. 179 and 181 of the GCC (legal principal of fairness) and art. 304 of the Greek Criminal Code (right to a legal abortion), and s.300 Ch. 19 of the SA Children's Act no. 38 of 2005.
- Automatic attribution of legal parenthood to the intended parent(s): art. 1458 and 1464 GCC, and s. 297 (1) (a) Ch. 19 of the SA Children's Act no. 38 of 2005. The child that is born after the drafting and the confirmation by the court of a surrogacy arrangement is considered as the child of the intended parent(s) from his/her birth. No adoption, or court proceedings (such as those of the parental order in the UK) is needed. The surrogate and her husband/wife/partner have absolutely no parental rights towards the child. Moreover, the SA law includes an express provision for the lack of a right of the surrogate, and her husband/wife/partner, as well as their relatives, to contact the child born through surrogacy, unless there is a different agreement between the parties found in the surrogacy agreement. Such a rule does not exist in the Greek Law.

## **PROVISIONS OF THE SA LAW THAT ARE DIFFERENT TO THOSE OF THE GREEK LAW ON SURROGACY**

Even though the Greek and SA laws on surrogacy are, as noted in the previous section, so much alike, they are also dissimilar in many critical points. The SA legislation is more progressive than the Greek one in a variety of aspects, providing for same-sex parenthood and death and disability insurance of the surrogate mother. However, in other respects the SA regime is more conservative, such as when it comes to the finite duration of the validity of the surrogacy agreement, the requirement for the existence of a genetic link between the intended parent(s) and the child.

More specifically:

- The SA law refers to "commissioning" parent(s) (s.294 Ch. 19 of the SA Children's Act no. 38 of 2005), and requires for the child to have a genetic relationship with his/her parent(s), as opposed to the Greek law, which allows for a non-biological parenting. The Greek law recognises the case of full social parenthood, whereby the parent-child relationship is based on emotions of love instead of biological ties (as derived by art. 1458 GCC).
- The cases of both full (s. 294 of the Children's Act no.38 of 2005) and partial surrogacy is recognised in SA (stemming from s. 294 in conjunction with s. 298 (1) of the Children's Act no.38 of 2005). In Greece only the case of gestational surrogacy is allowed, since the law requires for the egg not to belong to the surrogate mother (art. 1458 GCC). Hence, the fertilised egg will either come from the intending mother, if she is able to produce one, or a third donor. With the adoption of this rule the legislature tried to avoid the critiques against the enforcement of the law on surrogacy made by people who consider it unethical



and harsh to force a woman to relinquish a child, with whom she has supposedly formed an emotional bond during the period of pregnancy.

- The SA law makes surrogacy available to same-sex parents (S. 295 (a) of Ch. 19, Children’s Act 2005)<sup>740</sup>. Such a choice is currently not available to Greek same-sex couples. It is, however, possible that a judge may authorise surrogacy arrangements that will be presented before the court in the future, based on the general constitutional principle of equality and non-discrimination (art.4 of the Greek Constitution).
- According to the SA law, the application to the court for the authorisation of the surrogacy agreement may be made by either of the intending parents, whereas in Greece this right is only appointed to the intending mother (art. 1458 GCC). By placing the intended mother at the centre of the legal framework, it could be argued that the Greek law seeks to empower women’s rights and promote a more feministic approach to the law of reproduction. In contrast, the SA regime allows for a “cooling off” period for a surrogate mother who is also the genetic mother, during which she can change her mind about giving the child to the intended parent(s) (see below).
- The Greek law sets an upper limit to the age of the intending mother, which is the age of fifty (from the combination of the art. 1455 of the GCC and art. 4 paragraph 1 of Law 3305/2005), although no requirement is in existence with regards to the age of the surrogate mother. Recent case law, however, indicates that the most significant criterion for a woman to be allowed to act as a surrogate mother in Greece is not her biological age, but her general good health and her ability to endure the difficulties of pregnancy and childbirth.<sup>741</sup> A similar rule is not to be found in the SA regime on surrogacy. The Greek law has evidently sought to discourage post-menopausal women from continuing with their attempts to accomplish motherhood.
- The surrogate mother in SA must have already had a viable pregnancy and delivery and a child of her own: s. 295 (c) (vi) and (vii) of the Children’s Act of 2005, respectively. The Greek law does not require the woman who acts as a surrogate to have had the experience of pregnancy, childbirth, and motherhood before she agrees to enter into a surrogacy contract. This has been harshly criticised by many Greek commentators, who argue that the surrogate must know what it means for a woman to undergo the difficulties of a pregnancy and delivery, the emotional bond that is created between her and the child, and the pain of not being able to care for and raise the child afterwards. Concerns are expressed about the validity of her consent, which, according to them, is only partially informed and therefore void.
- The payment of a death and disability insurance to the surrogate mother is included in the “reasonable expenses” of a surrogacy arrangement (s. 301 (2) (c) of the Children’s Act of 2005). No such rule is adopted by the Greek law.
- In SA the fertilisation of the surrogate mother may take place, if the judge deems it necessary, even when the husband/wife/partner of the woman who wants to act as a surrogate does not consent to it (s. 293 (3) of the Children’s Act of 2005). The court will decide whether the person withholds his/her consent for no apparent and justifiable reason, and if it finds it correct and fair to do so, it will order the performance of the artificial insemination of the surrogate without worrying about the lack of the legal requirement of consent from all parties involved. Such an action is prohibited by the Greek law, where the legal rule of the indirect attainment of the legal parentage through the recognition of legal parentage to the man’s wife/civil partner (art. 1456 GCC, art. 5 of Law 3305/2005, arts. 1464 and 1475 GCC).

<sup>740</sup> See also footnote no. 11 above.

<sup>741</sup> In 2006 a woman aged 52 was allowed to bear the child of her daughter and her husband (One Member Court of First Instance of Korinthos no. 224/2006).



- The SA law states that the fertilisation of the surrogate must take place before the lapse of a period of time of 18 months after the court's permission to proceed with the surrogacy (s. 296 (1) (b) of the Children's Act of 2005). The reason for this is the fear that the consent of the parties will not be valid after the time specified by the law, which could render the agreement unethical and coerced. The Greek law pertaining to surrogacy includes no similar rule.
- Lastly, but importantly, the SA law allows for a "cooling-off period" and the right of the surrogate mother to change her mind. In Greece this is only possible *before* the attainment of pregnancy. After this point the surrogate mother must adhere to the regulations of the surrogacy arrangement and relinquish her parental rights along with the child after his/her birth. In SA, however, s. 298 (1) of the Children's Act of 2005 dictates that **the surrogate mother who is also the genetic mother** can terminate the agreement at any time, as long as this is done before the lapse of a period of 60 days after the birth of the child. The process is simple: she just has to file a written notice to the court informing the judge about it. She may then be considered as the wholly (both genetic and legal) mother of the child and not be forced to hand it over to the intending parent(s). However, the law states that she may have to compensate the intending parent(s) for any payments made up to that point<sup>742</sup> (i.e. payments for reasonable expenses) as a form of a breach of contractual obligations. Such a right for a change of heart is not available to the gestational surrogate mother according to the SA law. Her position as an altruistically motivated service provider is not deemed strong enough for her to be given the right to seek the recognition of legal motherhood. Any attempt to keep the baby for herself would be against the law (s. 297 (1) (b) of the Children's Act of 2005), as it is also in Greece.
- The role of the court: In practical terms, the judges who decide for the cases of surrogacy in Greece are extremely limited. They have little or no discretionary power, and the court procedure for the authorisation is more of a 'formal bureaucratic procedure'<sup>743</sup> rather than the ultimate test for the attainment of legal parenthood. The case is different in SA. The court is more than a rubber stamp for the endorsement of the individual's desire to have a child through surrogacy, if this cannot be accomplished otherwise. The judge is the protector of the law and of the interests and rights of all the parties involved in the surrogacy arrangement. He/she will investigate and confirm the lack of financial gain, the respect of all the legal prerequisites, and the suitability of the intending parent(s) and the surrogate mother to comply with the terms and conditions of the contract. The judge will ask about the true reasons for choosing the method of surrogacy in order to have a child, and search for a close relationship of mutual respect and appreciation among the parties. In theory, these are also the responsibilities of the Greek judge, but as the research conducted for this study on the recent case-law showed, the courts in Greece rather check if the paperwork submitted to the court is sufficient to declare the specific agreement as valid and in accordance with the national laws and the Constitution.
- No criminal sanctions are threatened against the violators of the SA law on surrogacy, as it is done by article 26 paragraph 8 of Law 3305/2005 in Greece. The penalties are in fact harsh: personal imprisonment of all the actors to the crime for two years at least, and a payment of damages of at least 1,500 Euros.

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<sup>742</sup> S. 298 (3) of the Children's Act 2005.

<sup>743</sup> Hatzis, A., 'The Regulation of Surrogate Motherhood in Greece' (working paper, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1689774](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1689774).

## 6.11. SPAIN

### Equal rights versus bioethics: a moral conflict or a legal one?

#### The current legal debate in Spain with regards to homosexual parentage through the case of surrogacy.

##### 1. Current legal framework

The Spanish law 35/1988 of the 22<sup>nd</sup> of November on the techniques of assisted reproduction (Ley sobre técnicas de reproducción humana asistida- LTRA, for its Spanish acronym)<sup>744</sup> has been considered one of the most liberal pieces of legislation, as it allowed already by the time of its entry into force the access to assisted reproductive technology to single women (art. 6.1.). It was also a pioneering law on the matter, as it allowed the access of ART to widowed women, if the husband had consented to donate his sperm while alive<sup>745</sup>.

In Spain, the prohibition of surrogacy was determined by the law of the 22<sup>nd</sup> of November 1988 on the techniques of medically assisted reproduction (TRA, for its Spanish acronym), and confirmed by the law nº14 of the 26<sup>th</sup> of May 2006.

This law stipulates that: "1. A contract convening the gestation, whether for profit or gratuitous, of a woman who will renounce to maternal parentage in favour of a co-contracting party or a third party, will be null and void. 2. The parentage of the children born from surrogacy will be determined by childbirth. 3. The biological father retains the possibility to contest the paternity, in conformity to the rules of common law" (art. 10)<sup>746</sup>.

This law forbids surrogacy explicitly and reinforces the presumption according to which the mother is the woman who gives birth. Moreover, sanctions are provided for in the form of fines. Surrogacy is sanctioned by a fine going from 10.000 to a million euros and can lead to the closing of the medical centre or the services of medically assisted reproduction that participated in it.

Recently, a debate emerged on the legal scene and the doctrine is shared between two positions that are relatively opposed to each other. Furthermore, some members of the National Commission on Medically Assisted Reproduction have expressed their disagreement with this prohibition and defend an opening-up of the legal framework to surrogacy for women who would not be able to bear children for physiological reasons. However, in the current context of crisis, of social demands and the ascension to power of a conservative party, this is not a legislative priority. Moreover, the right-wing government has concentrated its attention on the reform of the abortion law, questioning the legal concert resulting from more than 30 years of struggle for the equality of men and women.

##### 2. Historical context of the laws

In the context of the LTRA of 1988, the Spanish legislator had decided to create a Special Commission Studying In Vitro Fecundation and Artificial Insemination (Palacios Commissions)<sup>747</sup>. As a part of the work of this commission, a group of experts was

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<sup>744</sup> Official Bulletin of the State of the 24/11/1988, num. 282.

<sup>745</sup> MARTÍNEZ-PEREDA RODRÍGUEZ and J. M. MASSIGOGUE BENEGIU, *La maternidad portadora, subrogada o de encargo en el Derecho español*, Ed. Dykinson, 1994, pg. 71

<sup>746</sup> BUSTOS PUECHE, J-E., *El derecho español ante las nuevas técnicas genéticas*, *Diario La Ley*, Ed. LA LEY, tome 3, 1992.

<sup>747</sup> Report of the Special Commission Studying In Vitro Fecundation and Artificial Insemination: [approved by Congress of Deputies in Plenary session on the 10<sup>th</sup> of April 1986]. Spain. General Courts. Congress. Special

convened (biologists, gynaecologists, legal experts, philosophers) in order to counsel the legislative body with regards to the genetic, biological and ethical problems of assisted reproduction. The report issued by this Commission (approved in 1986) adopted a series of criteria that were determinant in the regulation of surrogacy, contemplated by the Law of 1988. In view of writing the report, the Commission disposed of a broad documentation, but it also was inspired –as the similarities of the final conclusion reveal– by the Warnock report, written in the United Kingdom in 1984.

This report refuses surrogacy on the basis of “ethical reasons” in relation to maternity, but also to the possibility of the manipulation of the feminine body, arguing that: “it is inadmissible in a fair and democratic society, as there is an increased risk of abuse and commercialisation, two situations that are subjected to conviction”.

At the same time, the Palacios Commissions settled on the question of prioritisation of the nature of maternity in cases of conflict: genetic, gestational, etc. concluding that it is necessary to reflect on the biological value of the two aspects of surrogacy: the genetic aspect of maternity and gestation. The third dimension emerging in the latter years of the debate, the intention (intended parents), is absent in these reports.

With regards to these conflicts on the prioritisation of the prevalence of maternity, the Commission concluded the following: “the gestation component is more important than the genetic one, as the gestating mother bears the child within her for nine months and protects the child physiologically and psychologically, an element that will give priority to the child-bearing woman, and opposes surrogacy. In this sense, we recommend that the biological preponderance of gestational maternity over the genetic one is admitted and that the legal mother is always the gestating mother, even if originally there was an intervention of donors”. It is, thus, on this basis that the current laws prohibit surrogacy and define maternity in relation to childbirth.

*The recommendations were the following:*

- Surrogacy must be prohibited in all circumstances.
- the individuals participating of a contract of surrogacy must be subjected to a penal sanction, as well as the individuals, the agencies and the institutions favouring it as well as the medical teams performing it.
- the health centres or services in which these techniques take place will be subjected to a sanction<sup>748</sup>.

From a penal point of view, Art. 221 of the Penal code (based on the version of 2003) establishes: 1. Those who, through economic compensation, deliver a child to another individual, without the existence of a relation of parentage, eluding the legal procedures of custody, hosting or adoption, with the objective of establishing an analogous relation to that of parentage, will be punished with imprisonment of a duration of from one to five years, and with a legal impediment to exercise parental authority, tutelage or custody during a period going from four to 10 years<sup>749</sup>. 2. The same sanction will apply to the person who receives the child as the intermediary, even if the case of the “delivery” of the child took place in a foreign country<sup>750 751</sup>.

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Commission Studying In Vitro Fecundation and Artificial Insemination, Marcelo Palacios. Congress of Deputies, General Secretary 1987.

<sup>748</sup> ROCA I TRÍAS, E., «Derechos de reproducción y eugenesia», *Biotecnología y Derecho. Perspectivas en Derecho comparado*, Bilbao-Granada, 1998, p. 127.

<sup>749</sup> It is impossible to know if the incrimination concerns both parents or only the mother, as there has not been a penal case concerning surrogacy until today.

<sup>750</sup> PEREZ VAQUERO, C. “Las pensiones de la poligamia”, *Revista Cuadernos de Criminología*, 2009, nº 7; pp. 38-39. <http://dialnet.unirioja.es/servlet/articulo?codigo=3104389>.

Let us move forward in history, and acknowledge the progress in terms of new techniques of reproduction that has been achieved during these last years. In particular the increased potential of research and the need to answer the issue of the destination of supernumerary pre-embryos, pushing forwards the need for a reform or a profound revision of the law 35/1988, of the 22<sup>nd</sup> of November 1988.

The Law 45/2003, of the 21<sup>st</sup> of November, modifying the Law 35/1988 only partially responded to these questions. Indeed, the Law authorises the use, for the purposes of research, of the cryopreserved pre-embryos existing before its entry into force (November 2003), and under very restrictive conditions. Moreover, this law established an important limitation: that of producing a maximum of three oocytes in every single reproductive cycle, which complicated the ordinary tasks related to assisted reproduction techniques. It is on this issue that the National Commission on Medically Assisted Reproduction showed criticism with regards to the legislative reform, and recommended a correction of the gaps resulting by the creation of a new law.

In this sense, there was also a problem of legal complexity, as Spain had two laws in force, the law 35/88 and the law 45/2003, which modified only two articles of the previous one, without addressing the rest of it<sup>752</sup>.

The Law 2006 will nullify the previous two laws and will constitute the sole norm on the matter.

The law nº14 of the 26<sup>th</sup> of May 2006 on the techniques of medically assisted reproduction ("*técnicas de reproducción humana asistida*") comprises an article entitled "Surrogacy", enouncing:

"1. A contract convening the gestation, whether for profit or gratuitous, of a woman who will renounce to maternal parentage in favour of a co-contracting party or a third party, will be null and void.

"2. The parentage of the children born from surrogacy will be determined by childbirth.

"3. The biological father retains the possibility to contest the paternity, in conformity to the rules of common law."<sup>753</sup>

Let us be reminded that the previous law, adopted in 1988, included exactly the same prohibition. Neither the explanatory statement on the basis of the law of 2006 nor the one for the law of 1988, both very detailed, specify the reasons for this prohibition.

### **3. A great change through the administrative channels**

Regardless of this prohibition, the Directive of the Directorate General for Registers and Notaries (DGRN, for its acronym in Spanish)<sup>754</sup> on the "regime of registration of parentage of children born out of surrogacy", of the 5<sup>th</sup> of October 2010 (Official Bulletin of the State of the 7<sup>th</sup> of July 2010), provides for the registration in the Civil Registry of children born from surrogacy in countries where the law provides for it and with the condition that at least one of the parents is Spanish. In other words, it

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<sup>751</sup> The penal process develops within the principle of territoriality (regardless of art. 221 of the Penal Code). This principle has to be articulated with the principle of minimal intervention of penal law and the principle of proportionality. This is the reason why the article 221 of the PC has never been applied to cases of international surrogacy. No case has been documented.

<sup>752</sup> Law 14/2006, of the 26<sup>th</sup> of May, on the techniques of assisted human reproduction.

Official Bulletin of the State, nº 126 of the 27<sup>th</sup> of May 2006, pages 19947 to 19956 (10 pgs.), BOE-A-2006-9292. [http://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2006-9292](http://www.boe.es/diario_boe/txt.php?id=BOE-A-2006-9292).

<sup>753</sup> BOE nº 126, 27.5.2006.

<sup>754</sup> The DGRN is structurally attached to the sub-secretariat of the Justice Ministry. It is the equivalent of the Registry Office.

allows the access to the Spanish Civil Registry of “foreign” cases<sup>755</sup>.

However, this directive was questioned by the Provincial Supreme Court of Valencia (*Audiencia Provincial de Valencia*), as it is shown by the sentence n° 8621/2011 of the Court (Sentence of the Provincial Supreme Court of Valencia, of the 23<sup>rd</sup> of November 2011). This sentence builds on the Directive of the DGRN of the 5<sup>th</sup> of October 2010, and follows the precedent stipulated by the sentence of the Court of First Instance (n° 15 of Valencia, of the 15<sup>th</sup> of September 2010)<sup>756</sup> that settles in favour of the action undertaken before it by the Public Prosecutor (Fiscal Ministry), ordering the annulment of the registration in the Civil Registry of children born from surrogacy in foreign countries.

### 3.1. Detailing the legal facts

In Spain, it was not until the question of the recognition of the double masculine same-sex parentage was raised, through the issue of surrogacy, that a case law began to emerge.

Surprisingly, there is no case before 2006. Previously Spain had bypassed<sup>757</sup> the question of surrogacy raised by publicised cases of celebrities becoming parents through “magic” channels. It is, thus, possible to affirm that there was a great degree of social and legal hypocrisy until a gay couple requested the registration in the consular Civil Register Office of their son born through surrogacy at Los Angeles in 2008. This case, very publicised, generated several judicial and administrative sentences and opened a debate within the doctrine, as we will explore in the following lines.

To return to the question of this supposed hypocrisy, let us explore the statistics of the Consulate of Los Angeles. If we observe the data of the Consulate, it is possible to note that the birth rate of the Spaniards residing within the territory of the Consulate of Los Angeles during the year 2008 was of 50,01 per thousand. This rate is five times higher than the rate of Spaniards residing in Spain (9,8 per thousand in 2008) or in other consular territories. To explain this disproportionate birth rate, we can suggest that the Consulate allows for the registration of sons and daughters of non-residing heterosexual couples. We have also found cases in which mothers, considered by the Consulate as having given birth at Los Angeles, entered the United States a few days after the birth of their child. In the blog “sonnuestroshijos” (Spanish for “they are our children”) there are several anonymous testimonies of heterosexual couples that registered their child born through surrogacy before the Consulate of Los Angeles, pretending to be the biological parents of the child.

In the light of this evidence, Spanish heterosexual couples were able to successfully obtain the transcription of foreign birth certificates in the Spanish Civil Registry, as if the children born from surrogacy were children born through natural means.

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<sup>755</sup> From the 1<sup>st</sup> of July 1992, Spain is a part of the Convention of the ICCS n°24 la Convention CIEC n°24 on the recognition and updating of civil status booklets, signed at Madrid on the 5<sup>th</sup> of September 1990 providing that civil registrars drawing up a civil status record, update, when presented to them, the civil status booklets drawn up in another Contracting State. Pursuant to the possibility provided by article 11 of the Convention, the Spanish civil registrar will not proceed to update the documents if such updates are not provided for by the domestic law or if the content is contrary to the domestic public order.

<sup>756</sup> LAMM, E., *Gestación por sustitución Realidad y Derecho*, Consejo Nacional de Investigaciones Científicas y Técnicas, Argentina, 2012.

<sup>757</sup> To the extent public authorities ignored the situation. No legal procedure was triggered. The most publicised cases concern a Marquise (Thyssen), a signer (Miguel Bosé).



ACTIVIDAD	2004	2005	2006	2007	2008
Residentes registrados	6.857	7.280	7.744	7.853	8.096
Inscritos en el CERA	4.507	4.202	4.453	4.785	6.907
Pasaportes	1.157	1.149	1.139	1.222	1.105
Visados	2.366	2.659	3.054	3.131	3.365
Inscrip. Registro Civil	342	389	326	356	406
Exped. nacionalidad	344	314	229	287	303
Escrituras Protocolariz	200	80	233	211	227
Legalizaciones	426	396	454	405	359
Fallec., tras. cadaveres	12	15	33	18	9
Ayudas, repatriaciones	15	7	23	14	9
Certificados expedidos	1.305	940	917	1.007	1.119

It is evident that the gay couples struggling to register their children in the Spanish Civil Registry from abroad made visible an issue that was until then invisible (or taboo). The discretion of this practice, even in recent cases, is explained by the fact that the heterosexual couples could misrepresent reality and pretend to be both legal and biological parents of the child.

In California, the practice of surrogacy is well established. An authorisation system for the couple and the surrogate is founded on social and medical criteria. Moreover in this state, the case law grants parentage to the genetic mother, regardless of the fact of childbearing. Furthermore, the parents undertake an action before a Court prior to the birth of the child. The choice of the surrogate is often made between relatives or friends, or to the benefit of homosexual couples that enjoy the same rights as heterosexual couples in terms of marriage and parentage. Some couples keep ties with the surrogate in a perspective of symbolic parenthood, by attributing the social role of aunt or friend of the couple.

### 3.2. The facts: legal actions of a gay couple

The RDGRN<sup>758</sup> (Resolution of the Directorate General for Registers and Notaries) of the 18/2/2009 resolves the legal action undertaken by two married men, both Spanish citizens residing in Spain, against a legal sentence of the officer in charge of the Spanish Consular Register Office in Los Angeles-California, who refused the registration after birth of their two children born through surrogacy in that American state. The parents of the minors appeared before the Spanish Consular Register Office in California with the objective of obtaining the documentation necessary to return to Spain with the newly born children.

Within the consular demarcation (zone 17: United States Los Angeles), there is a Registry Office before which it is possible to register the children born on Californian territory from Spanish citizens in order to allow these children to be recognised by the Civil Registry as Spanish. The officer in charge at the consulate verifies the provided documentation, and orders the transcription of the births into the Civil Registry in conformity with the Spanish law (Article 23 of the law on the Civil Registry). Thereafter, the Ministry of Justice approves these documents and sends them to the Central Registry (Article 12 of the law on the Civil Registry).

<sup>758</sup> The DGRN is not a judicial entity but an administrative one depending on the Ministry of Justice. The decision of the DGRN can be contested and taken before the courts. But the DGRN is the supreme entity governing registries and gives instructions (directives) to ensure the correct functioning of the registries (certificates, registrations).



In this case, the officer in charge of registration at the consulate refuses the registration, not because there was a failure to comply with the procedure concerning the law on the Civil Registry, but because the children were born through surrogacy, which is prohibited by article 10 of the law on the techniques of assisted human reproduction<sup>759</sup>.

Let us note that the procedure followed by this couple doesn't consist of asking before the Spanish courts the execution of the Californian decision establishing parentage. The couple requests the registration of the two children in the Consular Civil Registry (Registro civil consular). In this particular case, the Public Prosecutor (Ministerio Fiscal) was notified of the action, but did not take a stand. This could be due to the fact that the latter considers that the question does not have an incidence on the Spanish public order, as the transcription into the Spanish Civil Registry is necessary for the Public Prosecutor to be able to nullify this decision after the fact (thus, after the registration).

The Directorate General for Registers and Notaries (DGRN) orders for the children to be registered in the Civil Registry, arguing that the question of parentage in relation to the minors is not the object of the procedure but to attend to the issue of recognising the validity of the proof of the certificates issued by the foreign registry office<sup>760</sup> (Art. 81 of the Decree of the 14<sup>th</sup> of November 1958 concerning the Regulation of the law on the Spanish Civil Registry<sup>761</sup>).

The DGRN will settle in favour of the couple and will order the registration of the birth of the minors with parentage, identically to what appeared in the Californian civil registry: the children born in California are the "natural" children of the Spanish gay couple. On the Spanish family record booklet they are identified as having a direct relation of parentage with the gay couple.

The DGRN refuses, thus, the existence of fraud or "bad forum shopping" and argues that the registration was not contrary to the Spanish international public order. Moreover, the DGRN highlight that the principle of the best interests of the minor demands the children to have the same parentage in Spain and in California and that their identity is only one and not many.

In other words, to the DGRN the minors should not change parents every time they cross borders. However, on the 17<sup>th</sup> of September 2010, the Court of First instance n°15 of Valencia nullified this decision following an action undertaken by the Public Prosecutor (Ministerio Fiscal) and declared that the documents were null and void. The couple decides, then, to launch an appeal before the Provincial Supreme Court. Moreover, the DGRN issues a "directive"<sup>762</sup> concerning the registration of paternity or maternity in the case of international surrogacy.

The directive of the DGRN of the 5<sup>th</sup> of October of 2010 on "the regime of registration of parentage in relation to children born through surrogacy" attempts to establishing a legal security, proportionate to the Spanish legal regime on parentage for children born through techniques of assisted reproduction when the parentage has been validated by the authorities of the foreign country. But the directive has several operational limits, especially in Spanish international private law, and turns the procedure into an

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<sup>759</sup> QUIÑONES ESCAMEZ, A., "Doble filiación paterna de gemelos nacidos en el extranjero mediante maternidad subrogada. En torno a la RDGRN de 18 de febrero de 2009", WWW. INDRET.COM, 2009. QUIÑONES ESCAMEZ, A., « La famille homosexuelle en Espagne », Homoparentalité? Approche comparative, Société de législation comparée, Paris 2012, pp. 41-79.

<sup>760</sup> CALVO CARAVACA A.-L. et CARRASCOSA GONZALEZ, J., « Gestión por sustitución y derecho internacional privado: consideraciones en torno a la resolución de la dirección general de los registros y del notariado de 18 de febrero de 2009 », *Cuadernos de Derecho Transnacional*, vol. 1, n° 2, October 2009, pp. 294-319.

<sup>761</sup> Decree of the 14<sup>th</sup> of November 1958 concerning the Regulation of the law on the Spanish Civil Registry.

<sup>762</sup> OFFICIAL BULLETIN OF THE STATE, n° 243, 7<sup>th</sup> of October 2010.

extremely complicated one in bureaucratic terms<sup>763</sup>.

#### 4. Courts and case law

##### 4.1. 2009: Resolution of the DRGN of the 18/2/2009 (RJ/2009\1735)<sup>764</sup>

**A resolution of the DGRN of the 18th of February 2009 (RDGRN), assessing the action undertaken against the legal decision of the officer in charge of the Consular Registry, and ordering the transcription into the Spanish Civil Registry of the contents of the foreign birth certificates of the twins born through surrogacy in California.**

The RDGRN invokes the best interests of the minor, on the basis of the supranational norm of the article 3 of the United Nations Convention on the Rights of the Child (1989), in force in Spain from the 5<sup>th</sup> of January 1991. Moreover, the RDGRN adduces the need to guarantee a single identity to the minors through national borders.

After ordering the transcription of such documents, the DGRN does not solve neither the questions of substance in relation to the legality of the surrogacy contract (according to article 10 of the Law on Assisted Reproduction) nor the question of parentage of the children (according to the law designed by article 9.4 of the Civil Code), nor the question of the eventual recognition in Spain of the Californian legal sentence (according to articles 951 and following of the Law of Civil Procedure<sup>765</sup>).

Besides, the RDGRN considers that refusing the registration of the demanded parentage is a case of discrimination, because such a refusal would be motivated by the fact that both partners are of the same sex.

##### 4.2. Sentence of the Court of First Instance nº 15 of Valencia, of the 15th of September 2010

**The legal position reflected by the referenced legal sentence is founded on the prevalence of the express prohibition of surrogacy in the Spanish norm, and the control that the Civil Registry must carry out in conformity to the art. 23 of law on the Civil Registry, as it specifies that the registration will occur "...whenever there is no doubt of the reality of the fact registered and its legality in conformity to the Spanish Law "**<sup>766</sup>. **The sentence highlights that, due to the fact that in Spain surrogacy is prohibited, the registration in the Civil Registry cannot be allowed.**

For the judge of Valencia, the couple undertaking the action was aware of the prohibition in the Spanish law, and was aware that the request could be refused. Thus, for the judge, the two adults made an informed choice. In this sense, according to the sentence –adopting fully the action undertaken by the Public Procurator (Ministerio Fiscal) against the RDGRN– there is a prevalence of the Spanish norm (prohibition of surrogacy) in

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<sup>763</sup> See in detail these limits in CALVO CARAVACA A.-L. et CARRASCOSA GONZALEZ, J., « Notas críticas en torno a la instrucción de la dirección general de los registros y del notariado de 5 octubre 2010 sobre régimen registral de la filiación de los nacidos mediante gestación por sustitución », in *Cuadernos de Derecho Transnacional*, vol. 3, nº 1, March, pp. 247-262.

<sup>764</sup> nº 1032/2009 TSJ Madrid, the Resolution of the Directorate General of Registers and Notaries (DGRN) of the 18<sup>th</sup> of February 2009 (RJ 2009\1735), « L'Instrucció DGRN de 5 d'octubre 2010 sobre el règim registral de la filiació dels nascuts mitjançant gestació per substitució » (OFFICIAL BULLETIN OF THE STATE, nº 243, 7<sup>th</sup> of October 2010).

<sup>765</sup> Law 1/200 of the 7<sup>th</sup> on Civil Procedure.

<sup>766</sup> According to this article: Childbirth should be declared before the registry of the competent consulate in relation to the place of birth. The registration is based on general rules. The foreign birth certificate can be subjected to a registration, if there is no doubt of the reality of the childbirth and of the legality of the certificate according to Spanish law (art. 16 and 23 of the Law of the Civil Registry).

relation to the recognition of foreign birth certificates, especially in cases of fraudulent "forum shopping". Let us note that the sentence does not mention the best interest of the child, a fundamental argument of the RDGRN.

The sentence of the Court of First Instance nº 15 of Valencia notes that the resolution of the RDGRN opposes the prevalence of the Spanish norm (prohibition of surrogacy). According to the court of Valencia, it is a responsibility of the officer in charge of the Civil Registry to verify the "reality of the registered fact", and a formal control of qualification would not be enough, as it is also necessary to prove that both applicants are the "real" fathers of the children, something that is biologically impossible and, thus, would have left without legal effect the registration.

However, the sentence highlights that the "nullity of the registration is not in relation to the fact that the applicants are two men, but to the fact that the infants born are the consequence of a contract of surrogacy"; "this observation would be applicable to their situations, concerning two women, a single woman, or a heterosexual couple"

It is possible that on the cases concerning women or heterosexual couples, the problem of surrogacy will be harder to identify, but if the identification takes place, the consequence should be the same: to refuse the registration".

#### **4.3. Directive of the 5th of October 2010, by the Directorate General of Registers and Notaries (BOE nº 243, of the 7th of October 2010).**

**The content of the directive of the 5th of October 2010 of the DGRN is the following: when it comes to the registration of minors born through surrogacy in California, the question is not to determine parentage but to transpose into the Spanish Civil Registry a parentage that has already been determined by a certificated issued by a foreign Civil Registry offering all the necessary guarantees<sup>767</sup>.**

The directive of the DGRN confirms what expressed the RDGRN of 2009 and pretends to grant with legal protection the Spanish children born abroad through surrogacy. Unlike the RDGRN (2009), this directive specifies that only one birth certificate will not be sufficient<sup>768</sup>.

Indeed, the document, in the framework of its second directive, the DGRN indicates that: "In no case will it be admitted as a document allowing for the registration of birth and parentage of the new-born child, a foreign civil registry certificate or the simple declaration accompanied by a medical birth certificate of the minor, in which the identity of the gestating mother is not established".

As a result, the Directorate General of Registers and Notaries abandons the position that it had held in the Resolution of the 18<sup>th</sup> of February 2009, in which it had admitted the possibility of registering the parentage of children born through surrogacy on the basis of a simple certificate of registration of birth. On the contrary, while the DGRN admits the registration in the Consular Civil Registry of the children born through surrogacy, it will be necessary to present to the officer in charge of the Registry, a legal resolution (sentence), issued by the competent jurisdiction on the matter in the country of origin.

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<sup>767</sup> QUIÑONES ESCAMEZ, A., "Maternité de substitution et droit international privé (commentaire à la Instruction du 5 octobre 2010, de la Direction Générale des Registres et du Notariat, sur l'enregistrement de la filiation des enfants nés par gestation pour autrui)", *Revue Critique droit international privé*, 2011-1, pp. 183-188.

<sup>768</sup> CERDA SUBIRACHS, J., "La insostenible legalización de facto de la maternidad subrogada en España. A propósito de la Instrucción de 5 octubre de 2010 de la DGRN", *Abogados de Familia*, Nº 60, Section Tribuna Abierta, Second trimester of 2011, Editorial LA LEY. LA LEY 4893/2011.

The introduction of this new requirement is argued in the following way:

“The requirement of a judicial resolution in the country of origin aims at controlling the compliance with the conditions required by the contract within the legal framework of the country where it was formalised, as well as the protection of the best interests of the minor and the gestating mother. Especially, it allows to ascertain the full legal capacity of the gestating mother, the legal validity of her consent, which must have been given without being affected by an error on the consequences and the scope and without being submitted to deception, violence or coercion (...). It allows also to verify that no simulation exists in the surrogacy contract, which would disguise the international traffic of children”.

As a result, the attribution of parentage of the newborn children born through surrogacy should be based on a previous judicial decision, which must be the subject of an exequatur, in conformity with the procedure established in articles 954 and subsequent of the Law of Civil Procedure<sup>769</sup> of 1881 (Law 1/1881) (after the reform introduced by Law 62/2003, of the 30<sup>th</sup> of December (Law 2013/2003) on fiscal, administrative and social measures).

#### **4.4. Resolutions of the DGRN ordering the registration in the Consular Civil Registry of the Spanish children born through surrogacy**

**These resolutions are all based on the following arguments, drawing support from the new requirements specified in the Directive of the 5th of October 2010. All the decisions relate to married gay couples, which is explained, as we noted before, by the invisibility of the practice of international surrogacy when the intended parents are a heterosexual couple. The authorisation of the marriage between two persons of the same sex and the practice of surrogacy by gay couples conduced to this series of administrative decisions, ending underground practices.**

Concerning children born from a Spanish homosexual couple in the United States through surrogacy, it is necessary to assess if the conditions of the Directive of the DGRN of the 5<sup>th</sup> of October 2010 are complied with, that is: a) the presentation before an officer in charge of the Civil Registry of a judicial sentence issued by a competent court; b) the foreign resolution was issued according to a procedure comparable to that of the Spanish law; c) the Californian legal entity founded its international judicial decision on criteria equivalent to those of the Spanish legislation; d) the best interest of the child is respected by the Californian judicial resolution; e) the rights of the gestating mother are guaranteed. If all the conditions are complied with, there is no basis to refuse the recognition of the sentence of the Supreme Court of the State of California.

#### **DGRN, Resolution of the 6th of May 2011**

A resolution (4a) of the 6<sup>th</sup> of May 2011. In the case of the registration of the birth of two minors presented to that Direction Centre (the DGRN) in a procedure of appeal by the applicants against the resolution of the officer in charge of the Consular Civil Registry of Los Angeles (United States).

1. The DGNR granted the appeal and leaves the resolution of the officer in charge of the Consular Civil Registry of Los Angeles without effect.
2. Orders the indicated registration.

#### **DGRN, Resolution of the 9th of June 2011**

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<sup>769</sup> Law 1/2000, of the 7<sup>th</sup> of January on Civil Procedure.

A resolution (3a) of the 9<sup>th</sup> of June 2011. In the case of the registration of the birth of two minors presented to that Direction Centre in a procedure of appeal by the applicants against the resolution of the officer in charge of the Consular Civil Registry of Los Angeles (United States).

1. Granted the appeal and leaves the previously mentioned legal decision without effect.
2. Orders the indicated registration.

### **DGRN, Resolution of the 23rd of September 2011**

#### **Registration of the birth of children born in India through surrogacy.**

##### **The DGRN refuses the registration**

Motives:

Children born in India through surrogacy. The conditions required by the Directive of the DGRN of the 5<sup>th</sup> of October 2010 are not complied with.

The DGRN refuses the action and revokes the previously mentioned legal decision of the officer in charge of the Consular Civil Registry refusing the registration of the birth of children born in India through surrogacy, as the conditions required by the Directive of the DGRN of the 5<sup>th</sup> of October 2010 are not complied with. Indeed, the sentence issued in Mumbai does not guarantee the respect of the best interest of the child, it doesn't guarantee either the free consent of the gestating mother.

#### **4.5. Provincial Supreme Court of Valencia, sentence nº. 8621/2011 (Sentence of the Provincial Supreme Court of Valencia, of the 23rd of November 2011). Appeal of the sentence by the Court of First Instance of Valencia of 2010**

##### **Questioning of the Directive of the DGRN of the 5th of October 2010**

##### **The Sentence of the Provincial Supreme Court of Valencia confirms the sentence of the Public Procurator (Ministerio Fiscal) against the RDGRN, it proposes to nullify the practiced registration and agrees to its annulment.**

The Sentence of the Supreme Court of Valencia defends that there are "important obstacles to the registration to the Spanish Civil Registry of the pretended parentage, even without demanding [...] that the foreign sentence coincides with the one that could have been adopted by applying the Spanish law. These obstacles concern the infringement, through the Californian registration certificate, of the Spanish international public order".<sup>770</sup>

In this case, the conditions specified by the directive with the objective to recognise the paternity were not complied with. However, the question of a potential invalidation of the directive of the DGRN by the judges is raised.

#### **4.6. DGRN, resolution of the 22nd of December 2011:**

##### **Concerns a request of registration: The request of registration includes all the stipulated documents mentioned by the Directive of the 5th of October of 2010,**

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<sup>770</sup> VELA SÁNCHEZ, A. J. (2012), "De nuevo sobre la regulación del convenio de gestación por sustitución o de maternidad subrogada en España A propósito de la sentencia de la Audiencia Provincial de Valencia de 23 de noviembre de 2011", Diario La Ley. Section Doctrina, nº 7815, Year XXXIII, pp. 1-12.

**in this sense the DGRN evaluates the action against the previously mentioned judicial sentence that refused the inscription of two birth certificates.**

Let us note in detail some legal aspects on which the resolution is founded:

Resolution (4a) of the 22<sup>nd</sup> of December 2011.

The case concerns the registration of birth of two minors presented before this Direction Centre in a procedure of appeal by the applicants against the resolution of the officer responsible of the Central Civil Registry.

Two minors were born in the United States through surrogacy. The intended parents were two Spanish men. The local birth certificate does not mention the gestating mother but only the international parents. The parentage regime of newborn children was determined by a judicial sentence.

All the required conditions specified by the Directive of the DGRN of the 5<sup>th</sup> of October of 2010 for the registration of children born through surrogacy were complied: a judicial resolution comparable to the Spanish procedure, equivalent to the foreign jurisdictional entity based on equivalent criteria to those established by the Spanish legislation, the respect of the best interest of the minor and the rights of the gestating mother.

The DGRN evaluates the action against the previously mentioned administrative decision that refused the registration of two birth certificates issued by the foreign Civil Registry, after considering that the biological parentage of the minors was not established and invoked the prohibition of surrogacy in our legal order.

The DGRN grants the appeal on the basis of the following articles:

The articles 3 of the Convention on the Rights of the Child agreed in New York on the 20<sup>th</sup> of November 1989, 14 and 39 of the Spanish Constitution of the 27<sup>th</sup> of December 1978 (Law 2500/1978), 10 of the law 14/2006, of the 26<sup>th</sup> of May (Law 5218/2006) 2006 on the techniques of human assisted reproduction, 9.4, 12.4, 12.6 and 17.1 of the Civil Code; 319, 323.3 and 767.1 of the Law 1/2000 on Civil Procedure (Law 58/2000), 954 and subsequent of the Law on Civil Procedure of 1881 (Law 1/1881), in force by the exception clause of the previously cited Law 1/2000, 2 and 23 of the Law on the Civil Registry, 81, 82, 83, 85 and 86 of the Regulation of the Civil Registry and the Resolutions of this Direction Centre of the 23<sup>rd</sup> of April 1993 and the 18<sup>th</sup> of February 2009 and the 3<sup>rd</sup> of May 2011; and the directive of this Directorate General of the 5<sup>th</sup> of October 2010.

Considering that this case respects all the conditions stipulated by the Directive of the 5<sup>th</sup> of October 2010 of the DGRN, the DGRN censures the refusal of the registration of the two children to the Civil Registry. Thus, the registration is agreed.

#### **4.7. Recent case law: social security, maternity leave cases**

##### **Tribunal Superior de Justicia del Principado de Asturias, Sala de lo Social, Sentence of the 20th of September 2012, appeal 1604/2012 (Regional Superior Tribunal equivalent to a Court of Appeal)**

##### **Right to maternity leave and maternity indemnities for surrogacy.**

##### **The right to maternity leave on the supposition of surrogacy confirmed.**

Recognition of the right to a maternity leave and the subsequent indemnities. It is not the question to determine the parentage of the child born through surrogacy in



California, or to determine if a relation of parentage already determined by a foreign registration certificate can be translated into the Spanish Civil Registry, as the maternity of the woman is recognised by the Court of Los Angeles, and the birth and parentage of the new-born child have been registered at the Consular Civil Registry of Los Angeles.

In this sense, there is recognition of the legal effects in the context of social benefits.

Similarly, the instruments recognised by foreign judicial or administrative resolutions are considered here as legally comparable to forms of adoption and pre-adoption care, which leads to conclude that the presuppositions of parentage are also protected by the norm.

The Regional Superior Tribunal refuses the appeal introduced by the INSS (for the Spanish acronym of the National Institute of Social Security) against the sentence of the Social Chamber nº2 of Oviedo, on fundamental rights, in consequence, confirms the right of the applicant to maternity leave as well as the indemnities resulting from it.

## **5. The debate within the doctrine.**

### **5.1. Criticism of the Directive of the DGRN of the 5<sup>th</sup> of October 2010**

According to some authors, the solution proposed by the Directive is not fair, as it fosters administratively a certain "reproductive tourism"<sup>771</sup>, aiming at evading the application of a legal precept (art. 10.1 of the Law 14/2006) establishing the nullity of surrogacy contracts, a norm that has to be considered a norm of public order.

On the other hand, it is also noted that the directive generates an economic discrimination, as it allows only to Spanish citizens with the means to use this technique abroad<sup>772</sup>.

Two types of problems can be pointed out :

First, the directive contains very disputable clauses addressed at the officers responsible of the Consular Civil Registries, clauses concerning the regime of the parentage registry of newborn children born through surrogacy. In summary, experts consider that these clauses are not very clear and are very difficult to apply.

Second, a conflict of the hierarchy of laws arises. The sentence of the Court of First Instance nº 15 of Valencia, of the 15<sup>th</sup> of September 2010 refuses the solution given by the DGRN, on the basis of the nullity of surrogacy conventions in the Spanish legal system (art. 10 of the law on the techniques of assisted human reproduction)<sup>773</sup>. According to this sentence, founded on articles 81 and 85 of the Regulation of the Civil Registry, and art. 23 of the Law of the Civil Registry, which have a major normative value, the registration requires that there "should be no doubt with regards to the reality of the registered fact and its legality". According to this point of view, the parentage of children born from Spanish persons through surrogacy should be determined by childbirth. In this sense, the Spanish law explicitly prohibits that parentage in cases of surrogacy is not attributed to the mother giving birth.

### **5.2. DGRN: the legality of the directive and the conflict of laws**

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<sup>771</sup> DE VERDA Y BEAMONTE, J.-R., "Inscripción de hijos nacidos mediante gestación por sustitución (a propósito de la Sentencia del Juzgado de Primera Instancia número 15 de Valencia, de 15 de septiembre de 2010)", *Journal La Ley*, Nº 7501, Section Tribuna, 3<sup>rd</sup> of November 2010, Year XXXI, Ref. D-334, Editorial LA LEY.

<sup>772</sup> VELA SÁNCHEZ, *op.cit.*

<sup>773</sup> VELA SÁNCHEZ, A.-J., "Propuesta de regulación del convenio de gestación por sustitución o de maternidad subrogada en España. El recurso a las madres de alquiler (1): a propósito de la Instrucción de la DGRN de 5 de octubre de 2010", *Journal La Ley*, Nº 7621, Section Doctrina, 3<sup>rd</sup> of May 2011, Year XXXII, Ref. D-190, Editorial LA LEY.

For some authors, this regulation is void as it infringes the principle of normative hierarchy of the Spanish legal order. The Ministry of Justice, through the Directorate General of Registers and Notaries, would have made the mistake of thinking that regulatory norms can be arbitrarily used against the Law in force, affecting critically the legal system constitutionally established and guaranteed, and in particular article 9.3 of the supreme law establishing that the "Constitution guarantees [...] the normative hierarchy"; as did are equally article 1.2 of the Civil Code: "the dispositions opposing the norms of superior level will not be valid"<sup>774</sup>.

## 6. Premises for the regulation of surrogacy?

The directive of the DGRN of the 5<sup>th</sup> of October 2010 can also be understood as a statement of general intent or the premises of a regulation of surrogacy in Spain. Indeed, the Motives of the Directive as well as the clauses could configure the basic structure of a basic convention of surrogacy in the Spanish legal system. The following are the directive clauses of the 4<sup>th</sup> of October 2010: 1. the fertilization of the gestating woman with the genetic material of at least one of the parents or the intended mothers; 2. the capacity of the parties to act voluntarily; 3. the irrevocability of the given consent; 4. the possibility that the child born through surrogacy knows his/her biological origin<sup>775</sup>.

We would find therein the essential characteristics of the surrogacy convention: the supply of genetic material by at least one of the parents or the intended mothers, full capacity and free consent of the contracting parties, the irrevocability of the consent and a guarantee of the access to his/her biological origin of the child born through surrogacy.

We can also add a further characteristic that could be a part of the surrogacy convention, namely the registration on a notarial public document.

Moreover, some legal experts (within which many members of the National Commission on Medically Assisted Reproduction<sup>776</sup>) propose the legalisation of surrogacy for women who cannot bear or conceive children for physiological reason. In this sense, this commission does not consider the case of gay couples.

## 7. Determination of parentage: the growing complexity of assisted reproduction technology.

The determination of maternity in the context of ART is progressively complex, as three women can participate: the one taking the decision regarding the birth, the one providing the ovule, and finally the surrogate. In other cases, the ovule will be provided by the intended mother or the surrogate, engaging only two women, one of them having two functions in this case.

Art. 10.2 of the Law on the techniques of assisted reproduction established that the parentage of children born through surrogacy will be determined by childbirth. This article is based on the principle of a biological, gestational truth sometimes different from the genetic truth, which dominates in terms of the determination of paternity. This solution is justified according to civil law experts arguing on the basis of the

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<sup>774</sup> VELA SÁNCHEZ, *Op.cit.* LASARTE ÁLVAREZ, C. (2012), "La reproducción asistida y la prohibición legal de maternidad subrogada admitida de hecho por vía reglamentaria", *Journal La Ley*, nº 7777, pp. 1 and on.

<sup>775</sup> DE VERDA, *Op.cit.*

<sup>776</sup> The National Commission on Medically Assisted Reproduction (Comision Nacional de Reproduccion Humana Asistida) is a collegial, permanent advisory body with the objective of helping and orienting the use of techniques of assisted procreation, of contributing to the updating and diffusion of scientific knowledge and techniques on the matter and of establishing the functional and structural criteria of the centres and services concerned. It is composed by personalities named by the general administration of the State, the autonomous communities, the different scientific associations and diverse entities of civil society concerned by the different scientific, legal and ethical aspects of assisted reproduction.

psychological and physiological mother-child relation developed during the period of gestation, an important period in the process of formation and development of the child.

In the cases of bio-maternal, genetic and gestational duality, the first is sacrificed in favour of the second in the Law on the techniques of assisted reproduction, despite the fact that the genetic and volitional dimension is found in the gestational component. The sociological reality, derived from volition, is overlooked and used by the Civil Code in the recognition of children by the existence of a *de facto* parent-child relation<sup>777</sup>, to subsidiarily establish parentage or to condition the legitimation of certificates of parentage<sup>778</sup>.

The value of the genetic aspect is considered as preponderant by the law in other cases, as the one concerning the accessibility to the biogenetic information of the person<sup>779</sup>. Art. 5.5 of the Law on the techniques of assisted reproduction establishes that the born children have the right to obtain general information about the donors. It would be possible even to reveal their identity for the following reasons: in case of danger for health (life danger) or in case of problems relating to penal procedures<sup>780</sup>.

The prevention or cure of illnesses justifies the access to this biogenetic information, showing the importance of the biological component that is, however, ignored when determining parentage, not without a certain incoherence in the order of principles. Insofar as the right to health of art. 42 of the Spanish Constitution, the right to life of every person and the right to know of one's identity justify this access, these rights should also justify genetic parentage<sup>781</sup>.

### **7.1. Consent as the basis of determination of parentage.**

If the LTRA of 1988 did not take into consideration the possibility of determining parentage in favour of another woman other than the one giving birth, considering a double filiation only in cases of heterosexual couples<sup>782</sup>, nowadays, in Spain it is possible

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<sup>777</sup> In the Spanish law, the *de facto* existence of a parent-child relation constitutes a cause to attribute parentage even in the absence of biological relation. *Perspectivas del derecho de familia en el siglo XXI: XIII Congreso Internacional de Derecho de Familia / coord. por Carlos Lasarte Alvarez, Araceli Donado Vara, María Fernanda Moretón Sanz, Fátima Yáñez Vivero, 2004, I*

<sup>778</sup> DELGADO ECHEVARRIA J., "Los consentimientos relevantes en la fecundación asistida", pág. 203.

<sup>779</sup> The Spanish regulation on parentage is not only contemplated by the Civil Code, but also by other autonomous civil laws. Catalonia (art. 235 of the Law 25/2010, of the 29<sup>th</sup> of July, of the Second Book of the Civil Code of Catalonia, and arts. 87 to 114 Code of the Family of Catalonia) and Navarre (laws 68 to 72 of the Compilation of Civil Law of the Jurisdiction of Navarre (Fuero Nuevo de Navarra) have their own regulation in matters of determination of parentage.

<sup>780</sup> According to articles 5, 6, 7 of the LTRA (14/2006)

5. the donation will be anonymous and the confidentiality of the identity information of the donors will be guaranteed by the banks of gametes, as well as, in the pertinent cases, by the donor and activity registries of the centres. The born children have the right to obtain general information on the donors, except their identity (this general information is not specified by the law). Only exceptionally, in extraordinary circumstances such as cases of danger of life or health of the child born through medically assisted reproduction or when the application of laws on penal procedures requires it, will the identity of the donors be revealed, only when the revelation is inevitable to avoid danger or to obtain a legal objective. The revelation will be limited and will not imply the publicity of the identity of the donors.

6. Donors will have to be older than 18 years old, be in good psychophysical health and full volition (...).

7. The maximum number of children born through medically assisted reproduction, in Spain, from a same donor, cannot be higher than six. With the purpose of ensuring the effective application of this limit, the donors will have to declare for each donation if they have engaged in previous donations before, as well as the conditions and indicate the moment and the centre where the donations took place.

It will be the responsibility of each centre or service using gametes from donors to verify the identity of the donors.

<sup>781</sup> Parentage in assisted procreation "La filiación a finales del siglo XX: problemática planteada por los avances científicos en materia de reproducción humana: ponencias y comunicaciones" Vitoria-Gasteiz, 28-IX to 2-X-1987, 1988, pgs. 201-230.

<sup>782</sup> Art. 6, aps. 3 and 3; 8, pars 1 and 2 of the LTRA 1988.

to determine the parentage resulting from the access to ART by a homosexual couple of two women<sup>783</sup>.

In Spain, the law n° 14 of the 26<sup>th</sup> of May 2006 on the techniques of medically assisted human reproduction defines the main rules in relation to medical assistance to reproduction. It repeals previous dispositions, resulting from the law n° 35 of the 22<sup>nd</sup> of November 1988, which was reformed in 2003<sup>784</sup>. Two years after the law opening marriage to homosexual couples, co-maternity was recognised in parentage law. But discrimination still exists between homosexual and heterosexual couples in matters of parenthood. Contrary to the case of heterosexual couples who can adopt children or engage in medically assisted reproduction without being married, homosexual couples have to mandatorily be subjected to the institution of marriage.

Facing this situation, the doctrine has noted discrimination towards de facto homosexual couples, who cannot adopt, contrary to the case of heterosexual couples<sup>785</sup>. Surprisingly, parentage laws impose strongly the institution of marriage on homosexual couples.

In Spain, in the case of a marriage between two women, in which one of them gives birth to a child resulting from ART, the parentage norms (that the new law on marriage did not modify) create problems of discrimination.

These were initially denounced and, as a result, partially corrected by two changes of the law, the law 2006 on the techniques of assisted reproduction (L.T.R.A.) and the law 3/2007 on gender identity. In 2006, the law on the techniques of assisted reproduction, law 14/2006 on the "Técnicas de reproducción humana asistida", will also ignore this problem. It would be necessary to wait until 2007, in the frame of the law on gender identity, (law 3/2007, of the 15<sup>th</sup> of March, regulating the registry modification of the mentions in relation to the sex of individuals), for a modification of article 7 of the law of 14/2006 to take place, adding a third paragraph, recognising explicitly the possibility of engaging in a procedure of recognition of parentage in favour of the non biological mother, so as for it to enter into force when the child is born.

When it is the case of a heterosexual married couple, marriage works as a presumption of paternity. But when it is the case of two married women, following the reforms introduced by the law 13/2005 incorporating the figure of homosexual marriage with the same effects as those given to heterosexual marriage, marriage is not valid to establish presumption of co-maternity. However, in virtue of the principles of the Spanish law 3/2005, the treatment should not be different. In fact, the law 2005 and the new law L.T.R.A. leave a legal gap. Moreover, articles 6.3 and 8.1 of the L.T.R.A. refer only to the husband or the partner as the person able or obliged to give his consent for the parentage in relation to the conceived child through these techniques can be determined at the moment of childbirth. In practice, this situation obliged the wife of the women conceiving and giving birth to the child to undergo a request of adoption to be able to be recognised as the legal mother, a long and tedious procedure<sup>786</sup>.

For the Spanish legislator, it was evident that it was necessary to create a new norm to harmonise the legislation with the goals aimed by the law on homosexual marriage.

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<sup>783</sup> See the Catalanian laws: Law 10/2008, of the 10<sup>th</sup> of July, of the fourth book of the Civil Code concerning successions, and law 25/2010, of the 29<sup>th</sup> of July, of the second book of the Civil Code, concerning the person and the family. Especially in the following articles: Art. 235-8 rules the "Assisted reproduction of the married woman", and art. 235-13 rules the "Assisted reproduction of the woman".

<sup>784</sup> QUIÑONES ESCAMEZ, A. "Conjugalité, Parenté et Parentalité", *Revue Internationale de droit comparé*, 2012, pp. 57-91.

<sup>785</sup> VALLES AMORES, M., « Modificación del Código civil en materia de derecho a contraer matrimonio », *Revista de derecho de familia*, 28, 2005, pp. 57-64.

<sup>786</sup> ROCA i ESCODA, M., et GALLUS, N., « Ouverture du mariage aux homosexuelles en Espagne et en Belgique: une mise en question du caractère hétérosexué du droit? », in C. Perrin, M. Roca i Escoda et L. Parini, « Genre et homophobie », *Nouvelles questions féministes*, vol. 31, n° 1, March 2012.

There was “a problem of legal congruence and coherence between the laws”. The reform of the L.T.R.A. in 2006 entering into force after the law 13/2005 enacted an equal treatment for homosexual and heterosexual couples to the legal effects of marriage. This situation was, thus, apprehended as generating “unfair solutions”, partly resolved by the reform of the L.T.R.A. in 2007 establishing that:

“When the woman is married, and not legally or de facto separated, with another woman, the latter will be able to manifest before the officer in charge of the Civil Registry of the matrimonial home that she consents to a relation of parentage to her favour, when the child of her spouse is born”.

However, this modification does not create symmetry between the treatment in relation to heterosexual and lesbian couples. In the current states, it is only heterosexual men who are the subject of automatic establishment of parentage through marriage with the mother of the child through the presumption of paternity. In Catalonia, as a result of legislative reforms of the Catalan Civil Code<sup>787</sup>, the association of Lesbian and Gay Families (F.L.G. for its acronym in Spanish) had requested that the procedures of parentage of heterosexual and homosexual couples be placed in complete symmetry. To reach that objective, the FLG wanted that a presumption of maternity be applied beyond the use of A.R.T., that is, in cases where the conception is done through “artisanal” ways<sup>788</sup>. This opening to the presumption of maternity was refused by the legislator, adducing the biological impossibility to have the same child: “This new legislation gives space to the same-sex family, except for the differences imposed by nature”<sup>789</sup>.

We can, thus conclude, that the recognition of same-sex parentage in Spain continues to be supported on a parentage system that reproduces the transposition of a biological reality (that of the capacity to reproduce) into a legal artefact, even if the techniques of assisted reproduction deconstruct the logics of this fiction.

In the case of surrogacy taking place abroad, we observed that, while the practice is formally prohibited in Spain, recently, through the channels of the Civil Registry a gay couple can equally validate a “natural” parentage, registering the child in the Spanish Civil Registry as having two fathers, even if this legal instrument is not consolidated and has been questioned many times by judicial channels. We could raise a contradiction here: gay couples can validate a “natural” parentage by transcription of foreign birth certificates while lesbian couples are faced to the impossibility of procreation as justification for the refusal of the presumption of maternity. There would be, thus, discrimination between the couples of men (indivisibility of admitted parenthood) and couples of women (divisibility of parenthood).

Such an appreciation has to be, however, strongly nuanced: gay couples have to face very difficult procedures, especially taking into account that surrogacy is prohibited. Conversely lesbian couples can legally engage in assisted reproduction and the parentage relation is automatically established from childbirth, with the reserve of the insemination taking place in a health establishment and not in an artisanal manner.

## **8. Statistical problems.**

In Spain, the absence of official annual registries is an obstacle to having reliable information on the persons acceding to ART, and more concretely, to know of the percentage of homosexual couples engaging in the procedure. As highlighted by Farnós Amorós, the Spanish government has systematically ignored the obligation of articles 21

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<sup>787</sup> Catalonia, as other autonomous communities, disposes of a proper civil law. However, it cannot legislate on marriage, as the institution is the sole competence of the Spanish State.

<sup>788</sup> ROCA i ESCODA, M., « De la mobilisation du droit à la réalisation du droit - Les actions de l'association catalane Familles lesbiennes et gays », *Politix*, 2/2011, pp. 59-80.

<sup>789</sup> Official Journal of the Parliament of Catalonia, n° 5686, 5<sup>th</sup> of August 2010, pp. 61162-61260.

and 22 LTRHA, stipulating the regulation of registries of donors and the activities of the centres. It is important to highlight that the law on techniques of assisted reproduction of 1988 included an obligation to the government of creating a donor registry and a modification in 2003 ordered the creation of a registry of activities. However, this registry does not yet exist<sup>790</sup>.

In relation to the children born from surrogacy who have been registered and for whom parentage is recognised, it is impossible to count them, as according to art. 7.2. of the LTHRA (law 14/2006), "the registration in the Civil Registry will never reflect information that could lead to inferences on the character of the conception".

According to some publications, it would seem that most heterosexual Spanish couples wishing to engage in surrogacy sign agreements with foreign women, preferably Latin American. The different procedures prior to pregnancy take place in the country of origin of the gestating mother, within whose uterus is transferred an embryo resulting from the gametes of the intended parents. The child is sometimes directly registered as being that of the couple (without the need to be subjected to the strict conditions of the Directive of 2010) making it greatly difficult for Spanish to apprehend the scope of the phenomenon.

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<sup>790</sup> FARNOS AMOROS, E. "Acceso a la reproducción asistida por parejas del mismo sexo en España: Estado de la cuestión, propuestas y retos", P. Grosman et al. Derecho de familia, *Revista interdisciplinaria de Doctrina y Jurisprudencia*, 49, May 2011, pg: 153-181.



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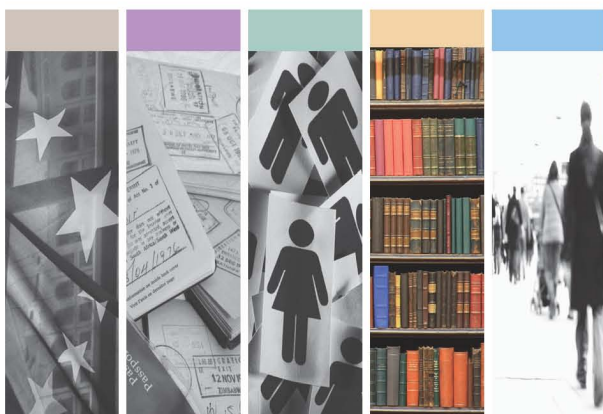
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