The legal status of surrogacy in Europe

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The comparative approaches of England and Wales, France, Italy and Spain

Developments in artificial reproductive techniques enable single individuals, same-sex or hetero-sexual couples to create their own family via surrogacy. In some European jurisdictions, whilst the status of the intended biological parent is usually accepted upon proof of genetic affiliation, the legal status of the second non-biological intended parent, can be ambiguous, irrespective of whether they are the same or opposite sex as the biological parent.

Faced with bans or limitations on surrogacy in certain jurisdictions, the existence of surrogacy-friendly destinations, such as California, Mexico and the Ukraine, sees intended parents travel across the globe to find and enter into commercial surrogacy arrangements. However, even though intended parents can be named on a foreign Parental Order and birth certificate, returning home, these Orders and birth certificates may not be legally recognised and establishing parenthood for the child, can be problematic. How differing jurisdictions recognise and assign the parental rights of a baby born via surrogacy overseas, varies dramatically depending upon domestic legislation, public policy and religious, social and cultural considerations.

In this article, we explore the French, Italian, Spanish and English and Welsh legal approaches to parentage when faced with a child born, either domestically or internationally, via surrogacy.

The legal status of surrogacy in England and Wales

Although in comparison to some European neighbours, the approach to surrogacy is permissive, it nevertheless remains a controversial subject. The law relating to surrogacy is complex, restrictive and not fit for purpose. Whilst wholesale legislative reform is on the horizon (which includes the possible recognition of some foreign Parentage Orders), until such reforms are enacted, judges hearing applications for Parental Orders are having to interpret extant legislation with judicial creativity to ensure the child's welfare is safeguarded. In order to make sense of the current legal framework, it is necessary to consider the evolution of the law in this area as set out below.

The legislative framework to date

The significant pieces of legislation are the Surrogacy Arrangements Act 1985 ('SAA'), the Human Fertilisation and Embryology Act 1990 ('HFEA 1990') and the Human Fertilisation and Embryology Act 2008 ('HFEA 2008').

The SAA states that whilst altruistic and compensatory surrogacy arrangements are permitted, arrangements with a commercial element are strictly banned, not legally recognised and unenforceable. The SAA even exposes those who engaged in arrangements for financial gain to criminal prosecution.[1] Thus, whilst intended parents seeking a domestic surrogacy arrangement are permitted to enter into altruistic or compensatory arrangements, in an attempt to redress the conflict with domestic public

1 Section 2(2) SAA 1985.

policy banning commercial surrogacy, intended parents entering into foreign commercial surrogacy arrangements, must seek the retrospective judicial authorisation of the payments to the surrogate.[2]

HFEA 1990

The developments in artificial reproductive techniques led to the enactment of the HFEA 1990.[3] This Act introduced the Parental Order. Akin to an Adoption Order, the Parental Order is a bespoke legal instrument which extinguishes the parental rights of the surrogate (and any other legal parent) and confers full parental rights upon the intended parents[4].

Human Rights Act 1998

The incorporation of the Human Rights Act in 1998 ('HRA') into law, obliged the courts to read legislation in a way which was compatible with a child's (and intended parents') right to respect for family life under Art 8 of the European Convention on Human Rights ('ECHR'). This obligation permitted judges to interpret the domestic legislation through a wider lens.

The impact of the incorporation of this legislation was vividly demonstrated in *Re X* [2020] EWFC 39, a tragic case where the intended biological father died before the child in a surrogacy arrangement was born. His intended parent wife had no genetic affiliation to the child and therefore not eligible to apply for a Parental Order under s 54 HFEA 2008. Mrs Justice Theis relied upon HRA to 'read down' the strict eligibility criteria, finding it was not incompatible with the 'underlying thrust of the [2008] legislation' and 'would be implied to go with the grain of the legislation.'[5] Accordingly, she found the intended mother could apply for a Parental Order and it was duly granted.

HFEA 2008

The HFEA 1990 legislation was fundamentally overhauled by HFEA 2008. This updating legislation extended the eligibility of Parental Orders to same-sex couples in a civil partnership or married (following the Marriage (Same Sex Couples) Act 2013) or those in an enduring relationship.

The criteria for a Parental Order is set out in s 54 HFEA 2008 but can be summarised as follows:

(1) the application must be made by two applicants in an enduring family relationship;

(2) at least one applicant must have a genetic link to the child;

(3) the applicants must apply for a Parental Order within 6 months of the child's birth;

(4) at the time of the application the child must be living with the commissioning parents;

(5) either or both of the applicants must be domiciled in the United Kingdom or the Channel Islands or the Isle of Man;

(6) the commissioning parents are over 18; and

(7) the surrogate (and any other legal parent of the child) consents to the making of the Parental Order.

HFEA 2008 (Remedial Order) 2018

The HFEA 2008 (Remedial Order) 2018[6] introduced remedial legislation to accommodate single applicants seeking to obtain Parental Orders.[7] This legislative update was thrust upon the government following a declaration of incompatibility

2 *Re X and Y (foreign Surrogacy)* [2008] EWCH 3030 (fam)
3 www.legislation.gov.uk/ukpga/1990/37/contents
4 Section 54 HFEA 1990 www.legislation.gov.uk/ukpga/2008/22/part/2/crossheading/parental-orders
5 Re X [2020] EWFC 39, Theis J.
6 www.legislation.gov.uk/ukdsi/2018/9780111171660/contents
7 House of Commons Briefing Paper, April 2019

with Human Rights Legislation in the case of *Re Z (A child) (No 2)* [2016] EWHC 1191 (Fam).[8]

Adoption and Children Act 2002

The incorporation of this legislation determined that when the court is satisfied that each of the requirements of s 54 (1)–(8) HFEA 2008 are met, it must also have regard to the lifelong welfare needs of the child under s 1 Adoption and Children Act 2002.[9]

Ascertaining parenthood

Legal motherhood

Even if a surrogate born child is born in a foreign jurisdiction and the intended parents are named on a foreign Parentage Order and birth certificate, for the purposes of domestic law, s 33 (1) HFEA 2008[10] defines the legal mother of the child as the 'woman who is carrying the child or has carried the child as a result of the placing in her of an embryo or of sperm and eggs'. Accordingly, the surrogate will be the legal mother of the child unless and until the intended parent(s) obtain a Parental Order.

Legal fatherhood

Similarly, irrespective of the jurisdiction in which the surrogate born child is born, domestic fatherhood is assigned as follows: whilst at common law, the biological father can rely upon the presumption of legitimacy, the 2008 Act provides for a number of circumstances in which legal parenthood will be vested in the non-biological father or second parent. For example, where the surrogate is married, the presumption of legitimacy takes precedence: the legal father will be the surrogate's husband and will be afforded parental responsibility for the child. However, this presumption is rebuttable upon the surrogate proving, on the balance of probabilities, that the child is not a legitimate child of the marriage and that there is no genetic link between the child and the father.

Government reform

In 2018, the Law Commission confirmed that existing surrogacy legislation would be subject to a comprehensive 3-year review. The consultation paper, published on 6 June 2019, outlined a new pathway to legal parenthood for intended parents.[11] The final report with their recommendations is expected in autumn 2022.[12] To date, this new pathway to parenthood recommends intended parents becoming the child's legal parents at birth, introduces regulation and safeguards, such as independent legal advice and a written surrogacy agreement and recognition of international surrogacy arrangements on a country-by-country basis. However, there is widespread concern that the reforms do not go far enough. Commercial payments to domestic surrogates will not be endorsed. Thus, for those intended parents seeking to enter into a commercial surrogacy arrangement, they will still be reliant on travelling to overseas surrogacy destinations. Further, international surrogacy cases will remain outside of the new parental pathway and intended parents will still be required to apply for a Parental Order to establish legal parentage of their child born via surrogacy.

Conclusion

Single, same-sex and heterosexual intended parents are all eligible to apply for a Parental Order. The second, non-biological intended parent, will receive full parental rights for the child provided both parents are in an enduring family relationship (and even, in some circumstances, if they have separated[13]). This broad scope means, despite our outdated laws, the Parental Order is seen as a gold standard in comparison with some European neighbours.

8 www.bailii.org/ew/cases/EWHC/Fam/2016/1191.html
9 Section 1 Adoption and Children Act 2002
10 www.legislation.gov.uk/ukpga/2008/22/section/33/enacted
11 www.lawcom.gov.uk/surrogacy-reforms-to-improve-the-law-for-all/
12 www.lawcom.gov.uk/project/surrogacy/
13 *A and B (Parental Order)* 2015 EWHC 1738 (Fam)

The legal status of surrogacy in France

In 2021, a new bioethics law was enacted after 2 years of discussion by the French parliament.[14] This law addresses very sensitive social issues, which attempt to balance principles of human dignity and scientific advances.

As regards surrogacy, French legislation currently prohibits any use of a surrogacy agreement (I), but Court decisions by the Cour de Cassation had opened pathways for intended parents to establish parentage (II). However, the new bioethics law enacted on 29 June 2021, has resulted in a two-tier system as regards children born from surrogacy in France (III).

Current laws prohibit surrogacy in France on the basis of the principle of non-availability of the human body

The use of a 'surrogate mother' agreement is prohibited under French law, whether the surrogate mother is the child's biological mother (traditional surrogacy) or not (gestational surrogacy).

In 1994, by enacting three laws,[15] lawmakers attempted to assemble all of the legal solutions to problems posed by the development of biomedical techniques into a coherent legal corpus for the first time.

The legislators of 1994 relied on principles established by prior jurisprudence. Article 16–1 of the French Civil Code recites the fundamental principles of unavailability of personal status, inviolability of the human body and non-commercialisation. The prohibition on surrogacy stems from these principles and is stated in Art 16–7 in these terms:

> 'Any agreement relating to procreation or gestation on behalf of another is null and void.'

Lastly, according to Art 16–9 of the same Code, the preceding provisions are public policy provisions and criminal penalties are provided in Art 227–12 of the Criminal Code.

Since 2019, French courts have allowed, indirectly, surrogacy performed abroad, in the name of the best interests of the child

Although the law prohibits surrogacy agreements, the Court of Cassation, faced with a large number of petitions, positioned itself to facilitate parentage through adoption by the intended mother and subsequently, transcription of the filiation with the French Civil Registry.

The first method of establishing parentage is through adoption. Full adoption is governed by Arts 343 et seq of the French Civil Code.

The second possible method of establishing parentage is to transcribe the foreign birth certificate with the French civil registry, pursuant to Art 47 of the French Civil Code.

At first, the Court of Cassation very clearly maintained that surrogacy was contrary to the principles of unavailability of the human body and unavailability of personal status.[16] This position remained in place for a long time.[17] The Court held unwaveringly that it was not possible to do something abroad that was prohibited under French law.[18] For this reason, it was not possible to transcribe in France the foreign birth certificate and as a consequence, to record the filiation of the child with the French Civil Registry.

14 Bill, adopted by the National Assembly, under the conditions provided for in Article 45, paragraph 4 of the Constitution, relating to bioethics on 29 June 2021, T.A. No. 640.
15 Law No. 94–548, 1 July 1994, Law No. 94–653, 29 July 1994. – Law No. 94–654, 29 July 1994.
16 Court of Cassation, Plenary Session, 31 May 1991 – No. 90–20.105.
17 Court of Cassation, Civil Chamber 1, 9 December 2003 – No. 01–03.927.
18 Cass. 1st civ., 17 Dec. 2008, No. 07–20.468 and Cass 1st civ., 6 Apr. 2011, No. 10–19.053, Mennesson, cited above. – And Cass. 1st civ., 6 Apr. 2011, No. 09–17.130, Labassée.

In 2014, the European Court of Human Rights ruled against France because the refusal to recognise parentage was contrary to the child's right to respect for private life. However, the Court limited its judgment to the failure to recognise the biological father's paternity.[19]

In 2015, the Court of Cassation thus made a first change to its position and agreed to recognise the transcription of the biological parent's parentage, under the guise of ruling on the validity of the transcription and not on the legality of the surrogacy.[20] Since adoption was an option for the intended parent, transcription for the intended parent was not necessary,[21] a position that was upheld by the ECHR.[22] As a result, the biological parent will be registered as the official parent, and the intended parent has the possibility to establish parentage through adoption (which is possible in France for same-sex couples since 2013). However, the conditions for completing an adoption are limiting and the long process offers little security for the intended parent.

Finally, in several judgments in 2019, the Court of Cassation made the latest change to its position, first by allowing transcription for the intended parent in the name of the best interests of the child, but only in a casuistic manner,[23] then by applying this solution to all heterosexual and homosexual couples.[24]

The recent limitation with the new French bioethics law

In summary, the system that the French courts have established since 2019 involved a certain violation of French law. For this reason, in 2019, legislators dealt with this issue by revising the law on bioethics.

On 29 June 2021, the French National Assembly finally approved the new bill, which marks a positive turning point on medically assisted procreation but a step back for the assignment of parentage after surrogacy. Establishment of parentage will be limited by the new amended Art 47 of the French Civil Code. The new law declares that recognition of the parentage 'is to be assessed according to French Law'.

This provision is very ambiguous and has not yet been applied or interpreted by the Courts. The question revolves around the position that the Cour de Cassation will take: will it return to its previous position where any transcription of parentage originating from surrogacy was refused or, will it continue to develop a progressive position, in the name of the best interests of child? Will it revert to the intermediary solution of the adoption by the intended parent?

Most commentators believe today that the enactment of this law will require intended parents to return to using the previous solution of the full adoption, which would then be the only way for them to establish parentage of their child.

If this is the case, there will be a different of status for the children born between 2019 and the children born more recently, which raises other issues of non-equal treatments for French children born from surrogacy.

The legal status of surrogacy in Italy

Mater semper certa est. This Roman Law presumption is now being threatened, as a consequence of the new techniques used to (pro)create babies.

Article 12.6 of Italian Law 40/2004 on 'Medically Assisted Procreation' ('L40') provides that anyone who creates, organises or advertises surrogacy commits a criminal

19 European Court of Human Rights, 5th section, 26 June 2014 – No. 65192/11 *Mennesson v France* and *Labassee v France*.
20 Cass. plen. sess. 3 July 2015, two judgments, Nos. 15–50.002 and 14–21.323.
21 Court of Cassation, 1st Civil Chamber, 5 July 2017 – No. 15–28.597.
22 ECHR, gr. ch., advisory opinion, 10 Apr. 2019, No. 16-2018-001 and ECHR 16 July 2020, 5th sect., No. 11288/18, D. v/ France, D. 2020. 1572.
23 Cass. plen. sess. 4 October 2019 Appeal No. 10–19.053.
24 Cass. 1st Civ., 18 Dec. 2019, No. 18–14.751, 18–12.327 and 18–11.815 and Court of Cassation, 1st Civ. 18-11-2020 No. 19–50.043 and Cass. 1st Civ., 13 Jan. 2021, No. 19–17.929 and 19–50.046.

offence. In 2017 the Italian Corte Costituzionale confirmed that surrogacy is an intolerable offence to a woman's dignity and profoundly undermines human relations.[25]

Italian citizens who decide to undergo surrogacy, therefore, must go abroad. But what happens to their babies on return?

Article 67 of Italian Law 218/1995 provides that foreign orders and birth certificates relating to children born abroad are recognised if these comply with 'public order'. The interpretation of 'public order' may be problematic. Italian law allows automatic recognition of biological parents. No issues, therefore, arise in relation to biological parents recorded on the birth certificates. Parenting relationships not based on biological/genetic connection, though, struggle to be recognised. Although pursuant to Arts 6–8 of L40, children born as a result of medically assisted procreation techniques have the status of children, this does not apply to surrogacy or to same-sex couples.

In recent years, Italian courts have had to face many cases regarding recognition of foreign Parental Orders/birth certificates relating to children born abroad by way of surrogacy. The Italian judiciary and administrative systems have reacted differently causing a plethora of contradictory/evolving judgments.

An important principle was established in 2016. The Italian Supreme Court[26] upheld a decision of the Turin Court of Appeal which recognised a Spanish birth certificate indicating two mothers: the biological and the gestational married to the biological one.

The Court established that babies born from eggs donated by the gestational mothers' partners (combined with a male gamete) are not to be qualified as 'surrogacy', but rather examples of parenthood generated within two women's couples, similar to heterologous fertilisation. For the first time the concept of 'public order' was considered by reference to a wider, international order, focusing only on the best interests of the children. The concept of family became no longer based on genetic relation, but on the intended parents' voluntary decisions[27] – a logical evolution from the adoption legislation.[28]

This trend, though, has not been wholeheartedly adopted in other cases. At the beginning of 2017, a decision made by the Grand Chamber of the European Court of Human Rights[29] upheld the 2012 draconian judgment of the Campobasso Italian Court of Appeal, which ordered the forced removal from his de facto family of a child born from a surrogate mother in Russia (with a donor embryo) to Italian intended parents. The registration of the birth certificate issued in Russia was not recognised in Italy as there was no genetic link with the intended parents. The Italian court viewed the case as one of international adoption rather than a cross-border surrogacy arrangement.

In 2018 the Venice Court of Appeal[30] made an important decision recognising a Canadian Parental Order which acknowledged legal parenthood between a minor born by way of surrogacy and the partner of his biological father.

In 2019, however, the Supreme Court[31] interpreted 'public order' more restrictively and overturned a 2016 decision of the Trento Court of Appeal recognising a Canadian Parental Order to two men (a biological father and his partner). The Court stated that compliance with 'public order' should be assessed on the basis of (1) the main principles of Italian Constitution and

25 272/2017
26 Corte di Cassazione, 19599/2016
27 Trento Court of Appeal, 23.02.17
28 Corte di Cassazione, 19599/2016
29 *Paradiso and Campanelli v Italia* – European Courts of Human Rights – 24.01.17
30 16.07.18
31 Corte di Cassazione a Sezioni Unite 12193/2019.

international conventions to which Italy is a signatory and (2) how those principles/conventions are embodied by domestic law. When recognition of foreign orders/birth certificates is not possible, minors' rights should be protected by applying the statutory provision of 'adoption in particular cases'[32].

Specific recommendations from ECHR and the Corte Costituzionale

In April 2019, the ECHR established that pursuant to Art 8 of ECHR children born by way of surrogacy are entitled to have their parental relations recognised. It was not specified whether this should occur by recognising foreign orders, transcribing foreign birth certificates, or adoption, but the Court requested that all signatory countries recognise intended parents 'as quickly as possible'.

In 2021, the Corte Costituzionale[33] invited the legislative body to make up for the intolerable grey area and protect children born as a consequence of surrogacy, currently left without legal protection. Who should have the duty of looking after, educating, being responsible for them other than the person(s) who have intentionally decided to (pro)create them? The law of the intended parents' country of residence should confirm their full responsibility for those children and recognise the legal parent-child relationship. Rather than focusing on the intended parents' rights, the focus should be on recognising the new-borns' rights. According to the Court analysis, adoption in particular cases[34] is unsuitable to guarantee legal protection to children born from two women by way of medically assisted procreation or by way of surrogacy. Being different from standard adoption, this cannot create the legal parent-child relationship.

Very recently, further to the decisions of the Corte Costituzionale[35], the Cagliari Court of Appeal confirmed the need to register on a birth certificate both the biological and the intended mother[36]. The Tribunal of Rome ordered the Birth Register Office to register a birth certificate with two mothers, clarifying that it is illegitimate to refuse the registration of certificates with two mothers to children born by way of medically assisted procreation[37].

Recently, the Supreme Court made a further step forward to recognising de facto families, clarifying that adoption should be extended to same-sex couples, establishing that the intended parents' sexual orientation is irrelevant[38].

Conclusion

Until such time as law-makers implement the latest request from the Corte Costituzionale and provide a law ruling on surrogacy, intended parents will still have to face the uncertainty due to the lack of judicial cohesion.

As stated by Maine in the 19th century, in the ancient world people were tightly bound by status to traditional groups, while in the modern world individuals are viewed as 'autonomous agents' and as such are free to make contracts and form associations with whomever they choose.[39] Hopefully this will be soon implemented by the Italian legislator.

The legal status of surrogacy in Spain

The Spanish legal system is characterised by its early acceptance and regulation of assisted reproduction techniques. However, surrogacy is a technique that is still a source of controversy, which has paralysed legal initiatives aiming for its regulation. The lack

32 Regulated by article 44(d) of Law 184/1983
33 Judgments 32 and 33 of 09.03.21.
34 Pursuant to article 44(d) of Law 184/1983
35 32 and 33, March 2021.
36 29.04.21
37 Decreto of 18.04.21
38 Sezioni Unite, 9006/2021.
39 Henry Sumner Maine, Ancient Law, London 1861

of regulation has not contained the irruption of surrogacy in the Spanish legal system. This erosion, far from protecting the legal interests at heart, has consolidated insecurity arising from the heterogeneous reception reserved to this phenomenon by the Spanish administration and case law.

To summarise the place of surrogacy in Spanish law, the place reserved to this technique by Ley 14/2006, de 26 de mayo must be described (I below) before addressing the disparate recognition of its legal effects (II below).

(I) The legal framework: the nullity of the surrogacy contract

Currently, assisted reproduction techniques are regulated by Ley 14/2006, de 26 de mayo, sobre técnicas de reproducción humana asistida. Not only is surrogacy not among the assisted reproduction techniques regulated by Ley 14/2006, de 26 de mayo (referred to in Art 1), but the legislator has positioned against admitting the validity of the surrogacy contract in Spain.

Indeed, Art 10 provides for the nullity of the contract, and it specifies that filiation with respect to the mother is established by childbirth (para 2). Therefore, by virtue of Art 10 para 2 the filiation with the surrogate is established irrespective of parties' agreement. Further protection is granted to the father since according to para 3 'the possible action of paternity claim against the biological father remains unaffected, in accordance with the general rules'. Therefore, irrespective of the nullity of the surrogacy contract, the filiation with the biological father can be established.

(II) Recognition of surrogacy in the Spanish legal system

The impossibility to resort to a surrogacy contract in Spain has encouraged the use of this technique abroad, which has rapidly led to the question of the recognition of the parentage in Spanish Civil Registers. Regrettably, there is not a uniform response to this question.

The favourable position of the General Directorate of Registers and Notaries

The resolution of the DGRN of 18 February 2009

The DGRN adopted a favorable position enabling registration in the Spanish Registry of the parentage established abroad on a resolution dated 18 February 2009[40]. In this case, two male Spanish citizens requested that the birth of two children, born via a surrogate, to be registered in the Spanish Civil Registry on the basis of a Californian registry certificate establishing the parentage in favor of the couple. The Spanish consular officer rejected the request as it considered that surrogacy is prohibited under Spanish law (Art 10 of Ley 14/2006).

The intended parents appealed the refusal of registration before the DGRN. The DGRN considered that recognising the effects of the foreign decision (the Californian registration certificate) was not contrary to the Spanish international public order, considering the best interest of the minors and ordered the registration mentioning the double paternal filiation. This decision was challenged by the Public Prosecutor's Office and gave rise to the Supreme Court's ruling on the matter (cf. below).

The DGRN Instruction of 5 October 2010

Following the above ruling, the DGRN issued an instruction.[41] According to the Instruction, the registration of the birth of a child born abroad as a result of surrogacy is possible by submitting, together with the petition, the judicial decision rendered by the competent court determining the parentage of the child.

The Instruction is still in effect despite the ruling of the Supreme Court of 6 February

40 DGRN, Ruling of 18 February 2009, EDD 2009/16359
41 Instrucción de 5 de octubre de 2010 (BOE-A-2010–15317)

2014 declaring the nullity of the Resolution of the DGRN of 18 February 2009. Indeed, on 18 February 2019, the DGRN reiterated the application of the Instruction of 5 October 2010[42].

The reluctance of the Supreme Court to admit the registration of parentage in the Spanish Civil Registry: the Supreme Court's ruling of 6 February 2014

The above decision rendered by the DGRN was challenged by the Public Prosecutor's Office and resulted on the first and only judgment rendered by the Supreme Court on international surrogacy[43]. The Supreme Court considered that the content of Art 10 of Ley14/2006 is embedded in the Spanish conception of international public order. Therefore, the Supreme Court concluded that:

> '. . . the parentage whose access to the Civil Registry is sought is directly contrary to that provided for in art. 10 of the Law on Assisted Human Reproduction Techniques and, as such, is incompatible with public order, which prevents the recognition of the foreign registry decision with respect to the parentage determined therein.'

In consideration of the best interests of the child, the Supreme Court tempered its position by accepting that the relation between the child and the intended parents ought to be recognised through the alternatives provided by Spanish law (paternity claim or, in the absence of a biological link, adoption or foster care).

The Supreme Court's ruling was strongly criticised, as crystallised in the dissenting opinion.

However, neither the criticism raised by the 2014 ruling nor the subsequent decisions of the ECHR resulted in an immediate evolution of the Supreme Court's position.

Recent case law evolution: towards a flexible solution on registration of parentage?

With the best interest of the child as the guiding criteria, some lower courts[44] have admitted the registration of the intended mothers as the mothers when the options offered by the decision of the Supreme Court for establishing the parentage were not feasible, the legal and factual criteria not being met (i.e. paternity claim or, in the absence of a biological link, adoption of foster care).

It stems from these decisions that when parentage cannot be determined through adoption, foster care or a paternity claim, 'the most important thing is to take into account the specific circumstances of the child and the protection of the family environment and its existing family relationships'[45]. Consequently, this jurisprudence states that, in order to assess whether there is a breach of international public policy, an analysis must be made in the specific case regarding the legal interests at stake, always prioritising the best interest of the child, which consists in the recognition of parentage (preferably via the legal alternatives, but not exclusively).

Conclusion

The Spanish law's acceptance of surrogacy may seem unsatisfactory to the extent that it maintains significant legal uncertainty. However, we can perceive a growing sensitivity to preserve the best interest of the child which, one can only hope, will be strengthened with a regulation that will enact the acquired rights and therefore protect intended parents and the child by granting them predictability.

Overview

This comparative study shows the various legal approaches adopted within these four

42 Instrucción de 18 de febrero de 2019 (BOE-A-2019–2367)
43 STS 835/2013, 6 February 2014
44 AP Madrid, 1 December 2020 (appeal no. 1274/2019); AP Madrid, 1 December 2020 (appeal no. 1274/2019)
45 AP Palma de Mallorca on 27 April 2021 (resolution 207/2021)

jurisdictions when faced with individuals and couples having children born following surrogacy.

Legal uncertainty for the parents, and for the children, is a reality particularly in France, Italy and Spain.

For this reason, one may wonder whether the European fundamental principle of 'the best interest of the child' is really being observed.

As stated by the Office of the High Commissioner, from the United Nations Human Rights:

> '. . . the international regulatory vacuum that exists in relation to international surrogacy arrangements leaves children born through this method vulnerable to breaches of their rights … With a growing industry driven by demand, surrogacy is an area of concern for the rights and protection of the child.'

There is clearly an urgent need for cooperation between different jurisdictions to adopt an international convention, which aims at protecting the rights of all surrogate-born children, regardless of the legal status of surrogacy arrangements under national or international law.

The authors of this article very much wish that the coming years will see the rise of international cooperation, combined with domestic efforts, in this direction.