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INTERCOUNTRY SURROGACY: AN ITALIAN AND UKRAINIAN ISSUE

The present analysis is based on a survey of Italian jurisprudence (period 1989-2016) that identifies sixteen cases arising from surrogacy arrangements undertaken by people living in Italy and highlights that nine of them involve Ukraine as country of origin. Since all Italian couples were acquitted in criminal proceeding, it is argued that the real sanction against surrogacy is the denial of civil effects in Italy. This paper will therefore focus on private international law and family law issues related to surrogacy and offer some reflections on the lights and shadows of the use of the principle of the best interest of the child to legitimate «procreative tourism». To conclude, I will advocate the need for a dialogue between the countries of origin and the receiving countries involved in surrogacy in order to define shared substantive and procedural guarantees.

Key words: surrogacy, family life, best interest of the child principle.

Жоель Лонг

Міжнародна сурогація: італійське та українське питання

Даний аналіз здійснений на основі досліджень італійської юриспруденції (у період 1989-2016 рр.), які ідентифікували шістнадцять справ, що впливали з сурогатних договорів, укладених між особами, які мешкали в Італії. У дев'яти з цих справ Україна виступала країною походження. Оскільки всі італійські пари були визнані невинними у кримінальному провадженні, стверджується, що реальна передбачена законом міра покарання за сурогатне материнство є запереченням цивільного явища в Італії. Таким чином, ця стаття досліджує міжнародні приватноправові проблеми та сімейно-правові проблеми, що виникають у зв'язку з сурогатним материнством, і пропонують деякі шляхи вирішення складнощів у застосуванні принципу найкращого забезпечення інтересів дитини, аби легітимізувати «про креативний туризм». Крім того, автор наголошує на необхідності проведення діалогу між країнами походження та приймаючими країнами, пов'язаними з сурогатним материнством, аби визначити взаємні матеріальні та процесуальні гарантії.

Ключові слова: сурогатне материнство, сімейне життя, принцип найкращого забезпечення інтересів дитини.

Жоель Лонг

Международная суррогація: итальянский и украинский вопрос

Данный анализ осуществлен на основе исследований итальянской юриспруденции (в период 1989-2016 гг.), которые идентифицировали шестнадцать дел, вытекающих из суррогатных договоров, заключенных между лицами, которые жили в Италии. В девяти из этих дел Украина выступала как страна происхождения. Поскольку все итальянские пары были признаны невинными в уголовном производстве, утверждается, что реальная предусмотренная законом мера наказания за суррогатное материнство является отрицанием гражданского явления в Италии. Таким образом, эта статья исследует международные частноправовые проблемы и семейно-правовые проблемы, возникающие в связи с суррогатным материнством, и предлагает некоторые пути решения сложностей в применении принципа наилучшего обеспечения интересов ребенка, чтобы легитимизировать «о креативном туризме». Кроме того, автор отмечает необходимость проведения диалога между

странами происхождения и принимающими странами, связанными с суррогатным материнством, чтобы определить взаимные материальные и процессуальные гарантии.

Ключевые слова: суррогатное материнство, семейная жизнь, принцип наилучшего обеспечения интересов ребенка.

1. Introductory data

Italians are among those who most frequently seek cross-border reproductive care in Europe⁶¹. According to the latest data collected by the Italian *Osservatorio sul turismo procreativo* (Observatory on procreative tourism), about 4,000 Italian couples crossed national boundaries in 2011 to fulfil their reproductive aspirations⁶². More than 2,000 couples travelled abroad for heterologous fertilization (which was legally prohibited in Italy until 2012 when the Constitutional Court declared unconstitutional the ban introduced by Law no. 40 of 19 February 2004, the «Medically Assisted Reproduction Act»)⁶³. An equal number of couples expatriate for homologous artificial insemination and fertilization (technically permitted in Italy, but very expensive and with significant limitations, such as the childbearing age of the intended parents). At least 32 surrogacies were carried out for Italian citizens in countries where this practice is permitted (*Osservatorio sul turismo procreativo*, 2012)⁶⁴.

A survey of Italian case law through databases and national law journals highlights sixteen judicial cases in the period 1989-2016 regarding surrogacies undertaken by people living in Italy, almost all of which were conducted abroad in countries where the practice is permitted by local law⁶⁵. The vast

majority of these situations concerned heterosexual Italian couples who underwent the practices in Ukraine (nine cases), India (three cases), France (one case), and the United Kingdom (one case). The couples were usually married (only one case involved cohabitants) and the intended father was the biological father (with two exceptions), while neither the woman undergoing fertilization⁶⁶ nor the intended mother had any genetic link with the child (three and one exception, respectively). Nonetheless, the latter often presented herself to the Italian authorities and to family and friends as the «natural mother», sometimes even simulating pregnancy. Only in a minority of cases were the intended parents a same sex couple of men, and surrogacy was performed in Canada (one case) or the United States (one case). In four cases, the surrogate mother received no payment in return; in the others, a price was likely paid.

2. Key issues in civil law

Half of these judicial cases concern criminal law, where criminal proceedings were undertaken against the intended parents suspected of «falsifying civil status» (Article 567 of the Italian Criminal Code), of «using falsified documents» (Article 489 of the Criminal Code), or «making a false statement as to identity» (Article 495 of the Criminal Code) and of the offence set out in section 72 of the Adoption Act, since they had brought the child to Italy in breach of the procedure provided for by its provisions on intercountry adoption. However, in light of the most recent case law, all couples were acquitted after invoking compliance of the birth certificates submitted to Italian authorities under the law of the country where the documents were issued (see Court of Cassation, Section V, judgment no. 13525 of 5 April 2016 and Court of Cassation, Section V, judgment no. 489696 of 17 November 2016).

⁶¹ F. Shenfield, J. de Mouzon, G. Pennings, A.P. Ferraretti, A. Nyboe Andersen, G. de Wert, and V. Goossens, «Cross border reproductive care in six European countries», *Hum. Reprod.* (2010) 25 (6): 1361-1368.

⁶² *Osservatorio sul turismo procreativo*, «Turismo procreativo: la fuga continua, anche senza indicazione medica», 2012, in <http://www.osservatorioturismoprocreativo.it/>

⁶³ As is known, the use of gametes - sperm or egg cells - external to the couple is the only option for heterosexual couples where one partner cannot produce gametes and therefore suffers from sterility or is suffering from severe forms of infertility, as well as for lesbian couples and single women.

⁶⁴ The *Osservatorio sul Turismo Procreativo* contacted 33 centres and agencies in 7 countries: the United States, Ukraine, Armenia, Georgia, Greece, Russia and India. Although many clinics refused to provide exact numbers, it was possible to confirm that in 2011 alone, there were at least 18 cases of surrogacy commissioned by Italian citizens in Russia, nine in Ukraine, and five in Georgia and Armenia. However, the *Osservatorio* estimates that, beyond these data, close to one hundred Italian couples have procreated through surrogacy.

⁶⁵ Except for the first three judicial cases: *Tribunale Monza*, 27 October 1989, *Corte di Appello Salerno*, 25 February 1992 and *Tribunale Roma*, 17 February 2000. For an analysis, see par. 2 below.

⁶⁶ Today, there is a strong preference for «gestational surrogacy» where the child is genetically unrelated to the surrogate mother: the aim is clearly to limit the rights of the surrogate mother to the unborn child.

Consequently, the real sanction against surrogacy today is denial of civil effects to surrogacy in the country of the intended parents' habitual residence; hence, the interest for civil law issues relating to surrogacy, issues addressed in eleven Italian judgements.

Two old cases related to the reproductive project itself and concerned contract law. The first case involved a traditional surrogacy performed between an Italian heterosexual couple and an Algerian woman who agreed to be artificially inseminated with the sperm of the intended father and then to relinquish the baby to the biological father and his wife (*Tribunale Monza*, 27 October 1989). When the surrogate mother refused to release the child, the couple brought a claim for enforcement of the contract, which was rejected by the Court that found the contract to be void due to legal impossibility and unlawfulness of the contractual object (*ibidem*)⁶⁷. A second case concerned an Italian couple who brought an action against the doctor who had previously signed a contract to form an embryo with gametes of both spouses and then implant it in the uterus of a female friend of the couple's who made herself available as an altruistic act; the doctor later declared himself unavailable since a new medical code of ethics expressly forbidding surrogacy had entered into force in the meantime (*Tribunale Roma*, 17 February 2000). The Court ordered the implant, stating that in this case the validity of the contract depended on the fact that the surrogate mother was moved not by financial gain but by altruism and that she did not intend to refrain completely from any contact with the baby, but was willing to continue to be present in the child's life (*ibidem*).

All of the other civil judgements related to the period after the birth of the child conceived through surrogacy and concerned the legal establishment of the parentage of the intended parents or an action

against them for the removal of the already existing legal bond due to the absence of a biological link.

With reference to the first aspect (the legal establishment of filiation), the topics discussed were those of the recognition of a foreign judicial order assigning parental responsibility to the intended parents (for recognition in Italy of a British parental order, see *Corte d'Appello Bari*, 13 February 2009; on the possibility of registering in Italy birth certificates indicating the intended parents as parents see against *Tribunale Forlì*, 25 October 2011 and in favour, more recently, *Corte d'Appello Milano*, 28 October 2016) and the possibility for the social parent to adopt the partner's child in Italy (in the affirmative *Tribunale per i minorenni Roma*, 23 December 2016 and *Corte di Appello Salerno*, 25 February 1992). Indeed, according to the courts, a legal relationship can be established with the step parent based on a broad interpretation of domestic law in compliance with international standards, above all with the interest of the child to the legal recognition of the *de facto* parental relationship (*ibidem*).

Conversely, as concerns the removal of the legal relationship of filiation, an Italian Court recently raised a question of constitutionality regarding the legislative provision that permits a challenge of the legal act of maternal recognition performed by the intended mother on the grounds of the lack of a genetic or biological link (*Corte d'Appello Milano*, 25 July 2016). According to the Court, a prior assessment of the compliance of the removal of legal motherhood with the best interests of the child seems reasonable in the light of the constitutional context (*ibidem*). Last, another issue considered by courts was the taking into care of a child conceived through surrogacy abroad by a couple residing in Italy. National case law, with the endorsement of the European Court of Human Rights (Grand Chamber, *Paradiso and Campanelli v. Italy*, 24 January 2017), seems to discriminate based on the existence of a genetic link between the child and at least one member of the couple. In fact, a child conceived through surrogacy abroad with no genetic link with either intended parent should be considered abandoned and therefore adoptable under adoption rules (Court of Cassation, Section I, judgment no. 24001 of 26 September 2014). According to the courts, the absence of genetic bonds

⁶⁷ According to the judgement, both genetic and gestational surrogacy should not be regulated by contracts given the existence of several legal principles that constitute (in the court's words) "insurmountable legal obstacles", primarily the right of the child to grow up in his or her own family, except in cases of objective inability or inadequacy of the birth parents, the right to know his or her biological parents and the principle according to which the mother is the woman who gives birth (*mater semper certa est*) and that the transfer of parental responsibility to a third party should be with the guarantees provided for by adoption law. Beyond that, the object of the contract would be unlawful due to the commodification of the surrogate mother's body and of the child's personal and family status.

and the use of the surrogacy technique abroad, which is prohibited by national law, demonstrated the parental couple's unsuitability. Indeed, adoption is the only option for creating artificial legal parentage under Italian law and is governed by safeguards that prospective parents genetically unrelated to the child should respect. Thus, the aim is to discourage the use of surrogacy as an alternative to intercountry adoption (*ibidem*). On the other hand, the court ruled against the child's adoptability in a case in which, unlike the above-mentioned one, the husband was actually the biological father and «in light of the social services report on the outcome of a social investigation on the family and on the basis of information provided and statements made by the intended parents at a judicial hearing, there is no evidence of any moral or material abandonment of the child and, consequently, there is no room for public authorities to intervene with a protective measure» (*Tribunale per i minorenni Firenze*, 16 June 2015).

3. and then?...

According to an opinion that seems to be increasingly finding followers in the courts, a correct reconstruction of the legal issues created by surrogacy imposes a distinction between two different levels: the first deals with the reproductive project itself, and therefore with the legitimacy of the practice of surrogacy and the lawfulness of surrogacy arrangements (e.g. between the surrogate mother and the intended parents, between the agency/clinic and the surrogate mother, and between the intended parents and the agency/clinic). The second concerns the legal establishment of parentage for the child conceived through surrogacy.

From a general point of view, it is often acknowledged that contract law is largely unfit to regulate surrogacy. First, the actual contractual nature of surrogacy agreements is doubtful, as is the appropriateness of the legislature establishing the content of such agreements by law. Furthermore, even if they were considered contractual instruments, determining their contents would be problematic, since to avoid unlawfulness they must safeguard the fundamental rights of the child and the surrogate mother, protecting the latter's self-determination and preventing the commodification of her body and of the child.

At the same time, however, it is emphasized that after the child's birth, the principle of the best interests of the child plays a decisive role. In the most recent case law, this principle is interpreted as the right of the child (but it is a «relational» right and so it is necessarily the adult's right as well) to the protection of an existing parent-child relationship or, in the language of the European Court of Human Rights, as a right to respect for family life, proved by the existence of real close personal bonds between the child and the caregivers (European Court of Human Rights, Section II, *Paradiso and Campanelli v. Italy*, 27 January 2015).

Today, the only limit to this approach seems to be the coexistence of three factors. First, the absence of any genetic link between the child and the intended parents. Secondly, the unlawfulness of the conduct of the intended parents, according to their country of habitual residence law. And last but not least a short duration of the *de facto* relationship between them, such that the trauma inevitably suffered by the child from the removal would not cause him or her irreparable harm; (Grand Chamber, *Paradiso and Campanelli v. Italy*, 24 January 2017). If these elements are present, other interests prevail, namely the general interest to prevent the potential commodification of individuals and family status and the best interest of children as a group to discourage the circumvention of substantive and procedural safeguards established by domestic rules on intercountry adoption⁶⁸. Moreover, in such a case, the Grand Chamber of the European Court of Human Rights held that there is no family life (*ivi*, paras. 157-158), but a mere interest to be respected for the private life originated by close bonds of affection between the adults and the child (*ivi*, par. 163-164)⁶⁹.

In general, even with the limitation described above, an approach favourable to the establishment of parentage according to the procreative project of the intended couple having chosen surrogacy is mixed. As already explained, it meets the «justice of the case», protecting family life. It also creates a

⁶⁸ The Grand Chamber deemed the reasons given by the Italian authorities in the decision to take the child into care sufficient and proportionate to the aim pursued by the removal of the child from the intended parents.

⁶⁹ See however, the dissenting opinion of six judges who considered there to have been family life that had been insufficiently protected: Joint dissenting opinion of judges Lazarova Trajkovska, Bianky, Laffranque, Lemmens and Grozev, par.4.

«globalization of rights», i.e. the protection of rights considered to be fundamental in a growing number of countries, namely the right to freedom from interference in reproductive choices (cfr. European Court of Human Right, *S H v. Austria*, 3 November 2011). Indeed, the national legislatures and courts of «prohibitionist» countries are encouraged to rethink the bans laid down by domestic law, keeping them only if and to the extent that they are truly considered an expression of fundamental values.

However, there is a concrete risk of discrimination. On the one hand, because of the cost of surrogacy that allows only people with sufficient means to enjoy reproductive and family rights. On the other, because it allows actions to be taken abroad that would be banned in Italy because they are considered contrary to the prohibition of the commodification of family status and against the principles of dignity and self-determination of women.

Hence, there is a strong need for a dialogue between the countries of origin and the receiving countries involved in surrogacy in order to define shared substantive and procedural guarantees. Therefore, we should welcome initiatives such as the one taken by the Hague Conference on Private International Law, whose group of experts on parentage and surrogacy (which also includes representatives of Italy and Ukraine) met in The Hague in February 2016 to explore the feasibility of advancing work on the private international law issues surrounding the status of children, including issues arising from cross-border surrogacy (see the Report of the February 2016 meeting of the Experts' Group on Parentage / Surrogacy, Prel. Doc. No 3, February 2016).