

Spanish Homosexual Couple and Surrogate Pregnancy (II)

In a previous post I related how a certificate issued in the U.S.A., establishing the parenthood of a baby born in this country to a surrogate mother, had been denied registration in Spain. The interested parties lodged an application for review before the *Dirección General de los Registros y el Notariado* (DGRN); on February 18, 2009, their appeal has been upheld. This post sums up the arguments on which the Spanish resolution is based.

The DGRN starts selecting the correct methodological approach: the request for registration in Spain of a birth certificate from a foreign authority arouses questions of recognition, and not of conflicts of law; hence art. 81 *Reglamento del Registro Civil* should apply. According with this article, facts can be registered by means of Spanish public documents; public foreign deeds are also accepted, provided they are given force in Spain under the laws or international treaties. A foreign deed has to meet three conditions in order to be suitable for registration in Spain:

.- The deed must be a public one: it has to stem from a public authority and meet the necessary requirements to be considered “full evidence” (i.e., to display privileged evidentiary strength) when used before the courts of the country of origin. Apostille or legalisation are usually called for; so does translation. In the instant case, the Californian certificate of birth and filiation satisfies those conditions.

.- The public authority granting the document has to be equivalent to the Spanish ones; that is, she must provide with guarantees similar to those required by the Spanish law for entering into public registers. According to the DGRN, the authority responsible for civil registration in California satisfies this requirement.

.- The act contained in the foreign registration certificate must endorse a legality test involving three elements: international jurisdiction of the foreign authority, due process, and compatibility with Spanish *ordre public*. In the instant case only the third requirement seems questionable. The DGRN devotes the rest of its reasoning to explain why incorporation of the foreign certificate to the

Spanish Registro Civil is not contrary to our public policy; why it “does not alter the smooth and peaceful running of the Spanish society”. To this end the DGRN develops several points that may be summarized as follows:

- 1) Registering parenthood of two male subjects in the Spanish Registro Civil does not violate public order, since Spanish law admits paternity of two males in cases of adoption, and adopted children and biological children are equal in the eyes of law.
- 2) Spanish law allows registration of parenthood of female couples; to deny it in the case of a couple composed of two male individuals would be discriminatory.
- 3) To deny entry into a Spanish public register of facts concerning parenthood, already inscribed in a foreign register, would go against the best interests of the child as conceived in UN Convention on the Rights of the Child. The DGRN also recalls ECJ case law, such as *Garcia Avello* (C- 148/02) and *Grunkin-Paul* (C-353/06), where the ECJ argues in favour of a unique identity of the child. Later on the DGRN would reintroduce the argument of the child’s interest: allowing registration in Spain in the same terms as Californian registration is better than leaving the children without any registration in Spain, and also preferable to having two different entries, one in the U.S. and another one in Spain.
- 4) In Spanish law, parenthood is not necessarily determined from the genetic linkage of those involved.
- 5) The interested parties have not acted in fraud of law; they have not tried to change the nationality of children in order to prompt the application of Californian law. The babies, born to a Spanish person, are Spanish.
- 6) The interested parties have not engaged in forum shopping or any fraudulent attempt to circumvent the application of Spanish mandatory rules. The Californian certificate of registration is not a court decision with *res judicata* effect. Any party may challenge the content of the birth registration before the courts; if so, the Spanish Courts would establish the paternity of children once and for all.