Belgian Judgment on Surrogate Motherhood

A lower court sitting in Belgium has recently been faced with a case of international surrogate motherhood. Two men married in Belgium had contracted with a woman living in California, who gave birth to twins in December 2008. One of the men was the biological father of the twins. In accordance with the laws of California, the birth certificate of the twins had been established mentioning the names of the two spouses as fathers. When the parents came back with their twin daughters in Belgium, the local authorities refused to give any effect to the birth certificate, in effect denying the existence of any parent-children relationship. The parents challenged this refusal before the Court of First Instance sitting in Huy.

In an opinion issued on the 22nd of March and yet unpublished, the court denied the request. Noting that what was at stake was not so much the recognition in Belgium of the decision by which the Superior Court in California had authorized, prior to the birth of the children, that the birth certificates mention the names of the two fathers, but rather the recognition of the birth certificates proper, the court applied the test laid down in Article 27 of the Code of Private International law, under which foreign acts relating to the personal status may only be recognized in Belgium provided they comply with the requirements of the national law which would be applicable to the relationship under Belgian rules. The court focused its ruling on one specific requirement of Article 27, i.e. public policy, mentioning the issue of *fraus legis* only briefly.

The parents had argued that since Belgian law allows the adoption of a child by two persons of the same sex, recognition of the birth certificates could not be held to be contrary to fundamental principles of the Belgian legal order. The court did not follow the parents. It first held that it should consider not only the birth certificates, but also the whole history of the dealings between the parents and the surrogate mother. The court thus examined the contract which had been concluded between the parties and noted that while such contract was invalid as a matter of Belgian law, it was uncertain whether public policy could defeat such a contract validly concluded under foreign law. Turning to two important

international conventions in force in Belgium, the court found that the practice of surrogate motherhood raised questions both under the Convention of the Rights of Children and under the European Convention on Human Rights. As to the first Convention, the court relied specifically on Article 7, which grants each child the right to know and be cared for by his or her parents. Turning to Article 3 of the European Convention, the court found that the fact that a surrogate mother is paid for her services is difficult to reconcile with human dignity. The Court also noted that countries which tolerate surrogacy arrangements insist on the absence of commercial motives for such arrangements. The court concluded on this basis that giving effect to the Californian birth certificates would violate fundamental principles and hence be contrary to public policy.

It is not yet known whether this ruling will be appealed. In any case, the parents will have to find an alternative solution to be recognized as such. They could turn to adoption, although this could prove difficult given that they have already had extensive contacts with the children. This is much probably not the last time a court is faced with this issue in Belgium.

Editors' note: Patrick Wautelet is a professor of law at Liege University.