

The French Cour de cassation and the « Thalys babies »

I am glad to post this comment by F. Mailhé, Associate Professor Paris 2, Panthéon-Assas

On September 22, 2014, the French *Cour de Cassation* (Supreme Court for civil and criminal matters) published two prejudicial opinions on the validity, in a same-sex couple, of the adoption by a woman of a child born to her wife thanks to a foreign medically-assisted procreation (Avis n°15010 and 15011, ECLI:FR:CCASS:2014:AV15010 and ECLI:FR:CCASS:2014:AV15011).

Despite its relatively restricted purpose, the French Same-Sex Marriage Act of May 17, 2013, just starts to give its first private international law consequences (On that law and private international law, see e.g. H. Fulchiron, *JDI* 2013. 1055 ; P. Hammje, *RCDIP* 2013. 774 ; S. Godechot and J. Guillaumé, *D.* 2013. 1756).

Indeed, avoiding any fundamental change in French family law, the Act was only meant to enable same-sex couples to get married. As a consequence, same-sex couples are for example still not allowed to get medically-assisted procreation (MAP) techniques by Article 2141-2 of the Public Health Code (“Code de la Santé Publique”, CSP), according to which:

“The purpose of [MAP] is to remedy a couple’s infertility which pathological character was medically diagnosed or to avoid the transmission of a particularly severe disease to the child or to the other member of the couple”.

Some things changed in adoption law, though. Among other provisions, in order for lonely parents getting married to provide the child with a second parent when the other parent was unknown or deceased, the 2013 Act allowed for their husband or wife to adopt the child in those situations.

The adoption procedure has therefore been used by a number of women in situations where the father was not known... because the baby was born from an insemination with anonymous donor, an MAP, abroad, especially in Belgium. Contrary to France, Belgium had authorized MAP for lonely mothers since July 2007. Called “Thalys babies”, by the name of the train which connects Paris to

Brussels, a certain number of babies were born from such travels in the last years.

In July, almost 300 files for adoption had apparently been enrolled in different courts of first instance in France, and the reaction and interpretation of the law was quite diverging. For most, the interest of the child and the evolution of the law asked for the adoption to be allowed (see e.g. TGI Nanterre, July 8, 2014, *D.* 2014. 1669, note Ph. Reigné). For some others, to the contrary, the situation was a plain fraud, since it was the conclusion of a procedure by which the couple simply tried to bypass different French law prohibitions (MAP by a lonely woman or same-sex couple). After the press echoed the emotion of couples blaming a “two tier justice”, two courts (Avignon and Poitiers) decided to use a specific prejudicial procedure to ask the *Cour de cassation* to issue an opinion on the matter.

On Sept. 22, 2014, the *Cour de cassation* answered in its uniquely concise style:

“Having resort to medically-assisted procreation, in the form of artificial insemination with anonymous donor abroad, does not bar the mother’s wife from adopting the child born from this procreation, as long as the adoption’s legal conditions are fulfilled and that it is in line with the child’s interest”.

The arguments in defense of the prohibition to adopt were indeed rather weak and it is no surprise that this decision of autumn 2014 was in favor of the adoption.

First, the prohibition of Article 2141-2 CSP is of ambiguous nature. Instead of regulating MAP as a filiation issue, it is regulated as a technical one, and destined to medical professionals, not to parents. Its consequence is therefore not a civil one for the parents, but a sort of disciplinary penalty for the professionals. Designed for purely domestic matters, it is therefore not as assertive as it needs to be in international matters: Does it concern the persons getting an MAP abroad, or is it just organizing French clinics and hospitals’ life?

Second, and as a consequence, contrary to the sister question of surrogacy, the international public policy is not at stake. Its foundation in Article 2141-2 CSP is too fragile. Actually, the problem does not seem to come so much from the foreign MAP itself than from the fact that a French mother, with no ties to Belgium, went abroad to get what she could not get in France, i.e. a problem of fraud. This is a

much harder question in purely philosophical and political terms. What does “forbidden in France” mean in that context? Should a person be allowed to “internationalize” the situations to bend the law to its will? One of the arguments of counsel for defense in those cases was that freedom of movement within Europe allows for such “legal optimization”. If the Court of Justice has approved the reasoning in company law since *Centros* (Aff. C-212/97), and has peeped into family and personal matters with cases such as *Garcia-Avello* (Aff. C-148/02), pure choice of law in family matters (and MAPs) does not seem the rule yet, if only because the European private international law regulations in family matters have not provided for such a complete freedom. Unfortunately for the debate, it comes at a time when France was already punished on a neighboring matter where the *Cour de cassation* had used the same rationale, so that, in the eyes of that Court, the door to negotiations seemed closed.

As readers of *Conflictolaws.net* have noticed, in *Menesson vs. France* and *Labassée vs. France*, the European Court of Human Rights (ECHR) recently condemned France for refusing to recognize the filiation of the “parents of intent” (here an heterosexual couple) with the children born in the United States from a surrogate mother. The decisions are actually not as assertive as it has been said in the press, the ECHR judging only that the children should each get at least recognition of their filiation with their father (who happened to be both father of intent and biological father). But the ECHR paid scant regard, in both cases, to the argument the *Cour de cassation* has used in more recent ones : fraud.

In 3 decisions of Sept. 13, 2013 and March 19, 2014 on another foreign surrogacy case, the *Cour de cassation* had preferred to argue that the parents of intent could not avoid the French interdiction of gestational surrogacy by going to get one in the United States and then ask recognition of the American decision in France (on those decisions, see e.g. L. Gannagé, *RCDIP* 2013. 587 ; J. Guillaumé, *JDI* 2014. 1 ; J. Heymann, *JCP* 2014. 613 ; H. Fulchiron et Ch. Bidaud-Garon, *D.* 2014. 905). This change of rationale (from international public order to fraud) was understood by some authors as showing a change in the strategy of the *Cour de cassation* to persuade the ECHR who was already seized of the *Menesson* and *Labassée* cases. But if this was the aim, it failed. Its case-law was condemned nonetheless.

The consequence of the *Menesson* and *Labassée* cases on the issue of the adoption of a child born by artificial insemination with anonymous donor was of

course not obvious, but the analogy is strong. In both cases, parents had gone abroad to get a child through a medical procedure they could not get in France. How could the *Cour de cassation* therefore decide otherwise than for its validity, when the value argument (through international public order) was so weak, and when the political argument (fraud) had already been knocked down by the European Court of Human Rights for an analog and much stronger case?

One last word, though. This was just a prejudicial opinion. Opinions by the *Cour de cassation* are not issued by plenary sessions of the Court, and do not bind its judging Chambers. It is therefore possible that (as has been seen in other matters) some Chambers will not follow the Opinion and decide otherwise. But, after the EHCR decision in *Menesson* and *Labassée*, after the refusal of the French government to appeal of those decisions (the government actually seems favorable to it), after this Opinion by some members of the *Cour de cassation*, and if the evolution of the French society keep on the same way in the years to come, years which would be needed before the *Cour de cassation* may be seized in its judging formation of the matter, such a reluctance would certainly go against the tide, if not too late, after the tide.