

A never-ending conflict: News from France on the legal parentage of children born through surrogacy arrangements.

As reported previously, the ECtHR was asked by the French *Cour de cassation* for an advisory opinion on the legal parentage of children born through surrogacy arrangement. In its answer, the Court considered that the right to respect for private life (article 8 of ECHR) requires States parties to provide a possibility of recognition of the child's legal relationship with the intended mother. However, according to the Court, a State is not required, in order to achieve such recognition, to register the child's birth certificate in its civil status registers. It also declared that adoption can serve as a means of recognizing the parent-child relationship.

The ECtHR's opinion thus confirms the position reached by French courts: the *Cour de cassation* accepted to transcribe the birth certificate only when the intended father was also the biological father. Meanwhile, the non-biological parent could adopt the child (See for a confirmation ECtHR, C and E v. France, 12/12/2019 Application n°1462/18 and n°17348/18).

The ECtHR advisory opinion was requested during the trial for a review of a final decision in the *Menesson* case. Although it is not compulsory, the *Cour de cassation* has chosen to comply with its recommendations (Ass. plén. 4 oct. 2019, n°10-19053). Referring to the advisory opinion, the court acknowledged that it had an obligation to provide a possibility to recognize the legal parent-child relationship with respect to the intended mother. According to the *Cour de cassation*, the mere fact that the child was born of a surrogate mother abroad did not in itself justify the refusal to recognize the filiation with the intended mother mentioned in the child's birth certificate.

When it comes to the mean by which this recognition has been accomplished, the *Cour de cassation* recalled that the ECtHR said that the choice fell within the State's margin of appreciation. Referring to the different means provided under

French law to establish filiation, the Court considered that preference should be given to the means that allow the judge to exercise some control over the validity of the legal situation established abroad and to pay attention to the particular situation of the child. In its opinion, adoption is the most suitable way.

However,

considering the specific situation of the Mennesson twins who had been involved in legal proceedings for over fifteen years, the Court admitted that neither an adoption nor an apparent status procedure were appropriate as both involve a judicial procedure that would take time. This would prolong the twins' legal uncertainty regarding their identity and, as a consequence, infringe their right to respect for private life protected by article 8 ECHR. In this particular case, this would not comply with the conditions set by the ECtHR in its advisory opinion: "the procedure laid down by the domestic law to ensure that those means could be implemented promptly and effectively, in accordance with the child's best interest".

As

a result and given the specific circumstances of the Mennessons' situation, the *Cour de cassation* decided that the best means to comply with its obligation to recognize the legal relationship between the child and the intended mother was to transcribe the foreign birth certificate for both parents.

The

Cour de cassation's decision of October 2019 is not only the final act of the *Mennesson* case, but it also sets a *modus operandi* for future proceedings regarding legal parentage of children born through surrogate arrangements: when it comes to the relation between the child and the intended mother, adoption is the most suitable means provided under domestic French law to establish filiation. When such an adoption is neither possible nor appropriate to the situation, judges resort to transcribing the foreign birth certificate mentioning the intended mother. Thus, adoption appears as the principle and transcription as the exception.

Oddly

enough, the Court then took the first chance it got to reverse its solution and

choose not to follow its own *modus operandi*.

By two decisions rendered on December 18th 2019 (Cass. Civ. 1^{ère}, 18 déc. 2019, n°18-11815 and 18-12327), *the Cour de cassation* decided that the intended non-biological father must have its legal relationship with the child recognized too. However, it did not resort to adoption as a suitable means of establishing the legal relationship with the intended parent. Instead, the court held that the foreign birth certificate had to be transcribed for both parents, while no references were made to special circumstances which would have justified resorting to a transcription instead of an adoption or another means of establishing filiation.

The Court used a similar motivation to the one used in 2015 for the transcription of the birth certificate when the intended father is also the biological father. It considered that neither the fact that the child was born from a surrogate mother nor that the birth certificate established abroad mentioned a man as the intended father were obstacles to the transcription of the birth certificate as long that they complied with the admissibility conditions of article 47 of the Civil Code.

But

while in 2015 the Court referred to the fact that the certificate “did not contain facts that did not correspond to reality”, which was one of the requirements of article 47, in 2019 this condition is no longer required.

Thus,

it seems that the *Cour de cassation* is no longer reluctant to allow the full transcription of the foreign birth certificate of children born of surrogate arrangements. After years of constant refusal to transcribe the birth certificate for the non-biological parent, and just a few months after the ECtHR advisory opinion accepting adoption as a suitable means to legally recognize the parent-child relationship, this change of view was unexpected.

However,

by applying the same treatment to both intended parents, biological and non-biological,

this reversal of solution put into the spotlight the publicity function of the transcription into the French civil status register. As the *Cour de cassation* emphasized, a claim for the transcription of a birth certificate

is different from a claim for the recognition or establishment of filiation. The transcription does not prevent later proceedings directed against the child-parent relationship.

But

the end is still not near! On January 24th, during the examination of the highly sensitive Law of Bioethics, the *Sénat* (the French Parliament's upper house) adopted an article prohibiting the full transcription of the foreign birth certificates of children born through surrogate arrangements. This provision is directly meant to "break" the *Cour de cassation's* solution of December 18th 2019. The article will be discussed in front of the *Assemblée nationale*, the lower house, and the outcome of the final vote is uncertain.

The

conflict over the legal parentage of children born through surrogate arrangements is not over yet. To be continued...