

International high-tech surrogacy and legal developments in the Netherlands

This blogpost is an edited version of this blogpost written in Dutch by Stichting IJI (The Hague Institute for private international law and foreign law). We thought it was interesting to also bring it to the attention of the international readership of this blog.

Introduction

In the Netherlands, international high-tech surrogacy is a hot topic, resulting in interesting legal developments. Recently, a Dutch District Court dealt with a case on the recognition of US court decisions on legal parenthood over children born from a high-tech surrogacy trajectory in the US, providing many private international law insights on how to assess such request for recognition. Furthermore, on July 4 a bill was proposed that encloses several private international law provisions. This blogpost briefly highlights both developments.

High-tech surrogacy in the Netherlands

In the Netherlands, high-tech surrogacy - this involves the use of in vitro fertilization (ivf), often with the use of an ovum of a woman other than the surrogate mother - has been allowed (decriminalized) since 1997, but under strict conditions. Important conditions include having a medical reason and medical, psychological and legal information and counseling. It should be noted that commercial surrogacy is illegal.

It is not well tracked how often surrogacy occurs in the Netherlands. The Dutch government estimates that there are several dozen occurrences annually, but indicates that the number is increasing.

High-tech surrogacy abroad

Because, i.a., there are not always (enough) surrogate mothers to be found in the Netherlands, it occurs that some intending parents search for a surrogate mother

abroad. Surrogacy is treated differently abroad, to which roughly three variations apply:

1. Surrogacy is prohibited (e.g. Germany and France);
2. Surrogacy is allowed, through a legal framework with either various safeguards (counseling, legal assistance, judicial review etc.) or rules that provide for the legal parenthood of the intended parents. Thereby, as far as legal parenthood at birth is concerned, roughly two alternatives can be distinguished. For example, the surrogate mother is regarded as the legal mother and her husband or partner as the legal father. But there are also countries where the intended parents are considered to be the legal parents from the birth of the child;
3. There is no specific regulation in place for surrogacy and existing legal regulations are applied by analogy or not (e.g. Belgium and the Netherlands).

In case intended parents enter into a surrogacy trajectory abroad, all kinds of private international law issues arise in the Netherlands regarding, among others, the legal parenthood of the intended parents.

District Court decision of January 13, 2023

Early in 2023, said private international law issues arose before the District Court of The Hague (ECLI:NL:RBDHA:2023:363). The court had to rule on several requests by two married men (hereinafter: husband X and husband Y) regarding legal parenthood over children born from a surrogacy trajectory in the US.

The surrogate mother became pregnant with twins following ivf treatment in the US. Two embryos were transferred to her, using sperm from husband X and an ovum from an ovum donor, and sperm from husband Y and an ovum from an ovum donor. The couple applies in the Netherlands for, among other things, recognition of several court decisions on legal parenthood issued in the US, including a decision on denial of paternity, denial of maternity and establishment of paternity, and a decision on custody.

The District Court ruled that the court decisions from the US could be recognized in the Netherlands, with an extensive assessment of the public policy exception and the question of whether there was a diligent surrogacy trajectory.

Dutch bill of July 4, 2023 to regulate (international) surrogacy

On July 4, 2023, a bill was proposed in the Netherlands. This bill introduces rules for granting parenthood after surrogacy within the Netherlands and further holds rules for recognising parenthood after surrogacy from abroad. The bill indicates there will be a standard for 'responsible surrogacy' that intended parents should consider when choosing a surrogacy route both domestically and abroad. If certain conditions are met and the court has given its consent prior to conception, the intended parents will be considered the legal parents from birth. The bill also provides a specific recognition scheme for decisions made abroad, in which family law relations following surrogacy have been established or modified between the child and the intended parents. Important here is that the surrogacy process has been diligent. The standard will be that comparable requirements have been met that are also set for a 'national' surrogacy trajectory.