

NATIONAL AND INTERNATIONAL SURROGACY: AN ODYSSEY

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1. SETTING OUT UPON THE JOURNEY

In recent years both the Central Authority for International Adoption and the Dutch Children Protection Board have been made aware of a number of cases concerning commercial surrogacy and the unlawful placement of foreign children in The Netherlands. Many of these cases have also received broad media attention. A number of Belgian cases have attracted particular attention in The Netherlands. The Dutch government operates a very restrictive policy with respect to commercial surrogacy. Incidents in recent years have led to numerous parliamentary questions being raised in the Second Chamber of the Dutch Parliament. The Minister of Justice has responded to the Dutch Parliament by commissioning research to be conducted into the nature and scope of the problems related to commercial surrogacy and the unlawful placement of children. The aim hereby is to ensure that more clarity can be gleaned as to what actually occurs in the countries where the possibilities are greater than in The Netherlands, as well as providing information with regards to the Dutch response upon the return of the commissioning parents to The Netherlands.

From April 2010 until January 2011, researchers of the Utrecht Centre for European Research into Family Law (UCERF) at the Molengraaff Institute for Private Law of Utrecht University conducted the research commissioned by the Minister of Justice.³ The resulting report was published on 2 March 2011.⁴ The report contains an in-depths study of Dutch criminal and civil law on the consequences of surrogacy and a detailed analysis of the way Dutch Private International Law does and could regard international surrogacy. Furthermore, it contains reports from four jurisdictions that allow surrogacy, namely California (USA), India, Greece and Ukraine, and eight reports from European countries that are faced with the same problems as the Netherlands, namely Belgium, England, Germany, France, Norway, Poland, Spain and Sweden. In these country reports answers are provided as to whether specific rules exist regulating surrogacy and which measures have been adopted to ensure the enforcement of those rules.

In legal literature a distinction is drawn between different types of surrogacy. High-technological surrogacy makes use of IVF and in which a reproductive expert must always be involved. This form of surrogacy offers commissioning parents the possibility to conceive a child that is genetically related to both commissioning parents. This is not, however, a requirement. Alongside high-technological surrogacy, low-technological surrogacy is also possible. In this case the surrogate is always genetically related to the child. The commissioning father may or may not be genetically related, depending upon whether the couple has used his sperm or that of a donor. In low-technological surrogacy the egg will be fertilized by means of artificial insemination. Furthermore, parties may also be involved in a surrogacy arrangement, despite the fact that the

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⁴ This contribution is for a large part based on that report: K. Boele-Woelki, I. Curry-Summer, W. Schrama and M. Vonk, *Draagmoederschap en illegale opnemings van kinderen*, The Hague: WODC 2011

child was conceived by natural means or self-insemination. In this final scenario the child could be genetically related to the surrogate and her husband. Another important distinction concerns the difference between altruistic and commercial surrogacy. In general, it would appear difficult to draw a distinct line between these two forms of surrogacy arrangements. In both cases, financial payments will be made. However, the financial payments in commercial surrogacy arrangements are often (if not always) concerned with profit, whereas in altruistic surrogacies the main object is to help another couple have a child.

2. FIRST STOP: SURROGACY IN THE NETHERLANDS

2.1 Dutch attitude

The Netherlands does not look very favourably upon surrogacy arrangements.⁵ Although altruistic surrogacy is allowed under certain very strict conditions, Dutch law has no special procedure geared towards transferring parental rights and duties from the surrogate mother (and her husband) to the intentional parents.⁶ After the introduction of IVF in The Netherlands in the late 1970s, discussion arose as to whether or not surrogacy should be allowed. On the whole, the answer to this question was negative, which resulted in the criminalisation of mediation by means of a professional practice or company and the publication of supply and demand requests concerned surrogacy arrangements.⁷ It has become clear from subsequent parliamentary debates⁸ that it is not the intention of the applicable provisions in the Dutch Criminal Code,⁹ to convict doctors co-operating with surrogacy, but to avoid the situation where women offer themselves as surrogate mothers for payment as this might lead to a form of trade in children.

IVF surrogacy is very strictly regulated in The Netherlands. In 1989 the Ministry of Health, Welfare and Sport determined in its IVF regulation statement that surrogacy in combination with IVF was not allowed. However, after active lobbying by interest groups¹⁰ in combination with the fact that the passing of time had proven that there appeared to be less interest than expected in IVF surrogacy, the IVF regulation statement issued in 1997¹¹ allowed for surrogacy in combination with IVF under very strict conditions. When this regulation statement was discussed in parliament, the minister stated no special regulations for the transfer of full parental rights from the surrogate mother to the intentional parents were envisioned.¹²

Moreover, the IVF regulation statement determines that IVF in combination with surrogacy must take place in accordance with the guidelines on high-technological surrogacy¹³ of the Dutch Society for Obstetrics and Gynaecology. These guidelines require IVF clinics to draw up their own protocol regarding IVF surrogacy. This protocol must at least ensure that the following conditions are met: there must be medical grounds for the procedure (specified in the regulation

⁵ Roscam Abbing, H., 'Enige gezondheidsrechtelijke aspecten van het draagmoederschap', in: Boele, K. & Oderkerk, M., *De (on)geoorloofde van het draagmoederschap in rechtsvergelijkend perspectief*, Antwerpen: Intersentia, 1999, p. 26.

⁶ K. Boele-Woelki & M. Oderkerk (eds.), *De (on)geoorloofde van het draagmoederschap in rechtsvergelijkend perspectief* (The permissibility and unpermissibility of surrogacy in comparative perspective), Antwerp: Intersentia 1999, p. 25-44; Vlaardingerbroek, P., 'Mens en maatschappij: Draagmoederschap: een gecompliceerde constructie', 52 *Ars Aequi*, 2003, p. 171-178.

⁷ Act of 16 September 1993, *Stb.* 486.

⁸ *Dutch Second Chamber* 1996-1997, 25 000-XVI, No. 62, p. 14.

⁹ Articles 151(b) and 151(c), 225, 236, 278, 279 and 442a Dutch Criminal Code

¹⁰ S.M. Dermout, *De eerste logeerpartij: Hoogtechnologisch draagmoederschap in Nederland* (The first sleep-over: High-technology surrogacy in The Netherlands), Groningen: Groningen University 2001, p. 13-17.

¹¹ Planningsbesluit in-vitrofertilisatie, *Staatscourant* 1998/95, p. 14-18.

¹² *Dutch Second Chamber* 1996-1997, 25 000-XVI, No. 62, p. 13.

¹³ *Hoogtechnologisch draagmoederschap*, Richtlijn Nederlandse Vereniging voor Obstetrie en Gynaecologie, No. 18 January 1999, <<http://www.nvog.nl/>>.

statement); the surrogate mother must have one or more living children whom she gestated and gave birth to without complications;¹⁴ there must be adequate information provision to the surrogate mother and the intended parents; and preceding the treatment the responsible doctor must draw up a statement to the effect that the above conditions have been met and that he considers the treatment to be justified.¹⁵

In the late 1990s a pilot was started to study whether or not surrogacy should be allowed as a means to help a certain group of infertile couples to have a child of their own.¹⁶ This pilot ran until mid 2004 and only allowed for surrogacy with the intentional parents own genetic material.¹⁷ The intentional parents had to bring their own surrogate mother. In order to be admitted to the surrogacy programme, couples had to pass a medical, psychological and legal screening procedure. In the course of this pilot 200 couples were admitted to the initial screening procedure. Of the 105 couples that passed the initial screening, 58 couples stopped before the medical screening or did not pass the medical screening. The 47 couples that passed the medical screening subsequently attended a psychological interview. In the end 35 couples were given legal advice and entered the IVF surrogacy program. Twenty-four women completed the IVF treatment cycle. As a result of this pilot 16 children were born to 13 women. The other 11 women who completed a full IVF cycle, did not achieve ongoing pregnancies. No problems were reported with the acceptance of the babies in the intentional families or with giving up the baby after birth. The intake centre that was established as a result of this pilot was forced to close in July 2004, since no Dutch IVF clinic was willing at that point to participate in gestational surrogacy.¹⁸ However, in April 2006 one of the Dutch licensed IVF clinics announced that it will make gestational surrogacy services available to married couples (VUMC, 6 April 2006).¹⁹

From case law and interviews with lawyers and professionals from the Dutch Child Protection Board, it is clear that other forms of surrogacy also occur in The Netherlands. In all these cases that do not involve IVF, the surrogate mother is the genetic and biological mother of the child, this means that she provides the egg and gives birth to the child. Regarding the sperm used to conceive the child, there are a number of possibilities, this may be provided by the surrogate's partner, the intentional father or a known or unknown donor. As long as there is no commercial element and the couples involved abide by the rules set out below for the transfer of a child to another family than its birth family, the couples do not breach Dutch law.²⁰ However, this does not mean that they will succeed in bringing the legal situation in line with the social situation.

¹⁴ The guidelines also state that the surrogate mother must consider her own family to be complete, probably in order to minimize the risk that she decides to keep the child for herself.

¹⁵ *Dutch Second Chamber* 25 000-XVI, No. 51, p. 2.

¹⁶ The results of this trial are described in S.M. Dermout, *De eerste logeerpartij: Hoogtechnologisch draagmoederschap in Nederland* (The first sleep-over: High-technology surrogacy in The Netherlands), Groningen: Groningen University 2001.

¹⁷ Dermout, Van der Wiel, Heintz, Jansen and Ankum, "Non-commercial surrogacy: an account of patient management in the First Dutch Centre for IVF Surrogacy, from 1997 to 2004", *Human Reproduction*, Vol. 25, No. 2, pp. 443-449. 2010.

¹⁸ <www.draagmoederschap.nl>. The initiator of the trial states, in a letter posted on the web-site referred to, that in the past 15 years she strove to make IVF surrogacy acceptable to the public, the media, the insurance companies, the Dutch Society of Obstetrics and Gynaecology and the medical profession in general. She and others managed to do all that, however 'the internal obstacles in the Academic Hospitals themselves, the ethics commissions and/or the board of directors are elusive, in particular because they do not send a reasoned rejection, just a message without any further comments that the hospital has decided nor to offer IVF surrogacy services. It is impossible to discover their real reasons?'

¹⁹ See also the letter of 15th May 2006 to the Second Chamber by the then Secretary of State on this issue (vws0600778).

²⁰ Using an unknown donor whose origin cannot be traced is contrary to Dutch law. However, this will not necessarily lead to problems with the transfer of parental rights. See, for instance, Rb Roermond, 24 November 2010, *LJN* BO4992.

2.2 Transfer of parenthood and parental responsibility

The transfer of full parental rights in surrogacy arrangements will not occur against the will of any of the parties involved. This means that the surrogate mother has no legal duty to hand over the child, nor are the intentional parents under a legal duty to accept the child. This also applies where a contract has been drawn up in which parties have agreed on the placement of the child in the family of the intentional parents. If the child is not yet 6 months old the intentional parents may only take the child into their home with the consent of the Child Protection Board.²¹

Under Dutch law, the woman who gives birth to the child is the child's legal mother, whether or not she is also the child's genetic mother.²² This is a mandatory statutory provision from which parties cannot deviate.²³ Whether the child born to the surrogate mother will automatically have a legal father, depends on the surrogate's marital status.²⁴ It will be obvious that the surrogate mother's marital status is of great relevance where the transfer of parental rights to the intentional parents is concerned. The marital status of the intentional parents may also play a role where the transfer of parental status is concerned.²⁵ In the discussion below the starting point will be the placement of the child in the family of the intentional parents. This means that there is still agreement between the surrogate mother and the intentional parents that the child will grow up with the intentional parents. Where relevant the genetic connection between child and intentional parents will be discussed. The schedule below shows the possibilities for the transfer of parental rights. First of all the situation will be discussed where the surrogate mother is married and subsequently where she is unmarried.

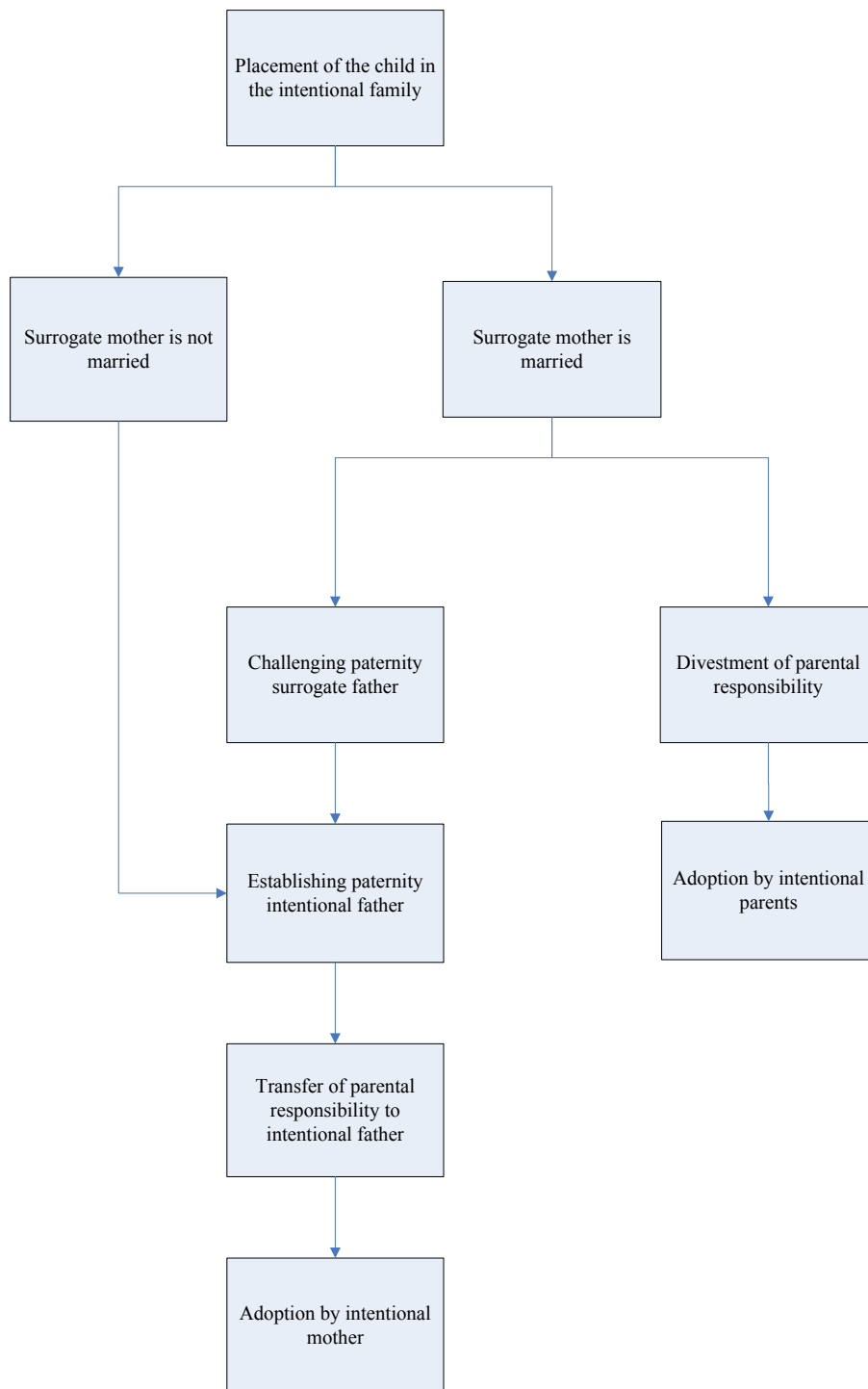
²¹ Article 1:241(3) DCC and Article 1 Foster Children Act (*Pleegkinderenwet*).

²² Article 1:198 DCC.

²³ Rb Den Haag, 11 December 2007, *LJN* BB9844.

²⁴ Article 1:199 DCC.

²⁵ However, as is clear from the policy guidelines of the surrogacy centre established at the VUMC, only married intentional parents at present have access to gestational surrogacy services.



2.2.1 Surrogate mother is married: the child has two legal parents at birth

The surrogate mother will be the child’s legal mother and if she is married her husband will be the child’s legal father;²⁶ both will have parental responsibility over the child by operation of law.²⁷ In the very unlikely situation that the surrogate mother’s husband did not consent to the conception of the child, he may challenge his paternity.²⁸ This means that unless the surrogate

²⁶ Article 1:198 DCC (mother) and Article 1:199(a) DCC (father).

²⁷ Article 1:251(1) DCC.

²⁸ Article 1:200(3) DCC.

father was completely unaware of fact that his wife was acting as a surrogate for another couple, he is highly unlikely to succeed. In most surrogacy arrangements the surrogate's husband will play a role. In cases of surrogacy in combination with IVF, the requirements are such that the surrogate mother's husband's consent is required.²⁹ In a recent case the paternity of the surrogate's husband was challenged in the name of the child through a *ad hoc* guardian (*bijzonder curator*). The child may challenge the paternity of any non-biological father and is not bound by the consent of adults or their marital status.

All this means that full parental status can only be transferred to the intentional parents through joint adoption. However, before the child can be adopted by the intentional parents, the surrogate parent(s) will first have to be divested of their parental responsibility.³⁰ Divestment of parental responsibility is a measure of child protection used in cases where parents are unable or unfit to look after their child.³¹ Parents cannot apply to the court to be divested, only the Child Care and Protection Board and the Public Prosecution Service can apply to the court to have parents divested of their responsibility.³² In the late 1990's there has been discussion in parliament whether parents themselves should not be given a right to apply for divestment, but the minister of Justice at that time was against such a measure as it would introduce a possibility for parents to relinquish their parental rights.

The outcome of a divestment procedure is uncertain as the Dutch Supreme Court has not yet had the opportunity to decide on divestment in the context of surrogacy.³³ However, decisions by various Courts of Appeal allow for the divestment of the surrogate parents on the ground that they are unable or unfit to care for this particular child since they did not intend to have it for themselves.³⁴ If the divestment procedure is successful, the intentional parents may be attributed with joint guardianship, which is very similar to parental responsibility. Normally, when parents are divested of parental responsibility, guardianship will be attributed to an institution for family guardianship.³⁵ However, in the surrogacy cases that have been published, guardianship was attributed to the intentional parents if the court considered this to be the best possible solution for the child concerned. If the intentional parents have taken care of the child together for a year they may file for an adoption order with the court, provided they have been living together for three years on the day the adoption request is filed. There is no special post-surrogacy adoption procedure, which means that the normal criteria for adoption apply in such cases. These criteria require the adoption to be in the child's best interests and state that adoption cannot take place if the child's parents object. Only in a very limited number of circumstances may a court disregard parental objections.³⁶ The court may for instance disregard parental objection if the child has not lived with the parents since its birth. In the earlier mentioned IVF surrogacy pilot all the children were adopted by the intentional parents a year after their birth. No legal problems were reported. Nevertheless, in particular where parents have not involved the Child Protection Board before

²⁹ Richtlijn hoogtechnologisch draagmoederschap (Guidelines high technology surrogacy), NVOG 1998, paragraph 3.3. VUMC treatment protocol: 'If the surrogate mother has a partner, the partner has to give his written agreement to the surrogate mother's decision to carry a surrogate pregnancy' (<<http://www.vumc.nl/communicatie/folders/folders/IVF/Hoog-technologisch%20draagmoederschap%20.pdf>>).

³⁰ Art 1:1228 (1)(g) and Article 1:266 DCC.

³¹ Kalkman-Bogerd, L.E., 'Ontheffing en draagmoederschap', 9 *Tijdschrift voor Familie- en Jeugdrecht*, 1998, p. 198-202.

³² Article 1:267 DCC.

³³ The Dutch Supreme Court did however judge in a case unrelated to surrogacy that parents may be unable or unfit to take care of a specific child (HR 29 June 1984 NJ 1984/767). This judgement has been used by Courts of Appeal to justify divestment in surrogacy cases.

³⁴ Hof Amsterdam, 19 February 1998, *NJ Kort* 1998/32 and Hof 's Gravenhage, 21 August 1998, *NJ* 1998, 865.

³⁵ Article 1:275 DCC.

³⁶ Article 1:228(2) DCC.

the birth of the child, transferring parental rights from the surrogate parents to the intentional parents may be a lengthy procedure of which the outcome is uncertain.

2.2.2 Surrogate mother is not married: child has one legal parent at birth

If the surrogate mother is not married, the child will only have one legal parent by operation of law: the surrogate mother. She will also be the only holder of parental responsibility. The intentional father may recognise the child with the surrogate mother's consent. Once the intentional father has acquired the status of legal parent through recognition, he may apply for sole parental responsibility, to the exclusion of the surrogate mother.³⁷ The intentional father can only file such an application if the surrogate mother is the sole holder of parental responsibility.³⁸ The intentional mother may subsequently adopt the child after she has been taking care of that child with the intentional father for a year and all the other criteria for adoption have been met.

It is unclear whether the unmarried intentional mother will be attributed with parental responsibility by operation of law through partner adoption. If one follows the system of the law regarding parental responsibility, joint parental responsibility does not come about by operation of law for cohabiting couples as a result of adoption. However, in particular in the case of joint adoption it would be rather awkward to attribute parental responsibility to only one of the adoptive parents, while the other can only obtain it through registration in the parental responsibility register (as is normally the case for cohabiting parents). In the case of partner-adoption it might be more defensible not to attribute parental responsibility to the adopting partner by operation of law, although it might well be contrary to the adopter's expectations.³⁹

2.2.3 Surrogate mother has entered into a registered partnership: child has one legal parent at birth, but both registered partners have parental responsibility

In The Netherlands different-sex and same-sex couples have the opportunity to enter into a registered partnership. The legal consequences of such a partnership are almost the same as those of a marriage. However, An important difference between registered partnership and marriage concerns the legal status of children. If the surrogate mother has entered into a registered partnership, her registered partner will not be a legal parent, but he or she will have parental responsibility unless the child was recognised by a third party before the birth.⁴⁰ So if the intentional father recognises the child before birth the transfer of parenthood and parental responsibility will follow along the lines described for the unmarried surrogate mother. However, if the recognition takes place after birth, the surrogate mother's registered partner, will have parental responsibility. This may complicate the transfer of parental responsibility to the intentional father as the partner's parental responsibility will need to be terminated.

3. SECOND STOP: SURROGACY IN CALIFORNIA⁴¹

³⁷ Article 1:253c DCC.

³⁸ Dutch law is ambivalent on this point, an in-depth discussion of this issue can be found in M.J. Vonk *Children and their parents: A comparative study of the legal position of children with regard to their intentional and biological parents in English and Dutch law*, Antwerp/Oxford: Intersentia, 2007, Chapter 6 on partially genetic primary families.

³⁹ J. Kok, 'Gezamenlijk gezag en voorkinderen', *Tijdschrift voor Familie- en Jeugdrecht*, 2006, p. 209 who refers to J.E. Doek, *Losbladige personen- en familierecht* (Titel 14, aant. 2A bij art 1:251 DCC), Deventer: Kluwer, 2006, Titel 14, aant. 2A by Art 1:251 DCC.

⁴⁰ Article 1:253sa DCC

⁴¹ In this section use has been made of material provided by Jessica Dorsey LLM for the Californian report in the Report on surrogacy for the Dutch Ministry of Justice: K. Boele-Woelki, I. Curry-Sumner, W. Schrama and M. Vonk, *Draagmoederschap en illegale opnemng van kinderen*, The Hague: WODC 2011.

Dutch case law shows that Dutch couples, and male same-sex couples in particular, travel to California to enter into surrogacy arrangements. Commercial surrogacy is allowed in California, though there may be limits to what is considered to be reasonable payment to the surrogate mother. Both same-sex and different-sex couples can make use of the services offered by a number of surrogacy agencies in California. A Dutch couple entering into a surrogacy arrangement in California can become the legal parents of the child born to the surrogate mother under Californian law. The first step is to have both the surrogate mother (and her husband if she is married) and the intentional parents agree on the terms of a surrogacy contract. Such a contract will generally contain provisions dealing with custody of the child(ren), parental relationships, financial compensation to the gestational mother, insurance arrangements, medical issues, evaluations (physical and psychological) of all parties and considerations about selective reduction in the case of multiple fetuses.⁴²

The next step is to file a petition to the court with affidavits of support from all parties, attorneys and doctors involved, to obtain a Judgment of Parentage. This Judgment of Parentage “terminates any rights presumed by the surrogate (and her husband, in the case she is married), establishes the intended parent or parents as the legal parents, and directs the local vital records office on how to fill out the birth certificate. In California, any intended couple (same-sex, different-sex, married or unmarried - regardless of whether there is a biological connection to the child or not) can obtain parental rights, but the manner in how they do so will vary, depending on the circumstances. Below follows a very brief overview of some of the possibilities.

Where a surrogate mother gives birth to a child for another couple or person, the only way the intended parents can be listed immediately on the birth certificate is if they have a Judgment of Parentage. After the child is born, the hospital will send the birth certificate with the names of the intended parents (as *per* Judgment of Parentage) to the California State Department of Vital Records. The intended parents will also need the birth certificate to obtain a passport for the child, if they want to travel back to the Netherlands.⁴³ Another possibility is to have the surrogate mother and the intended father listed on the child’s birth certificate. The other intentional parents can become a legal parent at a later stage through adoption.

For gay or lesbian couples as intended parents, the Judgment of Parentage should stipulate that both names go on the birth certificate, one as “Father” and one as “Mother”. Subsequently, the couple should have the birth certificate reissued (also allowed for in the Judgment of Parentage) with the word “Parent” before each name. This leads to an amended birth certificate. Without a Judgment of Parentage, the surrogate (and her husband, in case she is married) will be listed as the natural parent(s) of the child on the birth certificate.⁴⁴ This means that the intended parents will have to go through the adoption procedure to become the legal parents of the child.

This means that upon returning to the Netherlands with their baby, the couple may be in the possession of a birth certificate with both their names listed as the child’s parents (as an amended or original birth certificate with a judgment of parentage), they may return with a birth certificate that lists the surrogate mother and the intended father on the birth certificate (an original birth certificate), or they may return with an adoption order in one or both of their names (judicial adoption order).

⁴² Center for Surrogate Parenting, Inc., website. http://www.creatingfamilies.com/IP/IP_Info.aspx?Type=47 (last accessed 15 September 2010).

⁴³ Since the child is born in the United States it will obtain an American passport (8 U.S.C. §1401).

⁴⁴ Thomas M. Pinkerton, et al., National Fertility Law Clinic, *Parentage, Adoption and Child Custody*, found at <http://www.nationalfertilitylaw.com/acrobatfiles/parentage-adoption-custody.pdf> (2006) (last accessed 15 September 2010).

4. COMING HOME: DUTCH PRIVATE INTERNATIONAL LAW

4.1 Introduction

The question arises what happens when a Dutch couple returns to The Netherlands with a child conceived through surrogacy. At this stage a distinction should be made based upon the legal procedure that has taken place abroad. Although the scenario utilised in this report focuses on the judicial determination of parentage coupled the subsequent issuance of an amended birth certificate, there are jurisdictions and situations in which surrogacy arrangements ultimately lead to the issuance of a judicial adoption order. Accordingly, the applicable private international law rules can and often will be very different. Nonetheless, the rules applicable to these different procedures will not all be dealt with in this contribution. This report will follow the vast majority of surrogacy cases entering into The Netherlands, namely on the basis of the alleged creation of legal familial ties, i.e. parentage.

4.2 Variety of possible procedures

4.2.1 Initial contact with Dutch authorities abroad

The diversity of the situations in which surrogacy arrangements come to light negates the possibility of dealing with all cases in depth in this report. However, it is possible to illustrate the variety of routes along which surrogacy cases can surface with the Dutch authorities. One possibility is that the case first arises outside The Netherlands at the Dutch consulate. Roughly speaking these cases can be divided into three main categories.

1. **Passport application:** The Dutch commissioning parents may wish to apply for a Dutch passport. In this scenario, the Dutch commissioning parents will argue that the relationship of parentage established abroad has resulted in the child acquiring Dutch nationality. Although such a request must be submitted to the Dutch consulate or embassy abroad, it is ultimately the Dutch Ministry of Foreign Affairs in The Hague that is competent to issue the passport. The application of the Dutch rules on private international law is, however, executed in first instance by the consulate registrar abroad.
2. **Residence permit:** Dutch commissioning parents may also wish to apply for a provisional permission to remain in The Netherlands (the so-called *machtiging tot voorlopig verblijf*, *MVV*). This is, however, only necessary if the child possesses the nationality of a country with an *MVV*-obligation.⁴⁵ The United States of America is not one of these countries, and so these requests are not received with regards children with American citizenship (i.e. all children born on USA soil).
3. **Short stay visa:** Dutch commissioning parents may also wish to request a short stay visa. This visa is also known as a tourist visa and is only issued via the Dutch Immigration and Naturalisation Service (*Immigratie en Naturalisatie Dienst*, *IND*).

In short, the Immigration and Naturalisation Service or the consular registrar will always be the first authority to assess any request made by Dutch commissioning parents abroad, irrespective

⁴⁵ On the basis of §4.1.1, Part B, Chapter 1, Aliens Circular 2000 (*Vreemdelingencirculaire 2000*) an application for the issuance of a residence permit will not be rejected on the basis of Article 17(1) Aliens Act (*Vreemdelingenwet*) as due to the absence of an *MVV*, if the child has the nationality of one of the following countries: Australia, Canada, Japan, Liechtenstein, New Zealand, Vatican City, the USA and South Korea. (This is also the case for citizens of the European Union and the Schengen-area).

of whether this request concerns an issue related to nationality or immigration. The relevant statutory rules applied by the various civil servants in these cases are always the same, namely:

- Private International Law (Parentage) Act (in Dutch: *Wet Conflictenrecht Afstamming* (hereinafter Wca))
- Private International Law (Adoption) Act (in Dutch: *Wet Conflictenrecht Adoptie* (hereinafter Wcad)),
- Placement of Foreign Children for Adoption Act (in Dutch: *Wet Opneming van Buitenlandse Kinderen ter Adoptie* (hereinafter Wobka))

4.2.2 Initial contact with authorities in The Netherlands

Alongside the procedures that may be started abroad, there are also situations in which a surrogacy arrangement may surface after the Dutch commissioning parents have returned to The Netherlands, without prior contact with Dutch consular services abroad. In these situations, initial contact is with the Registrar of Births, Deaths, Marriages and Registered Partnerships (hereinafter the Registrar) in a municipality in The Netherlands. This can happen in the following situations:

- If the child possesses the nationality of a country that does not have an MVV-obligation (e.g. the United States of America) and has obtained valid travel documentation from that country (e.g. a passport)⁴⁶, the child may enter The Netherlands without prior contact with Dutch authorities abroad.
- The commissioning parents may also arrive in The Netherlands from a country within the Schengen-area.⁴⁷ This can, for example, happen when a Greek-Dutch couple travel to Greece and conceive a child through the legally available surrogacy possibilities there.⁴⁸ According to Greek law, the commissioning parents would be the legal parents of the child, whereby the child would obtain Greek nationality. Accordingly, the commissioning parents would be permitted to travel with the child without an MVV. Furthermore, the commissioning parents would be able to travel freely within the Schengen-area without prior consultation with the Dutch consulate.

4.2.3 Summary

According to the given circumstances, the question whether the commissioning parents have become legal parents of a child conceived by means of a surrogacy arrangement can present itself in a variety of different settings. Furthermore, the request made by the commissioning parents can also arise with respect to an application for a Dutch passport,⁴⁹ the registration of a foreign birth certificate⁵⁰ or the determination of child maintenance.⁵¹ On the basis of research into the law of California, Greece, India and Ukraine,⁵² it is clear that commissioning parents involved in a surrogacy arrangement in one of these jurisdictions can return to The Netherlands with a variety of different documents, for example an original birth certificate, an amended birth certificate, a

⁴⁶ The USA utilizes the *ius soli* principle, meaning that all children born on American soil acquire American citizenship: 8 U.S.C. §1401.

⁴⁷ These countries are also exempt from the obligation to obtain an MVV. §4.1.1, Part B, Chapter 1, Aliens Circular 2000, in combination with §2.2, Section B, Chapter 10, Aliens Circular 2000.

⁴⁸ K. Boele-Woelki, I. Curry-Sumner, W. Schrama and M. Vonk, *Draagmoederschap en illegale opneming van kinderen*, The Hague: WODC 2011, p. 137-143.

⁴⁹ For example, HR (Supreme Court) 27 May 2005 LJN: AS5109 en HR 28 April 2006, LJN: AU9237.

⁵⁰ For example Rb 's-Gravenhage 21 June 2010, LJN BN1330.

⁵¹ K. Saarloos, *European private international law Legal parentage? Thoughts on a European instrument implementing the principle of mutual recognition in legal parentage*, Océ: Maastricht 2010, p. 210.

⁵² K. Boele-Woelki, I. Curry-Sumner, W. Schrama and M. Vonk, *Draagmoederschap en illegale opneming van kinderen*, The Hague: WODC 2011, p. 91-162.

judicial decision, an administration decree or an adoption order. Nevertheless, despite the variety of situations, legal questions and documents, the same Dutch rules will apply in all cases. Due to space restrictions, in this contribution, attention will only be paid to the situation in which the commissioning parents return to The Netherlands and allege that they are already the legal parents of the child as result of the rules of parentage. This contribution will therefore not deal with the situation in which the parents have adopted their child abroad.

As has already been explained in Section 3, it is generally the case that commissioning parents who have utilised procedures in California will possess a judicial determination of parentage (so-called *judgment of parentage*), as well as an amended or original birth certificate. If the commissioning parents allege that parentage has already been established abroad or wish to have this parentage established in The Netherlands, two different routes need to be distinguished depending upon whether the parentage has been established abroad by virtue of a legal fact (e.g. birth) or legal act (e.g. recognition) (both issues discussed in §4.3) or in a judicial decision (§4.4). In the following sections the rules with regard these different situations will be dealt with, in order to explain how Dutch law currently deals with parentage that has been established abroad in surrogacy cases.

4.3 Confirmation of alleged parentage: legal acts or facts

4.3.1 General criteria

Due to the lack of specific private international law rules in cases of surrogacy, reference must be made to the general rules laid down in the Private international law (Parentage) Act (Wca). Article 10 Wca stipulates the conditions that must be satisfied in order to recognise a foreign legal act or fact in The Netherlands. Before dealing with the criteria themselves, it is important to appreciate that two different situations fall within the purview of this provision, namely legal facts (*rechtsfeiten*) and legal acts (*rechtshandelingen*).

Firstly, as already described above, Dutch commissioning parents can return to The Netherlands with a birth certificate according to which they are the legal parents of the child. The birth certificate would appear to provide *prima facie* evidence of legal parentage. In California the birth certificate *may* refer to an underlying judicial decision, namely the judgment of parentage, but this is not always the case. The question whether this ‘legal fact’ that has been recorded on the birth certificate can be recognised in The Netherlands according to the criteria laid down in Article 10 Wca. The birth certificate in this sense is to be regarded as confirmation of a legal fact. The second scenario that falls within the ambit of this provision is that of the legal act. An example is the recognition of child by a man. The recognition also ultimately leads to the acquisition of a formal confirmation of the act that has taken place. In The Netherlands, for example, recognition by the father of a child leads to the acquisition of a deed or certificate of recognition.

The criteria that apply in both situations are that the deed or certificate must:

- have been issued by a competent authority;
- have been issued abroad;
- be laid down in a legal document;
- have been made in accordance with local law; and
- not be contrary to Dutch public policy.

The majority of these conditions do not raise specific issues within the context of surrogacy, with the exception of two aspects in particular, namely that the deed or certificate must have been issued ‘in accordance with local law’ (§4.3.2) and that recognition of the deed must not be contrary to Dutch public policy (§4.3.3).

4.3.2 “*In accordance with local law*”

A Dutch civil servant confronted with the question whether a foreign deed can be recognised in The Netherlands, will first need to determine whether the legal familial ties have been created in accordance with foreign law. With respect to this question, it would appear that the civil servant must determine whether the legal facts have been registered in accordance with the rules applicable in the jurisdiction in which the legal fact has been registered. Generally speaking, the civil servant is to assume that this is the case, and only when the civil servant has “sufficient doubt” that this is not the case can the Dutch civil servant request further supplementary evidence to support the claims made in the foreign deed.⁵³ With respect to the criterion of “sufficient doubt”, it is important that two questions be answered separately. Firstly, what circumstances can give rise to “sufficient doubt”? Secondly, what steps need to be taken once the civil servant has established that he or she has sufficient doubt?

With respect to the first question, one must refer to the general starting point in relation to the recognition of foreign deeds, namely that the Dutch civil servant should display trust when confronted with foreign documents. The civil servant can only determine that he or she has “sufficient doubt” on the basis of objective indications to the contrary. It is also necessary to know in relation to what the Dutch civil servant may have “sufficient doubt”. The sufficient doubt in this context must relate to the correct application of the rules applicable in the jurisdiction in which the deed or certificate was issued. Accordingly, a distinction must be made between jurisdictions in which surrogacy is permitted and jurisdictions that do not permit surrogacy.

If a jurisdiction permits surrogacy arrangements, and furthermore also permits commissioning parents to be registered on the original birth certificate, then a birth certificate upon which Dutch commissioning parents have been registered as the legal parents has been issued in compliance with the applicable rules of the jurisdiction issuing the deed. In Ukraine, for example, it is permitted for a birth certificate to be issued to commissioning parents, as long as one of the parents is genetically related to the child.⁵⁴ In this situation, the civil servant must determine whether he or she has doubt that the deed or certificate has been issued contrary to the proper observance of this rule. The fact that the civil servant thinks that the persons registered on the birth certificate have used a surrogate is not sufficient grounds (with regard to this condition) to refuse recognition of the birth certificate. This may, however, nonetheless provide sufficient grounds for non-recognition with respect to the application of the public policy exception.⁵⁵

If, however, the foreign jurisdiction does not permit surrogacy, and the civil servant has sufficient objective indications that the commissioning parents have used a surrogate, then the civil servant may take the necessary steps to discover whether the deed has been drawn up in accordance with the locally applicable rules. The question arises, however, when can the civil servant state that he has sufficient objective indications to believe that the local law has not been observed. This question can best be answered using a number of illustrations. If, for example, two white Caucasian commissioning parents wish to register their child in a Dutch municipality and the child is not Caucasian but instead from a different ethnic origin, then the civil servant will have sufficient objective indications to doubt that the local rules have been followed.

⁵³ Vonken (Personen- en Familierecht. Het internationale afstammingsrecht), Article 10 Wca, note 1, p. 2173.

⁵⁴ K. Boele-Woelki, I. Curry-Sumner, W. Schrama and M. Vonk, *Draagmoederschap en illegale opnemings van kinderen*, The Hague: WODC 2011, p. 159

⁵⁵ See further §4.3.4.

Once the civil servant has determined that he has sufficient doubt to question whether the local rules have been applied correctly, the next question is which steps can the civil servant then take? The normal procedure will be for the civil servant to request supporting documentation. According to Ukrainian law, for example, the registration of the child in the registers of the local municipality requires a certificate in which the genetic relationship of the child is determined with respect to at least one parent. This certificate does not, however, state that use has been made of a surrogate. The commissioning parents will generally also be in possession of a surrogacy contract wherein all the agreements between the commissioning parents and surrogate parents are laid down. Should the commissioning parents not possess such a contract (or refuse to hand it over), it would seem very difficult on this ground to determine that the parents have used a surrogacy arrangement. Nonetheless, this does not exclude the possibility of non-recognition on grounds of public policy.

4.3.4 Grounds for refusal

Despite satisfying the abovementioned criteria, a foreign legal act or legal fact can also be denied recognition.⁵⁶ With respect to the non-recognition of foreign legal acts and facts, the public policy exception is the most important exception and will form the basis of this section. The aim of the public policy exception is to block the application of foreign law and the recognition of legal facts and acts concluded abroad, if the application or recognition would lead to a situation contrary to the fundamental principles and values of the Dutch legal system.⁵⁷ Article 10(2), Wca lists three specific cases which will always be deemed to be contrary to Dutch public policy. These situations will be dealt with first (§4.3.5) prior to an analysis of the general grounds for non-recognition on public policy grounds (§4.3.6).

4.3.5 Specific public policy grounds

In Article 10(2) Wca three specific situations are listed in which a foreign legal act or legal fact will be regarded as contrary to Dutch public policy, namely:

- (a) if the recognition is made by a Dutch national who, according to Dutch law, would not have been entitled to recognise the child;
- (b) if, where the consent of the mother or the child is concerned, the legal requirements applicable pursuant to Article 4(4) Wca were not complied with, or
- (c) if the instrument manifestly relates to a sham transaction.

It would appear that the latter two conditions have not provided any real problems with respect to surrogacy arrangements. The first condition has, however, raised a number of problems that will be discussed here further. If a Dutch man recognises a child abroad, yet according to Dutch law he would not have been permitted to recognise the child, then the foreign recognition will not be recognised in The Netherlands. The aim behind this non-recognition clause is that otherwise Dutch fathers would easily be able to circumvent the adoption legislation by recognising children abroad. The conditions for recognition can be found in Article 1:204 Dutch Civil Code (hereinafter DCC). The condition listed in Article 1:204(1)(e) DCC is of crucial importance in the context of surrogacy. This provision determines that a recognition will be regarded as null and void if it made “by a man who is married at the time of the recognition to another woman unless the district court has *prima facie* held that there is or has been a bond between the man and the mother which may, to a sufficient degree, be regarded as sufficiently equivalent to a marriage, or that there is a close personal relationship between the man and the child.”⁵⁸

⁵⁶ Article 10(1) Wca.

⁵⁷ L. Strikwerda, *Inleiding tot het Nederlands Internationaal Privaatrecht*, Deventer: Kluwer, 2008, p. 53.

⁵⁸ Translation provided by H. Warendorf, R. Thomas and I. Curry-Sumner, *Civil Code of The Netherlands*, Deventer: Kluwer 2009, p. 75

Prior to discussing the intricacies of these exceptions, it is first important to explore the extent of the prohibition itself. The Court of Appeal Amsterdam has, for example, determined that the prohibition does not apply if the man is involved in a registered partnership with another woman,⁵⁹ whilst the District Court Arnhem has applied this prohibition in a case when a man was married to another man.⁶⁰ Furthermore, the prohibition does not apply to a non-Dutch man, who is permitted according to the law of his nationality to recognise a child of another woman.⁶¹

With respect to the exceptions to this prohibition, two separate questions must be posed, namely:

1. When are the conditions for the exceptions satisfied in an international context?
2. Does prior permission need to be requested from the district court in order to satisfy the exception provided for in Article 1:204(1)(e) Dutch Civil Code?

In answering the first question, reference can be made to the decision of the Supreme Court on the 27th May 2005. This case was discussed extensively in the 2006 Survey.⁶² As stated in the 2006 Survey, the case revolved around a child born in 2001 in Turkey. The Dutch father had provided a notarial instrument in 2001 in which he had stated that he was the biological father of the child. A problem arose because at the time the father was married to another woman (and had been since 1973). The Dutch Supreme Court held that the mandatory nature of the public policy exception must lead to the conclusion that the man was not competent to recognise this child. The Supreme Court referred to a number of facts and circumstances that were relevant in determining whether a married man is competent to recognise a child, namely “the man’s evidenced interest and commitment to the child both before as well as after the birth. Furthermore, more is required than simple contact during a limited period of time.”⁶³ The District Court Assen has moreover determined that no close personal relationship can exist between an unborn child and the man, since this relationship can only develop after the child is born.⁶⁴

With respect to the second question, the Dutch Supreme Court has also provided clear directions in 2006. In this case, the central question was whether the recognition in Vietnam by a Dutch national could be recognised in The Netherlands. The child was born to an unmarried Vietnamese mother and recognised by a Dutch national who was married to another woman at the time. According to the district court the man satisfied the requirement of Article 1:204(1)(e) DCC and therefore the Vietnamese recognition could be recognised in The Netherlands. However, the man had not requested **prior** permission from the district court as required by Article 1:204(1)(e) DCC. The Supreme Court held that this was not required, as long as the man could prove that he substantively satisfied the necessary requirements.⁶⁵ On the 30th November 2007, the Supreme Court provided even more clarity in explaining that the relationship between the man and the child can be evidenced on the basis of the agreements and circumstances surrounding the case.⁶⁶

⁵⁹ Hof Amsterdam 18 August 2002, *LJN* BG2522.

⁶⁰ Rb Arnhem, 26 April 2008, *LJN* BI3495.

⁶¹ HR (Supreme Court) 28 April 1986, *NJ* 1987, 926.

⁶² I. Sumner and C. Forder, “The Dutch Family Law Chronicles: Continued Parenthood notwithstanding divorce”, in: A. Bainham, *International Survey of Family Law 2006 Edition*, p. 264-265.

⁶³ Hof Den Haag, 27 May 2009, *LJN* BI1434. See also M.J. Vonk, “Een, twee of drie ouders?,” *Tijdschrift voor Familie- en Jeugdrecht* 2003, p. 122-128 at 124-125.

⁶⁴ Rb Assen 15 June 2006, *LJN* AY7247.

⁶⁵ HR 28 April 2006, *LJN* AU9237

⁶⁶ HR 30 November 2007, *RvdW* 2007, 1023.

The two abovementioned questions raise particular problems with respect to surrogacy cases. If the commissioning father satisfies the substantive criterion of a “close personal relationship” with the child, then it is possible to recognise the child in the country of origin, regardless of whether or not he is married to another woman. Since it is also not required that the man who recognises the child be the biological father, this route would appear to be a rather “simplified” route should adoption prove to be too difficult, too expensive, or procedurally impossible.

4.3.6 General public policy grounds

Alongside these specific public policy grounds, Article 10(1) Wca provides for a general public policy exception. The question arises whether international surrogacy arrangements will fall foul of this exception. In discussing this topic a number of different scenarios must be distinguished. Due to space restrictions, only one of those scenarios will be discussed here, namely whether the lack of a birth mother on the birth certificate should lead to non-recognition.

Two cases have dealt with the issue of a birth certificate upon which no mother is listed. The first case concerned three Dutch persons, two men (in a relationship) and a woman, who acted as the surrogate. The surrogate did not wish to have any role in the child’s life, but knew that if she gave birth in The Netherlands she would be regarded as the child’s legal mother. As a result, she decided that she should give birth in France, since anonymous birth is possible according to French law. After the birth, they returned to The Netherlands, with a French birth certificate, upon which only the biological father was listed. The Dutch registrar refused to register the birth certificate stating that this was contrary to Dutch public policy. The District Court of The Hague agreed with the registrar, basing their conclusion on Article 7 UNCRC. On the basis of this provision, every child has a right to know his or her parents and be raised by them. The district court held that in recognising the birth certificate, upon which no details were provided with regards the mother, the identity of the mother would in this way be withheld from the child, as such,

“the child should be granted the choice to be able at a later age to give form to his or her identity. In doing so, he or she needs, as far as possible, full access to details of his or her parentage. Registration of the French birth certificate therefore contravenes Dutch public policy.”

In another unpublished decision of the District Court of The Hague, the judge decided that a birth certificate from the United States of America upon which two men were registered as the parents also contravened Dutch public policy. It was held that the *mater certa semper est* rule is of fundamental public policy and therefore a birth certificate with two men could not be recognised in The Netherlands.

4.4 Confirmation of alleged parentage: judicial decisions

4.4.1 General criteria

In a similar vein to Article 10 Wca, Article 9 Wca lays down the specific conditions according to which a foreign judicial decision with regard to legal parentage can be recognised in The Netherlands. The conditions with respect to an enforceable decision, jurisdiction of the foreign judge, and adherence with the rules of a fair trial do not appear to have presented any particular problems for Dutch judges and civil servants with respect to the specific complexities in surrogacy cases. These conditions will therefore not be discussed here.

4.4.2 Competence of the civil servant

If the Dutch civil servant is unsure whether a foreign judicial decision should be recognised, he or she is obliged to request the advice of the Advice Committee for Issues relating to Civil Status

and Nationality (*Commissie van Advies voor de Zaken betreffende de Burgerlijke Staat en de Nationaliteit*).⁶⁷ The civil servant must request this advice at the moment that he or she has “sufficient doubt” that the judicial decision does not meet the required criteria laid down in Dutch law. There are, however, no cases with respect to when the civil servant may assume that he or she has “sufficient doubt”.⁶⁸

4.4.3 *Public policy*

If the recognition of the foreign judicial decision would be contrary to Dutch public policy, then the decision will not be recognised. As already stated in §2, according to the law of California parties can request the judge to determine parentage prior to the birth of the child. In a recent unpublished decision of the District Court of The Hague, the court was confronted with such a case. Parentage between the applicants and two children had been determined by the Superior Court of California prior to the birth of the children. The Californian court also ordered that the civil servant draw up the birth certificate accordingly upon the birth of the children. The District Court of The Hague refused to recognise and register the birth certificates in the relevant registers in The Netherlands. The District Court argued:

“The judicial decision from the Superior Court of California of 15th April 2008 cannot be recognised since this is contrary to Dutch public policy, bearing in mind the aforementioned fundamental rule of family law (*mater certa semper est*) and the fact that the judicial decision was ordered without the legal mother first being determined.”⁶⁹

Question marks can, however, be placed with respect to this line of reasoning. The determination of paternity is not always dependent upon the prior determination of maternity. Especially when considering that the applicant in the case was also the biological father of the children, why is the recognition of a decision with regard to the determination of paternity of the biological father contrary to Dutch public policy? Furthermore, according to Californian law all parties must have provided consent prior to the issuance of a judicial determination of parentage.⁷⁰ If the biological mother had already been consulted and provided consent to the judgment of parentage, why is the recognition of such a decision contrary to Dutch public policy? Furthermore arguments and reasoning is absolutely essential.

4.5 Summary

This section of the contribution has hopefully illustrated the complex nature of the recognition of foreign birth certificates and judicial decisions regarding parentage. The current private international law rules in the field of parentage have not been designed to deal with the complex issues that present themselves in surrogacy cases. Specific recognition rules need to be designed that shows deference to the complexity of the cases, as well as the diversity of relevant factors.

5. CONCLUSION

It is plausible that the strict rules applicable in substantive Dutch law with respect to surrogacy cases lead many couples to search for alternatives abroad. Although the causal link between the

⁶⁷ Article 1:29c BW.

⁶⁸ It is suggested here that the same criteria and reasoning would apply here as is applicable with regards the recognition of foreign legal facts and legal acts.

⁶⁹ Author’s own translation.

⁷⁰ K. Boele-Woelki, I. Curry-Sumner, W. Schrama and M. Vonk, *Draagmoederschap en illegale opnemings van kinderen*, The Hague: WODC 2011, p. 134.

one and the other cannot be proven without empirical research into the motivation of couples embarking upon surrogacy arrangements abroad, the link is certainly more than plausible.

If this is the case, a number of questions arise. Firstly, should the Dutch substantive rules regarding access to high technology surrogacy be amended so as to abate the increasing flow of couples seeking solace abroad? If the Dutch Government properly regulates access to high-technology and low technology surrogacy, as well as providing a civil law method enabling the transfer of parental rights from the surrogate parents to the commissioning parents, perhaps fewer couples would need to seek the assistance of foreign medical partners. In this sense, inspiration could certainly be sought from the recently amended English legislation that has now been operational for more than twenty years. The parental order provides for a secure and certain process through which the rights of all parties involved in the process are taken into account, yet the whole process is governed by the best interests of the child.

Secondly, if the Dutch Government does not intend to address the issues surrounding access to high technology cases within the Netherlands, questions will increasingly need to be asked with regards the escalating number of international cases. When is surrogacy against Dutch public policy? In answering this question, it is of the utmost importance that one does not generalise. Distinctions need to be drawn between different cases depending upon the genetic relationship between the commissioning parents and the child. The protection offered by the UNCRC should protect the child in two senses, namely the right to know ones biological heritage, as well as the right to know that one was conceived as a result of surrogacy. In taking these two principles as a starting point, it is difficult to see the justification for refusing to recognise a birth certificate drawn up abroad upon which the genetically related commissioning parents are listed as the legal parents, despite the fact that the child was conceived through surrogacy. It is difficult to see how the recognition could be against Dutch public policy in a case where the identity of the surrogate mother is easily traceable, e.g. in Ukraine. Since the child has access to information regarding his or her status (i.e. as a child conceived through surrogacy), as well as his or her biological parents (i.e. the commissioning parents), it is difficult to see how the lack of a reference on the birth certificate should lead to non-recognition.

The answer may, and perhaps should, be very different if neither the commissioning parents nor the surrogate parents are genetically related the child. In this case, the question should be raised what makes this case any different to adoption? It would appear that the only difference is that in a surrogacy case agreements and arrangements are made prior to the birth of a child, whereas adoption involves the transfer of parental rights of a child that has already been born and is in need of a familial home. In our opinion, the single fact that commissioning parents have made arrangements prior to the birth should not mean that adoption legislation can be circumvented. Although, this will no doubt raise problems in practical terms (e.g. how can the State conduct a home study if the child has already been conceived? If a negative advice is to be given from the local Child Protection Board, what happens to the child that has been conceived?), these difficult questions need to be raised and should not be shied away from simply because of the difficult answers that these questions may lead to.