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France and Surrogacy

Thank you for having invited me to present to you the situation of France towards surrogacy.

For more than 20 years now I defend the interests of heterosexual couples, gay and lesbian couples who start a family thanks to surrogacy. They come to see me because surrogacy is forbidden in France and having a child born in that case leads to great difficulties.
Firstly I will recall the legal status of surrogacy in France and secondly its consequences.

I. Legal status of surrogacy in France

The practice of surrogacy for French people to this day concerns hundreds of couples per year (heteros et gays) which with 761,000 births per year, is nothing.

The actual government of President MACRON is against surrogacy and will not legalise it.

Surrogacy was developed in the 1980's and was used at the beginning by heterosexual couples.

The Court of Cassation was the first to forbid surrogacy in a judgment of 13th December 1989.

Then, this case law forbidding the use of surrogacy was formalised in the "bioethics" law of 1994.

This law has, on the one part, established the principle of nullity of the surrogacy contract in Article 16-7 of the Civil Code.

It means that, if a contract of surrogacy is concluded in France and that there is a problem of execution: refusal by the parents of intention to take the child or refusal by the surrogate to give the child, the Judge in case of dispute, will declare that there is no contract.

On the other hand, this law has defined criminal offence for:

- Incitement to abandon a child;
- Intermediary offence between the parents of intention and the surrogate.

Due to the lack of status, the legal situation of the children born through surrogacy outside of France, is complex.

II. Legal situation of children conceived through surrogacy

In short we can say that :

1. In French law, the birth certificate establishes the parentage –that is family identity – of the child;

2. Normally, France recognises foreign birth certificates;

3. French administration chose to treat birth certificates "suspected of surrogacy" different from the others, without any legal basis (with the result that it is the child who is the victim);

4. Lawyers must go through legal proceedings which are not necessary for other children born in foreign countries (requesting the cancellation of the refusal of a passport, request an exequatur from a judge, appeal before the European Court of Human Rights) in order to regularize the civil status of these children born through surrogacy.

1. Parentage is established by the foreign birth certificate

All the couples who went through surrogacy have to face the same difficulties, whether heterosexuals or gays.

What happens abroad on a legal point of view for the establishment of the birth certificate?

For heterosexual couples: the birth certificate is legally established with the name of both parents, called "intended parents". They can both be the biological parents or only one of them or none of them.

For homosexual couples, we can figure out three cases for the establishment of the birth certificate according to the law of the birth place.

For the child, we can have a birth certificate bearing:

- The mention of the father and of the woman who gave birth,
- Or a birth certificate mentioning the father alone,
- Or also a birth certificate mentioning both same sex parents, in this case, two men.

In all cases, the French legal principle is that the foreign birth certificate establishes the child's parentage towards the persons mentioned on its birth certificate (biology is not concerned).
The birth certificate is a legal title main element of the identity of the person and certifying legal parentage with one or two parents.
Normally this foreign birth certificate can be used before all public authorities.
It must be duly apostilled or legalised AND translated if not in the French language.

2. The very complex recognition of the foreign birth certificate by the French authorities

On a legal standpoint, the parents called "of intention" should be able to obtain the transcription of the foreign birth certificate on the civil register of the French persons born abroad, a passport, an identity card and a nationality certificate.

But, the policy of the Prosecutor of Nantes – central control of the civil status of French citizens born abroad – and of the administrations is to show that when there is a suspicion of surrogacy, the administrations "forget" legal rules and render arbitrary judgments, for which legal action must be taken before the judge.
Let's take the example of the transcription of a birth certificate established by a foreign law officer (the child being born abroad).

What is a transcription?

It is an executive act which consists in transcribing (reproduce) the elements mentioned on the foreign birth certificate on the civil register of the French citizens born abroad, so that the child may have a French civil status of birth.

This approach is completely optional: it is an advertising measure, not a parentage establishment.

Transcription does create parentage, it does not create a right, it only enables having a French birth certificate, which makes children's life easier.

Transcription does not establish parentage since parentage is established by the birth certificate, even if foreign (the birth certificate is what we call "legal title" creating rights and duties).

Thus, transcription is a simple advertising measure of the foreign birth certificate, a formality.

Legally, there is no need at all to have a foreign birth certificate transcribed in the central control of the civil register in order to have an identity or, even more, to exist.

In French law, each citizen exists as subject of law thanks and only thanks to his birth certificate, whether foreign or not transcribed.

It is the birth certificate that establishes each one's identity, including its parentage with – or without – one of the parents. Transcription is not necessary to request a passport, an identity card, or a certificate of French nationality. A very recent answer from the ministry to a parliamentary question, on 26th February 2019, reminded it once more. These actions can be done with the foreign birth certificate, translated and apostilled.
However, in practice, as soon as there is a suspicion of surrogacy, normal application of legal rights by administrations may become variable and is the origin of several litigations.

Thus, this question of transcription of the foreign birth certificate, which appeared at the beginning of the years 2000, is still not resolved even with France being condemned several times by the European Court of Human Rights:

- In 2014 for the Mennesson and Labassée families,
- In 2016 for the Foulon and Bouvet families,
- And in January 2017 for the Laborie family.

Without getting into details in the evolution of the Court of Cassation since the beginning of the years 2000, the last position of the Court of Cassation was on 5th July 2017.

On 5th July 2017, the Court of Cassation in a first judgment admitted a partial transcription of the foreign birth certificate towards the husband of the mother and supposed "biological" father.

The Court refused the transcription of the name of the intended mother who is mentioned on the foreign birth certificate because, according to the Court, the mother could only be the one who gave birth.

The Court held: *"Whereas the refusal of transcription of intended maternal filiation when a child is born abroad through a surrogacy contract, results from law and pursue a legitimate aim tending to protect the child and the surrogate mother and aims to discourage this practice, prohibited under Articles 16-7 and 16-9 of the Civil Code."*

Therefore, the Court said it wishes the "protection of the child", however, we don't understand how the protection of the child goes through a partial transcription of his foreign birth certificate (mentioning only the father) and not through a complete transcription, mentioning both parents.

Then the Court said it wants to protect the "surrogate mother"; but this "surrogate mother" doesn't ask anything, she is not part to the proceedings, she has renounced to all rights and duties over the child, as her national law allows her to do, she hasn't even been mentioned on the child's birth certificate.

In the end the Court revealed its objective: "discourage this forbidden practice" (surrogacy abroad).

But it is not up to the Court to fight against surrogacy, it is up to the legislator to say that he fights surrogacy by harsh legislation.

And as if this situation was not complicated enough, at the same date of 5th July 2017, the Court of Cassation in a second case, admitted simple adoption of the child of the spouse, event through surrogacy.

Why this simple adoption?

Because in this case, there are two parents on the birth certificate and when there are two parents on the certificate the only possibility is simple adoption which allows to add a third parent.

The story is as follows: Pascal and Yves were able to have a child thanks to Christine who is the surrogate.

The birth certificate of the child, Victor, mentions the father Pascal and Christine who gave birth.

In this case, the only solution for Yves to become a parent is to adopt Victor.

To do this, he must be married and must file a request for simple adoption, because as there are already two parents on the birth certificate (Pascal and Christine) the only way to add a parent is the simple adoption.

Victor has therefore three parents mentioned on his birth certificate: his two fathers Pascal and Yves, and Christine who remains mentioned on the birth certificate. The particularity – or the interest – of simple adoption, is that the original parents cannot be deleted.

In this context, at the beginning of 2018, I once again appealed before the European Court of Human Rights for three heterosexual couples who had been refused a complete transcription of their child's birth certificate. These requests are actually being examined before the ECHR.

Aware of this, the Court of Cassation, on 5th October 2018, asked the European Court of Human Rights (ECHR) an opinion in order to know whether or not it could transcribe for an "intended parent" mentioned on the birth certificate.

On 10th April 2019, the ECHR rendered its opinion. It considered that:
1. *The right for the respect of the child's privacy (...) requires that domestic law offers the possibility of the recognition of a parentage between that child and the mother of intention, designed on the birth certificate legally established abroad as his "legal mother";*
2. *The right for the respect of the child's privacy (...) does not require that this recognition be transcribed on the civil register of the birth certificate legally established abroad, it can be done in another way such as adopting the child by the intended mother* ***on condition that the terms provided by domestic law guarantee the effectiveness and the swiftness of its implementation, according to the best interests of the child****."*

This opinion offers an imperfect solution: it does not impose a complete transcription of the birth certificate, it imposes a quick and effective system of recognition of the intended parent (mother or second father), leading to the same result of a complete transcription.

But, legal proceedings in France to adopt the spouse's child, is:

- Uncertain: it is not systematic, it is up to the judge's discretion;
- It takes between 12 and 18 months before getting a judgment for adoption, due to a lack of judges and Court clerks.

Will the ECHR in a next recourse, decide that there is an effectiveness of recognition and promptness?

Such a set-up: partial transcription and adoption in order to avoid copying in full the foreign birth certificate on the French civil register, is a complete nonsense, as it would be better to forget the surrogacy and have the birth certificate transcribed in full.

Indeed, whether the child be conceived through surrogacy or not, the birth certificate is identical: it mentions the two parents or one parent when there is only one.

It is the suspicion of surrogacy that leads to impose stupid legal set-ups: transcription towards the husband of the mother, supposed to be the father and adoption by the intended mother or the second intended father.

Some judges understood that this process is stupid and they chose simplicity. The Court of Appeal of Paris on 28th May 2019, held that it was enough to recognise the validity of the foreign birth certificate mentioning both fathers to declare the children French by parentage. No need for transcription.

The Court held exactly the following:

"Saying that Valérie and Adam A-B did not have evidence of civil status and could not therefore be granted the French nationality, the first judges retained the record of their birth registration in the registers of Ontario on XXX 2014 mentioning instead of the mother, the name of one of the two fathers, which could not correspond to reality, according to Article 47 of the Civil Code.
However, on the one hand, it results from an affidavit produced by the Appellants that these certificates have been issued according to the law of Ontario, on the other hand, mentioning the name of two fathers on the birth certificate does not violate the French concept of international public order.
It is therefore to be noted that the children have a specific civil status. The French nationality of MM A & B not being contested by the Public Prosecutor, it is to be declared that the two children are French according to Article 18 of the Civil Code."

In the same way the Court of Appeal of Rennes, on 13th May 2019, upon the request for transcription of a mother mentioned alone on the birth certificate (this woman went through surrogacy in Armenia and there is no father), the Court did not take into consideration that the child was born through surrogacy. It ordered the transcription towards the intended mother … First time.

As you can see, it is complicated.

Therefore, what is the best solution for the child to have a French birth certificate?

Today, I would say that it is the exequatur of the foreign judgment when there is one (judgment of adoption by the second parent, parentage judgment, pre-birth order).

The exequatur of a foreign judgment is aimed to recognise the legal validity of this judgment on the French territory.

At the Court of Paris since late 2017, we obtain the exequatur of foreign judgments even if there is surrogacy.

It is easier to obtain the exequatur of the foreign judgment than to request an adoption to a French judge, because with the exequatur we ask the French judge to recognise a legal situation created abroad, and not to create a new one.

Once we have this exequatur judgment, we can then obtain from the Prosecutor of Nantes the establishment of a French birth certificate for the child mentioning both parents.

It is the most efficient way. It greatly reassures the parents, even if it not mandatory.