

## Questions and answers about surrogacy in France

Me Noémie Houchet-Tran, attorney at the Paris Bar, responds to questions about the actual status and issues of the surrogacy practice in France :

***– Does your jurisdiction recognize parentage conferred in other jurisdictions following surrogacy? If so, is this only following an order having been made in the other jurisdiction?***

At first, the Court of Cassation had accepted a partial transcription for the father if a biological link existed with the child but refused any transcription for the mother who had not given birth to the child, such a transcription being contrary to our international public policy.

The Court then hardened its case law by stating that both parents had committed fraud under French law by entering into such an agreement abroad and that no transcription could therefore be made.

This case law was totally contrary to the interests of these children, some of whom even found themselves stateless in practice. Indeed, while the United States, for example, gives nationality (and therefore a passport to return to France) to all children born in its territory, including surrogates, some States such as Ukraine, Georgia or Russia do not give their nationality, so that no travel documents can be issued until the French Consulate deigns to register the birth of the child.

This was the reason for France's condemnation by the European Court of Human Rights on 26 June 2014 in its *Mennesson and Labassée* judgments. The Court had found that this refusal to transcribe was contrary to Article 8 guaranteeing respect for private and family life. Further convictions followed. On the other hand, the Court has never ruled on the possible legalization of surrogacy in France. When France is convicted, the Court of Cassation must review the cases.

As a result, there were many developments on the French side.

***– Does your legal system have the facility to recognize the legal status of intended parents following an international surrogacy? If so, is the structure which you have one of pre-birth or post-birth orders or other form of registration?***

It is now admitted that children from surrogacy must receive French nationality. The transcription must also be made for the intentional father provided that a biological link exists, without this link being verified. For the intentional mother or the second father, the Court of Cassation requires the adoption of the spouse's child, which in our opinion makes no sense since it is a question of adopting one's own child. This also forces parents to marry. In addition, there are differences between jurisdictions, which is not without additional difficulties: some will require consent to adoption from the surrogate mother, who has abandoned all her rights and is not a legal parent with regard to the child.

Some find subterfuges by obtaining directly abroad, when possible, an adoption judgment that is then transcribed in France. This is particularly the case with Florida.

In Nantes, where the central civil registry office is located, significant progress was made in 2018: The Tribunal de Grande Instance, and then even the Prosecutor directly, decided to transcribe certain birth certificates directly in full for both intentional parents. The Court of Cassation has never gone that far.

At the end of 2018, when the *Mennesson* and *Labassée* cases were reviewed and based on these developments, the Advocate General at the Court of Cassation, in an extremely well-crafted opinion, stated that the transcription of acts for the intentional father must be ordered and that in the case of the intentional mother, without amendment of the Civil Code by the legislator, the fact that she has not given birth to the child always prevents the foreign act from being recognized as true within the meaning of Article 47 of the French Civil Code and that there is no need to postpone the examination of cases for opinion. However, the Court of Cassation sent a request to the European Court of Human Rights for an advisory opinion as to whether the refusal to transcribe a foreign act in so far as it designates the intentional mother as the legal mother was contrary to Article 8 of the Convention (respect for private and family life). It also asked the European Court whether it should distinguish between an intentional mother with a biological link or without a biological link. Finally, it asked the Court if the adoption process would meet the requirements of Article 8.

Of course, the same reasoning applies to the second dads.

The European Court replied on 10 April 2019:

*“In the case of a child born abroad by surrogate motherhood and derived from the gametes of the intentional father and a third party donor and where the parent-child relationship between the child and the intentional father has been recognized in national law,*

*the right to respect for the child’s private life, within the meaning of Article 8 of the European Convention on Human Rights, requires that domestic law provide a possibility of recognition of a parent-child relationship between the child and the intentional mother, referred to in the birth certificate legally established abroad as the “legal mother”.*

*the right to respect for the child’s privacy does not require that this recognition be made by transcribing the birth certificate legally established abroad into civil status registers; it may be made by another means, such as the adoption of the child by the intentional mother. »*

Roughly speaking, the European Court tells us: filiation between the child and the intentional non-biological mother (which is almost always the case in practice) must be established, but States are free to choose the legal means of achieving this, so adoption is a possible solution.

It is now official: the parent-child relationship must be established for both parents.

But the Court leaves States free to decide how to achieve this and does not impose any changes in the current case law of the Court of Cassation.

What is clear is that there is a clear desire to liberalize the process in the interests of children: some bold prosecutors order direct transcripts while the Advocate General at the Court of Cassation appeals to the legislator.

The Court of Cassation is expected to rule shortly in the light of this opinion. It is still free to change its case law. To be continued!

***– Can you tell me anything that works well or works badly about the process that you have for conferring parentage following surrogacy?***

When a child of at least one French parent is born abroad, the parents must either directly declare the birth to the French Consulate as if they were declaring the birth at the town hall or have the foreign birth certificate transcribed to the Consulate.

As a reminder, transcription is an administrative formality: the information from the foreign civil status record is copied onto the French registers in order to obtain a new French civil status record. This formality is not known by all countries. For example, this does not exist in the United States. You can be a U.S. citizen and keep your foreign birth certificate for life. Transcription is never mandatory in France but greatly facilitates the child's future life, allowing him or her to obtain a French passport.

If transcription does not mean filiation, which may well exist without transcription, in practice it is on the occasion of transcription that France, via the public prosecutors in the first instance, will question the filiation relationship existing between the child born from a surrogate mother and his or her intended parents.

To request the transcription, parents thus use article 47 of the Civil Code, which states that “ *full faith must be given to acts of civil status of French persons and of aliens made in a foreign country and drawn up in the forms in use in that country, unless other records or documents retained, external evidence, or elements drawn from the act itself establish, after all useful verifications if necessary, that the act is irregular, forged, or that the facts declared therein do not square with the truth.* »

The foreign birth certificates of these children have all, except in exceptional cases, been duly obtained in the country of birth. This is therefore not a problem. The surrogate mother is sometimes mentioned in the foreign document, while in most cases the father and intentional mother (or the second non-biological father) are directly mentioned.

Despite this, intentional parents have always faced difficulties in having their birth certificates transcribed in the name of our international public policy.

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