Features

Surrogacy in Spain: reality v legality

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The Spanish Supreme Court ('SSC'), in judgment 835/2013 dated 6 February 2014, prohibits the registration of children born from surrogacy arrangements. Their registration is permitted in order for them to obtain their nationality, but such registration does not establish affiliation to their surrogate parents. The reasons provided by the SSC have sparked much controversy in particular as to the interpretation of the best interests of children in an international context. Surrogacy is still prohibited in Spain, despite the understanding up to the judgment of the SSC that through registration, surrogacy was gaining legal acceptance. It was in fact a legal contradiction which the SSC has now addressed. Whether or not the decision is in accordance with the protection of the interests of children will be examined here.

The SSC judgment has raised eyebrows in the international surrogacy community as Spain had previously given the impression that despite prohibiting the gestation of children through surrogacy, it was prepared to provide a legal status to these children based on their overall best interests. Given this background, the Spanish and international legal community was expecting a permissive ruling; however nothing could be further from the current status quo.

Legal background

Looking into Spanish legislation, we start from 1988 when Law 35/1988 of 22 November 1988 on 'Techniques of Assisted Reproduction' was approved. This was considered very liberal and pioneering at that time. It allowed assisted reproduction for single women and widows whose husbands had agreed to donate their sperm while living. At the same time in Spain the Special Commission Studying In Vitro Fertilisation and Artificial Insemination was created, whose recommendations in the field of surrogacy were:

'(1) Surrogacy must be prohibited in all circumstances;
(2) The individuals participating in a contract of surrogacy must be subjected to a penal sanction, as well as the individuals, the agencies and the institutions favouring it and also the medical teams performing it; and
(3) The health centres or services in which these techniques take place will be subjected to a sanction.'

This sanction is typified in Art 221 of Spanish Penal Code which states:

'(1) Those who, through economic compensation, deliver a child to another individual, without the existence of a relation of parentage, eluding the legal procedures of custody, hosting or adoption, with the objective of establishing an analogous relation to that of parentage, will be punished with imprisonment of a duration of from one to five years, and with a legal impediment to exercise parental authority, tutelage or custody during a period going from four to 10 years.
(2) The same sanction will apply to the person who receives the child as the intermediary, even if the case of the "delivery" of the child took place in a foreign country.'

In 2003, Spain legislated again in respect of Techniques of Assisted Reproduction with Law 45/2003 which mirrored the former in various ways, for example by allowing the use of cryo-preserved pre-embryos; but this meant that there were two pieces of legislation applicable at the same time for the same purpose, although they were complementary, so it was reasonable that the two of them be merged into one in 2006 when the current law came into force: Law 14/2006, which is known as 'Techniques of Assisted Human Reproduction'. It annuls the two previous and complementary laws and at the moment is the sole law in Spain which regulates this field.

Parallel to the legislation of assisted reproduction and in order to understand the current developments, it is important to highlight that in 2005 the law that allows same-sex marriages was approved; it is the homosexual community that has really enhanced and developed the techniques of assisted reproduction.

Current legal framework

Law 14/2006 states in its Art 10 the following:

'(1) A contract convening the gestation, whether for profit or free, of a woman who will renounce maternal parentage in favour of a co-contracting party or a third party, will be null and void.
(2) The parentage of the children born from surrogacy will be determined by childbirth.
(3) The biological father retains the right to contest the paternity, in conformity to the rules of common law.'

This Art 10 is identical to Art 10 of Law 33/1988, so in the 18 years between both laws, the prohibition has not changed at all. Therefore the prohibition of surrogacy in 1988 was confirmed in 2006 in the same terms. In both 1988 and 2006 a socialist government was in office in Spain.

However, the reality of Spanish society does not reflect this restriction. In particular following the legalisation of marriages of same-sex couples in 2005, surrogacy arrangements have increased. The Directorate General for Registers and Notaries, a government body, published conclusions in respect of the registration of children born from surrogacy arrangements on 5 October 2010. Within these were listed the legal requirements for the registration of children born from surrogacy arrangements:

(1) in those countries surrogacy must be permitted;
(2) either father or mother must be a Spanish national;
(3) the procedure and the rights of the parties must have been warranted, especially the rights of the pregnant mother;
(4) there must be no infringement of the interests of the child; and
(5) the resolution of the country of origin must be executive or non-appealable.

In these cases, children born from surrogacy arrangements made in jurisdictions where surrogacy is legal have had access to the Spanish Civil Registry and have received the recognition of their affiliation (as provided in the order of the jurisdiction where the surrogacy has taken place) and naturalisation as Spanish nationals. On the one hand we continued to have the prohibition and sanction of these arrangements in Spain as prescribed by the 2006 Law, on the other the interests of these children were protected by permitting their registration. Therefore, legality was being overtaken by reality. This permissive approach was favoured by the media who published the news of families formed by single parents and children born from surrogacy arrangements. However a problem arose from the registration of two children from a homosexual couple. Previous registration from a single father, a single mother or heterosexual couples was generally not refused or, if refused, was not brought to the attention of the judicial authorities in Spain.

The case that led to the SSC decision is of a homosexual couple from Valencia who had two children from a surrogate mother contracted in California. Following the birth of the children and their compliance with the legal requirement of the Law of Los Angeles to obtain an order confirming their paternity, the Spanish couple proceeded to register the children as their children and as Spanish nationals with the Spanish Consulate in Los Angeles in 2008. The registration in this case was refused under Art 10 of Law 14/2006. Both parents appealed the decision in 2009 and the Directorate General of Registries and Notaries resolved this matter in favour of the couple. Both children were legally registered as the children of the couple upon Art 23 of the law of the Spanish Civil Registry which in s 23 states the following:

> 'The registrations are carried out by virtue of the authentic document or, in those cases pointed out by law, by declaration in the form provided by such law.
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> The registrations could also be carried out, without the need of a previous file, by certification of the entries made in foreign registries, provided that there is no doubt of the reality of the fact recorded and its legality in accordance with the Spanish law.
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> The entries will be made in Castilian or in the official own language of the Autonomous Government where the Registry Office is located according to the language used to draft the document or to make the statement. If the document is bilingual, the entries will be made in the language indicated by the person who submits it to the Registry, provided that the linguistic laws of the Autonomous Government provide the possibility of drafting the entries of the public registries in a co-official language different to Castilian.'

So, following the registration the children were deemed legitimate sons of this couple and Spanish nationals and have all rights provided within. Practitioners started to speak about not so much forum shopping, but forum convenience here. The registration was the way to reach a desired goal by bypassing the existing ban on surrogacy arrangements.

From this point on, the Spanish Public Prosecutor became involved and appealed the decision of the Directorate General of Registries and Notaries. By 17 September 2010 the Court of First Instance of Valencia rejected the decision taken by the Directorate General of Registries and Notaries allowing the registration. That order was appealed and a year later, in 2011, the Provincial Court of Valencia confirmed the prohibition, rejecting the inscription of these children. The couple appealed that order to the Supreme Court in Madrid. On 6 February 2014 the judgment was handed down upholding the decision of the Provincial Court of Valencia. This decision was made in what we call Plenum of the Civil Chamber of the Supreme Court (SSC) which is composed of nine judges; however it must be noted that four of them dissented indicating why the judgment denying surrogacy has thrived in extremis showing the great division in Spanish society with regards to this extraordinarily sensitive point.

The SSC was not asked to examine a conflict of law, hence whether the order of the California Court can be recognised as an executive in the jurisdiction of Spain, but to consider the validity of an

Features

extra-territorial decision, a decision of the Civil Registry of the Spanish Consulate of Los Angeles in refusing the registration of two children as children of these couple as granted by the order of the California Court. When examining whether the inscription is valid, the SSC took into consideration the rules of international private law in respect of the regulation of access to the public civil registry. In accordance with Arts 81 and 85 of the Spanish Civil Registry, it is not a requirement to provide a foreign judgment of affiliation or paternity to permit registration and additionally, Art 23 of the Spanish Civil Registry, as above, indicates that the foreign registration cannot be made against Spanish law.

The key to the decision of the SSC is the interpretation of Spanish public policy. By registering these children as children of this couple in the Spanish Consulate, such registration is against Spanish public policy. Therefore the registration cannot be valid and as such is in breach of what is called international public policy of Spain. This breach is reasoned by the SCC as follows:

(1) The SSC affirms that 'Surrogacy breaches the dignity of the expectant mother and child by commercialising the pregnancy and the relationship, treating the expectant mother and child as an object, allowing certain intermediaries to make some business out of them, making possible the exploitation of the situation of necessity in which young women who are poor find themselves and creating a kind of "restricted citizenship", in which only people who have great financial means can establish a parent-child relationship that is prohibited to most of the population'.
(2) Article 10 of Law 14/2006 on Techniques of Assisted Reproduction prohibits surrogacy. Such prohibition forms part of the integrity of Spanish public policy. The SSC does not say that this Law constitutes an imperative law applicable to all surrogacy arrangements, but constitutes the principles that protect international public policy in Spain. The principles which are breached by the registration are: 'the constitutional values of the dignity of a person, respect to her moral integrity and the protection of children.'
(3) The facts of this case in particular have more links with Spain than with the USA. The parties are Spanish; they intend to bring up these children in Spain. They only arranged the surrogacy in USA because it is forum convenient.
(4) The opposition to the registration is not in breach of the interests of the children. Their interests are protected by other legal forms such as by biological affiliation or by adoption. Therefore only one of the surrogate parents, the donor, would be allowed to be registered as a parent and the other parent would need to obtain legal parental status by applying to adopt the children in Spain.
(5) The SSC accepts that such families formed by children from surrogacy arrangements need to be protected by the Law.
(6) The SSC states that the principle of the interests of the child needs to cohabitate with other principles such as respect to the dignity and moral integrity of the surrogate mother.

The judgment is controversial in particular in these aspects:

(1) The principle of the interests of children is contemplated in the Spanish Constitution of 1978, and in international instruments such as the Convention of the Rights of Children of 20 November 1989. This principle is contemplated therefore in higher legal instruments than national law. It should be Spanish national law, which has to be interpreted in accordance with international law, not the other way around in accordance with the proper Spanish Constitution.
(2) As stated by the particular vote of some members of the chamber, 'breach of international public policy can only be examined case by case'. The Court did not have evidence that these children were objects of a transaction, that the surrogate mother was lied to or sold her services for inappropriate income. Only if those facts had been proven could the SSC have made those general affirmations.
(3) The prohibition to register the affiliation of these children will provoke in reality children registered with different parents in different states. In this particular case the children could be registered by children of the donor and the other parent would need to apply for adoption of these children.

It is difficult to understand how this judgment is to serve the best interests of children and it will undoubtedly end up before the Constitutional Tribunal of Spain.