

Surrogacy – Factsheet

1. Definition

In surrogacy, the desired mother's or a donor's egg is fertilised in a laboratory tube, either with the intended father's sperm or with an (anonymous) sperm donor. The embryo is then transferred to a surrogate mother. The surrogate mother performs the pregnancy and gives the child to the intended parents after birth. In general, the surrogate mother is not genetically related to the child.

2. Prohibition of surrogacy in Switzerland

Surrogacy is prohibited under Swiss law (Art. 119 Abs. 2 lit. d of the Federal Constitution of the Swiss Confederation; Art. 4 of the Reproductive Medicine Act, RMA). However, as a result of globalisation and technological advances, more and more couples residing in Switzerland decide to undergo surrogacy abroad in order to realise their unfulfilled wish to have children. Although surrogacy is not permitted in Switzerland, it is not a criminal offence to carry it out abroad. But Switzerland does not always recognise the legal parent-child relationship of a child born abroad by surrogacy (see point 4 below).

3. Surrogacy abroad

Countries in which surrogacy is permitted

Surrogacy is only permitted in some countries, such as Ukraine, Georgia and some US states. The choice of country is a personal decision, but it can also be decisive for the terms of the return journey to Switzerland and for the subsequent procedure of recognising the foreign birth in Switzerland.

Carry out surrogacy abroad

Surrogacy abroad is linked to risks. Its realisation is demanding and requires good preparation. Various surrogacy agencies have established themselves abroad which, in addition to arranging the surrogate mother and organising medical matters, also support the intended parents in obtaining the necessary civil status documents for the child. However, the foreign agencies are not familiar with the situation in Switzerland or the individual cantons. The Swiss

authorities require numerous documents for the entry of the child into Switzerland and the recognition of the parent-child relationship established abroad, some of which are subject to special formal requirements.

It is therefore advisable to seek advice at an **early stage** so that careful planning and realisation of surrogacy can be guaranteed. In addition, the documents required for entry and recognition can be prepared without delay and in the correct form so that the stay abroad does not last longer than necessary.

4. Recognition of the parent-child relationship in Switzerland

Principle

A distinction must be drawn between the prohibition of surrogacy in Switzerland and the question of whether the parent-child relationship legally established abroad is recognised in Switzerland. This is due to the fact that Switzerland regards bypassing the prohibition as an infringement of public order in Switzerland.

In Switzerland, intended parents are therefore not automatically recognised as the legal parents of the child – even if they are listed as legal parents in the foreign birth certificate.

Jurisdiction of the Federal Supreme Court

The Federal Supreme Court distinguishes between genetic and non-genetic parents when deciding whether the parent-child relationship established abroad as a result of surrogacy is recognised in Switzerland. In a leading ruling issued in 2015, it decided that only parents genetically related to the child are recognised as legal parents in Switzerland. Non-genetic parents are thus denied recognition (see BGE 141 III 312, E. 6.2.). These must establish legal parenthood through adoption (see point 5 below).

5. Stepchild adoption

The non-genetic parent, who in Switzerland has been denied recognition as a legal parent, must establish his legal parenthood through stepchild adoption. According to Art. 264c of the Swiss Civil Code (ZGB), parents do not necessarily have to be married for this; it is sufficient to lead a de facto

partnership. However, adoption in Switzerland is subject to strict conditions and its approval depends on the discretion of the competent authorities.

6. Conclusion

Surrogacy abroad is no longer a rare or unusual phenomenon. More and more homosexual and heterosexual couples are fulfilling their desire to have children with the help of a surrogate mother.

However, Switzerland has restrictive legislation in this regard. The current case law of the Federal Supreme Court with regard to recognition, i.e. the distinction between genetic and non-genetic parents, violates the principle of discrimination, especially since both parents circumvent Swiss law, but only the non-genetic parent is "punished" for doing so. Another violation of the prohibition of discrimination is seen in the fact that the "surrogacy child" is less secure than the "normal child"; after all, every child has the right to have two parents from birth.

Persons considering surrogacy abroad are therefore advised to be well prepared and to seek legal advice in good time.

Karin Hochl, Rechtsanwältin
September 2019