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Surrogacy abroad

BGer 5A_545/2020

Judgement of the Swiss Federal Court of 7 February 2022

Summary: In its judgement of the 7th February 2022, the Swiss Federal Court (Bundesgericht) decided that foreign birth certificates based on surrogacy are not acknowledged in Switzerland. Instead, the legal parentage is determined according to Swiss law. This means that the surrogate is considered the legal mother of the child in Switzerland. The legal parent-child relationship to the genetic intended father must be established by acknowledgement of paternity, which presupposes that the surrogate is not married. The intended mother, whether genetically related or not, has to adopt the child in Switzerland. Until the stepchild adoption of the intended mother is finalised, the surrogate is the holder of sole parental custody, and the

child is given her surname by the time of registration (Art. 298a, 298b and 270a Swiss Civil Code).

The assessment is different when the intended parents have a court decision in addition to the birth certificate, as is common in the USA for example. According to a leading decision of the Swiss Federal Court from 2015, surrogacy judgments from the United States are directly recognised in Switzerland with regard to the non-parentage of the surrogate as well as to the parentage of the genetic intended parents (BGE 141 III 312, [link](#)).

Therefore, it is relevant whether the intended parents dispose of a court judgment or only a birth certificate from the state of birth. The present Swiss Federal Court decision 5A_545/2020 concerns a surrogacy in Georgia, where it is not possible for the intended parents to obtain a court judgment.

Facts: A. and B, a married couple living in Switzerland, decided to enlist help of a surrogacy abroad due to health reasons. In 2019, the children C. and D. were born in Georgia by the surrogate E. Both spouses are the genetic parents: The children were conceived using a sperm donation by husband A. and an egg donation by wife B.

Consequently, Georgian birth certificates were issued for the children C. and D. Obtaining a court ruling to establish the parentage is not possible in Georgia, as the intended parents are the legal parents *ex lege*, which means directly based on Georgian legislation, and a legal parent-child relationship with the

surrogate is excluded *ex lege* (Art. 143 Law of Georgia on HealthCare). From the Georgian point of view, there is no court proceeding available due to lack of interest in legal protection.

The Gemeindeamt of the Canton of Zurich refused to recognise the Georgian birth certificates but considered the Georgian surrogacy contract to be an acknowledgement of paternity on the part of the genetic intended father. It therefore ordered the children to be entered in the Swiss civil status register with the surname of the surrogate as the legal mother and with the genetic intended father as the legal father.

A., B., C., D. and E. (intended parents, children and surrogate) appealed against this order to the Direktion der Justiz und des Innern of Zurich, which approved the appeal and ordered the registration of the children with both genetic intended parents as legal parents with their family name.

The Bundesamt für Justiz appealed against this decision to the Verwaltungsgericht of Zurich, which partially upheld the order of the Direktion der Justiz und des Innern of Zurich.

Thus, A., B., C., D. and E. (intended parents, children and surrogate) appealed to the Swiss Federal Court in civil matters and requested that both intended parents be registered as legal parents and that the children be given their family name.

Considerations of the Swiss Federal Court: The legislation in countries such as Georgia allows the recognition and

registration of intended parents as legal parents directly based on the birth certificate of the children. A court procedure to confirm the intended parents as legal parents is neither intended nor possible. Thus, the question therefore arises, whether foreign birth certificates can be recognised in Switzerland and whether this results in a legal relationship between the intended parents and the child (Art. 32 in conjunction with Art. 25-27 and Art. 70 Federal Act on Private International Law). So far, there have been different cantonal jurisdiction on this question in Switzerland: The Obergericht of the Canton of Aargau recognised a Georgian birth certificate as eligible for recognition in a similar case (judgment of the Obergericht of the Canton of Aargau of 16.11.2020, ZBE.2020.6/LK, [link](#)), while the Verwaltungsgericht of the Canton of Zurich refused to recognise Georgian birth certificates (judgment of the Verwaltungsgericht of the Canton of Zurich of 14.11.2020, VB.2019.00833, [link](#)).

The Swiss Federal Court denied the recognition of the Georgian birth certificates on the grounds that they did not constitute a judicial decision within the meaning of Art. 70 Federal Act on Private International Law (E. 5). It did not attach any significance to the fact that court proceedings are neither provided nor possible in Georgia. Nor did it deal with the differing assessment of the Obergericht of the Canton of Aargau, which qualified a Georgian birth certificate as eligible for recognition.

As a result of the non-recognition of the Georgian birth certificate, the question of the establishment of the legal parent-child relationship is, according to the Swiss Federal Court, governed by the law of the child's habitual residence (Art. 68 f. Federal Act on Private International Law). Since the children's intended place of residence was in Switzerland, Swiss law was therefore applicable. In application of the Swiss principle *mater semper certa est* the surrogate is being regarded as the legal mother (Art. 252 Abs. 1 Swiss Civil Code). This means that the surrogate is registered as a legal mother in the Swiss civil registry, contrary to the legislation of her country of residence and home country and contrary to her intention to be registered in Switzerland.

Furthermore, the Swiss Federal Court supported the view of Verwaltungsgericht of Zurich that the surrogacy contract could be considered as a valid recognition of paternity under Swiss law (Art. 73 Federal Act on Private International Law), leading to the recognition of the genetic intended father as the legal parent (E. 7.3). However, at the same time it denied the recognition of the intended mother as the legal mother based on the same contract. It was stated that "a recognition of a child is unknown to Swiss law" despite their genetic connection (E. 7.4.1).

Result: Overall, the Swiss Federal Court dismissed the appeal, which led to the children being entered in the civil register with the surrogate as their legal mother and the intended father as their

legal father. In addition, on the basis of Art. 270a Swiss Civil Code, the children are given the name of the surrogate, who has sole parental custody as long as the KESB (child and adult protection authority) has not ordered the genetic intended father to have sole parental custody (Art. 298a and Art. 298b Swiss Civil Code; E. 8.6).

Comments: With this ruling, the Swiss Federal Court tightens its already strict practice, irrespective of the negative consequences for the parties in need of protection (child, surrogate and intended parents).

The following points of the decision are worth highlighting:

- The Swiss Federal Court does not address the legal status of the Georgian surrogate, although she participated in the proceedings as complainant and applied to the Court for recognition of her non-parentage. The legal parentage including sole parental custody is forced upon her against her will and in contradiction to the legislation of her country of residence and home country and the country of birth of the children. In this way, the Swiss prohibition of surrogacy in Art. 119 Abs. 2 lit. d Federal Constitution, which serves to protect women, is reversed. Forced parentage of the surrogate constitutes an inadmissible interference with her fundamental rights under Art. 8 ECHR.

- There is no legal basis for the Swiss Federal Court's unequal treatment of the genetic intended parents. The Swiss Federal Court protects the valid recognition of fatherhood of the genetic intended father as seen by the Verwaltungsgericht of Zurich in the surrogacy contract but rejects a qualification of the same contract as a valid recognition of the genetic intended mother and non-recognition of the surrogate (E. 7.3 f.). The surrogacy contract is an unethical and void contract under Swiss law and is thus *per se* unsuitable to justify unequal treatment of the genetic intended parents. The recognition of the surrogacy contract only regarding the parentage of the genetic intended father, but not the parentage of the genetic intended mother and the non-parentage of the surrogate violates the prohibition of discrimination between men and women (Art. 8 in conjunction with 14 ECHR).
- The Swiss Federal Court denies the legal parent-child relationship between the children and their genetic mother by registering the surrogate – who is unknown and absent to the children – as their legal mother with sole parental custody. The children are thus denied the recognition of both their parents from birth, which not only violates the best

interests of the child, but also leads to legal uncertainty.

The Swiss Federal Court ruling has the consequence that in cases where the intended parents only have a birth certificate, the surrogate is registered as the legal mother and the legal parent-child relationship with the intended mother must be established by stepchild adoption. The adoption process involves time, costs and risks. For example, in the event of the separation or death of one of the intended parents, there is a risk that the adoption will become impossible, and the surrogate's parentage will be perpetuated. It is also unclear how to proceed if the contact with the surrogate is broken off and her consent to the adoption can no longer be obtained. Difficulties also arise in the case of married surrogates, as in this case their husband is considered as the legal father of the child and no recognition of paternity by the genetic intended father is possible.

Recommendation: Due to the legal situation in Switzerland described above, it is important for couples to obtain information and legal advice at an early stage if they are considering surrogacy abroad. We will be happy to advise and accompany you throughout the entire process.