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Overview of surrogacy in Switzerland

Notion

Surrogacy is characterised by a woman acting as a surrogate mother and carrying a child for the intended parents. In most cases, she is not genetically related to the child.

Depending on whether the sperm and egg cells come from the intended parents or from donors, both intended parents, one or none of the intended parents are genetically related to the child.

Prohibition of surrogacy in Switzerland

Surrogacy is prohibited in Switzerland (art. 119 para. 2 BV (Swiss Federal Constitution), art. 4 and 31 FMedG (Swiss Federal Reproductive Act)). At the time, the Federal Council justified the ban on the grounds of the best interests of the

child and the protection of the surrogate mother from exploitation. However, in the wake of globalisation, medical progress and the pluralisation of societies, more and more childless couples in Switzerland are deciding to fulfil their wish to have a child by means of a surrogacy abroad.

In principle, intended parents residing in Switzerland carrying out a surrogacy abroad are not liable to prosecution.

From a civil law point of view, however, the following questions arise: Does Switzerland recognise the child relationship established through surrogacy abroad with the intended parents? Are the intended parents the legal parents in Switzerland?

Surrogacy abroad

In contrast to Switzerland, surrogacy is permitted in many foreign countries, for example in various federal states in the USA, Georgia and Ukraine. The choice of the country in which surrogacy is to be carried out depends on the financial circumstances of the intended parents, the situation in the foreign country and the expectations of the contracting partners. The choice of country has an influence on the recognition procedure in Switzerland, as foreign countries have different procedures.

Many surrogacy agencies and specialised clinics have been established in the countries concerned. These agencies accompany the intended parents through the procedure, look for a surrogate mother, organise the medical examinations and treatments and help with the

administrative procedures in the country of birth. However, as these agencies are not very familiar with Swiss law and practice, early legal consultation is recommended in view of the recognition of the intended parents as legal parents in Switzerland.

Recognition in Switzerland - Practice and legal basis

Compared to other countries, Switzerland has a strict recognition practice which depends, among other things, on whether the intended parents have a court decision or only a birth certificate from the country of birth and whether they are genetically related to the child or not.

According to art. 70 IPRG (Federal Act on Private International Law) a foreign decision concerning the determination of the child's relationship is recognised if it was made in the state of the child's habitual residence, in the child's home state or in the state of residence or home state of the mother or father. However, recognition is refused if the decision would be manifestly incompatible with Swiss public policy (art. 27 para. 1 IPRG). The purpose of this exception is to avoid a situation where a reference to foreign law in Switzerland would lead to results that are manifestly inconsistent with Swiss legal views.

Recognition in the event of a court ruling from the USA

The Federal Supreme Court had to deal with the question of surrogacy for the first time in 2015.

In its leading decision [BGE 141 III 312](#), it ruled in the case concerning the event of an American court ruling establishing the parenthood of the intended parents and the non-parenthood of the surrogate mother: The intended parents must be recognised as legal parents if they are genetically related to the child. The Federal Supreme Court came to the conclusion that if there is a court decision, the genetically related parent may not be refused recognition on Swiss public policy grounds. On the other hand, it refused to recognise the non-genetically related intended parent and referred them to the adoption procedure. However, the non-parenthood of the surrogate mother was recognised on the basis of the US court ruling and she was therefore not entered as a mother in the Swiss civil registry (BGE 141 III 312 Cons. 6.2).

This practice is still valid today, but the Swiss authorities demand extensive documentation for the registration of the child, which is why the procedure requires good preparation.

Recognition in the absence of a court judgment (Georgia, Ukraine)

The Federal Supreme Court takes a different view of cases in which no court proceedings are provided for in the country of birth of the child and the intended parents only have a foreign birth certificate (e.g., Ukraine, Georgia).

In another landmark ruling of 7 February 2022 ([BGer 5A 545/2020](#)) the Federal Supreme Court decided in a case concerning Georgia that foreign birth certificates are not recognised in

Switzerland because they do not constitute a court decision within the meaning of art. 70 IPRG. As a result of the non-recognition of the Georgian birth certificate, the question of the establishment of the child relationship is - according to the Federal Supreme Court - governed by the law of the child's habitual residence (art. 68 f. IPRG). If the intended parents are domiciled in Switzerland, Swiss law is applicable according to the Federal Supreme Court. The principle *mater semper certa est* applicable under Swiss law means that the surrogate mother is regarded as the legal mother (art. 252 para. 1 CC). This means that the surrogate mother is registered as a mother in the Swiss civil registry ([Comment on BGer 5A_545/2020](#)).

The Federal Supreme Court ruling 5A_545/2020 has the consequence that in cases where the intended parents only have a foreign birth certificate the surrogate mother is registered as the legal mother, the child's relationship to the genetic father must be established by means of recognition of paternity and that to the intended mother - regardless of whether she is genetically related or not - must be established by means of stepchild adoption.

Establishment of the child relationship through adoption

Intended parents who are refused direct recognition as the legal mother or father must establish the child's relationship by means of adoption or stepchild adoption.

The requirements for adoption and stepchild adoption are, in accordance with

art. 264 ff. ZGB (Swiss Civil Code), that the intended parents must live in a de facto cohabitation and have shared a household for at least three years. The adoption application can be filed if the adopting parent has cared for and brought up the child for at least one year, i.e. in the case of birth through surrogacy, de facto from the child's first birthday. Generous exceptions are made with regard to the age limit of 45 years anchored in the law ([adoption in Switzerland](#)).

Summary

Surrogacy abroad is no longer a rare phenomenon. More and more heterosexual and homosexual couples are fulfilling their long-awaited desire to have a child with the help of a surrogacy abroad. However, due to Switzerland's strict practices surrogacy is a demanding undertaking. We recommend that people who are considering surrogacy abroad seek advice and consult a legal advisor at an early stage. In particular, it is important to ensure that all the necessary documents are brought with you from the country of birth, otherwise the registration of the child may be delayed for a considerable time.

We are happy to support you in this process and are at your disposal for competent advice and guidance. Do not hesitate to contact us.