Journal of Forensic and Legal Medicine 30 (2015) 4–8

Contents lists available at ScienceDirect

Journal of Forensic and Legal Medicine

journal homepage: www.elsevier.com/locate/jflm

Case review

Surrogate motherhood: Where Italy is now and where Europe is going. Can the genetic mother be considered the legal mother?

Paola Frati [a, b], Francesco Paolo Busardò [a], Gianluca Montanari Vergallo [a], Arianna Pacchiarotti [c], Vittorio Fineschi [a, *]

[a] Department of Anatomical, Histological, Forensic and Orthopaedic Sciences, Sapienza University of Rome, Viale Regina Elena 336, 00161 Rome, Italy
[b] Neuromed, Istituto Mediterraneo Neurologico (IRCCS), Via Atinense 18, Pozzilli, 86077 Isernia, Italy
[c] Department of Obstetric Gynaecological and Urological Sciences, Sapienza University of Rome, Via di Grottarossa 1035, 00189 Rome, Italy

ARTICLE INFO

Article history:
Received 20 July 2014
Accepted 9 December 2014
Available online 18 December 2014

Keywords:
Surrogate motherhood
Unborn child health
Marital status
Heterologous insemination
Genetic mother's rights
Protection of children

ABSTRACT

This paper explores a recent case, which has reawakened the debate in Italy over the opportunities offered by technological progress in the field of Assisted Reproduction. On 17 January 2013, the Juvenile Court of Brescia ordered the removal and adoption of a newborn baby whose parents had turned to surrogate motherhood and heterologous insemination in Ukraine, thus expressly violating the Italian and Ukrainian laws. The authors provide a critical analysis of the legal reasoning given by the Court in order to balance the best interests of the unborn child and the needs of certain parents suffering from sterility/infertility problems. In establishing the legal status of parent, the guiding principle must be the child's right not to be objectified or exploited by the adult. Therefore, it is necessary to provide appropriate tools to balance, on the one hand, the defence of the desire to become parents, if legitimate, and on the other the preservation of the legal and harmonious development of the child. Thus, the professionals have the burden of adapting the legal rules to a variety of individual cases, always taking into account the need to comply with the principles of both Constitutional and European Union law.

1. Introduction

Since its introduction, Law no. 40/2004 on Assisted Reproduction Technologies (ART) has aroused intense debate, resulting in several parts of it being declared unconstitutional by the Courts.[1] Because of the restrictions of the Italian Law with regard to ART, large numbers of couples are reported to have travelled abroad in recent years to satisfy their need to have a child. The scope of ART in fact extends to 'fertility tourism'. Italian couples suffering from sterility/infertility problems, and exposed to the risks of particular pathologies, travel to other countries in order to obtain Assisted Reproduction treatments. This phenomenon has also been analysed by the Italian Fertility Tourism Observatory, founded in 2005 soon after the enforcement of Law 40/2004. The Observatory has performed four studies on Human Assisted Reproduction, focusing particularly on heterologous insemination. In the first study, the Italian Fertility Tourism Observatory reported a dramatic increase in Italian couples travelling abroad in order to obtain Human Assisted Reproduction treatments. In fact, during the first twelve months from the enacting of Law no. 40/2004 an increase from 1000 to 3600 was recorded, reaching 4173 cases during 2005. Such outcomes demonstrate that the enactment of Law no. 40/2004 has triggered cross-border mobility for the purpose of getting around it.[2] Moreover, this increase is also confirmed in a survey by the European Society of Human Reproduction and Embryology, which records that Italian couples represent the main cross-border cases of reproductive care in Europe.[3–5] The survey was based on 1230 forms obtained from six countries (Belgium, Czech Republic, Denmark, Slovenia, Spain and Switzerland), which are considered to be the destinations *par excellence* for reproductive care. Several reasons for crossing international borders for treatment were identified by the study. For patients travelling from Italy, legal reasons were predominant, with a percentage of 70.6%. Unlike that of other European countries (i.e. Austria, Germany, Switzerland, Sweden, France, Great Britain, Holland and Spain), Italian legislation is very strict, forbidding artificial heterologous insemination and surrogate motherhood. In 2012 the Italian Fertility Tourism

* Corresponding author. Department of Anatomical, Histological, Forensic and Orthopaedic Sciences, Sapienza University of Rome, Viale Regina Elena 336, 00185 Rome, Italy. Tel.: +39 06 49912626; fax: +39 06 4455335.
E-mail address: vfinesc@tin.it (V. Fineschi).

http://dx.doi.org/10.1016/j.jflm.2014.12.005
1752-928X/

Observatory reported new data, highlighting an increase in the number of Italian couples who travel to foreign countries for surrogate motherhood.[6] Thirty-three foreign agencies in seven countries (USA, Ukraine, Armenia, Georgia, Greece, Russia and India) were identified as surrogate motherhood providers in the study. However, the above-mentioned study has no perception of the real and exact number of Italian couples.

Law no. 40/2004 was introduced with the primary aim of protecting the unborn child's health and status. Both heterologous insemination and surrogate motherhood are forbidden under Italian law. Surrogate Motherhood (SM) means that a woman agrees to carry and give birth to a child not for herself, but for a woman or couple who subsequently assumes the legal guardianship of the child.[7,8] Because the Italian legal order is based on the principle of '*mater semper certa est*' (the mother is always certain), the mother is traditionally identified as the person giving birth to the child. The ART law concerns the biological process of maternal and paternal filiation in the case of gamete donation (heterologous insemination) or SM. Moreover, in the latter case, the relationship between the unborn child and intended mother is less clear.

Here we describe and discuss a case that has strongly impacted on public opinion and reawakened the discussion over the opportunities provided by technological progress in the field of ART.

2. The case

The case concerns an Italian married couple who had been suffering from infertility problems for several years. The woman's sterility was caused by a hysterectomy, while the man was affected by oligospermia. Due to the strictness of the Italian Law, the couple decided to satisfy their need to have a child by starting the surrogacy procedure in a medical clinic located in Ukraine. They opted for commercial surrogacy, commissioning a woman for the donation of female gametes and pregnancy. The father instead claims to have given his own semen. After the birth, the couple registered the child under Ukrainian Law. Later, the request was extended to Italy. During the procedure, however, the official entrusted with the registration in the district of residence, a small town in northern Italy, not having seen the woman pregnant, decided to inform the Criminal Judge, who immediately opened an enquiry. Two different legal processes (criminal and civil) arose from this enquiry. As regards the Criminal Law, because the DNA test did not show any biological relationship between the registered parents and the child, the couple was charged with altering their marital status. Unconfirmed reports stated that the couple had been swindled by the Ukrainian medical clinic because it had not used the semen delivered by the father. Currently the criminal process is still in progress; therefore we do not have any evidence of whether or not the couple actually delivered the male gametes to the clinic. As regards the Civil Law, on 17 January 2013 the Juvenile Court of Brescia ordered the removal and consequent adoption of the child born of the SM. Addressing the case of ascertaining the biological parenting, the Court argued the following: 1) the DNA test did not show any biological relationship between the couple and the child; 2) along with heterologous insemination, the practice of SM is expressly forbidden under Italian Law; 3) the Ukrainian Law allows the practice of SM so long as the surrogate mother does not use her female gametes and at least fifty percent (50%) of the genetic patrimony belongs to either of the two parents; 4) the contract of SM was null and void also under Ukrainian Law because the couple used the surrogate mother's female gametes; 5) the delivery of notification to the National Civil Registry was performed against Italian and Ukrainian Law; 6) the elderly age of the couple did not meet the requirements of the Italian Law on Adoption; 7) all past requests for adoption by the couple had been rejected due to their lack of sound parental competence.[9] On the basis of the above-mentioned arguments, the Court ordered the suspension of the legal guardianship of the couple, as well as their relatives, and designated a lawyer as tutor.

3. Discussion

The case described here raises two fundamental and controversial questions: the prohibition of heterologous fertilization and the prohibition of surrogacy. This concomitance led the Italian courts, for the first time, to order the removal of the child from the family and its subsequent inclusion in the procedure for future adoption.

Law 40/2004 does not regulate or define surrogacy, but only imposes penalties and sanctions on those who organize, advertise and carry it out (Art 12, paragraph 6). This provision, therefore, is particularly severe because it is directed not only at physicians involved in these practices but also at the parents seeking surrogacy. The legislator's objection to this practice is clear: the lack of any definition highlights its illegality in all aspects. However, important issues concern the identification of legal parents, as well as the status – and especially the custody – of the infant.[10,11]

In Italy, with increasing frequency, legal disputes concerning ethically sensitive matters are resolved by the judiciary. According to Italian law (art. 269 of the Civil Code) the mother is she who actually gives birth to the infant, on the assumption of a genetic link which also exists at the time of delivery. This consideration, while valid in the past, can now be easily disproved by new techniques such as artificial insemination when the eggs do not belong to the pregnant woman. In Europe, since the nineties, both the European Commission and the European Court have argued that simple genetic lineage is not sufficient to establish a family life, highlighting the contribution that parents make in terms of social responsibility.[12–16]

Generally, in the case of disputes between biological and legal motherhood, European countries tend to accept the former more frequently. In the following countries, filiation in favour of the biological mother is expressly stated: a) France, art. 332 Civil Code in the text entered into force on 1 July 2006 following the reform of the law on filiation[17]; b) Germany, § 1591 Civil Code[18,19]; c) Holland, Art. 1:198 Civil Code[20]; d) Norway, chapter 2, section 2, Act no. 7 of 8 April 1981 relating to children and parents (The Children Act)[21]; Denmark, § 30 The Child Law (No. 460) of 7 June 2001[22,23]; f) Sweden, § 7 of the chap. 1 LG Sved., g) Switzerland, Art 252 of the Civil Code[24]; h) Portugal, art. 1796 Civil Code[25]; i) Spain, art 120 no. 4 Civil Code[26]; j) United Kingdom, section 27 (1) HFE Act 1990[27]; k) Belgium, § § 312 and 314 of the Civil Code.[28] These considerations apply not only to heterologous fertilization but even more so to surrogacy because there are very few nations that allow this practice and the legal status of the mother who commissioned it (Tables 1 and 2).[29] Some significant examples are: a) the British legal system: if a woman is available as surrogate mother to fulfil the wish of a married couple to become parents, and where one or both of them are the child's genetic parents and the child lives with them, it is possible to submit, within six months of the baby's birth, a 'parental order', to recognize the legal status of maternity and/or paternity.[30,31] The agreement is valid if the surrogate mother and the genetic father, (if the sperm was not of the aspiring father), have expressed their consent and no payment is exchanged (Art. 30 of the Human Fertilisation and Embryology Act 1990); b) the Greek legal system: renting a uterus is allowed for married and unmarried couples as well as single women.[32] The only requirements are that the would-be mother is the genetic mother, who must prove her inability to carry a pregnancy, that the Court authorizes the agreement in advance and that all the parties involved (the