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Surrogacy issues and naming law in Poland – theory and practice

Official surrogacy proceedings

Birth acts (birth records) made out in the country of birth – generally 2 situations:

- a) Initially, the biological mother as the legal mother but subsequently a new birth act naming only the intending parents
- b) From the very outset, the birth act with the intending parents

The receiving state – the post birth context

- The evidentiary value of foreign civil status certificates
- The difference with foreign judgments
- The recognition of foreign documents?

Secrecy of surrogacy - no mention about surrogacy proceedings in the birth record

Attempts to transcribe the foreign act into the local register

Transcription - Poland

Art. 104.1 of the Law on Civil Status Acts (PASC)
A foreign civil status document, which is evidence of an event and its registration, may be transferred to the Civil Status Register by means of transcription.

The Registrar's duties are rather technical:

- when no evidence concerning surrogacy
→ transcription (a Polish birth act is „generated”)

Only if surrogacy is evident... → refusal of transcription
– *ordre public* exception (art. 107 point 3 PASC)

Appeal proceedings (I)

If transcription **has taken place** there exists a strong evidence of parentage

Art. 3 PASC – *A civil status act constitutes **the sole evidence of facts and relations revealed therein.***

Still, only declaratory value of the act.

When surrogacy is discovered, the act may be challenged.

Art. 39 PASC provides for *the annulment of the civil status act if it describes the event not consistent with facts or if there are defects reducing the probative value of the act.*

Public prosecutor may challenge the act in front of **the civil law court.**

Appeal proceedings (II)

In case of **refusal of transcription** the intending parents may try to challenge the Registrar's decision:

- administrative proceedings – an appeal to the local Voivode.

If the Voivode's position is still negative, the case may be reviewed in judicial proceedings by **the administrative court (two instances)**.

The ordre public clause

Art. 107 point 3 PASC - in front of the administrative court:

- is transcription against the local public order?

Art. 7 PPM – in front of the civil law court:

- is the parentage (established according to foreign law) against the local public order?

Basically the same considerations. The post birth context important.

The welfare of the child principle(!)

The guiding light - case law of ECtHR

Mennesson v. France (application 65192/11),

Labassee v. France (application 65941/11),

Foulon v. France (application 9063/14),

Bouvet v. France (application 10410/14),

Laborie v. France (application 44024/13).

Paradiso and Campanelli v. Italy (application 25358/12) - two decisions(!)

The deciding elements

- welfare of the child
- genetic link
- time factor

Surrogacy in the post birth context

Preventive actions preferred.

Once the "bad thing" happened, the interest of the child comes into play and must be protected.

Potential „sanctions“ for the parents may prove harmful for the child.

[Some parallels to bigamy, which is also against public order but bigamic marriages are valid]

When a genetic link is present and the child has lived for quite some time in a „happy family“, these are strong arguments **FOR transcription**, or – as the case may be – **AGAINST the annulment of the transcribed (surrogacy) act.**

Surrogacy in the post birth context (Poland)

If the transcription has taken place,
and it has been „authorised” in the court proceedings,
the existence of the Polish birth record – which formally
has only evidentiary value – means in fact the **material
recognition of legal parentage** established abroad
(with all the consequences) .

The recognition method instead of the PIL approach(?)
(analogy to the recognition of names and surnames
advocated by the CJEU)