

I. GENERAL PROVISIONS

MINISTRY OF JUSTICE

15317 Statement of October 5, 2010, from the Directorate General of Registries and Notaries, regarding the registration process for the parents of children born through gestational surrogacy.

The Law 14/May 26, 2006 on Assisted Human Reproduction Techniques, provides in Article 10.1 shall be null and void the contract is agreed by the pregnancy, with or without price, by a woman who gives up the maternal parentage in favor of the contractor or a third party. For these cases, in the second paragraph of that article provides that the parentage of children born through gestational surrogacy is determined by birth. But it remains safe the possible action concerning claim of paternity of the biological father, according to the General rules.

This legal provision provides for the possibility of attributing the paternity of the baby using this technique, by ordinary means regulated in our legislation enabling the registration of children in the Civil Registry. In fact, Article 10.3 of Law 14/2006 on Assisted Reproduction Techniques permits the exercising of both actions claiming paternity of the child as the claim by the biological father. The actions referred to in this provision are referred as the general legal determination of parentage, regulated in Articles 764 and following of the LEC, the Spanish courts retain jurisdiction under the criteria of international jurisdiction established in 22 of the Organic Law of Judicial Power.

Although, as mentioned, the Spanish legislation regulates other legal avenues that allow allocation of paternity of child, before the Directorate General, Spanish citizens have lodged an appeal against decisions of other civilians in charge of consular records, denying the registration of births of foreign-born children of pregnant women who, under a gestational surrogacy contract, have waived their maternal affiliation.

The Directorate-General has issued an Order dated February 8, 2009 in ordering the Civil Registration of a child born as a result of a substitution pregnancy contract. The registration practiced in implementation of that resolution has been challenged in court.

Given the purpose of giving full legal protection for the child's best interests and other interests involved in cases of pregnancy by substitution, it is necessary to establish criteria for determining the conditions of access to the Spanish Civil Registration of births in abroad through the technique of assisted reproduction. Such protection is the primary purpose of this instruction, considered from a global perspective, it involves at least three equally important issues: first, the instruments necessary for the affiliation to access to the registry when a parent is of Spanish nationality, as a means for recognition with a registration of birth, second, the registration in no case be permitted where there is an appearance of payment and possibility of international trafficking in minors and, third, the requirement

does not infringe the right of children to know their biological origin, as expressed in Article 7, paragraph 1, of the Convention on the Rights of the Child of 20 November 1989, Article 12 Law 54/2007, of December 28, International Adoption, as well as Supreme Court Judgment of September 21, 1999.

Along with the child, should be an evaluation of the other parties' interest in this contract of gestation by substitution, especially the protection of the women's rights who agree to participate in this type of reproduction and giving up their rights as mothers.

Within the competence of management and leadership that has the Directorate General of Registries and Notaries on civil registration under the powers conferred by Article 9 of the Civil Registration Act and Regulation 41 of the Civil Registry, by This instruction sets the guidelines for qualification of the civil registrar in relation to applications for registration of birth made by Spanish citizens of children born abroad as a result of pregnancy using substitution techniques. These guidelines must meet registration practice in this area for its conformed desirable uniformity and legal certainty.

To ensure the protection of those interests, this Instruction establishes as a prerequisite for the registration of births by gestation, the submission to the civil registrar a court order issued by a competent court. The requirement of a court order in the country of origin is intended to monitor compliance with the requirements and ensure the country's legal framework has been formalized to consider the protection of the interests of the child and gestational mother. In particular, it helps establish that the gestational mother had legal capacity. Establishing the gestational mother is fully aware of the consequences and the scope of her decision. Also confirming there were no acts of deception, coercion, or violence and in any way limiting her rights under the laws of the country of origin. It also allows to verify that there is no arrangement in the contract that conceals gestation international child trafficking.

The requirement that the allocation of parentage must be based on a previous court decision is based on the provision contained in Article 10.3 of Law 14/2006 of 26 May on human assisted reproduction techniques that, through reference to General rules on the determination of parentage, require the exercise of legal proceedings and subsequent judicial resolution for the determination of paternal affiliation of children born as a result of pregnancy by substitution. With this instruction the interest of the child is protected, facilitating cross-border continuity of a relationship of affiliation declared by foreign court provided that such resolution would be recognized in Spain.

In relation to the recognition of the decision that determines the paternity of the child issued by a foreign court, this instruction incorporates the doctrine fully consolidated by the Supreme Court. According to this doctrine, shall apply to Articles 954 and following of the LEC 1881, provisions remained in force after the entry into force of the LEC 2000, under which it will be necessary to urge the enforceability of the decision before the Courts of First Instance, as stated in article 955 of the LEC 1881 after the reform of Law 62/2003, of December 30 measures, fiscal, administrative and social order. However, in cases where the court order resulting from a procedure comparable to a Spanish proceedings of voluntary jurisdiction, the Supreme Court has declared repeatedly that its inclusion is not subject to

the condition of enforceability, suffice for this purpose with incidental recognition of the resolution as a prerequisite to registration.

In short, if the civil registrar considers that the foreign decision was rendered in the context of a legal proceedings contentious nature, it can deny registration of the resolution, called upon the enforceability of it in accordance with the provisions of the LEC. On the contrary, if it considers that the foreign decision stems from a process analogous to a Spanish-controlled voluntary jurisdiction incidentally if the resolution can be recognized in Spain, as a prerequisite to registration.

In cases in which application for registration of foreign-born through substitution pregnancy a resolution to determine parentage is not presented, incidental recognition or enforcement order, the civil registrar shall refuse to register. This does not preclude the applicant to try such registration by ordinary means governed by Article 10.3 of Law 14/2006 of 26 May on human reproduction techniques and articles 764 and following of the LEC.

Consequently, the Directorate General, in exercise of the powers conferred upon it by Article 9 of the Civil Registration Act, 41 of the Rules and 7 of Royal Decree 1125/2008, of 4 June, has agreed to establish and make public the following guidelines:

First.-1. Registration of birth of a child born abroad as a result of pregnancy by substitution techniques may only be submitted if also included with the application is the judicial decision issued by the competent court to determine the parentage of the newborn.

2. Unless an international agreement is applicable, the foreign court order for enforcement should be under the procedure provided in the Civil Procedure Act 1881. To proceed with the registration of birth with the Spanish Civil Registry, the application for registration and the court order must be submitted to complete the process mentioned.

3. Notwithstanding the foregoing, in the event that the foreign court decision had its origin in a process analogous to a Spanish court-contentious matters, the civil registrar control incidentally, as a prerequisite to registration, if such a judicial decision can be recognized in Spain. In this incidental control/review the following must be verified:

- a) The regularity and formal authenticity of the foreign judicial resolution and any other documents that were presented.
- b) That the Court of origin had based its international jurisdiction in conditions equivalent to those under Spanish law.
- c) That the procedural rights of the parties have been guaranteed, in particular the gestational mother.
- d) That there has been no infringement of the best interests of the child and the rights of the gestational mother. In particular, verify that the latter's consent has been obtained freely and voluntarily without any error, fraud, or threat of violence and which has the mental capacity for this decision.

- e) That court decision is final and the consents rendered are irrevocable, or, if they were subject to a period of revocation under the foreign law, it had passed, but who have recognized authority to repeal, would have exercised it.

SECOND. "In no case shall the title suitable for the registration of birth and parentage of the newborn, a foreign registration certificate or the simple statement, accompanied by medical certification on the child's birth which fails to show the identity of the gestational mother.

Madrid, October 5, 2010.-The Director General of Registries and Notaries, María Ángeles Alcalá Díaz. (Madrid, 5 de octubre de 2010.-La Directora General de los Registros y del Notariado, María Ángeles Alcalá Díaz.)