

# RESEARCH SUMMARY

## 1. Introduction

In recent years increasing attention has been paid to commercial surrogacy and the unlawful placement of children in The Netherlands. This is true both in terms of the parties who wish to form a family by means of surrogacy, as well as the authorities that are confronted with the regulation of such situations. The possibilities offered through the internet have played an important role in the increased awareness of the opportunities, as well as the problems. On the one hand, information is readily accessible with respect to the possibilities for adoption and surrogacy in other countries. On the other hand, it has also become much easier for interested parties to match supply and demand. Boundaries would appear nonexistent. Moreover, continuing developments in medical reproductive techniques ensure increasing possibilities to conceive a partially genetically related child, for example with the assistance of high-technological surrogacy arrangements.

Both the Central Authority for International Adoption and the Dutch Children Protection Board have been made aware of a number of cases concerning commercial surrogacy and the unlawful placement of foreign children in The Netherlands. Many of these cases have also received broad media attention. A number of Belgian cases have attracted particular attention in The Netherlands. The Dutch government operates a very restrictive policy with respect to commercial surrogacy. Incidents in recent years have led to numerous parliamentary questions being raised in the Second Chamber of the Dutch Parliament. The Minister of Justice has responded to the Dutch Parliament by commissioning research to be conducted into the nature and scope of the problems related to commercial surrogacy and the unlawful placement of children. The aim hereby is to ensure that more clarity can be gleaned as to what actually occurs in the countries where the possibilities are greater than in The Netherlands, as well as providing information with regards to the Dutch response upon the return of the commissioning parents to The Netherlands.

From April 2010 until January 2011, researchers of the Utrecht Centre for European Research into Family Law (UCERF) at the Molengraaff Institute for Private Law of Utrecht University conducted the research commissioned by the Minister of Justice. The following research questions were posed:

- What is the nature (and scope) of commercial surrogacy, the unlawful placement of foreign children and the combination of the two?
- To which countries do Dutch commissioning parents travel and how are these issues legally regulated abroad?
- To what extent are the Dutch rules followed and in which situations may problems arise in The Netherlands as a result of more liberal laws abroad?
- Are there other European countries with similar problems and how are these problems solved there?

In answering the first research question, a study has been made of the phenomenon (*fenomeenstudie*). On the basis of this orientation study, four jurisdictions emerged as relevant in providing an answer to the second research question, namely California (USA), India, Greece and Ukraine. The third question was answered using a literature and case-law analysis, alongside which interviews were conducted in order to gain more insight into the operational response to the problems encountered. The fourth question has been answered using a questionnaire sent to a number of experts from eight different European jurisdictions. The responses provide relevant information on the legislative and judicial response to the problem of commercial surrogacy and the unlawful placement of children in other jurisdictions.

In legal literature a distinction is drawn between different types of surrogacy. High-technological surrogacy makes use of IVF and in which a reproductive expert must always be involved. This form of surrogacy offers commissioning parents the possibility to conceive a child that is genetically related to both commissioning parents. This is not, however, a requirement. Alongside high-technological surrogacy, low-technological surrogacy is also possible. In this case the surrogate is always genetically related to the child. The commissioning father may or may not be genetically related, depending upon whether the couple has used his sperm or that of a donor. In low-technological surrogacy the egg will be fertilized by means of artificial insemination. Furthermore, parties may also be involved in a surrogacy arrangement, despite the fact that the child was conceived by natural means or self-insemination. In this final scenario the child could be genetically related to the surrogate and her husband. Another important distinction concerns the difference between altruistic and commercial surrogacy. In general, it would appear difficult to draw a distinct line between these two forms of surrogacy arrangements. In both cases, financial payments will be made. However, the financial payments in commercial surrogacy arrangements are often (if not always) concerned with profit, whereas in altruistic surrogacies the main object is to help another couple have a child.

## **2. Structure of the research report**

The chronological path travelled by commissioning parents involved in a surrogacy arrangement has been decisive in determining the structure of this report. Firstly, the legal position of the commissioning parents in The Netherlands is discussed. Thereafter, attention is paid to the legal situation in the countries where commissioning parents travel to in order to undergo surrogacy techniques. The report analyses the position of all parties involved: the commissioning parents, the surrogates and the children. Finally, this research follows the children upon their return to The Netherlands. The central question is whether the legal position obtained abroad is recognised in The Netherlands.

Surrogacy arrangements and the unlawful placement of children are also evident in other European jurisdictions. The approaches and solutions from elsewhere could be used in answering the question whether the law in The Netherlands should or must be amended.

Mindful of the path followed by commissioning parents involved in a surrogacy arrangement abroad, the research report has been divided into the following sections:

Section I:	Introduction
Section II:	View of The Netherlands: What is possible here?
Section III:	Going abroad: Which possibilities are available abroad?
Section IV:	Coming back: How does the child come to The Netherlands and what is its legal status here?
Section V:	Which possibilities are available in other European jurisdictions?
Section VI:	Comparable tables
Section VII:	Research summary

### **3. Scope of the problem**

How often commercial or altruistic surrogacy arrangements and the unlawful placement of children in The Netherlands occurs is difficult to determine. Equally difficult to assess is the scope of the problems arising as a result of such activities. From case-law analysis and interviews with various experts engaged in front-line work in the field of surrogacy and the unlawful placement of children, for example the Municipal Population Register (GBA), the Civil Registrar, the Immigration and Naturalisation Service, the Central Authority for Adoption, the Dutch Embassies abroad and the Child Protection Board. From a number of interviews it is clear that after a case arises by one of the above-mentioned organizations, this is subsequently reported to the National Office of the Child Protection Board. From other interviews, it would appear that the Central Authority for Adoption is informed (who in turn forwards these cases to the Child Protection Board). As a result of the absence of a clear reporting structure, it is difficult to ascertain the exact numbers concerned.

Reports of unlawful placements are made to the National Office of the Child Protection Board through the ASAA locations (*Afstand, Screening, Adoptie en Afstamming* (The office responsible for issues arising from giving up children, screening, adoption and parentage)). The local ASAA office is subsequently responsible for investigating whether there is indeed a case of unlawful placement or unlawful surrogacy. From information received from the member of the Child Protection Board in the Advisory Commission for the Research Team, it would appear that on average approximately 10 cases are reported annually to the Child Protection Board. Moreover, the Central Authority has also indicated that since 1<sup>st</sup> April 2009, it has been made aware of 11 cases involving the unlawful placement of children.

Alongside these figures, it is clear from a thorough case-law analysis that cases of surrogacy do reach the courts on a somewhat regular basis. This includes cases that are solely connected with The Netherlands, as well as cases linked to foreign jurisdictions, such as California or Ukraine. With respect to the pure Dutch surrogacy cases, it is known the Medical Centre of the Free University of Amsterdam receives on average 20 requests annually from those wishing to conceive a child using a surrogate. Only approximately 10 cases annually actually lead to a course of treatment. On 31 May 2010 three children were born after IVF surrogacy in this Medical Centre and two more children were expected. The first surrogacy expert centre which existed between 1997-2004, screened 202 of the 500 couples who expressed an interest in IVF surrogacy. Only 35 couples were given IVF surrogacy treatment, which resulted in the birth of 16

children. It would appear difficult to obtain a clear impression of the exact numbers involved in surrogacy (whether or not commercial) and the unlawful placement of children. The impression remains that some of these cases simply never reach the surface.

#### **4. Conclusions per section**

The underlying reasoning underpinning the current state of Dutch law in this field is that commercial surrogacy and the unlawful placement of children is undesirable. Various measures have been created to combat both situations, both in the field of the criminal law (Articles 151(b) and 151(c), 225, 236, 278, 279 and 442a Dutch Criminal Code) and immigration law. The best interests of the child plays an important role in this respect, both at micro-level (the individual child concerned), as well as at a macro-level (prevention of the undesirable commercialization of baby and child-trafficking for family formation purposes). The interests of the surrogate and the commissioning parents are also relevant in these policy decisions. This reasoning surfaces in a number of different places through this report. Hereunder follows a summary of the research results per section.

**Section II** of the research report investigates the situation according to Dutch law and comprises two sub-sections: a section on criminal law and a section of civil law.

The criminal law policy discussed in **Section II.1** is focused on the discouragement of surrogacy. This is partly achieved through the criminalisation of the mediation by means of a professional practice or company and the publication of supply and demand requests concerned surrogacy arrangements. Furthermore, the placement of a child in another family without prior satisfaction of the requisite reporting requirements is furthermore criminal in certain circumstances according provisions in the Dutch Criminal Code (*Wetboek van Strafrecht*) and the Foster Care Children Act (*Pleegkinderenwet*). Alongside these penalties, other criminal sanctions are also discussed that, although not specifically applicable to surrogacy or unlawful placement, can be invoked in such situations. An analysis of the legal databases in the field does, however, indicate that there are very few actual prosecutions. However, it is extremely difficult to obtain a clear impression of why few of the cases reported ultimately lead to charges being brought or penalties levied. Nevertheless, no real conclusion can be attached to this factual situation, as the causes for the low number of prosecutions are diverse and have not been able to be identified.

**Section II.2** focuses on the legal position of the surrogate and the commissioning parents with respect to the child. Dutch law does not specifically regulate the consequences of surrogacy in the field of parentage. Accordingly, the regular rules in the field of parentage, parental responsibility and child protection apply in these cases. The legal position of a child born as a result of surrogacy is uncertain and dependent upon a significant number of factors that in and of themselves have little relevance to the surrogacy arrangement. The surrogate is always regarded as the legal mother of the child, regardless of whether she has also provided the genetic material for the birth. If the surrogate is married, then her husband is also automatically the child's legal father. The transfer of parental rights to the commissioning parents is difficult and the result

dependent upon a variety of different circumstances. Adoption by at least one of the commissioning parents will also be necessary prior to the final transfer of parental rights to both commissioning parents. From research into supervised high-technological surrogacy, it would appear that in cases in which surrogate and commissioning parents are *a priori* screened and the genetic material of the commissioning parents is used, problems are seldom encountered. The law with respect to the legal transfer of parental rights from the surrogate family to the commissioning family is also not catered specifically, meaning that the normal rules of parentage law will apply in these cases too. Commissioning parents who do not wish to use the supervised high-technological surrogacy route within the Dutch legal context run exceedingly high risks.

Tension can exist between the wishes and interests of the commissioning parents on the one hand and the surrogate parents on the other, which can often lead to conflict. Giving a child up after birth can have unexpected emotional consequences beyond the information and guidance provided. The successful completion of the surrogacy path requires co-operation up until the point when parental rights have been transferred to the commissioning parents. In conflict situations, there is a risk that the child will ultimately not be placed in the family of the commissioning parents, dependent upon the moment at which the conflict arises. Furthermore, one cannot predict the outcome of a given case. At various moments, judicial intervention is required, and it is not always clear which conclusion a judge will reach in a given case. Even in cases where there is no disagreement between the parties, it cannot be *a priori* predicted whether the commissioning parents will be vested with parental authority.

**Section III** of the research comprises two sub-sections: a study of the phenomenon (*fenomeenstudie*) (**Section III.1**) and an in-depth study into four jurisdictions where Dutch couples may travel for surrogacy arrangements (**Section III.2**). The first section makes it clear to which countries Dutch couples could travel in order to conceive a child via a surrogacy arrangement. This knowledge is obtained via two research methods. Firstly, an internet search using search terms. Each search term led to twenty links which were subsequently researched to discover commercial surrogacy clinics. These clinics were subsequently organized per jurisdiction. Four countries returned regular results in this internet research, namely Greece, India, Ukraine and the United States of America. Secondly, use was made of information obtained via internet forums. These forums were analysed to determine whether other countries or clinics were repeatedly mentioned.

**Section III.2** delves further into the legal systems of the four aforementioned jurisdictions, namely Greece, India, Ukraine and the United States of America (more specifically California). It would appear from these country reports that foreign commissioning parents are entitled to partake in the surrogacy facilities offered, varying from the use of the genetic material of both commissioning parents to the use of the genetic material of two donors.

If the Dutch commissioning parents leave for one of these jurisdictions to make use of the surrogacy possibilities, the Dutch legal system will be confronted with the situation upon their return. The returning Dutch commissioning couple will naturally be provided

with various legal and non-legal documents which they will have to present to various Dutch governmental institutions.

**Section IV** focuses on the return to The Netherlands. A number of different circumstances are conceivable in which the parentage between a child and the commissioning parents maybe be at issue: a request may be made to acquire Dutch nationality, a request for registration of a foreign birth certificate in the local municipal population register, a determination of child maintenance or a question related to inheritance law. The question how Dutch law 'reacts' to the situation created abroad can arise either in The Netherlands or abroad at a Dutch consular office (for example with the passport application). Furthermore, the various requests and applications can be made using a variety of different documents, including an original birth certificate, an amended birth certificate, a judicial decision or an adoption decision. Despite the fact that these questions can arrive on a diverse variety of 'desks' or 'offices', all civil servants will always the same rules of Dutch law.

The legal relationship the commissioning parents profess to have created with the child is of crucial importance. The following options can be identified:

1. determination of parentage by operation of law (Section IV.2)
2. recognition of parentage by means of adoption (Section IV.3)
3. determination of a foster care arrangement for the child (Section IV.4)

In **Section IV.2** attention is paid to two different situations: the commissioning parents indicate that parentage has been created (1) by means of a decision of a foreign judge or (2) by means of a legal fact (for example, the birth of a child subsequently recorded in a birth certificate) or legal act (for example a recognition by a commissioning father). In the first situation, Article 9, Private International Law (Parentage) Act (*Wet conflictenrecht afstamming, Wca*) is applicable, in the second situation Article 10. With respect to foreign judicial decisions, few problems have arisen thus far concerning surrogacy arrangements or unlawful placements. With respect to the second category, case law would appear to indicate that some birth certificates are refused recognition on the basis of non-conformity with Dutch public policy, as laid down in Article 10(1) Wca, in combination with article 9(1)(c). Although up until now it is clear that a birth certificate upon which no mother is recorded will be regarded as contrary to Dutch public policy, other cases are far from clear. This uncertainty exists with respect to original birth certificates in which the genetic mother is recorded instead of the birthmother, or where the non-genetic commissioning parents are recorded on the birth certificate. Nevertheless, children do arrive in The Netherlands with such birth certificates. Once these children have remained in The Netherlands for some time, it is very difficult for the State to remove the child from the commissioning parents, due to the weight given to the best interests of the child and the protection of the family life created between the child and the commissioning parents.

In **Section IV.3** attention shifts to the situation in which Dutch commissioning parents bring a child into their family by means of adoption. This is possible with or without the use of a surrogate arrangement abroad. Upon arrival in The Netherlands, the situation will be judged according to the immigration rules concerning family reunification. The

procedure that needs to be followed is dependent upon the origins of the child. Citizens from certain countries are required to be in possession of permission to provisionally reside in The Netherlands (*machtiging tot voorlopig verblijf, mvv*) prior to travel to The Netherlands. Subsequently, the scope of the adoption laws is researched with specific attention being paid to the definition of the phrase “with a view to adoption”. Thereafter, a distinction is drawn between three different categories of cases:

1. adoptions according to the rules of the Hague Adoption Convention 1993
2. adoptions that do not fall within the scope of the Hague Convention and:
  - a. in which the commissioning parents have their habitual residence in The Netherlands; and
  - b. in which the commissioning parents have their habitual residence outside the Netherlands

The relevant conditions are analysed first, for example the adoption decision must have been established by a competent authority and the aspirant-adoptive parents must be in possession of a permission to adopt in principle (so-called *beginseltoestemming*). Four different factors would appear to play a role when determining the effects attributed to a breach of these conditions, namely the best interests of the child, the nature of the breach of the statutory provisions, the stability of the aspirant-adoptive parents and the place of residence of the child.

In **Section IV.4** the situations in which commissioning parents living in The Netherlands bring a child to The Netherlands with a view to fostering the child, regardless of whether they have previously made use of a surrogacy arrangement. The law on immigration determines which conditions need to be satisfied in order for the child to legally enter and remain in The Netherlands. The strict conditions for the placement of a foreign child ensure that this route is seldom chosen by commissioning parents. If commissioning parents do opt for this route and they satisfy the necessary immigration requirements, they must ensure that they make inform the Mayor and Aldermen in writing within one week of their arrival that a foster child is residing with them (art. 5(1) Foster Care Children Act, *Pleegkinderenwet*). If the child is younger than 6 months then the foster parents are also obliged to apply for permission for the placement from the Child Protection Board (Article 1:241(3) Dutch Civil Code).

To gain insight into the alternative solutions for the problems analysed in this research project the law of other European jurisdictions has also been examined. In **Section V**, the solutions proffered in eight other European jurisdictions with respect to commercial and altruistic surrogacy have been analysed. The jurisdictions comprise Belgium, England, Germany, France, Norway, Poland, Spain and Sweden. In these country reports answers are provided as to whether specific rules exist regulating surrogacy and which measures have been adopted to ensure the enforcement of those rules.

**Section VI** concludes the substantive section of this research report with comparable tables based on the information provided in the eight European country reports. In this respect it is interesting to note that with respect to certain questions nearly all those countries researched respond in an identical manner (for example in seven of the eight jurisdictions a surrogacy contract is regarded as null and void), whereas answers to

other questions are characterized by their diversity (for example the possible criminal provisions and sanctions with respect to surrogacy).

## **5. Conclusion**

The legislative policy in this field is consistent with regards the discouragement of surrogacy and non-facilitation of the transfer of parental-rights to the commissioning parents. There has been no alteration in this policy since the 1980s, despite changed social attitudes (for example towards the acceptance of high-technological surrogacy and the increasing rate of unwanted childlessness). An important conclusion is that both Dutch substantive law, as well as Dutch private international law provide no clear answers with respect to many questions surrounding surrogacy and the unlawful placement of children. Accordingly, the position of a child born by means of a surrogacy is legally unclear, and uncertainty exists with respect to the legal position of the commissioning parents and the surrogate parents. The agreements made between the parties concerning the surrogacy and the transfer of the child cannot be legally enforced and it is not predictable how a judge will decide in any given case, if the surrogate refuses to give up the child.

Numerous questions also remain unanswered with respect to the recognition of parentage created abroad by means of surrogacy. The legal uncertainty apparent in Dutch law at this time is caused on the one hand by the policy of discouragement towards surrogacy that has also been reflected in criminal sanctions, whilst, on the other, a small group of people are able to make use of surrogacy arrangements, without this being taken into account in the law of parentage or adoption. Furthermore, it is also difficult to determine the scope of occurrence of surrogacy and any connected unlawful placements of children in The Netherlands. The Child Protection Board and the Central Authority for Adoption probably only receive a section of the surrogacy cases that occur in The Netherlands or abroad.

On the basis of this research into surrogacy and the unlawful placement of children, in which thirteen jurisdictions have been analysed, the following conclusions can be reached:

- Surrogacy in The Netherlands has not been extensively regulated. The criminal law contains a number of provisions specifically related to surrogacy. Parentage and adoption law do not contain any specific provisions concerning surrogacy.
- No clear distinction has been drawn in Dutch law between altruistic and commercial surrogacy.
- The following aspects remain unclear:
  - The role genetics plays with respect to the Dutch parentage laws;
  - The status of a surrogacy contract and the various provisions that can be included in such a contract;
  - Whether the recognition of an original foreign birth certificate upon which the birthmother is not recorded is to be regarded as contrary to public policy;

- Whether an original foreign birth certificate upon which two parents are recorded, both of whom are not genetically related to the child, should be regarded as contrary to public policy;
- Whether the scope of the *Wobka (Placement of Children with a view to Adoption Act)* should be extended to include cases in which a child has been taken into a family without a view to adoption, but for example with a view to *kafala* or foster care;
- Whether the *Wobka* should always be applied in surrogacy cases;
- What the consequences are of breach of the relevant legislation in international cases.