

## MATERNITY FOR ANOTHER: A DOUBLE DUTCH APPROACH

M. Vonk\*

### 1. Does Dutch Law accept Maternity for Another?

Yes, The Netherlands does accept maternity for another under certain very strict conditions. Dutch law has no special procedure geared towards transferring parental rights and duties from the surrogate mother (and her husband) to the commissioning parents.<sup>1</sup> The Dutch government has adopted a very reticent attitude with regard to surrogacy.<sup>2</sup> In particular, after the introduction of IVF in the late 1970s, a discussion arose as to whether or not surrogacy should be allowed. On the whole, the answer to this question was in the negative, which resulted in the introduction of art. 151b in the Dutch Criminal Code, making commercial surrogacy a criminal offence.<sup>3</sup> It has become clear from subsequent parliamentary debates<sup>4</sup> that it is not the intention of this provision to convict doctors co-operating with half- or low technological surrogacy, but to avoid the situation where women offer themselves as surrogate mothers for payment as this might lead to a form of trade in children.

High-technological surrogacy is very strictly regulated in The Netherlands. In 1989 the Ministry of Health, Welfare and Sport determined in its IVF regulation statement that surrogacy in combination with IVF was not allowed. After active lobbying by interest groups<sup>5</sup> in combination with the fact that the passing of time had proven that there appeared to be less interest than expected in high technological surrogacy, the IVF regulation statement issued in 1997<sup>6</sup> allowed for surrogacy in combination with IVF under very strict conditions. When this regulation statement was discussed in the Second Chamber, the minister stated that it was not his intention to adapt Dutch family law to accommodate surrogacy in combination with IVF.

\* For this Questionnaire extensive use has been made of two earlier publications by the author: Vonk 2007 and Vonk 2008.

<sup>1</sup> Boele-Woelki & Oderkerk 1999, p. 25-44; Vlaardingerbroek 2003, p. 171-178.

<sup>2</sup> Roscam Abbing 1999, p. 26.

<sup>3</sup> Act of 16 September 1993, *Stb.* 486.

<sup>4</sup> *Dutch Second Chamber* 1996-1997, 25 000-XVI, No. 62, p. 14.

<sup>5</sup> Dermout 2001, p. 13-17.

<sup>6</sup> Planningsbesluit in-vitrofertilisatie, *Staatscourant* 1998/95, p. 14-18.

No special regulation for the transfer of full parental rights from the surrogate mother to the commissioning parents was envisioned. In the words of the minister: 'Transfer from one set of parents to another set of parents must take place by means of the voluntary divestment of parental responsibility of one set of parents, after which the intended parents can be vested with parental responsibilities and will eventually have to adopt the child'.<sup>7</sup>

Moreover, the IVF regulation statement determines that IVF in combination with surrogacy must take place in accordance with the guidelines on high-technological surrogacy<sup>8</sup> of the Dutch Society for Obstetrics and Gynaecology. These guidelines require IVF clinics to draw up their own protocol regarding IVF surrogacy. Such a protocol must at least ensure that the following conditions are met: there must be medical grounds for the procedure (specified in the regulation statement); the surrogate mother must have one or more living children whom she gestated and gave birth to without complications;<sup>9</sup> there must be adequate information provision to the surrogate mother and the intended parents; and preceding the treatment the responsible doctor will draw up a statement to the effect that the above conditions have been met and that he deems the treatment to be justified.<sup>10</sup>

In the early 1990s a trial was started to study whether or not surrogacy should be allowed as a means to help a certain group of infertile couples to have a child of their own.<sup>11</sup> The intake centre that was established as a result of this trial was forced to close in July 2004, as Dutch IVF clinics turned out to be unwilling to participate in gestational surrogacy.<sup>12</sup> However, in April 2006 one of the Dutch licensed IVF clinics announced that it will make gestational surrogacy services available to married couples (VUMC, 6 April 2006).<sup>13</sup> At least one of the other IVF centres will make use of the screening facilities of

<sup>7</sup> *Dutch Second Chamber* 1996-1997, 25 000-XVI, No. 62, p. 13.

<sup>8</sup> *Hoogtechnologisch draagmoederschap*, Richtlijn Nederlandse Vereniging voor Obstetrie en Gynaecologie, No. 18 January 1999, <<http://www.nvog.nl/>>.

<sup>9</sup> The guidelines also state that the surrogate mother must consider her own family to be complete, probably in order to minimize the risk that she decides to keep the child for herself.

<sup>10</sup> *Dutch Second Chamber* 25 000-XVI, No. 51, p. 2.

<sup>11</sup> The results of this trial are described in Dermout 2001.

<sup>12</sup> <[www.draagmoederschap.nl](http://www.draagmoederschap.nl)>. The initiator of the trial states, in a letter posted on the web-site referred to, that in the past 15 years she strove to make IVF surrogacy acceptable to the public, the media, the insurance companies, the Dutch Society of Obstetrics and Gynaecology and the medical profession in general. She and others managed to do all that, however 'the internal obstacles in the Academic Hospitals themselves, the ethics commissions and/or the board of directors are elusive, in particular because they do not send a reasoned rejection, just a message without any further comments that the hospital has decided nor to offer IVF surrogacy services. It is impossible to discover their real reasons'.

<sup>13</sup> See also the letter of 15 May 2006 to the Second Chamber by the then Secretary of State on this issue (vws0600778).

this surrogacy centre and subsequently carry out the medical component in their own clinic.<sup>14</sup>

The transfer of full parental rights in surrogacy arrangements will not occur against the will of any of the parties involved. This means that the surrogate mother has no legal duty to hand over the child, nor are the commissioning parents under a legal duty to accept the child. If the child is not yet 6 months old the commissioning parents may only take the child into their home with the consent of the Child Care and Protection Board (Article 1:241(3) DCC and Article 1 Foster Children Act).

## **2. If the Answer is yes, what is the Legal Situation?**

### **2.1. *Is Maternity for Another under the Control of a Judge?***

Parenthood can only be transferred from one set of parents to another set of parent through a judicial decision. The legal parental relationship that is established at birth cannot be changed at will by the child's legal parents or the commissioning parents. See section for the procedure to transfer legal parental status from the birth mother (and her partner) to the commissioning mother (and her partner).

### **2.2. *Is it purely Contractual?***

There has been a lot of discussion regarding the validity of surrogacy contracts in The Netherlands.<sup>15</sup> Such contracts may contain many different kinds of clauses, ranging from the surrogate mother agreeing that she will not smoke during the pregnancy, to her agreement to abort the child if serious birth defects are discovered.<sup>16</sup> However, the main clause concerns the obligation of the surrogate mother to surrender the child to the commissioning parents after the birth. Whereas not all authors agree on the validity of the subsidiary clauses and the possibility for damages if the surrogate mother does not fulfil her obligations, they all agree that the main clause is void and cannot be enforced.<sup>17</sup> Under Dutch law, juridical acts (including agreements) that violate mandatory statutory provisions or are contrary to good morals will result in the agreement being regarded null and

<sup>14</sup> UMCG sends prospective foursomes who want to participate in gestational surrogacy to VUMC to be screened and will subsequently perform the medical component.  
<[http://www.umcg.nl/azg/nl/patienten/ziekte\\_onderzoek\\_behandeling/78623](http://www.umcg.nl/azg/nl/patienten/ziekte_onderzoek_behandeling/78623)>.

<sup>15</sup> Broekhuijsen-Molenaar 1991; Vranken 1997, p. 1751-1761; Boele & Oderkerk 1999; Nieuwenhuis 2001; Dermout 2001; Vlaardingerbroek 2003, p. 171-178; Van den Berg et al. 2004; Klijnsma 2008, p. 11-19.

<sup>16</sup> See for instance Boele & Oderkerk 1999, p. 23 for a list of such clauses; see also Asser-De Boer 2006, No. 696 and Vlaardingerbroek 2003, p. 171-178.

<sup>17</sup> For an overview of the discussion see Vlaardingerbroek 2003, p. 171-178.

void, which means they are treated as if they never came into being and can thus not be enforced.<sup>18</sup> Contracts concerning the surrender of children after birth are considered to be a breach of good morals. Contracting about the legal position of children, for instance who will be the child's legal parent, may violate the mandatory statutory provisions of parentage law and parental responsibility which would render such a contract illegal and void.<sup>19</sup> Nevertheless there are authors who propose that under certain conditions surrogacy contracts should play a role in the process of transferring parental rights from the surrogate mother to the intentional couple.<sup>20</sup>

At present, however, adults cannot legally enter into contracts concerning the status of legal parenthood if this deviates from mandatory statutory provisions and they cannot be obliged on the basis of a contractual provision to surrender 'their' child to the other contractual party. This does not mean that such contracts are completely without meaning. For instance, one of the licensed IVF centres that recently opened a surrogacy centre, requires the parties to draw up a contract. The contract itself cannot alter the legal status of the parties involved, but the idea is that it can give a court supportive evidence about the intentions of the parties involved at the time the contract was drawn up and thus may facilitate decisions in the adoption process.<sup>21</sup>

### **2.3. *What are the Rights of the Woman who carries the Child?***

The woman who carries the child is the legal mother of the child on the basis of the fact that she has given birth to the child (Article 1:198 DCC). No distinction is made between birth mothers who give birth to their own genetic children and birth mothers who give birth to children who are not genetically related to them. The surrogate birth mother has the same rights as any other birth mother and cannot be made to give up her child when she decides to keep the child for herself.

### **2.4. *What is the Filiation of the Baby?***

#### **2.4.1. *Who is the Child's Mother ex lege?***

Under Dutch law, the woman who gives birth to the child is the child's legal mother, whether or not she is also the child's genetic mother (1:198 DCC).

<sup>18</sup> Art. 3:40(2) DCC.

<sup>19</sup> See Asser-De Boer 2006, No. 696. With regard to parental responsibility see for instance Art. 1:121 lid 3 DCC.

<sup>20</sup> Van den Berg et al. 2004; Vranken 1997, p. 1751-1761 and Vonk 2007, p. 276-277.

<sup>21</sup> For an overview of how Dutch courts have taken contracts into consideration when judging on the voluntary transfer of rights from the surrogate mother to the commissioning parents see, Vonk 2008.

This is a mandatory statutory provision from which parties cannot deviate.<sup>22</sup> A recent decision by the District Court of The Hague further illustrates this point.<sup>23</sup> A Dutch male couple and a Dutch woman entered into a surrogacy arrangement. The woman gave birth to the child in France and gave birth to the child anonymously which means that she was not registered on the birth certificate as the child's mother. The French birth certificate only mentioned one of the male partners as the child's father. When the men subsequently returned to The Netherlands with the baby and tried to register the birth certificate in the Dutch birth registers, problems arose because no mention was made of the mother on the birth certificate. The court judged that not mentioning the birth mother on the birth certificate is against *public order*.

#### **2.4.2. Does the Infant have one or several Mothers?**

No, the child will only have one legal mother *ex lege*. Under Dutch law it is possible for a child to have two mothers after adoption, but that will only happen if the intentional parents are a lesbian couple and they subsequently adopt the child in accordance with the procedures described below.

#### **2.4.3. How can Parenthood be transferred from the Legal Parent(s) to the Intentional Parent(s)?**

There are a number of ways (all of which are uncertain) in which parental rights may be transferred from the surrogate parent(s) to the commissioning parents. The option available for a particular couple depends on whether the surrogate mother is in a formalised relationship or not. The status of the relationship of the commissioning parents is also relevant for the transfer of parental rights, but only in relation to the status of the relationship of the surrogate mother.<sup>24</sup> There are basically three routes to full parental status for the commissioning parents: 1) divestment of parental responsibility followed by adoption (surrogate mother is married); 2) recognition by the commissioning father followed by divestment of parental responsibility and partner adoption (surrogate mother is in a registered partnership); 3) recognition followed by transfer of sole parental responsibility from the surrogate mother to the commissioning father followed by partner adoption (surrogate mother is not in a formalised relationship).

Whether or not the commissioning parents are married is only relevant for the issue of recognition by the commissioning father. The married commissioning father may under certain circumstances recognise the unmarried surrogate mother's child with her consent. This is only possible if

<sup>22</sup> Rechtbank Den Haag, 11 December 2007, *LJN* BB9844.

<sup>23</sup> Rechtbank Den Haag, 14 September 2009, *LJN*: BK1197.

<sup>24</sup> However, as is clear from the policy guidelines of the surrogacy centre established at the VUMC, only married commissioning parents at present have access to gestational surrogacy services.

there is no other legal parent than the surrogate mother since a child can only have two legal parents (Article 1:204(1)(f) DCC). Moreover, there needs to be a close personal relationship between the married commissioning father and the child (Article 1:204(1)(e) DCC). This may for instance be the case if the child has been living with the commissioning parents for some time after its birth.<sup>25</sup> For the subsequent course of action to be taken by the commissioning parents see the relevant sections below. Recently one of the Dutch district courts<sup>26</sup> decided on an application by a married man who was the biological father of the child carried by his wife's sister to find as a matter of fact that there is a close personal relationship between him and the child his sister in law was carrying so that he might recognise the child after his or her birth.<sup>27</sup> However, the court stated that there was no close personal relationship between the man and the unborn child, since such a close personal relationship can only come into existence after the child's birth.<sup>28</sup>

In the following sections the possibilities for transferring full parental status from the surrogate mother (and her husband) to the commissioning parents will be discussed. First, the possibility of divestment of parental responsibility followed by adoption (surrogate mother is married) will be discussed, subsequently the possibility of recognition by the commissioning father followed by divestment of parental responsibility and partner adoption (surrogate mother is in a registered partnership) and finally the possibility of recognition followed by the transfer of sole parental responsibility from the surrogate mother to the commissioning father followed by partner adoption (surrogate mother is not in a formalised relationship).

#### *2.4.3.1. Divestment of Parental Responsibility followed by Joint Adoption*

The surrogate mother will be the child's legal mother and if she is married her husband will be the child's legal father;<sup>29</sup> both will have parental responsibility over the child by operation of law.<sup>30</sup> In the very unlikely situation that the surrogate mother's husband did not consent to the act that

<sup>25</sup> See Rechtbank Almelo, 24 October 2000 (*FJR* 2001 (3) 91) for a case in which a married commissioning father had begotten a child through sexual intercourse with an unmarried surrogate mother. The court judged that recognition by the married commissioning father of the surrogate mother's child would not be void given the circumstances of the case.

<sup>26</sup> Rechtbank Assen, 15 June 2006, *LJN* AY7247.

<sup>27</sup> His wife's sister was married to a woman, which meant that at the moment of the child's birth the female couple would have joint parental responsibility over the child. However, the child would only have one legal parent.

<sup>28</sup> If the man were to divorce, recognise the child and subsequently remarry his ex-wife, he would be the child's legal father.

<sup>29</sup> Art. 1:198 DCC (mother) and Art. 1:199(a) DCC (father).

<sup>30</sup> Art. 1:251(1) DCC.

led to the conception of the child, he may deny his paternity.<sup>31</sup> However, given the complexity and invasiveness of gestational surrogacy it is highly unlikely that he will succeed. Moreover, in cases of surrogacy in combination with IVF the requirements are such that the surrogate mother's husband's consent is required.<sup>32</sup> In the rare case that the surrogate mother's husband successfully denies his paternity, it is unclear whether the commissioning father may recognise the child. There is no provision in the DCC which prevents this, but it does not seem to be in line with the system of the law.

All this means that full parental status can only be transferred to the commissioning parents through joint adoption. However, before the child can be adopted by the commissioning parents, the surrogate parent(s) will first have to be divested of their parental responsibility.<sup>33</sup> Divestment of parental responsibility is essentially a measure of child protection used in cases where parents are unable or unfit to look after their child.<sup>34</sup> Parents cannot apply to the court to be divested, only the Child Care and Protection Board and the Public Prosecution Service can apply to the court to have the surrogate parents divested of their responsibility.<sup>35</sup> The outcome of such a procedure is uncertain as the Dutch Supreme Court has not yet had the opportunity to decide on such a matter.<sup>36</sup> However, decisions by various courts of appeal allow for the divestment of the surrogate parents on the ground that they are unable or unfit to care for this particular child since they did not intend to have it for themselves.<sup>37</sup>

If the divestment procedure is successful, the commissioning parents may be attributed with joint guardianship. Normally, when parents are divested of parental responsibility, parental responsibility will be transferred to an institution for family guardianship.<sup>38</sup> However, in IVF surrogacy cases that have been published, guardianship was attributed to the commissioning parents if the court considered this to be the best possible solution for the child concerned. If the commissioning parents have taken care of the child together for a year they may instigate adoption proceedings, provided they

<sup>31</sup> Art. 1:200(3) DCC.

<sup>32</sup> Richtlijn hoogtechnologisch draagmoederschap, NVOG 1998, paragraph 3.3. VUMC treatment protocol: 'If the surrogate mother has a partner, the partner has to give his written agreement to the surrogate mother's decision to carry a surrogate pregnancy' (<<http://www.vumc.nl/communicatie/folders/folders/IVF/Hoog-technologisch%20draagmoederschap%20.pdf>>).

<sup>33</sup> Art. 1:266 DCC.

<sup>34</sup> Kalkman-Bogerd 1998, p. 198-202.

<sup>35</sup> Art. 1:267 DCC.

<sup>36</sup> The Dutch Supreme Court did however judge in a case unrelated to surrogacy that parents may be unable or unfit to take care of a specific child (Hoge Raad 29 June 1984 *NJ* 1984/767). This judgement has been used by Courts of Appeal to justify divestment in surrogacy cases.

<sup>37</sup> Hof Amsterdam, 19 February 1998, *NJ Kort* 1998/32 and Hof 's Gravenhage, 21 August 1998, *NJ* 1998, 865.

<sup>38</sup> Art. 1:275 DCC.

have been living together for three years on the day the adoption request is filed. The normal criteria for adoption apply in such cases, which means that the legal parents of the child need to consent to the adoption. Only in a very limited number of circumstances may the court disregard a parent's refusal to consent to adoption.<sup>39</sup>

#### 2.4.3.2. *Recognition followed by Divestment of Parental Responsibility and Partner Adoption*

If the surrogate mother is in a registered partnership, she will be the child's legal mother and have parental responsibility over the child. Her male or female partner will automatically have joint parental responsibility over the surrogate mother's child, unless the child at the moment of its birth has another legal parent outside the relationship.<sup>40</sup> However, the registered partnership in itself has no consequences with regard to the child's parentage as would be the case in a different-sex marriage.<sup>41</sup> This means that the unmarried commissioning father may recognize the child with the surrogate mother's consent. If he does so before the birth of the child, only the surrogate mother will be attributed with parental responsibility; if he recognises the child after its birth both the surrogate mother and her partner will be attributed with parental responsibility. The first situation will be described in the following section. In the second situation, where both registered partners have parental responsibility, a divestment procedure before a court is required, despite the fact that the commissioning father is a legal parent. If the divestment procedure is successful and the commissioning father (who is already the child's legal parent) is attributed with parental responsibility, the commissioning mother may adopt the child after she has taken care of that child together with the commissioning father for one year,<sup>42</sup> provided they have been living together for three years on the day the application is made and all the other criteria for adoption have been met. The commissioning mother will be attributed with parental responsibility as a consequence of the adoption.<sup>43</sup>

If, however, the surrogate mother refuses to consent to the recognition of the child by the commissioning father, he has no recourse to the court to apply for the surrogate mother's consent to be replaced. The surrogate mother may even have her male partner recognise the child with her consent, if she is determined not to give up the child.

<sup>39</sup> Art. 1:228(2) DCC.

<sup>40</sup> Arts 1:253aa and 1: 253sa DCC.

<sup>41</sup> For more detailed information on legal parenthood in a same-sex or different-sex registered partnership, see Vonk 2007, Chapters 3 and 6.

<sup>42</sup> Art. 1:228(1)(f) DCC.

<sup>43</sup> It is unclear whether the adopting co-mother who has not entered in to a formalised relationship with the child's father will acquire parental responsibility by operation of law. See Vonk 2007, Sections 5.5.3 and 4.4.1.2.

### 2.4.3.3. *Recognition followed by the Transfer of Parental Responsibility and Partner Adoption*

If the surrogate mother is not in a formalised relationship, the child will only have one legal parent by operation of law. Moreover, the surrogate mother will be the only holder of parental responsibility. The commissioning father may recognise the child with the surrogate mother's consent. Once the commissioning father has acquired the status of legal parent through recognition, he may apply for sole parental responsibility, to the exclusion of the surrogate mother.<sup>44</sup> The commissioning father can only file such an application if the surrogate mother is the sole holder of parental responsibility.<sup>45</sup> The commissioning mother may subsequently adopt the child after she has been taking care of that child with the commissioning father for a year and all the other criteria for adoption are met. This latter procedure is also possible where the surrogate mother is in a registered partnership and has sole parental responsibility because the commissioning father has recognised the child before its birth.

It is unclear whether the unmarried commissioning mother will be attributed with parental responsibility by operation of law through partner adoption. If one follows the system of the law regarding parental responsibility, joint parental responsibility does not come about by operation of law for cohabiting couples as a result of adoption. However, in particular in the case of joint adoption it would be rather awkward to attribute parental responsibility to only one of the adoptive parents, while the other can only obtain it through registration in the parental responsibility register (as is normally the case for cohabiting parents). In the case of partner-adoption it might be more defensible not to attribute parental responsibility to the adopting partner by operation of law, although it might well be contrary to the adopter's expectations.<sup>46</sup>

Just like a surrogate mother in a registered partnership, a surrogate mother who is not in a formalised relationship may have her partner recognise the child if she is unwilling to give the child to the commissioning parents.

<sup>44</sup> Art. 1:253c DCC.

<sup>45</sup> Dutch law is ambivalent on this point, an in-depth discussion of this issue can be found in Vonk 2007, Chapter 6 on partially genetic primary families.

<sup>46</sup> Kok 2006, p. 209 who refers to Doek 2006, Titel 14, aant. 2A by Art 1:251 DCC.

2.5. *Is the Situation the Same when the Carrying Mother is a Foreign Person, or when the Baby is born outside the Country?*<sup>47</sup>

If a Dutch couple travel abroad for the purpose of engaging in a surrogacy arrangement and return from abroad with a child, the Dutch rules of private international law will apply in order to determine questions related to the legal status of the child. There are broadly speaking two different scenarios.<sup>48</sup>

1. The couple have become the child's legal parents in accordance with the parentage laws of the country where the child was born. For instance, this could have occurred by operation of law, by recognition or registration on the birth certificate, or by means of a judicial or administrative legal determination of parenthood.
2. The couple (have) become the parents of the child pursuant to an adoption order either in the country of the child's habitual residence or in the country where the parents habitually reside.

It is important to distinguish between these two methods of establishing legal parenthood, because the laws applicable for the recognition of the established legal parenthood will differ in these two cases. In the first case, Dutch international private law rules on the recognition of legal parenthood will be applicable. These rules have been codified in the Private International Law (Parentage) Act (*Wet conflictenrecht afstamming*).<sup>49</sup> In the second case, three different legal instruments may be applicable, namely the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption 1993, the Dutch international private law rules on the recognition of adoptions (*Wet conflictenrecht adoptie*)<sup>50</sup> and the Dutch law regulating the adoption of foreign children (*Wet opneming buitenlandse pleegkinderen ter adoptie* abbreviated to *Wobka*).

In principle Dutch law will recognise parenthood established abroad, unless it does not comply with the provisions of the *Wet conflictenrecht afstamming*.<sup>51</sup> An example where the establishment of parenthood abroad may be contrary to the provisions of the *Wet conflictenrecht Afstamming* is the case where a Dutch married man travels abroad and recognises the child of a woman other than his wife. If the man in question has not had a relationship

<sup>47</sup> This section was written together with dr. I. Curry-Sumner, associate professor of International Private Law and Comparative Law, Molengraaff Institute for Private law.

<sup>48</sup> There are doubtlessly other possible scenarios but for the sake of expediency only these two most likely scenarios will be discussed.

<sup>49</sup> An English translation of this Act is available in Sumner & Warendorf 2003.

<sup>50</sup> *Ibidem*.

<sup>51</sup> Arts 9 and 10 of the *Wet Conflictenrecht Afstamming*. See also Saarloos & Van Berkel 2008, p. 117-124.

with the child or the child's mother prior to the recognition, the Dutch court may refuse to recognise the man's status as the legal father of the child.<sup>52</sup> The reason for this refusal is based on the assumption that recognition can be used as a means to circumvent the Dutch rules on the international adoption.<sup>53</sup>

With respect to the second scenario, in which a couple adopt a child, two different situations need to be distinguished depending upon the habitual residence of the adoptive couple. If the couple is habitually resident in The Netherlands, it is vital that the adoption does not violate the Dutch rules on intercountry adoption.<sup>54</sup> Dutch residents wishing to adopt a child from abroad will first need to acquire permission to adopt (*beginseltoestemming*) from the Minister of Justice.<sup>55</sup> If they fail to acquire the Minister's permission the adoption will in principle not be recognised in The Netherlands.<sup>56</sup> The couple must furthermore satisfy all the conditions laid down in the *Wobka*. However, in case of a surrogacy arrangement with the genetic material of the commissioning couple, it can be questioned whether the adoption of a child that is genetically related to the commissioning parents residing in The Netherlands, but born abroad as a result of a surrogacy arrangement, falls within the scope of the *Wobka*. Such a case has recently come before the District Court in The Hague in 2007.<sup>57</sup> A Dutch couple had travelled to England where they had entered into a surrogacy arrangement in accordance with English regulations. The genetic material of the commissioning couple had been used. After the birth the surrogate mother signed a declaration that she agreed with the adoption of the child by the commissioning parents. The court stated that Article 2 of the *Wobka* only allows for the adoption of foreign children if the prospective adoptive parents have obtained the consent of the Minister of Justice to adopt a foreign child.<sup>58</sup> However, the court reasoned that according to the parliamentary history of the *Wobka*, this law was not intended to also cover the situation where the child to be adopted from abroad was conceived using the genetic material of the prospective adopters. In such cases the rules that apply in The Netherlands to adoption subsequent to IVF surrogacy are applicable. The surrogate mother and the commissioning couple had complied with the laws in England and with the rules that apply to adoption after IVF surrogacy in The Netherlands. The court, therefore, granted the adoption order, despite

<sup>52</sup> Art. 10(2) under a *Wet Conflictenrecht Afstamming*.

<sup>53</sup> *Dutch Second Chamber 1998-1999*, 26 675 No. 3 p. 13, 14 and 21 in the explanatory note to the *Wet conflictenrecht afstamming*. *Staatsblad* 2002 No. 153. See for instance Hoge Raad, 27 May 2005 *NJ* 2005, 554 and Hoge Raad, 28 April 2006, *NJ* 2006, 557 and Boele-Woelki 2005, p. 5312-5314.

<sup>54</sup> Arts 6 and 7 *Wet Conflictenrecht Adoptie*.

<sup>55</sup> Art. 2 *Wobka*.

<sup>56</sup> Art. 7(1) under a *Wet Conflictenrecht Adoptie*.

<sup>57</sup> Rechtbank 's Gravenhage, 11 December 2007, *LJN* BB9844.

<sup>58</sup> Curry-Sumner & Vonk 2009, p. 329-352.

the fact that the couple had not obtained prior consent of the Minister of Justice to adopt a child from abroad.

However, bringing a child unrelated to either partner to The Netherlands without prior consent of minister (*beginseltoestemming*) will result in problems for both the commissioning parents and the surrogate mother. The most notorious example of such a case is the so-called *Baby Donna* case. The case concerns a Belgian surrogate mother who agreed to carry a child for a Belgian commissioning couple with the sperm of the commissioning father. Towards the end of the pregnancy, the surrogate mother informed the commissioning parents that she had miscarried. However, this turned out to be a lie. After the baby was born in February 2005 she handed the child over to a Dutch couple. The Dutch couple had informed the appropriate authorities that they would receive a new born baby into their family for the purpose of adoption, but not that it concerned a child from abroad. This is important, since the couple had not followed the necessary procedure for intercountry adoption. At the time the court was confronted with the question whether the child could stay with the couple despite the fact that the couple had not proceeded in accordance with the relevant provisions, the child had been living with the couple for some 7 months. The District Court in Utrecht (*Rechtbank Utrecht*) decided that there was 'family life' between the child and the couple on the basis of the fact that the child had been living with them since her birth. Accordingly, the child was allowed to stay with the couple for the time being.<sup>59</sup>

Meanwhile, the Belgian commissioning parents discovered that the surrogate mother had given birth to 'their' child. More than 2 years after the baby was born, DNA-testing revealed that the commissioning father was the child's biological father, a fact that had been contested by the surrogate mother from the start. The commissioning father subsequently started proceedings with the Dutch courts to have the child turned over to him and his wife. The court decided it would not be in the interest of the child to leave the home and family she had been living with since birth, despite the fact that the commissioning parent (her biological father and his wife) were very willing and eager to raise her themselves.<sup>60</sup> Presently the surrogate mother, the commissioning couple and possibly the Dutch couple may be facing criminal charges in Belgium.

Secondly, if the couple is not habitually resident in The Netherlands at the time of the adoption, the adoption will be recognised if they can provide

<sup>59</sup> Rechtbank Utrecht, 26 October 2005, *LJN AU4934*.

<sup>60</sup> See for instance Rechtbank Utrecht, 7 May 2008, *LJN BD1068* and Hof Amsterdam, 25 November 2008, *LJN BG 5157*. In the most recent decision the Utrecht District Court decided that Donna's foster parents will have to tell her that they are not her biological parents before she starts school. The court feared that given the amount of media attention Donna's case had received, Donna would hear from children at school how she had been conceived and that her parents are not her biological parents (Rechtbank Utrecht, 10 June 2009, *LJN BI9334*).

the necessary documents and the adoption procedure complies with the requirements laid down in article 6 Private International Law (Adoption) Act (*Wet Conflictenrecht Adoptie*).<sup>61</sup>

All in all, it is not always clear what the situation is after surrogacy abroad and whether the commissioning parents will be considered the legal parents under Dutch law or will be able to become the legal parents under Dutch law.

### **3. If the Answer is no, are there any Sanctions?**

#### **3.1. Civil Sanctions?**

#### **3.2. Criminal Sanctions?**

See question 1.

### **4. Is your Law about to change?**

No, there are at present no proposals in Parliament to change the existing legislation regarding surrogacy. However, there has been debate in Parliament about the desirability of surrogacy after a number of baby buying cases and surrogacy scams reached the courts (and the press) in the Netherlands.<sup>62</sup> These cases created a lot of publicity and again raised the question whether or not surrogacy should be forbidden in its entirety. If the law on surrogacy will develop on the short term, it is more likely that these measures will further restrict the possibilities there are than that they will broaden them. The Dutch government has recently commissioned a comparative study of the legal status and consequences of surrogacy arrangements in a number of European and non-European countries. The author and her colleagues are at present working on this comparative study which includes 13 jurisdictions.<sup>63</sup> It remains to be seen what actions the Dutch government will take on the basis of the report.

<sup>61</sup> The adoption will not be recognized if there was no proper investigation or legal procedure prior to the adoption, if the decision would not be recognized by the State where the child and/or the parents had their habitual residence at the time of the adoption decision or of the recognition of the decision would violate Dutch public policy. Art. 6(2) *Wet Conflictenrecht Adoptie*.

<sup>62</sup> See for instance *Dutch Second Chamber 2007-2008*, 31 200-XVI, No. 154 and *Dutch Second Chamber 2008-2009*, 31 265, No. 11.

<sup>63</sup> The following jurisdictions are included: Belgium, California, England, France, Germany, Greece, India, The Netherlands, Norway, Poland, Spain, Sweden, Ukraine,

## References

### Asser-De Boer 2006

Asser-De Boer, *Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht, Deel 1: Personen- en familierecht*, 17<sup>th</sup> ed., Deventer: Kluwer, 2006.

### Van den Berg et al. 2004

Van den Berg et al., M., 'Hoogtechnologisch draagmoederschap', 14 *Nederlands Juristenblad*, 2004, p. 724-728.

### Boele-Woelki 2005

Boele-Woelki, K., 'Internationaal privaatrecht, Buitenlandse erkenning door gehuwde Nederlander in strijd met openbare orde', *Ars Aequi*, Katern 96, 2005, p. 5312-5314.

### Boele-Woelki & Oderkerk 1999

Boele-Woelki, K. & Oderkerk, A.E., *(On-)geoorloofdheid van het draagmoederschap in rechtsvergelijkend perspectief*, Antwerp: Intersentia, 1999.

### Broekhuijsen-Molenaar 1991

Broekhuijsen-Molenaar, A., *Civielrechtelijke aspecten van kunstmatige inseminatie en draagmoederschap*, diss. Leiden, Deventer: Kluwer, 1991.

### Curry-Sumner & Vonk 2009

Curry-Sumner, I. & Vonk, M.J., 'It all depends on who you ask: Dutch parentage law in four acts', in: Atkins, B. (ed.), *The international survey of family law 2009 edition*, Bristol: Jordan Publishing, 2009, p. 329-352.

### Dermout 2001

Dermout, S.M., *De eerste logeerpartij: Hoogtechnologisch draagmoederschap in Nederland*, (thesis) Groningen: Groningen University, 2001.

### Doek 2006

Doek, J.E., *Losbladige personen- en familierecht* (Titel 14, aant. 2A bij art 1:251 DCC), Deventer: Kluwer, 2006.

### Kalkman-Bogerd 1998

Kalkman-Bogerd, L.E., 'Ontheffing en draagmoederschap', 9 *Tijdschrift voor Familie- en Jeugdrecht*, 1998, p. 198-202.

### Klijnsma 2008

Klijnsma, J., 'De verzakelijking van het menselijk lichaam', 1 *Ars Aequi*, 2008, p. 11-19.

**Kok 2006**

Kok, J., 'Gezamenlijk gezag en voorkinderen', *Tijdschrift voor Familie- en Jeugdrecht*, 2006, p. 209.

**Nieuwenhuis 2001**

Nieuwenhuis, J., 'Promises, promises', *37 Nederlands Juristenblad*, 2001, p. 1795-1799.

**Roscam Abbing 1999**

Roscam Abbing, H., 'Enige gezondheidsrechtelijke aspecten van het draagmoederschap', in: Boele, K. & Oderkerk, M., *De (on)geoorloofdheid van het draagmoederschap in rechtsvergelijkend perspectief*, Antwerpen: Intersentia, 1999, p. 25-32.

**Saarloos & Van Berkel 2008**

Saarloos, K.J. & Van Berkel, H., 'From Russia with love: ouderschap na draagmoederschap en de Wet conflictenrecht afstamming', *NIPR*, 2008, p. 117-124.

**Sumner & Warendorf 2003**

Sumner, I. & Warendorf, H., *Family Law Legislation of The Netherlands*, Antwerp/Oxford: Intersentia, 2003.

**Vlaardingerbroek 2003**

Vlaardingerbroek, P., 'Mens en maatschappij: Draagmoederschap: een gecompliceerde constructie', *52 Ars Aequi*, 2003, p. 171-178.

**Vonk 2007**

Vonk, M.J., *Children and their parents: A comparative study of the legal position of children with regard to their intentional and biological parents in English and Dutch law*, Antwerp/Oxford: Intersentia, 2007.

**Vonk 2008**

Vonk, M.J., 'The role of formalized and non-formalised intentions in legal parent-child relationship in Dutch law', *4(2) Utrecht Law Review*, 2008, p. 117-134.

**Vranken 1997**

Vranken, J., 'Contractualisering en draagmoederschap', *4 Tijdschrift voor Privaatrecht*, p. 1751-1761.