Surrogacy in The Netherlands

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I. Introduction

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 thereby 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 regard to the Dutch response upon the return of the commissioning parents to The Netherlands.

From April 2010 until January 2011, researchers from 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 resulting report was published on 2 March 2011. The report contains an in-depth study of Dutch criminal and civil law on the consequences of surrogacy, and a detailed analysis of the way Dutch private international law does and could regard international surrogacy. Furthermore, it contains reports from four jurisdictions that allow surrogacy, namely,

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1 The research team consisted of Professor Katharina Boele-Woelki (chair of the research group), Ian Curry-Sumner, Wendy Schrama and Machteld Vonk.

2 This contribution is largely based on that report: K Boele-Woelki, I Curry-Sumner, W Schrama and M Vonk, Draagmoederschap en illegale opneming van kinderen (The Hague, WODC, 2011).
California (USA), India, Greece and Ukraine, and eight reports from European countries that are faced with the same problems as The Netherlands, namely, 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.

In legal literature a distinction is drawn between different types of surrogacy. High-technology surrogacy makes use of in vitro fertilisation (IVF) and always requires the involvement of a reproductive expert. This form of surrogacy offers commissioning parents the possibility to conceive a child that is genetically related to both of them. This is not, however, a requirement. Alongside IVF-surrogacy, low-technology 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 have used his sperm or that of a donor.\(^3\) In low-technology surrogacy the egg will be fertilised by means of artificial insemination. Furthermore, parties may be involved in do-it-yourself surrogacy, where the child is conceived by natural means or self-insemination. In this last 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.

In this chapter, Dutch law on surrogacy and the legal consequences of surrogacy for the intended parents, the surrogate mother and above all the child will be discussed, in the context both of domestic surrogacy and of cross-border surrogacy. In order to illustrate the legal rules, we introduce a Dutch married heterosexual couple, Charlotte and Michael, who dearly wish for a child of their own. They have undergone fertility treatment, but to no avail. They have considered international adoption, but were daunted by the intense

\[^3\] Given the present guidelines issued by the medical profession on surrogate motherhood, it seems very unlikely that hospitals knowingly provide low-technology surrogacy treatment. This means that in a case of domestic surrogacy (which means there is no international element in the procedure), the couple will either have had IVF-surrogacy treatment or been involved in some form of do-it-yourself surrogacy.
screening and the subsequent long waiting period. A close friend, Tania, has offered to become their surrogate mother. This is the start of a long and uncertain journey towards possible parenthood.

II. Domestic Surrogacy

The first step Charlotte and Michael take is to collect information about the legal consequences of a surrogacy arrangement for the child that Tania wants to bear for them. They face many complicated legal issues regarding the validity and enforceability of the agreement they intend to draw up with Tania, the amount of money they may pay her for her services and, most importantly, the question of acquiring parental status.

A. Legal issues: contracts and payment

There has been a lot of discussion regarding the validity of surrogacy contracts in The Netherlands. 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. However, the main clause concerns the obligation of the surrogate mother to surrender the child to the commissioning

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5 See, eg, K Boele-Woelki and M Oderkerk, above n 4, 23, for a list of such clauses; see also P Vlaardingerbroek, above n 4.
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.  

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 void, which means that it is treated as if it had never came into being and thus cannot be enforced. 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. 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 intended couple.

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.

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6 For an overview of the discussion, see P Vlaardingerbroek, above n 4.
7 Art 3:40(2) Dutch Civil Code (DCC).
8 See Asser-De Boer 2006, No 696. With regard to parental responsibility, see for instance Art 1:121 lid 3 DCC.
10 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 MJ Vonk, 'The role of
Regarding the issue of payment, it is difficult to acquire precise information. It is clear that Charlotte and Michael are allowed to reimburse Tania for the expenses that she makes with regard to the pregnancy, but how much more they may pay her is unclear. The regulations in the Dutch Criminal Code ('DCrC') relating to 'commercial' surrogacy concern acting as a go-between for surrogate and intentional parents, and not so much the issue of payment to the surrogate mother. The Government wants to avoid the coming into being of commercial go-betweens or surrogacy brokers. The legislation was specifically not aimed at making surrogates and intended parents liable to criminal prosecution.

B. Legal issues: transfer of full parental status

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 intended parents under a legal duty to accept the child. This also applies where a contract has been drawn up in which parties have agreed on the placement of the child in the family of the intended parents. If the child is not yet six months old, the intended parents may take the child into their home only with the consent of the Child Protection Board.\footnote{Art 1:241(3) DCC and Art 1 Foster Children Act (Pleegkinderenwet).}

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.\footnote{Art 1:198 DCC.} This is a mandatory statutory provision from which parties cannot deviate.\footnote{Rb Den Haag, 11 December 2007, LJN BB9844.} Whether the child born to the surrogate mother will automatically have a legal father depends on the surrogate’s marital status.\footnote{Art 1:199 DCC.} It will be obvious that the surrogate mother’s marital status is of great relevance where the transfer of parental rights to the intended parents is concerned. The marital status of the formalised and non-formalised intentions in legal parent-child relationships in Dutch law' (2008) Utrecht Law Review volume 4, issue 2.
intended parents may also play a role where the transfer of parental status is concerned. In the discussion below, the starting point will be the placement of the child in the family of the intended parents. This means that there is still agreement between the surrogate mother and the intended parents that the child will grow up with the intended parents. Where relevant, the genetic connection between child and intended parents will be discussed. Table 1 shows the possibilities for the transfer of parental rights. First the situation will be discussed where the surrogate mother is married and then where she is unmarried.

Table 1  Transfer of full parental status

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15 However, as is clear from the policy guidelines of the surrogacy centre established at the VU Medical Centre (VUMC), only married intended parents at present have access to gestational surrogacy services.
Placement of the child in the intentional family

Surrogate mother is not married

Challenging paternity surrogate father

Establishing paternity intentional father

Transfer of parental responsibility to intentional father

Adoption by intentional mother

Surrogate mother is married

Divestment of parental responsibility

Adoption by intentional parents
i. **Surrogate mother is married: the child has two legal parents at birth**

The surrogate mother will be the child’s legal mother, and if she is married her husband will be the child’s legal father; both will have parental responsibility for the child by operation of law. In the very unlikely situation that the surrogate mother’s husband did not consent to the conception of the child, he may challenge his paternity. Unless the surrogate father was completely unaware of fact that his wife was acting as a surrogate for another couple, he is highly unlikely to succeed. In most surrogacy arrangements the surrogate’s husband will play a role. In cases of surrogacy in combination with IVF, the requirements are such that the surrogate mother’s husband’s consent is required. In a recent case the paternity of the surrogate’s husband was challenged in the name of the child through an *ad hoc* guardian (*bijzonder curator*). The child may challenge the paternity of any non-biological father and is not bound by the consent of adults or their marital status.

All this means that full parental status can be transferred to the intended parents only through joint adoption. However, before the child can be adopted by the intended parents, the surrogate parent(s) will first have to be divested of their parental responsibility. Divestment of parental responsibility is a measure of child protection used in cases where parents are unable or unfit to look after their child. 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 parents divested of their responsibility. In the late 1990s there

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16 Art 1:198 DCC (mother) and Art 1:199(a) DCC (father).

17 Art 1:251(1) DCC.

18 Art 1:200(3) DCC.

19 *Richtlijn hoogtechnologisch draagmoederschap [Guidelines on high-technology surrogacy]*, NVOG 1998, para 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.’ See <www.vumc.nl/communicatie/folders/folders/IVF/Hoog-technologisch%20draagmoederschap%20.pdf>.

20 Art 1:1228 (1)(g) and Art 1:266 DCC.


22 Art 1:267 DCC.
had been discussion in Parliament whether parents themselves should not be given a right to apply for divestment, but the Minister of Justice at that time was against such a measure as it would introduce the possibility for parents to relinquish their parental rights.\footnote{Eg, Dutch Second Chamber 1994/1995 answers by the then Secretary of State to questions submitted by Member of Parliament Boris Dittrich, attachment 622 to Parliamentary Debates.}

The outcome of a divestment procedure is uncertain as the Dutch Supreme Court has not yet had the opportunity to decide on divestment in the context of surrogacy.\footnote{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 (HR 29 June 1984 NJ 1984/767). This judgment has been used by courts of appeal to justify divestment in surrogacy cases.} 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.\footnote{Hof Amsterdam, 19 February 1998, NJ Kort 1998/32 and Hof ‘s Gravenhage, 21 August 1998, NJ 1998, 865.} If the divestment procedure is successful, the intended parents may be attributed with joint guardianship, which is very similar to parental responsibility. Normally, when parents are divested of parental responsibility, guardianship will be attributed to an institution for family guardianship.\footnote{Art 1:275 DCC.} However, in the surrogacy cases that have been published, guardianship was attributed to the intended parents if the court considered this to be the best possible solution for the child concerned. If the intended parents have taken care of the child together for a year, they may file for an adoption order with the court, provided they have been living together for three years on the day the adoption request is filed. There is no special post-surrogacy adoption procedure, which means that the normal criteria for adoption apply in such cases. These criteria require the adoption to be in the child’s best interests and state that adoption cannot take place if the child’s parents object. Only in a very limited number of circumstances may a court disregard parental objections.\footnote{Art 1:228(2) DCC.}

The court may, for instance, disregard a parental objection if the child has not lived with the parents since its birth. In an IVF-surrogacy pilot which took place in the 1990’s, all the children were adopted by the intended parents a year after their
birth. No legal problems were reported. Nevertheless, in particular where parents have not involved the Child Protection Board before the birth of the child, transferring parental rights from the surrogate parents to the intended parents may be a lengthy procedure of which the outcome is uncertain.

ii. **Surrogate mother is not married: child has one legal parent at birth**

If the surrogate mother is not married, the child will have only one legal parent by operation of law: the surrogate mother. She will also be the only holder of parental responsibility. The intended father may recognise the child with the surrogate mother’s consent. Once the intended father has acquired the status of legal parent through recognition, he may apply for sole parental responsibility, to the exclusion of the surrogate mother. The intended father can file such an application only if the surrogate mother is the sole holder of parental responsibility. The intended mother may subsequently adopt the child after she has been taking care of that child with the intended father for a year and where all the other criteria for adoption have been met.

It is unclear whether the unmarried intended 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 obtain it only 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

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28 SM Dermout, *De eerste logeerpartij: Hoogtechnologische draagmoederschap in Nederland*, PhD Thesis (Groningen, 2001);

29 Art 1:253c DCC.

30 Dutch law is ambivalent on this point; an in-depth discussion of this issue may be found in MJ Vonk, above n 9, ch 6 on partially genetic primary families.
adopter's expectations.31

C. Surrogacy in practice

Charlotte and Michael’s first stop is the only hospital that offers IVF-surrogacy treatment in The Netherlands: VU Medical Centre in Amsterdam.32 The hospital offers such treatment in accordance with the legal and professional framework set out in ministerial guidelines and the Guidelines on IVF-surrogacy issued by the Dutch Society for Obstetrics and Gynecology.33 These Guidelines are based on the IVF Regulation Statement issued by the Government in 1997,34 which allows for IVF-surrogacy to take place under very strict conditions in one of the 18 licensed IVF clinics. The 1997 IVF Regulation Statement determines that IVF-surrogacy must take place in accordance with the Guidelines on IVF-surrogacy35 of the Dutch Society for Obstetrics and Gynaecology. These Guidelines require IVF clinics to draw up their own protocols regarding IVF surrogacy.

The Guidelines contain a number of requirements to be met by the surrogate mother (Tania) and a number of requirements to be met by the intended mother (Charlotte) and her partner (Michael). When discussing the requirements for surrogates and intended parents, it


32 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 children of their own (SM Dermout, above n 4). 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. However, in April 2006 one of the Dutch-licensed IVF clinics announced that it would make gestational surrogacy services available to married couples (VUMC, 6 April 2006).


34 Planningsbesluit in-vitrofertilisatie, Staatscourant 1998/95, 14–18.

35 Guidelines, above n 32.
is very important to make a distinction between IVF-surrogacy, which at present is carried out only at the Amsterdam VU Medical Centre, and surrogacy that takes place out of sight of the reproductive experts. For the latter group there are no requirements, because do-it-yourself surrogacy is unregulated.

i. IVF-surrogacy

One of the most important requirements listed in the Guidelines is that IVF-surrogacy treatment may be provided only for intended parents whose own genetic material (the woman’s eggs and the man’s sperm) can be used. A direct consequence of this requirement is the fact that only heterosexual couples are eligible for IVF-surrogacy in The Netherlands. Furthermore, intended parents have to bring their own surrogate mother, preferably a relative or a close friend, since advertising in the context of surrogacy or bringing intended parents and surrogate mothers together is a criminal offence.\footnote{See for more detailed information SM Dermout, H Van der Wiel, P Heintz, K Jansen and W Ankum, ‘Non-commercial surrogacy: an account of patient management in the first Dutch centre for IVF Surrogacy, from 1997 to 2004’ (2010) 25(2) Human Reproduction 443.} Before IVF-surrogacy treatment is provided, both the surrogate mother and the intended parents will have to undergo psychological screening and be informed of their legal position regarding the child after its birth.

The surrogate mother will at least have to meet the following criteria: she may not be over 44 years of age, must be in good health, have given birth to one or more children for herself and regard her own family as complete. Her previous pregnancies and deliveries must have been uncomplicated, she must have a strong personality, a strong desire to provide this service to the intended parents, and she must be able and willing to surrender the child after birth. Both the surrogate mother and her partner need to be Dutch nationals, live in The Netherlands and be fluent in the Dutch language.

The intended mother must be incapable of carrying a pregnancy to term, either because she has no or a non-functioning uterus, or because a pregnancy would endanger her life. She may not be older than 40 years of age at the time of the IVF treatment. Moreover, the Dutch Child Care and Protection Board, which is involved in the whole process from the
beginning, requires proof that the intended parents do not have a criminal record, as this may frustrate the transfer of parental status to the intended parents at a later stage.

Charlotte and Michael meet all the criteria, but their prospective surrogate mother, Tania, delivered her first child by C-section and therefore does not meet the 'uncomplicated pregnancy and delivery' requirement. Charlotte and Michael are willing to forgo the possibility of having a child genetically related to both of them, as this seems impossible in The Netherlands, but Tania has problems with giving up her own genetic child. Egg donation in combination with surrogacy is not allowed in The Netherlands (in this case Tania could give birth to a child conceived with a donor egg). Charlotte and Michael find no one else among their friends and family willing to be a surrogate and carry their genetic child or give up her own genetic child.

ii. Advertising for a surrogate

Charlotte and Michael consider advertising for a surrogate mother on the Internet, but soon they discover this to be illegal. A number of different aspects of surrogacy are illegal in The Netherlands. Table 2 indicates the relevant provisions that might be utilised in criminal proceedings.

| Table 2 | Table of criminal provisions in surrogacy context |
|-----------------|-----------------|-----------------|
| Criminal provision | Maximum fine | Maximum prison sentence |
| Art. 151a DCrC\(^{37}\) Illegal mediation for placement of child | €7,600 | 6 months |
| Art. 442a DCrC Illegal placement of a child younger than 6 months | €3,800 | 3 weeks |

\(^{37}\) Dutch Criminal Code.
<table>
<thead>
<tr>
<th>Article</th>
<th>Description</th>
<th>Fine</th>
<th>Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art. 151b DCrC</td>
<td>mediation and publicizing wish for surrogacy</td>
<td>€19,000</td>
<td>1 year</td>
</tr>
<tr>
<td>Art. 151c DCrC</td>
<td>mediation and promotion of abandoning a child</td>
<td>€7,600</td>
<td>6 months</td>
</tr>
<tr>
<td>Art. 236 DCrC</td>
<td>fraud in relation to status</td>
<td>€19,000</td>
<td>5 years</td>
</tr>
<tr>
<td>Art. 225 DCrC</td>
<td>misrepresentation</td>
<td>€76,000</td>
<td>5 years</td>
</tr>
<tr>
<td>Art. 228 DCrC</td>
<td>false declaration with regard to birth by doctor or midwife</td>
<td>€19,000</td>
<td>3 years</td>
</tr>
<tr>
<td>Art. 278 DCrC</td>
<td>(international) human trafficking</td>
<td>€76,000</td>
<td>12 years</td>
</tr>
<tr>
<td>Art. 279 DCrC</td>
<td>removal of minor from parental authority</td>
<td>€19,000</td>
<td>6 years</td>
</tr>
<tr>
<td>Art. 20 Foster Child Act</td>
<td>placement of child without notification (art. 5 Foster Child Act)</td>
<td>€3,800</td>
<td>In cases of repeat offending within 2 years, a prison sentence can be imposed (2 months)</td>
</tr>
</tbody>
</table>
In the end they search the Internet and find there are possibilities for them in a number of foreign jurisdictions, such as Ukraine, India and California. They go to their chosen destination, and find a surrogate mother who gives birth to their child. The question then arises how The Netherlands deals with the couple upon their return.

III. Cross-border Surrogacy

A. Introduction

The question arises what happens when a Dutch couple return to The Netherlands with a child conceived through surrogacy. At this stage a distinction should be made based upon the legal procedure that has taken place abroad. Although the scenario utilised in this chapter focuses on the judicial determination of parentage coupled with the subsequent issuance of an amended birth certificate, there are jurisdictions and situations in which surrogacy arrangements ultimately lead to the issuance of a judicial adoption order. Accordingly, the applicable private international law rules can and often will be very different. Nonetheless, the rules applicable to these different procedures will not all be dealt with here. This chapter will concentrate on the situation of the vast majority of surrogacy cases entering into The Netherlands, namely, on the basis of the alleged creation of legal familial ties, ie parentage.

B. Variety of possible procedures

i. Initial contact with Dutch authorities abroad

The diversity of the situations in which surrogacy arrangements come to light negates the possibility of dealing with all cases in depth in this chapter. However, it is possible to illustrate the variety of routes along which surrogacy cases may come to the attention of the Dutch authorities. One possibility is that the case first arises outside The Netherlands at the Dutch Consulate. Roughly speaking, these cases may be divided into three main categories:
(a) **Passport application.** The Dutch commissioning parents may wish to apply for a Dutch passport. In this scenario, the Dutch commissioning parents will argue that the relationship of parentage established abroad has resulted in the child acquiring Dutch nationality. Although such a request must be submitted to the Dutch Consulate or Embassy abroad, it is ultimately the Dutch Ministry of Foreign Affairs in The Hague that is competent to issue the passport. The application of the Dutch rules on private international law is, however, executed in the first instance by the consular registrar abroad.

(b) **Residence permit.** Dutch commissioning parents may also wish to apply for a provisional permission to remain in The Netherlands (the so-called *machtiging tot voorlopig verblijf* (MVV)). This is necessary, however, only if the child possesses the nationality of a country with an MVV obligation. The United States of America is not one of these countries, and so these requests are not received with regard to children with American citizenship (i.e. all children born on US soil).

(c) **Short stay visa.** Dutch commissioning parents may also wish to request a short stay visa. This visa is also known as a 'tourist visa' and is only issued via the Dutch Immigration and Naturalisation Service (*Immigratie en Naturalisatie Dienst* (IND)).

In short, the IND or the consular registrar will always be the first authority to assess any request made by Dutch commissioning parents abroad, irrespective of whether this request concerns an issue relating to nationality or immigration. The relevant statutory rules applied by the various civil servants in these cases are always the same, namely:

- Articles 92–101, Book 10, Dutch Civil Code, previously contained in Private International Law (Parentage) Act (in Dutch: *Wet Conflictenrecht Afstamming* (hereinafter *Wca*))
- Articles 103–111, Book 10, Dutch Civil Code, previously contained in Private International Law (Adoption) Act (in Dutch: *Wet Conflictenrecht Adoptie* (hereinafter *Wcad*))
- Placement of Foreign Children for Adoption Act (in Dutch: *Wet Opneming van Buitenlandse Kinderen ter Adoptie* (hereinafter *Wobka*)).

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38 On the basis of §4.1.1, Part B, Chapter 1, Aliens Circular 2000 (*Vreemdelingencirculaire 2000*), an application for the issuance of a residence permit will not be rejected on the basis of Art 17(1) of the Aliens Act (*Vreemdelingenwet*) as due to the absence of an MVV, if the child has the nationality of one of the following countries: Australia, Canada, Japan, Liechtenstein, New Zealand, Vatican City, the USA and South Korea. (This is also the case for citizens of the European Union and the Schengen Area.)

39 As of 1 January 2012, these rules will be codified in Title 5, Book 10, DCC (namely, the codification of private international law).

40 As of 1 January 2012, these rules will be codified in Title 6, Book 10, DCC (namely, the codification of private international law).
ii. Initial contact with authorities in The Netherlands

Alongside the procedures that may be started abroad, there are also situations in which a surrogacy arrangement may surface after the Dutch commissioning parents have returned to The Netherlands, without prior contact with Dutch consular services abroad. In these situations, initial contact is with the Registrar of Births, Deaths, Marriages and Registered Partnerships ('the Registrar') in a municipality in The Netherlands. This can happen in the following situations:

(a) If the child possesses the nationality of a country that does not have an MVV obligation (e.g. the United States of America) and has obtained valid travel documentation from that country (e.g. a passport), the child may enter The Netherlands without prior contact with Dutch authorities abroad.

(b) The commissioning parents may also arrive in The Netherlands from a country within the Schengen Area. This may happen, for example, when a Greek–Dutch couple travel to Greece and conceive a child through the legally-available surrogacy possibilities there. According to Greek law, the commissioning parents would be the legal parents of the child, whereby the child would obtain Greek nationality. Accordingly, the commissioning parents would be permitted to travel with the child without an MVV. Furthermore, the commissioning parents would be able to travel freely within the Schengen Area without prior consultation with the Dutch consulate.

Whether the child will subsequently be granted permanent residency will depend on the individual circumstances. However, the fact that the child is now in The Netherlands plays an important role in the subsequent approach of the Dutch judiciary.

iii. Summary

According to the given circumstances, the question whether the commissioning parents have become legal parents of a child conceived by means of a surrogacy arrangement can present itself in a variety of different settings. Furthermore, the request made by the

41 The USA utilises the *ius soli* principle, meaning that all children born on American soil acquire American citizenship: 8 USC §1401.

42 These countries are also exempt from the obligation to obtain an MVV. See §4.1.1, Part B, Chapter 1, Aliens Circular 2000, in combination with §2.2, Section B, Chapter 10, Aliens Circular 2000.

43 K Boele-Woelki *et al*, above n 2, 137–43.
commissioning parents may also arise with respect to an application for a Dutch passport, the registration of a foreign birth certificate or the determination of child maintenance. On the basis of research into the law of California, Greece, India and Ukraine, it is clear that commissioning parents involved in a surrogacy arrangement in one of these jurisdictions can return to The Netherlands with a variety of different documents, for example an original birth certificate, an amended birth certificate, a judicial decision, an administrative decree or an adoption order. Nevertheless, despite the variety of situations, legal questions and documents, the same Dutch rules will apply in all cases. Due to space restrictions, in this chapter attention will be paid only to the situation in which the commissioning parents return to The Netherlands and allege that they are already the legal parents of the child as result of the rules of parentage. We therefore shall not deal with the situation in which the parents have adopted their child abroad.

It is generally the case that commissioning parents who utilized proceedings, for example in California, will possess a judicial determination of parentage (so-called judgment of parentage), as well as an amended or original birth certificate. If the commissioning parents allege that parentage has already been established abroad, the steps they are required to take will depend on whether the alleged parentage has been established abroad by virtue of a legal fact (e.g., birth) or legal act (e.g., recognition) (both issues discussed in § C), or in a judicial decision (§ D). In the following sections the rules with regard to these different situations will be dealt with, in order to explain how Dutch law currently deals with parentage that has been established abroad in surrogacy cases.

44 Eg, HR (Supreme Court) 27 May 2005 LJV: AS5109 en HR 28 April 2006, LJV: AU9237.
45 Eg, Rb `s-Gravenhage 21 June 2010, LJV BN1330.
47 K Boele-Woelki et al, above n 2, 91–162.
C. Confirmation of alleged parentage: legal acts or facts

i. General criteria

Due to the lack of specific private international law rules in cases of surrogacy, reference must be made to the general rules laid down in Book 10 of the Dutch Civil Code, previously contained in the Private International Law (Parentage) Act (Wca). Article 10:101 DCC stipulates the conditions that must be satisfied in order to recognise a foreign legal act or fact in The Netherlands. Before dealing with the criteria themselves, it is important to appreciate that two different situations fall within the purview of this provision, namely, legal facts (*rechtsfeiten*) and legal acts (*rechtshandelingen*).

First, as already described above, Dutch commissioning parents may return to The Netherlands with a birth certificate according to which they are the legal parents of the child. The birth certificate would appear to provide *prima facie* evidence of legal parentage. In California the birth certificate *may* refer to an underlying judicial decision, namely, the judgment on parentage, but this is not always the case. The question is whether this ‘legal fact’ that has been recorded on the birth certificate can be recognised in The Netherlands according to the criteria laid down in Article 10:101 DCC. The birth certificate in this sense is to be regarded as confirmation of a legal fact. The second scenario that falls within the ambit of this provision is that of the legal act. An example is the recognition of a child by a man. The recognition also ultimately leads to the acquisition of a formal confirmation of the act that has taken place. In The Netherlands, for example, recognition by the father of a child leads to the acquisition of a deed or certificate of recognition.

The criteria that apply in both situations are that the deed or certificate must:

(a) have been issued by a competent authority;
(b) have been issued abroad;
(c) be laid down in a legal document;
(d) have been made in accordance with local law; and
(e) not be contrary to Dutch public policy.

The majority of these conditions do not raise specific issues within the context of surrogacy, with the exception of two aspects in particular, namely, that the deed or certificate must have been issued ‘in accordance with local law’ and that recognition of the deed must not be contrary to Dutch public policy.
ii. ‘In accordance with local law’

A Dutch civil servant confronted with the question whether a foreign deed can be recognised in The Netherlands will first need to determine whether the legal familial ties have been created in accordance with foreign law. With respect to this question, it would appear that the civil servant must determine whether the legal facts have been registered in accordance with the rules applicable in the relevant jurisdiction. Generally speaking, the civil servant is to assume that this is the case, and only when the civil servant has 'sufficient doubt' that this is not the case can he or she request further supplementary evidence to support the claims made in the foreign deed. With respect to the criterion of 'sufficient doubt', it is important that two questions be answered separately. First, what circumstances can give rise to 'sufficient doubt'? Secondly, what steps need to be taken once the civil servant has established that he or she has sufficient doubt?

With respect to the first question, one must refer to the general starting point in relation to the recognition of foreign deeds, namely, that the Dutch civil servant should display trust when confronted with foreign documents. The civil servant can determine that he or she has 'sufficient doubt' only on the basis of objective indications to the contrary. It is also necessary to know in relation to what the Dutch civil servant may have 'sufficient doubt'. The sufficient doubt in this context must relate to the correct application of the rules applicable in the jurisdiction in which the deed or certificate was issued. Accordingly, a distinction must be made between jurisdictions in which surrogacy is permitted and jurisdictions that do not permit surrogacy.

If a jurisdiction permits surrogacy arrangements, and furthermore also permits commissioning parents to be registered on the original birth certificate, then a birth certificate upon which Dutch commissioning parents have been registered as the legal parents has been issued in compliance with the applicable rules of the jurisdiction issuing the deed. In Ukraine, for example, it is permitted for a birth certificate to be issued to commissioning parents, as long as one of the parents is genetically related to the child. In this situation, the civil servant must determine whether he or she has doubt that the deed or certificate has been issued contrary to the proper observance of this rule. The fact that the

48 Vonken (Personen- en Familierecht. Het internationale afstammingsrecht), Art 10 Wca, note 1, p 2173.

49 K Boele-Woelki et al, above n 2, 159.
civil servant thinks that the persons registered on the birth certificate have used a surrogate
is not a sufficient ground (with regard to this condition) to refuse recognition of the birth
certificate. This may, however, nonetheless provide sufficient grounds for non-recognition
with respect to the application of the public policy exception.\(^5\)

If, however, the foreign jurisdiction does not permit surrogacy, and the civil servant
has sufficient objective indications that the commissioning parents have used a surrogate,
then the civil servant may take the necessary steps to discover whether the deed has been
drawn up in accordance with the locally applicable rules. The question arises, however, of
when the civil servant can state that he has sufficient objective indications to believe that
the local law has not been observed. This question can best be answered using an
illustration. If, for example, two white Caucasian commissioning parents wish to register
their child in a Dutch municipality, and the child is not Caucasian but instead of a different
ethnic origin, then the civil servant will have sufficient objective indications to doubt that
the local rules have been followed if, according to local law, both commissioning parents
need to be genetically related to the child.

Once the civil servant has determined that he has sufficient doubt to question
whether the local rules have been applied correctly, the next question is which steps he or
she can then take. The normal procedure will be for the civil servant to request supporting
documentation. According to Ukrainian law, for example, the registration of the child in the
registers of the local municipality requires a certificate in which the genetic relationship of
the child is determined with respect to at least one parent. This certificate does not,
however, state that use has been made of a surrogate. The commissioning parents will
generally also be in possession of a surrogacy contract wherein all the agreements between
the commissioning parents and surrogate parents are set out. Should the commissioning
parents not possess such a contract (or refuse to hand it over), it would seem very difficult
on this ground to determine that the parents have used a surrogacy arrangement.
Nonetheless, the inability to deny recognition on the basis that local law regulations have
been followed does not exclude the subsequent possibility of non-recognition on grounds of
public policy.

\(^5\) See further below at section III.C.
iii. **Grounds for refusal**

Despite satisfying the abovementioned criteria, a foreign legal act or legal fact may also be denied recognition.\(^{51}\) With respect to the non-recognition of foreign legal acts and facts, the public policy exception is the most important exception and will form the basis of the rest of section III.C. The aim of the public policy exception is to block the application of foreign law and the recognition of legal facts and acts concluded abroad, if the application or recognition would lead to a situation contrary to the fundamental principles and values of the Dutch legal system.\(^{52}\) Article 10:101(2) DCC lists three specific cases which will always be deemed to be contrary to Dutch public policy. These situations will be dealt with first, prior to an analysis of the general public policy grounds for non-recognition.

iv. **Specific public policy grounds**

In Article 10:101(2) DCC three specific situations are listed in which a foreign legal act or legal fact will be regarded as contrary to Dutch public policy, namely:

(a) if the recognition of the child is made by a Dutch national who, according to Dutch law, would not have been entitled to recognise the child;
(b) if, where the consent of the mother or the child is concerned, the legal requirements applicable pursuant to Article 10:95(4) DCC were not complied with; or
(c) if the instrument manifestly relates to a sham transaction.

It would appear that the last two conditions have not provided any real problems with respect to surrogacy arrangements. The first condition has, however, raised a number of problems that will be discussed further here.

If a Dutch man recognises a child abroad, yet according to Dutch law he would not have been permitted to recognise the child, then the foreign recognition will not be recognised in The Netherlands. The aim behind this non-recognition clause is that otherwise Dutch fathers would easily be able to circumvent the adoption legislation by recognising children abroad. The conditions for recognition may be found in Article 1:204 DCC. The condition listed in Article 1:204(1)(e) DCC is of crucial importance in the context of

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\(^{51}\) Art 10:101(1) DCC.

surrogacy. This provision determines that a recognition will be regarded as null and void if made

by a man who is married at the time of the recognition to another woman unless the district court has *prima facie* held that there is or has been a bond between the man and the mother which may, to a sufficient degree, be regarded as sufficiently equivalent to a marriage, or that there is a close personal relationship between the man and the child.53

Prior to discussing the intricacies of the exceptions, it is first important to explore the extent of the prohibition itself. The Court of Appeal Amsterdam has, for example, determined that the prohibition does not apply if the man is involved in a registered partnership with another woman,54 whilst the District Court Arnhem has applied this prohibition in a case when a man was married to another man.55 Furthermore, the prohibition does not apply to a non-Dutch man who is permitted according to the law of his nationality to recognise a child of another woman.56

With respect to the exceptions to this prohibition, two separate questions must be posed, namely:

(a) When are the conditions for the exceptions satisfied in an international context?
(b) Does prior permission need to be requested from the district court in order to satisfy the exception provided for in Article 1:204(1)(e) DCC?

In answering the first question, reference may be made to the decision of the Supreme Court on 27 May 2005. This case was discussed extensively in the Chapter on Dutch Law in the 2006 Issue of the International Survey of Family Law.57 As stated in the 2006 Survey, the case revolved around a child born in 2001 in Turkey. The Dutch father had provided a notarial instrument in 2001, in which he had stated that he was the biological father of the

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53 Translation provided by H Warendorf, R Thomas and I Curry-Sumner, *Civil Code of The Netherlands*, (Deventer, Kluwer 2009) 75.

54 Hof Amsterdam 18 August 2002, *LJN BG2522*.

55 Rb Arnhem, 26 April 2008, *LJN BI3495*.

56 HR (Supreme Court) 28 April 1986, *NJ* 1987, 926. Reference will always be made to the law of the nationality of the non-Dutch man in accordance with Art 10:95(1) DCC.

child. A problem arose because at the time the father was married to another woman (and had been since 1973). The Dutch Supreme Court held that the mandatory nature of the public policy exception must lead to the conclusion that the man was not competent to recognise this child. The Supreme Court referred to a number of facts and circumstances that were relevant in determining whether a married man is competent to recognise a child, namely,

the man’s evidenced interest and commitment to the child both before as well as after the birth. Furthermore, more is required than simple contact during a limited period of time.58

The District Court Assen has, moreover, determined that no close personal relationship can exist between an unborn child and a man, since this relationship can develop only after the child is born.59

With respect to the second question, the Dutch Supreme Court has also provided clear directions in 2006. In this case, the central question was whether recognition in Vietnam by a Dutch national could be recognised in The Netherlands. The child was born to an unmarried Vietnamese mother and recognised by a Dutch national who was married to another woman at the time. According to the district court, the man satisfied the requirement of Article 1:204(1)(e) DCC and therefore the Vietnamese recognition could be recognised in The Netherlands. However, the man had not requested prior permission from the district court, as required by Article 1:204(1)(e) DCC. The Supreme Court held that this was not required, as long as the man could prove that he substantively satisfied the necessary requirements.60 On 30 November 2007, the Supreme Court provided even more clarity in explaining that the relationship between the man and the child can be evidenced on the basis of the agreements and circumstances surrounding the case.61

The two abovementioned questions raise particular problems with respect to surrogacy cases. If the commissioning father satisfies the substantive criterion of a 'close personal

59 Rb Assen 15 June 2006, LJN AY7247.
60 HR 28 April 2006, LJN AU9237
relationship' with the child, then it is possible to recognise the child in the country of origin, regardless of whether or not he is married to another woman. Since it is also not required that the man who recognises the child be the biological father, this route would appear to be a rather 'simplified' route should adoption prove to be too difficult, too expensive or procedurally impossible.

v. General public policy grounds

Alongside the specific public policy grounds discussed above, Article 10:101(1) DCC provides for a general public policy exception. The question arises whether international surrogacy arrangements will fall foul of this exception. In discussing this topic, a number of different scenarios must be distinguished. Due to restrictions on space, only one of those scenarios will be discussed here, namely, whether the lack of a birth mother on the birth certificate should lead to non-recognition.

Two cases have dealt with the issue of a birth certificate upon which no mother is listed. The first case concerned three Dutch persons, two men (in a relationship) and a woman who acted as the surrogate. The surrogate did not wish to have any role in the child’s life, but she knew that if she gave birth in The Netherlands she would be regarded as the child’s legal mother. As a result, the parties decided that the surrogate should give birth in France, since anonymous birth is possible according to French law. After the birth they returned to The Netherlands, with a French birth certificate upon which only the biological father was listed. The Dutch registrar refused to register the birth certificate, stating that this was contrary to Dutch public policy. The District Court of The Hague62 agreed with the registrar, basing its conclusion on Article 7 of the United Nations Convention on the Rights of the Child. On the basis of this provision, every child has a right to know his or her parents and be raised by them. The district court held that in recognising the birth certificate, upon which no details were provided with regard to the mother, the identity of the mother would in this way be withheld from the child. Consequently,

- the child should be granted the choice to be able at a later age to give form to his or her identity. In doing so, he or she needs, as far as possible, full access to details of his or her

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62 The District Court of The Hague, 14 September 2009, Ljn: BK1197.
parentage. Registration of the French birth certificate therefore contravenes Dutch public policy.  

In another unpublished decision of the District Court of The Hague, the judge decided that a birth certificate from the United States of America upon which two men were registered as the parents also contravened Dutch public policy. It was held that the principle mater certa semper est rule is fundamental public policy, and therefore a birth certificate naming two men could not be recognised in The Netherlands.

D. Confirmation of alleged parentage: judicial decisions

i. General criteria

In similar vein to Article 10:101 DCC, Article 10:100 DCC lays down the specific conditions according to which a foreign judicial decision on legal parentage may be recognised in The Netherlands. The conditions with respect to an enforceable decision, jurisdiction of the foreign judge and adherence to the rules of a fair trial do not appear to have presented any particular problems for Dutch judges and civil servants in light of the specific complexities in surrogacy cases. These conditions will therefore not be discussed further here.

ii. Competence of the civil servant

If the Dutch civil servant is unsure whether a foreign judicial decision should be recognised, he or she is obliged to request the advice of the Advice Committee for Issues relating to Civil Status and Nationality (Commissie van Advies voor de Zaken betreffende de Burgerlijke Staat en de Nationaliteit). The civil servant must request this advice the moment that he or she has 'sufficient doubt' that the judicial decision does not meet the

63 The District Court of The Hague, 14 September 2009, LJN: BK1197.

64 The District Court of The Hague, 23 November 2009, Case no. 328511 / FA RK 09-317 (unpublished).

65 Art 1:29c DCC.
required criteria laid down in Dutch law. There are, however, no cases with respect to when
the civil servant may assume that he or she has 'sufficient doubt'.

iii. Public policy

If the recognition of the foreign judicial decision would be contrary to Dutch public policy
then the decision will not be recognised. According to the law of California, for instance,
parties can request the judge to determine parentage prior to the birth of the child. In a
recent unpublished decision of the District Court of The Hague, the court was confronted
with such a case. Parentage between the applicants and two children had been determined
by the Superior Court of California prior to the birth of the children. After the birth of the
twins, the civil registrar drew up the birth certificate in accordance with the pre-birth
judicial decision. The Californian court also ordered that the civil servant draw up the birth
certificate accordingly upon the birth of the children. The District Court of The Hague
refused to recognise and register the birth certificates in the relevant registers in The
Netherlands, stating that the underlying judicial decision could not be recognised. The
District Court argued:

The judicial decision from the Superior Court of California of 15th April 2008 cannot be
recognised since this is contrary to Dutch public policy, bearing in mind the aforementioned
fundamental rule of family law (mater certa semper est) and the fact that the judicial
decision was ordered without the legal mother first being determined.

Question marks may be placed, however, with respect to this line of reasoning. The
determination of paternity is not always dependent upon the prior determination of
maternity. Especially when considering that the applicant in the case was also the biological
father of the children, why is the recognition of a decision with regard to the determination
of paternity of the biological father contrary to Dutch public policy? Furthermore, according
to Californian law, all parties must have provided consent prior to the issuance of a judicial

66 It is suggested that the same criteria and reasoning would apply here as are applicable with regard to the
recognition of foreign legal facts and legal acts (see section III.C. above).

67 This is the same unpublished decision by the District Court of The Hague mentioned earlier under C, The

68 Authors’ own translation.
If the biological mother had already been consulted and provided consent to the judgment of parentage, why is the recognition of such a decision contrary to Dutch public policy? Furthermore arguments and reasoning is absolutely essential.

E. Summary

It is to be hoped that this section of the chapter has illustrated the complexity surrounding the recognition of foreign birth certificates and judicial decisions regarding parentage. The current private international law rules in the field of parentage have not been designed to deal with the complex issues that present themselves in surrogacy cases. Specific recognition rules need to be designed that show deference to the complexity of the cases, as well as the diversity of relevant factors.

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69 K Boele-Woelki et al, above n 2, 134.