Surrogate motherhood in Sweden, considered under the criterion of the child’s best interest

A. Introduction

Developments in the realms of medicine and biotechnologies over the last few decades have enabled the application of techniques that until recently were unthinkable. Surrogate motherhood is one such approach, whereby the concept of biological motherhood is essentially challenged. When it comes to Medically Assisted Reproduction methods, surrogate motherhood, along with post-mortem fertilization and reproductive cloning, have come to be the most controversial issues. Sweden has been the first country worldwide to adopt ad-hoc legislation to regulate Medically Assisted Reproduction. More specifically, the first legislative approach in

1 A contrario, cf. K. Panagos, Παρένθετη μητρότητα: ελληνικό νομικό καθεστώς και εγκληματολογικές προεκτάσεις (Surrogacy: Greek legal framework and criminal effects in Δίκαιο & κοινωνία στον 21ο αιώνα (Law and Society in the 21st Century) Law Review, Sakkoulas Editions, Athens – Thessaloniki, 2001, p.28 et seq. This scholar has been invoking examples to corroborate his assertion that “substitution in motherhood is nothing novel”.


3 The originality of the Swedish approach mainly consisted in the institution of the right of offspring born through donated gametes, to become informed of the identity of the donor, a fact considered to be unique and as revolutionary. Ever since, more legal orders have adopted relevant laws, fashioned after
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this field, in Sweden, has been the Insemination Act (1984:1140), entered into effect in 1985. In that particular legislative text there had been no specific provision on surrogate motherhood. The law has understandably since been amended and complemented on more than one occasions over the following years. Still, despite all the amending acts and complementary laws, surrogate motherhood in Sweden continues not to be directly regulated.

B. The current legislative framework

In 2006 there was introduced in Sweden the Genetic Integrity Act (GIA) (2006:351), meant to substitute all previous laws in the matter. This particular piece of legislation, still in effect today, did not in any way change things with respect to the


5 Here are the main pieces of legislation passed in the matter of Medically Assisted Reproduction in Sweden:

1991 → Act on the Use of Certain Genetic Technologies in Medical Screening (1991:114) and Act on Measures for Purposes of Research or Treatment using Fertilized Human Eggs (1991:115), regulating issues relevant to research in oocytes and embryos.
2003 → In the wake of the adoption of Draft Law 2001/02:89 submitted by the Swedish Ministry of Health it became possible for eggs to be donated.
2005 → Clearance of a conditional creation of embryos for research purposes.
2005 → In the wake of final adoption of the modifications brought about by the Draft Law on Assisted Fertilization and Parenthood (2004/05:137) submitted by the Swedish Ministry of Justice, female homosexual couples were allowed access to Medically Assisted Reproduction methods.
More specifically, Article (3) of Chapter (7) of the GIA (2006:351) stipulates that “… a fertilized egg may be introduced into a woman’s body only if the woman is married or cohabiting and the spouse or cohabitee gives written consent to this. If the egg is not the woman’s own, the egg shall have been fertilized using the husband’s or cohabitee’s sperm”.

The very formulation of this Article leads to the obvious assertion that in-vitro fertilization may only be applied when either of the future parents is genetically connected to the child. Consequently, from the moment that either the woman destined to bear the child or her spouse / cohabitee has obligatorily to be one of the child’s future parents, such provision essentially prohibits in-vitro fertilization in a surrogate motherhood context.

The technique of surrogate motherhood⁶. Swedish legislators seem to be avoiding to explicitly allow or restrict the implementation of this particular method.

C. The establishment of kinship

1) There can be no doubt as to the multitude of legal issues - mostly relevant to the establishment of kinship between the child and the parents aspiring at the conception of the latter - occurring as a result of the Genetic Integrity Act (GIA) (2006:351) not regulating the concept of surrogate motherhood.

At this point, it is worth observing that, under the Swedish legislation, the establishment of kinship on the side of the mother is governed by the principle of “mater semper certa est”⁷. Otherwise said, the woman having given birth to the child shall also be legally deemed to be the mother, irrespective of the latter’s intention to ultimately hand the child over to the social parents⁸. Even in the case of the genetic material originating from the mother aspiring at having a child, the latter, legally speaking, has no parental right towards the child to which she is nevertheless biologically connected, hence the need for the adoption procedure to be followed.

Similarly, legally speaking, it is the spouse of the woman having given birth to the child – i.e., in the case of surrogate motherhood, the spouse of the woman having

⁶ Be it noted for the record that legislation in Sweden in the matter of Medically Assisted Reproduction is being constantly complemented and refined by way of relevant Regulations and Guidelines.
⁸ J. Stoll, Surrogacy Arrangements and Legal Parenthood, Swedish Law in a Comparative Context, p. 120.
borne the child - that is considered to be the child’s father. This presumption is rebuttable if no genetic material of such spouse was utilized, provided the spouse claims not to have consented to a Medically Assisted Reproduction procedure. Moreover, if third-party fertilized egg is involved, the spouse may challenge fatherhood of the child if he is in a position to bring in evidence of his not having consented to a Medically Assisted Reproduction procedure.

In order for the persons intending to have a child to be formally acknowledged as such child’s legal parents, the commissioning mother shall have to adopt the child whereas the commissioning father shall be expected to go through the so-called “confirmation” procedure – provided he has supplied his own genetic material for the conception. Such “confirmation” procedure is applied irrespective of the biological father being in a heterosexual union or in a homosexual union or if the father is living alone.

2) Despite such gap in the law, however, there are always children born through such method. Still, because of surrogate motherhood not being practiced in public hospitals, many Swedish couples either go abroad or take recourse to the application of such method privately, in Sweden. As a consequence, offspring born through such procedures are found themselves in a legally precarious condition since the establishment of kinship to persons having aspired at their birth – i.e. the social parents – does not happen upon the offspring’s birth whereas there have to take place certain legal actions, which in turn often creates problems. Typical of such eventuality are two court rulings, namely: (a) the ruling issued on the of 7th of July 20069 by the Supreme Court in Case Ö 5154-04 and (b) a ruling issued by the Appellate Court of Gothenburg10 on 27-5-2014 in Case No. 5568-13 Dok.Id 285610.

In Case Ö 5154-04 (in the matter of which a ruling was handed down on the 7th of July 2006), a married couple unable to have children decided, in 2006, to take recourse to the method of surrogate motherhood. To such purpose, they came to an arrangement with the husband’s sister, who agreed to bear the child for them. Both members of the married couple supplied their genetic material whereas the husband’s sister rendered herself to Finland, underwent a Medically Assisted Reproduction

9 NJA, 2006, s 505.
process and eventually became pregnant with a child that was in due time born in Sweden.

Despite the fact that both social parents of the child nurtured the latter and the father having exclusive parental care rights over the child, legally speaking it was the father (husband of the social couple) and his sister (surrogate mother) that were considered to be the parents of the child.

Upon the child reaching the age of one year, the social mother applied for adoption, in an effort to also be granted parental care of the child and eventually obtain the status of legal mother.

The relevant request was sustained by the District Court in 2004. Subsequently to that, however, the social father and his sister (i.e. the surrogate mother) withdrew their consent to the adoption, upon which the social father took recourse before the Court of Appeals, requesting that the application for adoption of the child, originally filed by his wife, be rejected on the grounds of his having withdrawn his consent to such adoption, which in turn made it impossible for the adoption to be confirmed.

The Court of Appeals rejected the request for adoption which in turn compelled the social mother to take recourse to the Cassation Court of that country, where the appellate ruling was eventually confirmed by a majority vote of 3/2, arguing that the withdrawal of the consent to the adoption had been valid as well as that there was no possibility for an adoption to be allowed unless both legal parents have consented thereto. According to the Court, the fact of the social mother also being the child’s genetic mother did not in any way alter the sine-qua-non requirement of an unequivocal consent thereto by both legal parents.

Just as interesting are the provisions of the 27-5-2014 Ruling by the Court of Appeals of Gothenburg11 (Case No. 5568-13 Dok.Id. 285610) in that they touch upon a series of more specific issues stemming from the lack of legislative regulation of the concept of surrogate motherhood.

In said case, Mr. J.L. had a child through a surrogate mother from India. He took action against his social security fund before the Administrative Tribunal of Malmö, requesting that financial assistance be also granted in connection with the

child, given that under the circumstances it was impossible to seek alimony from the child’s surrogate mother.

J.L.’s allegation was that the child should be awarded financial support on the grounds of the latter needing to be spared any discriminatory treatment in comparison to other children which, when not entitled to alimony by the parent not having custody over them (if proven that the parent not having custody is not in a position to meet this particular financial burden) are to receive such funds from the State. What J.L. essentially argued, therefore, was that the child’s legal status under the circumstances is similar to the status the child would have had, had the latter been adopted by J.L. alone. Whereas an agreement had been entered between the two parents, according to which the father alone would be in charge of the child, under the Swedish law a biological parent may not decline payment of alimony for the child, hence the entitlement to request assistance from the competent social security fund. Put in a nutshell, the allegations by the social security fund may be resumed in that when it comes to having a child through a surrogate mother, it is presumed that the person having had such child also undertake the entire expense for the latter’s maintenance, hence the impossibility of any claim of the kind been raised against such person’s social security fund.

The Court of Appeals eventually sustained the appellate recourse lodged by the father, holding that the social security fund is under the obligation of protecting the child, hence the need for the Court to enter anew into the merits of the case, all the more since there had been no possibility for the father to be pressed towards looking for the surrogate mother and eventually seek alimony for the child.

D. The criterion of the child’s best interest

The circumstances set forth above are downright irreconcilable with the fact that under the Swedish legislation in the matter of Medically Assisted Reproduction, the child’s best interest is meant to be given the utmost priority. Whatever actions are taken should therefore be inspired by such interest, this being also an “assessment criterion” as to the acceptability of the various methods of Medically Assisted Reproduction. More specifically:

According to Article (3) of Chapter (6) of the GIA (2006:351), prior to insemination, the MD in charge shall have to assess whether the social and
psychological circumstances of the spouses / cohabitees justify the procedure. Insemination shall only start once it has been plausibly established that the prospective child may be brought up under favorable conditions.

The same applies under Article (5) of Chapter (7) of the GIA (2006:351) in the matter of heterologous in-vitro fertilization.

Special mention is at this point to be made of Article (2) of Chapter (6) of the Children and Parents Code, stipulating that the child’s best interest has to be considered as the most critical of all criteria by reference to which to determine – in the light of the specific provisions of that particular Chapter – whatever issues relevant to custody, residence and communication. In order to assess what it is that serves a child’s interests best, special focus is to be placed upon the child’s need for close and positive contacts with both parents. The risk for the child to be physically abused, kept deliberately away, illegally confined or otherwise suffer damages is to be very seriously considered.

Despite all, children born through surrogate motherhood are de facto in a less advantageous position compared to children born naturally or by use of other reproductive technology methods, as in the former case, there has also to intervene an adoption or a “confirmation” procedure for parent rights to be confirmed for the child’s social parents.

In the light of such primacy granted to the child’s best interest, over the interests of any other party whatsoever (namely of the woman having actually born the child and the social parents thereof), one is therefore righteously given to some wondering as to the ways whereby such interest is served in case of birth through this particular technique.

E. Conclusions

In view of the considerations set forth above, the consistent reluctance on the part of the legislator in Sweden to regulate the practice of surrogate motherhood in this country is definitely odd. Social reality in Sweden nevertheless suggests that such method is essentially practiced either abroad or – if within Swedish territory – privately. In a legal order like that of Sweden, with laws uncompromisingly benefiting the child, an absence of regulation of the legal circumstances arising from recourse to
this particular method of Medically Assisted Reproduction places the child to be born through such technique in a disadvantageous position.

The Swedish legislation ought therefore to ponder whether, in the effort to scorn the conduct of those couples who choose to take recourse to surrogate motherhood in contempt of the indirect / inferred prohibition to do so, it is the child born by a surrogate mother who is ultimately punished, to the extent that the precarious legal status they face is definitely not to the best of their interest.