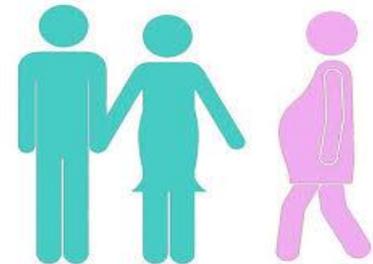


Surrogacy and EU Law: a missed opportunity for a coherent regime for parental rights?

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Current reflections on EU Gender Equality Law

Trier 7 December 2015



What is surrogacy?



- “an understanding or agreement by which a woman ... agrees to bear a child for another person or couple” (Morgan, 1989)
- “a situation “where a woman makes prior arrangement to carry a child with the intention that it will be handed over to someone else at birth” (DH, 2005)

- No relevant EU Law
- different national position (L. Brunet, J. Carruthers, K. Davaki, D. King, C. Marzo, J. McCandless, *A Comparative Study on the Regime of Surrogacy in EU Member States*, Parliament, DG for Internal Policies, 2013



- Equal treatment (Recast Directive)?
- Pregnant Workers Directive: a pregnant worker is a
 - worker who has informed her employer
 - worker who has recently given birth
 - worker who is breastfeeding
- NB: The proposed revision of the Pregnant Workers Directive has been withdrawn
- Disability (Framework Directive)?

Surrogacy and its impact on employment law in the EU context. Should it be regulated?

- It is a discriminatory situation
- It would put surrogacy in line with a powerful human rights argument that place more emphasis on family unit
- It would close a gap between social reality and legislation
- It would acknowledge that family units come about in different ways and, ultimately, would impact on how society constructs motherhood and more generally parenthood

Who is a Parent?

Re G (Children) (Residence: Same Sex Partner)
[2006] UKHL 1 WLR 2305 (*per* Baroness Hale)

- **Genetic:** can bring a special sense of love and commitment as well as knowledge of origin
- **Gestational:** conceiving and bearing the child that creates a very special relationship between the mother and the child
- **Social (psychological):** relationship that develops through the child and the parent providing for the child needs.



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Case *C.D. v S.T*

(referral from Ireland) CJEU 18March 2014

- The child was genetically linked to Mrs C.D.'s partner.
- C.D. started breastfeeding hours after the birth
- She was granted parental responsibility 4 months after the birth of the child.
- Applies (unsuccessfully at first) for paid leave under the adoption policy.
- Claim of discrimination on grounds of sex (recast Directive) and/or pregnancy and maternity (Pregnant Workers Directive).

Case C-363/12, Z

(UK referral) CJEU 18 March 2014

- The child was genetically linked to the intended parents.
- The mother appeared on the child's birth certificate since the start.
- She was granted parental responsibility 4 months after the birth of the child.
- She had applied (unsuccessfully at first) for adoption leave.
- Claim of discrimination on grounds of sex (recast Directive) and/or pregnancy and maternity (Pregnant Workers Directive) and disability (Framework Directive)

The opinions of the Advocates Generals (26 September 2013)

AG J. Kokott



**emphasis on health and
safety**

AG N. Wahl



**emphasis on equal
treatment**

Surrogacy and Equal Treatment (Recast Directive)

Surrogacy and equal treatment: intended mothers are not discriminated against on grounds of gender (the reason does not apply exclusively to worker of one gender)

Ag Whal: “issue of identifying the correct comparator”

Surrogacy and Adoption (Recast Directive)

AG Kokott: surrogacy cannot be compared to adoption because “as a rule there is no bond between the intended mother and the child prior to the birth of the latter”

AG Whal: “unfavourable treatment *vis á vis* adoptive mother cannot be ruled out”

Surrogacy and Health and Safety (Pregnant Workers Directive)

PWD cannot be used because it is triggered by “giving birth” (gestational criteria)

BUT it is also addressed to workers who are breastfeeding (AG Kokott) and is inadequate as does not address the social element of motherhood (AG Whal)

Surrogacy and Disability (Framework Directive)

“the inability to have a child by conventional means does not (...) prevent the commissioning mother from having access to, participating or advancing in employment”

The judgments of the CJEU



No discrimination on grounds of sex (Recast Directive), pregnancy and maternity (Pregnant Workers Directive) or disability (Framework Directive).

Traditional understanding
of motherhood



What can we learn from these cases?

- the EU framework in this area is out of date and in urgent need of revision
- Parenthood does not stem solely from the gestational link between the parent and the child
- Need to consider the value of social parenthood, which is ultimately in the best interest of the child

Role for the legislator?

The European Commission's recent announcement that it would withdraw the proposal to amend the Pregnant Workers Directive is indeed disappointing. However, it might opens up opportunities. We call upon the European Commission to design a new framework for parenthood related rights in the workplace. In doing so, the Commission should take genuine account of equal chances for men and women workers, and pay full attention to the difference between, on the one hand, the protection of health and safety of the gestating mother and unborn baby and, on the other hand, the equal chances of all children to build up relationships with the people who take care of them.

Recent developments

- Case 173/13, *M. Leone, B. Leone v Garde des Sceaux, ministre de la Justice, Caisse nationale de retraite des agents des collectivités locales*, 17 July 2014
- Case C-222/14, *K. Maïstrellis v Ypourgos Dikaiosynis, Diafaneias kai Anthropinon Dikaiomaton*, 16 July 2015
- *Surrogacy in the UK: Myth busting and reform*
Report of the Surrogacy UK Working Group on Surrogacy Law Reform, November 2015.

thank you!