



On the Subject

Recent Court Cases Highlight the Difficult Questions Related to Medically Assisted Procreation in France

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Law No.2013-404 dated May 17, 2013, (the Law) allowed same-sex couples to get married and to adopt children, through either the mutual adoption of a child or the adoption of the same-sex spouse's biological or adopted child. However, same-sex couples are still denied the right to resort to medically assisted procreation (MAP) and gestational surrogacy. This situation is further complicated by the fact that some French courts have permitted the adoption of children born through MAP by same-sex couples, while other courts refused to do so, thereby creating a patchwork of inconsistent legal situations, leading to frustration and growing debates on this topic.

Introduction

In the spring of 2013, France tackled and ultimately permitted same-sex couples to marry and to adopt children. Yet the Law paved only a partial road to equality for same-sex couples. While the Law addressed some parenting rights for same-sex couples, it did not address avenues for MAP for lesbian couples, which entails clinical and biological methods that are used to achieve pregnancy by artificial or partially artificial means. This was due, in part, to the split in public opinion, which suggested that France was not ready to permit such options for lesbian couples, fearing that it would become

the proverbial slippery slope and ultimately open the door for gestational surrogacy. Gestational surrogacy involves an arrangement with a woman unrelated to the couple, the surrogate, who then carries to term a fertilized embryo formed from another woman's egg, and is expected to release the child to the genetic parent upon delivery. As discussed further in this article, MAP and gestational surrogacy, as avenues to the creation of families for same-sex spouses, remain prohibited.

French Legal Background

On April 29, 2014, the district court of Versailles (*Tribunal de grande instance de Versailles*) rendered two decisions that rekindled the controversy, only one of which, however, is publicly available. In the case where the decision is publicly availableⁱⁱ, the court denied a lesbian the right to adopt her wife's child. The women were lawfully married right after the passage of the Law, and travelled to Belgium to engage in MAP. The court ruled that applicable French laws do not allow lesbian couples to resort to MAP and that same-sex couples who leave the country to engage in MAP and subsequently adopt in France are guilty of fraudulent evasion, a violation of French law. Under French law, fraudulent evasion entails the attempt to obtain, through the back door, a right or privilege that is otherwise forbidden under French law, whether in France or another country. While not a crime, *per se*, the punishment imposed for such conduct is the refusal to recognize the non-birth mother on the child's birth certificate and include only the name of the birth mother.

As French law currently stands, only different-sex couples suffering from medically diagnosed infertility, or for whom there is a proven risk of transmitting a severe and incurable genetic

disorder to the child or to one of the spouses, are eligible for MAP. While the Law is silent on the issue of the recourse to MAP by same-sex couples, the French Public Health Code is clear. Article L.2141-2 states that:

... medically-assisted procreation aims at relieving a couple's state of infertility or avoiding the transmission of a serious disease to the child or to a member of the couple. The pathological nature of the infertility must have been diagnosed medically. The man and the woman forming the couple shall be alive, of childbearing age, and shall give their prior consent to the transfer of embryos or to the insemination [...] (emphasis added)

In a decision dated May 17, 2013, the French Constitutional Councilⁱⁱⁱ (the Council), the highest constitutional authority in France that may be petitioned to review statutes and their compliance with the French Constitution, commented about article L.2141-2 of the French Public Health Code, saying that “different-sex couples are, with respect to procreation, in a situation that differs from the situation of same-sex couples, hence, the principle of equality does not prevent a law from addressing in a different way situations that are different, as long as the different treatment resulting from this law is directly related to the issue dealt with by the law creating such difference of treatment.” The Council further stated that it was for French courts to prevent and render ineffective the recourse to MAP by couples who are not entitled to pursue MAP in pursuance of article L.2141-2 of the French Public Health Code.

Consistent with the Council's directive that the French courts take the lead to ensure that married lesbian couples are prevented from MAP as a way of starting their families, the French Ministry of Justice published a circular on May 29, 2013, in which it indicated that, while the principle of equal treatment was recognized between same-sex couples/parents and different-sex couples/parents in the Law, the section of the French Civil Code related to parentage (*filiation*) was not subject to this general provision. The Minister highlighted that the marriages between same-sex partners had no impact on non-adoptive parentage (*filiation non-adoptive*) and that the establishment of parentage as regards same-sex couples could only result from an adoption order. In other words, in

order to have a child together, both lesbian and gay couples can either adopt a child together as a married couple or ask for the adoption of the already-existing child of the spouse of the non-parent spouse. There is no provision under current French law that permits a lesbian couple to have a child together through MAP.

Five months after the effective date of the Law, five members of the French Senate lodged a draft bill amending article L.2141-2 of the French Public Health Code with a view toward removing the criteria related to gender difference and the right to MAP recourse (*i.e.*, eliminating the phrase “the man and the woman forming the couple”). They argued that the enactment of this revised bill was necessary to safeguard the principle of equality guaranteed under the Law and to eliminate a discrepancy of constitutional proportion. This proposal was rejected, however, and therefore did not lead to a modification of the law.

An Unclear Legal Situation

Against this current legal background and in contrast with the decision of the district court of Versailles dated April 29, 2014, on October 14, 2013, the district court of Lille^{iv} (*Tribunal de Grande Instance de Lille*) allowed a French lesbian to adopt the children of her female partner who were conceived through MAP in Belgium. The women married following the enactment of the Law, and the non-biological spouse was willing to adopt her spouse's children aged 8 and 10 years, arguing that the conditions required by articles 343 and *seq.* of the French Civil Code were indeed met. In support of her argument, the non-biological spouse cited the provisions in the Code that permit adoption of a child, as long as the child is less than 15 years old, and in any case 15 years younger than the person(s) willing to adopt him/her or 10 years younger than the non-biological spouse willing to adopt him/her, and provided the adoption is requested (i) by two spouses who have been married for more than two years or who are both aged greater than 28 years; (ii) by any person aged greater than 28 years; or (iii) any person adopting his/her spouse's child, regardless of the age of the spouses. In addition, the adoption of the spouse's child is only permitted if the child only has one parent. The Lille court ordered the full adoption of the children, cancelled the original birth certificates showing only the name of the children's biological mother and endorsed it

with the word “adoption.” As a result of this decision, each child’s new birth certificate shows the names of both mothers.

How can the French legal system permit two identical situations to result in completely opposite results?

Those who speak out against the adoption of children born as a result of MAP by lesbian couples argue that this mechanism results in a fraudulent evasion of the law. The French Supreme Court for judicial matters (*Cour de cassation*) holds a similar position regarding gestational surrogacy, considering that the adoption by couples—both same-sex and different-sex couples—following gestational surrogacy is a circumvention of the institution of adoption. This arrangement is strictly forbidden in France pursuant to article 16-9 of the French Civil Code, which sets forth that a contract for gestational surrogacy shall be null and void. All married couples, same sex or different sex, who resort to gestational surrogacy in countries where it is permitted are thereafter denied the right to a transcription of the foreign birth certificate in the French civil registries. In the case of different-sex couples, they are treated the same as a same-sex couple for whom infertility or the possibility of transmittal of a serious disease to one of the spouses or the child is not at issue; as such, different-sex couples are also prohibited from resorting to gestational surrogacy.

In addition, gestational surrogacy is criminally punishable according to article 227-12 and 227-13 of the French Criminal Code, with a sentence of six months of imprisonment and a fine amounting to €7,500 for the person who introduces the couple willing to resort to gestational surrogacy and the surrogate, as well as for anyone who would pressure the surrogate birth mother into abandoning her child, including the couple willing to pursue gestational surrogacy. In the event the married couple wilfully conceals the civil status of a child, the sentence is significantly increased to three years of imprisonment and a fine of €45,000. According to article 113-6 of the French Criminal Code, these sentences will be imposed upon conviction whether the couple resorted to gestational surrogacy in France or in another country where it is forbidden.

Several legal scholars and commentators have noted that to the extent there is any “fraud” that has been perpetrated, with respect to both MAP and gestational surrogacy, it would rather be in the way the child was *conceived* than in

the adoption itself. That said, one may argue that it would make more sense for the French Public Prosecutor to challenge the parentage between the child and his/her biological parent (*i.e.*, the woman who resorted to MAP or the father who donated his gametes, in the case of a gestational surrogacy) rather than to contest the adoption of the child by the same-sex spouse who, according to the Law, is entitled to adopt his/her spouse’s child. However, disputing the biological parentage is likewise an unsatisfactory way to proceed in any case because, should the challenge be successful, the child will be deprived of the legal recognition of his/her parents in France. In addition, proving that the couple resorted to MAP or gestational surrogacy would seriously trample on individual privacy rights and be an impractical way for the French authorities to proceed.

It is further argued by the opponents to the adoption of children born as a result of MAP by lesbian couples that, should such adoption be allowed, this would actually violate the principle of equality to the prejudice of *male* same-sex couples because the only available option to male couples wishing to have a child (apart from mutual adoption) is gestational surrogacy, which is punishable under criminal law. As a consequence, male couples, lacking any possibility of giving birth to a child, would be treated differently under the law from lesbian couples who, if permitted by law, would have the possibility of engaging in MAP outside of France and then adopting the children resulting from this process.

Erwann Binet, former draftsman for the draft Law, stated in February 2014, “the law does not aim at forbidding the adoption of children conceived via MAP.” While it is correct that the Law does not actually forbid this practice, it does not allow it either. In refusing to establish a clear legislative solution to this situation, the French government therefore abdicated to the courts the power and burden to decide whether or not a child born outside of France to a lesbian couple by way of MAP may be adopted in France by the same-sex spouse of his/her mother. As discussed, this situation is inherently rife with problems.

Forthcoming Developments

Several authors and lawyers have commented on the above-mentioned decisions by French courts and claim that the question at stake should be brought before the European Court of Human Rights to obtain a clear and consistent answer.

Prior to the enactment of the Law, the European Court had ruled, in a decision dated March 15, 2012, that same-sex domestic partners were not in a comparable legal situation as different-sex married couples with respect to the non-birth parent's adoption of the spouse's child, and that these same-sex partners were not subject to different treatment based on sexual orientation since unmarried *different-sex* couples who entered into a civil solidarity pact (*PACS*) were also denied the right to resort to simple adoption.

With respect to issues that arise as a result of children born through gestational surrogacy, on June 26, 2014, the European Court rendered two decisions^v condemning France for banning the establishment of parentage between fathers and their biological children born through gestational surrogacy in the United States. While the European Court acknowledges that states that are parties to the European Convention of Human Rights shall have some room for discretion when it comes to gestational surrogacy, this discretion is nonetheless viewed as narrow in scope when parentage issues are at stake. In the instant matters, the European Court determined that French laws did not constitute a breach of the parents' right to family life. However, in both cases, the European Court ruled that the children born through gestational surrogacy were in a state of legal uncertainty, as the parentage was established in the United States but not in France. The European Court further indicated that this ruling runs afoul of the privacy rights granted by Article 8 of the European Convention of Human Rights to these children, which ensures that everyone be able to determine his/her identity, including the identity of his/her parents. In these cases, the European Court ruled that the children's privacy rights were violated, and France was ordered to pay damages to each of the children in the amount of €5,000 and €15,000 to the parents for costs and expenses related to the proceedings in the first case, and €5,000 to the child and €4,000 to the parents in the second case.

Such decisions are not final, however, and France may request the re-examination of these decisions by the Grand Chamber of the European Court. Should the Grand Chamber confirm these decisions, France will be bound to take measures to comply with them. The French State will have to pay the damages due to the claimants, adopt measures specifically tailored to the claimants' rights and adopt measures of a general nature that will apply to everyone in France. Accordingly, France may: (i) modify its laws with respect to the legal recognition of parentage between children born through gestational surrogacy and their biological parents; (ii) let French jurisdictions rule in a way that will make France compliant with the European Court's decisions dated June 26, 2014; or (iii) issue a notice to French consulates abroad, explaining that gestational surrogacy should no longer prevent the transcription of foreign birth certificates in the French civil registries.

Members of the French Parliament are currently working on a draft bill related to parental authority and children's interest. This draft bill aims at improving the status of stepfathers and stepmothers, but does not address the issues of MAP and gestational surrogacy. Two members of the French Parliament drafted an amendment to establish an assumption of parentage (*présomption de parenté*) for the benefit of lesbian couples who have a child through a common parental project¹. According to this amendment, a new article 312-1 would have been included in the French Civil Code, stating that "A child conceived or born in the course of the marriage of a couple composed of two women, that results from a common parental project and that has no known paternal filiation, shall be the son/daughter of his/her mother's spouse." This amendment was rejected, and the French government reaffirmed in April 2014, *i.e.*, prior to the two decisions of the European Court referenced above, that MAP would not be discussed again before 2017.

¹ "Common Parentage Project" is not expressly defined in the law.

Conclusion

To date, approximately 20 same-sex couple adoptions have occurred in France since the first adoption ordered by the district court of Lille. While most of these adoptions are related to children conceived via MAP outside of France, some of these children were adopted, in the first place, by one spouse on his or her own and, in the second place, by the other spouse. No mutual adoption of a child has occurred thus far. Upcoming debates and decisions need to be watched closely, as the situation is certainly in flux and bound to change as the debate over parenting rights and equality for same-sex couples continues in France and around the world.

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ⁱⁱ District court of Versailles, April 29, 2014, No.13/09268

ⁱⁱⁱ Constitutional Council, May 17, 2013, No.2013-669

^{iv} District court of Lille, October 14, 2013, No.2013-027517

^v European Court of Human Rights, June 26, 2014, No.65192/11 and No.65941/11

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