



Opinion by letter No 18 on the impact of the legal framework for Surrogate Motherhood on the social rights of the various parties involved in Surrogate Motherhood

Request for opinion dated 25 March 2024 from the Deputy Prime Minister and Minister of Economy and Employment

Admissibility of the request: adopted by the Plenary Committee through electronic procedure on 23 May 2024

Adoption of the opinion by letter: Committee plenary session of 9 September 2024

Preliminary Warning:

The committee's opinions are drafted in Dutch and French. Please consider these two language versions as official, even if translations in other languages are available.

1 October 2024

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our references

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your references

Your letter of 25 March 2024

Your request for an opinion on the impact of the legal framework for Surrogate Motherhood on the social rights of the various parties involved in Surrogate Motherhood

Mr Minister,

In your letter of 25 March 2024, you raised the following question:

"We receive many requests for family leave that could be granted to intended parents. More specifically, the request concerns the possibility of granting an adapted maternity leave, whereby one of the two intended parents can benefit from a 15-week maternity leave in the context of surrogate motherhood, or when the woman giving birth does not wish to take care of the child after delivery.

In Opinion no. 86 on the legal framework for surrogate motherhood, your Committee makes relatively little mention of the situation of the woman who carries the child and gives birth ('femme gestatrice' (surrogate mother), in the terminology used in this opinion). The impact of the latter in terms of social rights, for example, is not covered in the opinion in question.

However, apart from the question of establishing a parent-child relationship, it is important to emphasize that in labour law, it is the state of pregnancy and childbirth that gives rise to the right to "maternity" leave.

Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at

work of pregnant workers and workers who have recently given birth or are breastfeeding (hereinafter referred to as the "Pregnant Workers Directive") requires member states to take the necessary measures to ensure that pregnant workers and workers who have recently given birth are granted maternity leave of at least 14 consecutive weeks, spread out before and/or after the birth, in accordance with national legislation and/or practice. This Directive is transposed into national law by the Law of 16 March 1971 on employment. Article 39 of this law provides for 15 weeks' maternity leave.

The aim of the Pregnant Workers Directive (and its transposition into Belgian law) is essentially to protect the health and safety of workers who are pregnant, have recently given birth or are breastfeeding. The Directive recalls in a recital that pregnant workers and workers who have recently given birth or are breastfeeding must be considered in many respects as a specific risk group, and that measures must be taken with regard to their safety and health. It also adds that work organisation measures designed to protect the health of pregnant workers and workers who have recently given birth or are breastfeeding would have no useful effect if they were not accompanied by the maintenance of rights linked to the employment contract, including the maintenance of remuneration and/or the provision of an adequate benefit.

In the spirit of the directive and the law, therefore, it is really the state of pregnancy and childbirth that justify the right to rest after childbirth. Indeed, the law strictly prohibits employers from making their employees work during their rest period. In other words, even if the employee does not want to take care of the child after giving birth, she cannot waive the leave. The same applies to surrogate motherhood in Belgium.

Nevertheless, when the mother is unknown and/or absent (for example, in the case of surrogate motherhood performed abroad, where the birth certificate lists the names of the intended parents without mentioning the name of the woman who gave birth to the child), the question arises as to whether granting "maternity" leave to one of the intended parents is appropriate.

It is also important to note that "parental" leave is established in relation to parents whose filiation (biological or adoptive) has been

established. For example, birth leave (formerly known as paternity leave) is leave granted to the child's "second" parent. In Belgium, this leave is 20 days and must be taken within four months of the birth.

Finally, there is adoption leave, which entitles the worker to six weeks' leave per adoptive parent (plus a further 3 weeks to be shared between the two adopting parents). Adoption leave must commence within two months of the child being registered as part of the employee's household.

In order to contribute to the discussions regarding a legal framework for surrogate motherhood, could your Committee look into the impact of surrogate motherhood in Belgium or abroad on the social rights of the various parties involved, and in particular regarding entitlement to leave for workers?"

The Committee wishes to respond to your request for an opinion in the form of this letter.

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We thank you for referring to the Committee a request for an opinion on the social rights, and in particular the right to maternity and parental leave, of intended parents involved in surrogate motherhood.

As you will note, our opinion n°86 on the legal framework for surrogate motherhood did not go into this specific question in depth. The aim of this opinion was to make general recommendations regarding an ethical framework and adapting current legislation, rather than going into detail about the potential concrete implications for existing regulations. It is not for the Committee to define the specific legal measures that must underpin the framework for surrogate motherhood.

However, we understand that clarification may be necessary on this crucial issue of social rights and, based on the ethical principles underlying our opinion, we wish to highlight the following points regarding the rights and well-being of all involved:

1) *As regards the adults involved:*

- **Reproductive solidarity** implies that there is **collective support and shared responsibility** within our society for the reproductive rights and choices, access to reproductive health care and associated social rights of individuals starting surrogate motherhood procedures. These include giving access to surrogate motherhood to people who are unable to conceive a child without the assistance of a third party, and

providing appropriate parental leave for both the surrogate mother and the intended parents, as is already the case with other forms of assisted reproduction.

- Denying the intended parents the right to parental leave undermines the recognition of their parenthood and can lead to feelings of exclusion and marginalisation. The **principle of equality** must guide any decisions concerning access to reproductive treatments for individuals or couples becoming parents, and to their support, including financial support, taking into account their particular situations and needs. As parental leave is designed to give new parents time to adjust to life with their new child, it is only fair to extend the current parental leave to intended parents, as is already the case for adoptive parents, even if filiation has not (yet) been established with regard to one of the parents. The current discrepancies in this area are unfair and should be eliminated to ensure that all new parents benefit from equivalent leave and support.

- By extending the right to parental leave to intended parents in the context of surrogate arrangements, we underline the importance of supporting and respecting non-traditional situations of procreation. This is how we can promote inclusion and recognise the validity of the diversity of modern ways of starting a family, thereby fostering a more tolerant and empathetic society. The importance of this leave in newborn care is discussed below (point 2).

- **The protection of women's rights:**
The Committee reaffirms the importance of keeping maternity leave in place for surrogate mothers, since maternity leave is, by definition, granted to any woman who gives birth on account of the risks associated with pregnancy, childbirth and the period thereafter. This specific situation justifies adequate leave and measures to protect the health and rights of the surrogate mother, as well as to grant her a period of rest, even after giving birth to a stillborn child (beyond 180 days of pregnancy), as is the case for all pregnant women. For the same reasons, a possible "transfer" of maternity leave to the intended parents does not appear, in the first instance, to be the right way of allowing them to benefit from the time needed to build up the family cocoon and care for the newborn. Creating specific rights that do not compete with those of the surrogate mother is necessary in this case, and must be linked to the general discussion highlighted in the previous point on equality between the different forms of access to parenthood.

2) Concerning the child:

The **child's well-being** is fundamental. Granting the same parental leave rights to intended parents ensures that children born to surrogate mothers receive the same care and bonding time, which is essential to their development, as children raised in other families. Various studies have shown the importance of adequate support from the very first weeks of the

child's life, both for the child and for the parents. This makes a fundamental contribution to the health and well-being of all family members. This support includes all the necessary care and parental assistance. This aspect is fundamental from an ethical perspective, but also offers major advantages in terms of prevention and public health.

Based on these ethical principles, we recommend:

- extending parental leave to intended parents. The latter must be supported and treated in the same way as other people becoming parents, based on the principles of justice, solidarity and fairness in procreation, even if filiation has not (yet) been established with regard to one of the parents.

It should be noted that these principles apply not only to intended parents using a surrogate mother, but also to those seeking other family arrangements, such as intended co-parenthood. This increasingly common approach to starting a family also lacks adequate legal safeguards;

- maintaining the right to maternity leave for surrogate mothers as it currently exists.

Kind regards,

Jan De Lepeleire,

President of the Belgian Advisory Committee on Bioethics

This opinion letter was drawn up by Cathy Herbrand and An Ravelingien, co-chairs of the select committee "Gestation pour Autrui" (Surrogate Motherhood).