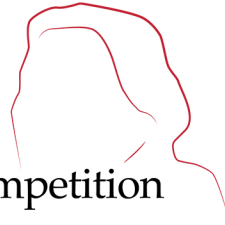


Helga Pedersen
Moot Court Competition



THE CASE OF THE

HELGA PEDERSEN

MOOT COURT COMPETITION

11TH EDITION - 2022

Kramer v. Zephyria

Facts

1. The applicant, Mr Anton Kramer, was born in 1995. His partner, Mr Luke Kramer, was born in 1993. Both of them live in Zephyria, a Council of Europe Member State. They are Zephyrian nationals.

Birth of B through gestational surrogacy and subsequent events

1. The applicant and Mr Luke Kramer entered into a registered partnership in Lari, Zephyria on 1 November 2019. Shortly afterwards, they explored the available parenting options in the country. As adoption by same-sex couples was not permitted by the local legislation, they opted for a gestational surrogacy. They underwent in-depth psychological and physical screening at the largest fertility clinic in Zephyria and were approved for surrogacy at that clinic.
2. With the assistance of an attorney, on 1 February 2020, they signed a gestational surrogacy agreement with Ms D.
3. Ms D was single and without children. At the relevant time, she was on unpaid leave from her employer (from 1 January 2020 to 31 December 2021), as she wanted to dedicate her time to travels and other personal projects.
4. The gestational surrogacy agreement specified that Mr Anton Kramer and Mr Luke Kramer would be the child's intended parents and Ms D would not have any legal or parental rights or any future contact with the child. Ms D agreed to become pregnant through an *in vitro* fertilisation (IVF), carry, and deliver the child for the applicant and his partner. According to the agreement, the IVF treatment would be performed with Mr Luke Kramer's sperm and an anonymous donor's eggs. The use of an anonymous donor, as opposed to the use of eggs by a known donor (Ms D) was preferred by the applicant and his partner. Ms D did not have any objections to the use of donor eggs.
5. The agreement further specified that Mr Anton Kramer and Mr Luke Kramer would cover all costs connected with the IVF treatment, including all medication for Ms D, as billed by the fertility clinic (the total amount of approximately EUR 8,000 per one IVF cycle). In addition, Ms D would receive EUR 5,000 per one cycle, as compensation for her time and any inconvenience connected with the fertility treatment or pregnancy (one half before the start of the IVF cycle, and the remaining part after the birth of the child). In addition, the applicant and his partner agreed to transfer to Ms D, during her pregnancy, at a flat rate of EUR 200 on a monthly basis as a contribution to her nutrition and any necessary pregnancy supplements and vitamins. The agreement was concluded for a maximum of three IVF cycles, with a possibility to renegotiate further, if all three cycles were unsuccessful. The agreement specified that Ms D was not paid for the surrogacy on a commercial basis, and that she would

not receive any other payment from the applicant and his partner before or after the birth of the child.

6. Ms D became pregnant following the first IVF treatment with the use of donor eggs and Mr Luke Kramer's sperm. The pregnancy was without any complications and Ms D remained in regular contact with the applicant and his partner, sharing updates about the foetal development and the state of her health.
7. Ms D gave birth to B on 19 March 2021 at 1 p.m. at the Central Hospital in Lari. The hospital was aware of the agreement between Ms D, Mr Luke Kramer, and Mr Anton Kramer. The applicant and his partner were present during the birth of the child. One hour after the birth of B, they transferred all remaining payments to Ms D's bank account.
8. Unbeknownst to the applicant and his partner, on the morning of 20 March 2021, Ms D filled out an application for B's birth certificate, indicating herself as the mother and Mr Luke Kramer as the father.
9. On 22 March 2021, upon B and Ms D's scheduled release from the hospital, Ms D refused to give the baby to the applicant and his partner. She told them about the entry in the civil registry. She explained that, upon seeing the baby, she had changed her mind and wanted to take care of the child. She explained that she felt like the baby's mother, as she was carrying him for nine months. Ms D wanted to return all money to them, but they refused to accept it, insisting that they are B's parents.
10. On the same day, based on legal advice provided by the hospital's legal department to the hospital's management, the hospital refused to discharge the baby to Ms D's care. Instead, based on the surrogacy agreement, the hospital gave B to the applicant and his partner. The hospital explained that it had to proceed on the basis of the established practice of honouring surrogacy agreements. The surrogacy agreement signed between Mr Anton Kramer, Mr Luke Kramer, and Ms D was the only legal document regulating the parental rights and responsibilities towards B. The agreement clearly stated that Ms D did not have any parental rights and that her role in B's life ended when she gave birth to him. Ms D had voluntarily agreed to this arrangement before her pregnancy, and was generously compensated for any reasonable costs incurred. As Ms D did not present any other document invalidating or amending the surrogacy agreement, she had no right to take the baby home with her.
11. From the moment Mr Anton Kramer, Mr Luke Kramer, and B came home from the hospital, Ms D tried to repeatedly visit them. She also contacted them by phone almost on a daily basis, until they changed their phone numbers. On each occasion, Ms D presented an emotional plea to spend time with B, which the applicant and his partner did not allow. Ms D ultimately informed them that she would lodge a criminal complaint against them for child abduction. Upon consultation with their lawyer, to prevent further altercations with Ms D, and to rectify the erroneous birth certificate, the applicant and his partner decided to seek recognition of

Mr Anton Kramer's paternity before a court, based on their registered partnership certificate and on the surrogacy agreement signed with Ms D.

Court proceedings for recognition of the applicant's paternity

12. On 11 April 2021, the applicant and his partner instituted proceedings for recognition of Mr Anton Kramer's paternity before the Lari City Court. Referring to the surrogacy agreement and their registered partnership certificate, they asked the court to issue an order to change B's birth certificate indicating both of them as B's parents. They requested the court to protect their private and family life by recognising the validity and enforceability of the surrogacy agreement. They argued that although the law stated that a woman who gave birth to a child would be regarded as the child's mother, Ms D had clearly and unambiguously relinquished her parental rights to Mr Anton Kramer and Mr Luke Kramer. These agreements should be honoured just as any other private agreement. The agreement did not allow Ms D to change her mind after the birth of the child. As Ms D's unilateral revocation of the surrogacy agreement was not possible under the agreement, it should not be afforded any legal relevance.
13. The court held two public hearings on the matter. Ms D, acting as intervener, submitted that she was legally the child's mother, as she gave birth to him and her name was on the child's birth certificate.
14. The applicant and his partner maintained that it was in B's best interests to have them both as his *de jure* and *de facto* parents. B was a child born to a loving couple who had gone to great lengths to become his parents and had prepared a caring home for B. Gestational surrogacy was the only option for them to have a child in Zephyria. The role of Ms D in B's life was accidental, as any other woman could have acted as a surrogate. She should not be allowed to fulfil her wish to become a mother at the financial and emotional expense of B's parents. If she wanted to have a child, she could undergo an IVF treatment with the money received from B's parents.
15. At a public hearing of 1 September 2021, the Lari City Court ruled in favour of the applicant and his partner. It ordered to remove Ms D from B's birth certificate and to indicate Mr Anton Kramer, together with Mr Luke Kramer, as B's parents. The court opined that neither Mr Anton Kramer nor Ms D had any biological link to the child. Nevertheless, the applicant's paternity and parental rights clearly stemmed from the surrogacy agreement, which was not the case for Ms D. The surrogacy agreement did not allow Ms D to unilaterally revoke her consent after the birth of the child. The court concluded that the surrogacy agreement should be respected based on the well-established domestic practice.
16. On 29 September 2021, the Malenian Regional Court granted Ms D a leave to appeal and scheduled a public hearing, which took place on 5 December 2021. Ms D argued that it was in the child's best interests to live with her and to have her as the mother in the birth certificate.

17. On 1 June 2022, the Regional Court ruled that domestic law demanded that Ms D be registered as the child's mother and that the child's best interests warranted that the child knows his birth mother. It was irrelevant that Ms D did not have any biological link to the child. While mindful of a private agreement, such as the present surrogacy one, the latter should not supersede the mother's parental rights. Accordingly, and in the circumstances, the surrogacy agreement was not relevant.
18. Further, the court considered it irrelevant that the child had spent a period of time since his birth with the applicant and his partner. It concluded that it would not be healthy for the child to maintain any contact with them based on an expert report by a psychologist. In his report, the expert psychologist stated that a 2005 Zephyrian scientific research had showed that strong psychological and physical bonds between the child and the mother were created during pregnancy. The research conclusions applied to surrogate mothers as well.
19. The court opined that although Ms D did not have biological ties with the child, she carried him for 9 months, developed emotional and psychological ties with the child and, as a woman, was biologically and emotionally better placed to raise a child. Accordingly, the Regional Court ordered that the child be placed in Ms D's care, while allowing Mr Luke Kramer visitation rights. As Ms D did not request any alimony payments from B's biological father, the court did not rule on the child support obligations.
20. As the judgment of the Regional Court was enforceable immediately after its adoption, on 2 June 2022, the social services removed B from the house of the applicant and his partner, and handed him over to Ms D.
21. Mr Luke Kramer immediately initiated a set of civil proceedings against Ms D for B's custody. The proceedings are still pending before the Lari Civil Court.

The applicant's request to adopt B

22. On 11 April 2021, in parallel to the proceedings for recognition of the applicant's paternity, the applicant filed an application for B's adoption with the State Adoption Agency. His application was dismissed on 2 August 2021 on the ground that the law did not permit an individual in a same-sex registered partnership to adopt a biological child of his or her registered partner. In any event, the child's mother did not agree with the adoption. The decision was upheld by the Lari City Court on 17 February 2022 and, on appeal, by the Malenian Regional Court on 27 May 2022.

Constitutional complaint

23. On 23 June 2022, the applicant submitted a complaint to the Constitutional Court against both decisions of the Regional Court. He argued that, in its decision of 1 June 2022, the Regional Court had erred in the application and interpretation of domestic law and practice and that the decision had violated his right to private and family life. The complaint centred

- on the existence of *de facto* family ties, on the direct biological link between B and the applicant's partner, and the fact that the applicant, who was B's intended parent as per the surrogacy agreement and the partner of B's biological parent, had acted as B's father since his birth. The applicant underlined that the nature and duration of his and B's *de facto* family life should have played a role in the court's reasoning.
24. Further, the applicant complained that the Regional Court had given unlawful preference to the fact that Ms D had given birth to the child and completely disregarded the fact that she had no biological link to the child and had not spent any time with B before the child was forcibly removed from the applicant and his partner's home.
25. Regarding the Regional Court's second decision of 27 May 2022, the applicant complained that he was discriminated against on the basis of his sexual orientation. He, as the partner of B's biological father, was prevented from adopting B solely on the ground of his sexual orientation. If he was not allowed to be on B's birth certificate, he should have at least be able to adopt B, his partner's biological child. The lack of Ms D's consent was irrelevant. While adoption was possible for different-sex married couples, he was deprived of a possibility to adopt B.
26. On 1 August 2022, the Constitutional Court rejected the first part of the applicant's complaint and found that a *de facto* family life of such a duration did not attract the protection of Article 8 of the European Convention of Human Rights (the Convention) and did not amount to a violation of the applicant's constitutional rights. The child had a mother who was recorded on his birth certificate. Accordingly, the applicant, who was not the child's biological father, could not be recorded on B's birth certificate in addition to Ms D and Mr Luke Kramer. Ms D was correctly indicated on B's birth certificate as his mother and, nevertheless, it was in B's best interest to have a mother and to have a family life with her. The Constitutional Court concluded that the applicant could therefore not claim to be a victim of violation of any rights guaranteed by the Constitution or the Convention.
27. Regarding the second part of his complaint, the Constitutional Court held that the applicant's complaint amounted to a request to review the local legislation. As the Constitutional Court was not competent to review such requests, the second part of the applicant's complaint was found inadmissible.
28. On 2 September 2022, the applicant submitted an application to the European Court of Human Rights alleging violations of his rights under Article 8 of the Convention, Article 1 of Protocol No. 12. He also stated that he did not have an effective remedy as required by Article 13 of the Convention.

Law

29. Zephyria is a Council of Europe Member State. It is not a Member State of the European Union. It has ratified all major Council of Europe, all additional protocols to the Convention,

and the core United Nations human rights treaties.¹ Zephyria is a country with a civil law system.

The Constitution

30. The Constitution incorporates all rights guaranteed by the Convention and its Protocols.
31. If individuals consider that their human rights were violated by final decisions of regional courts, they can file a complaint with the Constitutional Court. The deadline for filing such a complaint is 30 days after the adoption of the regional court's judgement. The Constitutional Court will examine the individual complaints and, if it considers that one or more rights of the applicant were violated, it may quash the challenged decisions, order the court or the relevant State authorities to act or to refrain from acting in a certain way, and order just satisfaction for material or non-material damage suffered. The European Court of Human Rights has accepted the constitutional complaint in Zephyria as an effective remedy for the alleged violations of rights guaranteed by the Convention that needs to be exhausted before reverting to the European Court of Human Rights.
32. In their constitutional complaints, the individuals cannot request the Constitutional Court to review compliance of the Zephyrian legislation with the Constitution or the Convention. The European Court of Human Rights have not yet considered a case against Zephyria where the applicant argued that the alleged violation of their Convention rights stemmed directly from legislation.

Same-sex registered partnerships

33. Registered partnerships in Zephyria became legal on 1 October 2019. They are available only for same-sex couples as an alternative to marriage. Marriage is available only for different-sex couples. Registered partners have the same rights as married couples, except for a possibility to adopt children.

Adoptions

34. Adoptions are available only to different-sex married couples. In addition to a joint adoption of a biologically unrelated child, a husband or a wife can also adopt a biological child of his or her spouse, if there is no other biological parent, or if the other biological parent has agreed with the adoption. The applications are reviewed by the State Adoption Agency. Its decisions may be challenged before the civil courts. If it is in the child's best interest, the courts may exceptionally allow adoption even in the absence of an explicit consent by the child's biological parent(s).
35. While some discussions have taken place in Parliament regarding adoptions by individuals, including individuals in same-sex registered partnerships, and joint adoptions by same-sex

¹ <https://www.ohchr.org/en/core-international-human-rights-instruments-and-their-monitoring-bodies>

couples, there is no clear support nor disapproval for such legislative changes in the future. The discussions have been on hold since January 2020. The opponents rely on, among others, the 2005 research by leading Zephyrian children development psychologists (see above).

The Family Law

36. Article 70 of the Family Law reads that a woman who gives birth to a child shall be regarded as the child's mother, unless she relinquished her parental rights after the birth of the child to the State authorities or to another person.
37. Under Article 79 of the Family Law, children shall be registered in the civil registry immediately after their birth. The application can be filed by one of the parents either at a hospital or at the local civil registry in the area of residence of either parent.

The Code of Civil Procedure

38. Claims for establishing paternity and/or maternity are decided in non-contentious civil proceedings. Non-contentious proceedings do not have opposing parties and may be instituted either *ex officio* or by a concerned individual. The courts can take any evidence necessary to establish facts, including hearing expert witnesses *ex officio* or at request of a party or an intervener.
39. Any individual whose rights may be affected by non-contentious proceedings can act as an intervener, upon their own request or upon a request by a court, and submit arguments and/or evidence. They can appeal only if granted leave to appeal. Before granting leave to appeal, the court must establish that the intervener may suffer irreparable consequences.
40. Civil courts have jurisdiction to consider non-contentious civil proceedings. In Zephyria, the civil court system consists of city courts and regional courts acting as second-instance courts. Decisions of city courts may be challenged before the competent regional courts within 30 calendar days from the date when the decision was adopted. The decisions of the regional courts are immediately final and enforceable and are not subject to further appeal (except for the possibility of filing a constitutional complaint set out above).
41. If there is a need for urgent measures in the best interests of a child, the courts may take such measures *ex officio* in the context of the non-contentious civil proceedings (e.g. immediate removal of a child from the care of one or both parents, temporary custody, alimony payments, prohibition of contact, supervision by social services, etc). If either of the affected individuals does not agree with the decision, they may initiate a separate set of regular civil proceedings.

Gestational surrogacy agreements

42. Zephyria does not have a law regulating surrogacy. However, in the past ten years, State institutions, such as the civil registries, have regularly accepted gestational surrogacy agreements as a basis for entries into birth certificates. While the courts have regularly accepted “altruistic” (i.e. non-commercial) surrogacy agreements, they have dismissed claims for recognition of maternity/paternity and/or parental rights based on commercial surrogacy agreements, i.e. agreements where the amount paid to the surrogate “significantly exceeded reimbursement of reasonable costs”, usually exceeding EUR 30,000 per one IVF cycle.
43. Article 70 of the Family Law was originally meant to cover situations where mothers decided to give their children for adoption after the birth of the child. Even though not originally intended to extend to surrogacy agreements, this provision is referred to by the courts when accepting surrogacy agreements. The courts have accepted that surrogates, by signing a surrogacy agreement before the child’s birth, effectively relinquished their parental rights within the meaning of Article 70 of the Family Law. The courts have not yet dealt with a case where a surrogate would change her mind after the birth of the child.
44. Since the early 2000s, and in addition to the local population, fertility clinics in Zephyria have been frequently used by clients travelling from abroad to undergo IVF treatments with the use of surrogates. In 2009, especially with a view to preventing child trafficking and considering the best interests of children-to-be-conceived, the five largest fertility clinics in Zephyria agreed on common standards and procedures. The clinics regularly review and update these standards almost on a yearly basis. In particular, fertility clinics conduct in-depth psychological and physical screening of potential candidates against specific criteria based on medical and psychological research primarily emphasising the best interests of the children-to-be-conceived. Ultimately, approximately two-thirds of candidates are rejected by the clinics. The other smaller fertility clinics in Zephyria, while not being a part of this formal cooperation, generally follow the procedures and standards established by the larger clinics.