

The Legal Aspects Of Surrogacy In Argentina

Produced By Núñez Martínez Abogados



LEGAL ASPECTS OF GESTATIONAL SURROGACY IN ARGENTINA¹

The legal situation in Argentina surrounding gestational Surrogacy is very favourable, both for Argentine nationals and foreigners.

At present, there is no specific NATIONAL legislation on surrogacy.

However, there are other rules that are applicable to surrogacy processes, such as the principle of procreative intent established in the Argentine Civil and Commercial Code, international conventions on Human Rights, (Regulation 93/2017, 103/2017 and 122/20 only for the Autonomous City of Buenos Aires), including the Argentine Constitution.

The fact that there are no specific rules does not mean that surrogacy is prohibited. Quite the contrary. There is a constitutional principle which clearly states that everything that is not forbidden is allowed.

a) Current Argentine Civil and Commercial Code.

The new Argentine Civil and Commercial Code, in force since August 1, 2015, introduces the concept of PROCREATIVE INTENT, as a source of filiation in assisted human reproduction. In order to determine filiation of a baby born by means of AHR, the procreative intent to give life to the child will be considered, regardless of the gamete donation.

b) Regulations 93/17 amended by Regulation 103/2017 and 122/20 of the Autonomous City of Buenos Aires.

In the Autonomous City of Buenos Aires, no judicial proceedings are required, nor any judicial request since there is a special regulation on surrogacy.

Regulation 93/DGRC/17 as amended by Regulation 103/2017, as amended by REGULATION No. 122/DGRC/20 provides that: Section 1. *"As a precautionary measure, the births of minors born through highly complex Assisted Human Reproduction Techniques, known as gestational surrogacy, are authorized to be registered under the following conditions: 1) That they are minors born in the Autonomous City of Buenos Aires by gestational surrogacy; 2) That the procreative intent of the parents has been expressed in a previous, free and informed manner; 3) That the gestational carrier has previously and duly expressed that she does not have procreative intent; and 4) That the registration must be made as a precautionary measure, and the data of the gestational carrier must be recorded in the file."*

¹ Report made by Ms. Maria Ester Nuñez www.abogadosnuma.com (ester@abogadosnuma.com)

Consequently, the intended parents have the right to register children born by surrogacy in the Autonomous City of Buenos Aires if the following requirements are met:

- Gestational surrogacy (AHR) can be performed in Argentina or abroad.
- The child must be born in the Autonomous City of Buenos Aires.
- The gestational carrier must sign, in the presence of a notary and before the beginning of the treatment, an INFORMED CONSENT stating that she has NO PROCREATIVE INTENT FOR THE PROCEDURE OF ASSISTED HUMAN REPRODUCTION OF HIGH COMPLEXITY WITH DONATED GAMETES KNOWN AS GESTATIONAL SURROGACY.
- The intended parents must sign, in the presence of a notary and before the beginning of the treatment, an INFORMED CONSENT stating that they HAVE PROCREATIVE INTENT FOR THE PROCEDURE OF ASSISTED HUMAN REPRODUCTION OF HIGH COMPLEXITY WITH THEIR OWN GAMETES OR DONATED GAMETES KNOWN AS GESTATIONAL SURROGACY.

This is the only regulation of its kind in the country, and it is only in force in the Autonomous City of Buenos Aires.

If these requirements are met, the birth certificate of the child born by this technique will be drafted with the name of the parents/intended parents. This means that there is no need to request that the Court approve the correct registration of the child.

After the birth of the baby, the Registry Office issues the birth certificate (where the intended parent/s are registered as parents), the Argentine identity document and the Argentine passport for the child, without judicial intervention. This is done through a short-term administrative procedure.

The aforementioned regulation -no. 93/DGRC/2017-, as amended, does not establish exclusions regarding the persons who can carry out the surrogacy process.

This means that both Argentine citizens and foreign citizens (residing or not in the country) can do it, and also families of all types and genders (heterosexual couples, male couples, female couples, single males, single females, other non-binary genders, etc.) can perform the surrogacy process.

Fortunately, there are no exclusions regarding the age of the future parents, nor their marital status, as they can be married, unmarried couples, or single.

It is not even necessary that the AHR procedure be performed in Buenos Aires, the treatment can be performed in any clinic in the country or abroad, but for the application of the law, the birth must take place in the Autonomous City of Buenos Aires.

In the event that the requirements are not met, the aforementioned law cannot be applied, and the Registry Office will not register the child directly. In that case (in the event of non-compliance

with the requirements), a lawsuit must be filed to obtain the registration of the child in favor of the intended parents or parents.

This does not mean that the right is "lost" with respect to the child, but that it must be claimed in court.

- **Registration of birth. BIRTH CERTIFICATE of the newborn baby**

The Registry Office of the Autonomous City of Buenos Aires, in accordance with the aforementioned regulation, must issue the respective birth certificate (birth record) of the newborn baby with the name of the intended parents as parents.

That is to say, with the name of those who have expressed their procreative intent in the informed consent. The regulation states that the data of the gestational carrier shall be recorded in the minor's file (not in the birth certificate, but in the file), in order to protect the minor's right to identity (who, being of legal age, may request information on the woman who gestated him/her).

Therefore, there is no variation on birth certificates of children born through surrogacy.

This does not mean that the data of the gestational carrier will be "anonymous" but simply that there will be a confidential file in the registry with the data of the gestational carrier, a file that can only be accessed by those parties with the right to do it, or by those who have a legitimate interest by means of judicial authorization.

The fact that the regulation states that the registration is "precautionary" does not mean that it is not FINAL, the registration is FINAL, as long as it is not judicially ordered otherwise. At the Registry Office, a "registry aspect" is recorded after the AHR, to give automatic legal certainty to the filiation data of the child born by surrogacy, therefore, if there is no judicial order to the contrary, the registration is FINAL. The RIGHT TO IDENTITY and the RIGHT TO IMMEDIATE REGISTRATION is protected.

- **IDENTITY DOCUMENT AND PASSAPORT of the newborn baby.**

All children born within the country through surrogacy are automatically considered Argentine citizens, regardless of the citizenship of the parents, and therefore, they will receive their Argentine identity documents and passports. This is essential in these cases since the newborn baby will be able to travel abroad with its parents in a short period of time.

There is no risk of the child being "stateless", which is very common in other countries and is an extremely serious situation.

Then, the future parents will be able to convey their own citizenship to their son or daughter, and depending on their country of origin, the minor will have dual citizenship, or they will be able to renounce directly to the Argentine citizenship once they have their own.

- **Personal care and parental responsibility of the child.**

The custody and parental rights of the newborn baby (in Argentina this is currently called personal care and parental responsibility) is in charge of the parents or intended parents, from the moment of birth, and in some rulings it has even been determined that the parental authority is retroactive to the moment of conception.

The gestational carrier, pursuant to the aforementioned legislation, case-law, and specialized jurisprudence, does not have any guardianship or custody rights over the minor at any time.

- **Foreign citizens living abroad.**

For citizens residing in other countries, contracts and/or legal proceedings are carried out pursuant to Argentine regulations and in accordance with the legislation of their countries of origin, so that the foreign intended parents may obtain the acknowledgment of the baby's filiation in their own countries.

For example, for Chilean citizens who come to Argentina to carry out a surrogacy treatment, the Argentine regulations and the birth certificate issued by the Autonomous City of Buenos Aires Registry with the name of the intended parents, -in this example Chilean citizens-, is fully compatible, so that these Chilean parents can obtain the normal recognition of the child's filiation in Chile, without any additional administrative or judicial procedure, other than going through the Chilean consulate.

In other cases, for example Spanish or French single women, in accordance with the status quo of the matter in Spain or France, in addition to the birth certificate issued by the Autonomous City of Buenos Aires Registry, a precautionary measure will be necessary, in which an Argentine judge will establish maternity and thus, through an Exequatur procedure, the filiation of the child will be recognized in France or Spain, since there will be no record in the medical records of the country of origin of any pregnancy of the intended mother.

Therefore, in the case of foreigners, although surrogacy in Argentina is completely legal, it is necessary to take certain legal steps according to the existing regulations in the countries of origin, to ensure that the recognition of filiation is agile and without complications, and the children born by this technique can acquire their parents' citizenship.

If there is any type of difficulty in the countries of origin, it does not mean that the parents "lose" the right to their children, nor that they lose custody, nor that they cannot take them out of the country, but simply that the State of the country of origin may take some years to grant them the citizenship, therefore, the children should and may live normally with Argentine citizenship in the country of origin of their parents.

Let us emphasize that surrogacy procedures in Argentina for non-resident foreigners are completely viable and lawful and there is no discrimination of any kind, all types of families can resort to surrogacy.

In summary, the characteristics in Argentina are as follows:

- Highly favorable situation, Argentina is a safe and surrogacy-friendly country.
- Filiation is determined by procreative intent.
- Choice of the baby's sex is allowed
- Gamete donation can be anonymous or open identity
- The gestational carrier has no guardianship or custody rights over the baby born. (In some rulings, parental rights have even been determined retroactively to the date of conception).

María Ester Núñez

Cell Phone: +54 (911) 64201034

www.abogadosnuma.com

**Tte. Gral Peron 315 piso 6° oficina 23 (CP 1038)
CABA - Argentina**