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Παρένθετη μητρότητα στην Ελλάδα: Στατιστικά δεδομένα από δικαστικές αποφάσεις

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Περίληψη

Η «μερική υποκατάστατη* [παρένθετη] μητρότητα», δηλαδή η περίπτωση όπου μια γυναίκα (*«φέρουσα»* ή *«κυοφόρος»*) κυοφορεί ξένο προς εκείνη γεννητικό υλικό και γεννά για λογαριασμό μιας άλλης γυναίκας η οποία επιθυμεί να αποκτήσει τέκνο αλλά αδυνατεί να κυοφορήσει, ρυθμίστηκε με τους νόμους 3089/2002 και 3305/2005 για την Ιατρικώς Υποβοηθούμενη Αναπαραγωγή (ΙΥΑ) και προκάλεσε έντονο προβληματισμό με ηθικοκοινωνικές όσο και αμιγώς νομικές διαστάσεις.

Οι νομικές διατάξεις σχετικά με την παρένθετη μητρότητα είναι συνεπείς προς το γενικότερο πνεύμα που διαπνέει το νομοθέτη στα ζητήματα της ΙΥΑ: *ανεκτικότητα* που ισορροπεί επιτυχώς ανάμεσα στις αντικρουόμενες αντιλήψεις, επιλέγοντας την κατ' αρχήν αποδοχή σχεδόν κάθε δυνατότητας υποβοήθησης, με έμφαση στην σαφήνεια των σχετικών ρυθμίσεων, αλλά και αξιοσημείωτη *εμπιστοσύνη* στην ειλικρίνεια των προθέσεων των ενδιαφερομένων καθώς και -στην περίπτωσή μας- στην ελεγκτική και διαγνωστική της ειλικρίνειας αυτής ικανότητα του δικαστή.

Η παρούσα έρευνα παρουσιάζει τα αποτελέσματα στατιστικής αποδελτίωσης 281 δικαστικών αποφάσεων που χορήγησαν σε γυναίκες με ιατρική αδυναμία κυοφορίας άδειες προσφυγής σε παρένθετες μητέρες προκειμένου να αποκτήσουν το παιδί που επιθυμούν, στο πλαίσιο του άρθρου 1458 ΑΚ. Σε παράρτημα επισυνάπτεται σύνδεσμος ηλεκτρονικής πρόσβασης στον αναλυτικό πίνακα των δεδομένων της έρευνας, όπου, με χρήση φίλτρων, δίνεται η δυνατότητα στον αναγνώστη, να εμβαθύνει στη μελέτη τους.

* Στην *μερική* υποκατάστατη μητρότητα, η παρένθετη μητέρα κυοφορεί γονιμοποιημένα ωάρια ξένα προς την ίδια, σε αντίθεση με την *πλήρη* υποκατάστατη μητρότητα, στην οποία η παρένθετη μητέρα παραχωρεί όχι μόνον τη μήτρα της αλλά και τα ωάριά της, με αποτέλεσμα να είναι ολοκληρωτικά η βιολογική μητέρα του τέκνου που γεννιέται. Η πλήρης υποκατάστατη μητρότητα δεν επιτρέπεται από την ελληνική νομοθεσία.

Surrogate Motherhood in Greece: Statistical Data Derived from Court Decisions

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Abstract

Gestational surrogacy is legal in Greece since 2002, under conditions that include a court decision granting permission prior to the transfer of reproductive material to the gestational surrogate.

Quantitative and qualitative statistical data compiled from 256 relevant court decisions issued between 2003 - 2017 outline the profile of intended mothers (and fathers) that resorted to gestational surrogacy as well as the profile of women that offered to become gestational carriers. Core aspects of the evergreen legal and social debate on surrogate motherhood are revisited under the light of this indicative part of its application in practice.

1. Introduction

The Greek legal definition of a "gestational surrogate mother" refers to a woman (*«φέρουσα»* or *«κυοφόρος»*) that carries the pregnancy and gives birth to a child for another woman (intended mother), who wishes to have the child but is unable for medical reasons to carry it to term; Non-commercial gestational surrogacy[1] has been allowed in Greece under the two laws on Medically Assisted Reproduction (Law 3089/2002[2] - incorporated in the Greek Civil Code- and Law 3305/2005). The legal provisions on gestational surrogacy are consistent with the general spirit that runs through the Greek legislation on assisted human reproduction, namely tolerance with an eloquent element of trust towards the candour of the intentions of the parties involved[3] as well as towards the ability of the court to diagnose and confirm it. The relevant legislation aims to balance the different legal and social perceptions, while it emphasizes on the implementation of a system of concrete rules that are supposed to practically void any attempt of whatever it considers as 'undesired' or 'foul play'.[4]

This survey[5] examines the relevant experience, during fourteen years of the law's imple-

[1] Also referred to as "partial" surrogacy, namely when the surrogate is a gestational carrier that has foreign reproductive material transferred to her uterus and carried to term by her as a birth mother, as opposed to the traditional ("full") surrogacy, where the surrogate mother offers not only her uterus but also her own reproductive material (ova), thus being not only the birth mother but also the biological mother of the child. Traditional ("full") surrogacy is not permitted under Greek law.

[2] An English translation of the law is available at the Hellenic National Bioethics Commission's website (retrieved on 17.09.2017): http://bioethics.gr/images/pdf/ENGLISH/BIOLAW/MEDICALLY_ASSISTED_REPRODUCTION/law_3089_en.pdf

[3] Shortly after the enactment of the first law on medically assisted human reproduction (law 3089/2002), Professor A. C. Papachristos, [see supra note 3, also member of the law's Lawmaking Committee] wrote in the introduction of his book *The artificial reproduction in the Civil Code*, (in Greek) (2003: 26): "*The question that is raised refers to the efficiency of the new legal provisions in the social reality. Will the interested parties abide by the legal provisions, or will the medical practice, despite the daring of the law, operate beyond the law's limits? […] The main burden of this responsibility belongs to the persons interested. The law has shown an understanding to their problems and has trusted their choices. The frustration of those expectations will challenge the authority of the law as regulator of social life. In any case, the implementation of the new legal provisions will show whether and up to what extent the legislator's decision to move beyond certain legal constants in order to provide solution to reality's problems was an act of "humanization" of the legal regulations or, on the contrary, it has been a forced decision that endangers fundamental values. And, of course, the whole legislative enterprise is connected to a final question:[…] Was it worth bringing such fundamental changes to the legal system and also, indirectly, to the value system, in order to satisfy the wishes of relatively few persons? The law answered affirmatively. This justification of its choice shall be found in practice.*

[4] E.g.: commercialism, recourse to gestational surrogacy for merely aesthetic or career reasons.

[5] The first research on Court Decisions that have granted permission for gestational surrogacy in Greece had been conducted in 2010, by ms Kyriaki V. Kokkinaki -at that time, postgraduate student in the Postgraduate Programme of Studies in Civil Law at the National and Kapodistrian University of Athens-; data from 71 relevant Court decisions, issued between 2005 and 2009 was gathered and studied and the conclusions were included in her Diploma Thesis under the title "*The Court permission for the use of a surrogate mother- Empirical research at the Court of First Instance of Athens*", which Diploma Thesis was written under the supervision of Professors Dimitra Papadopoulou-Klamari and Evgenia Dakoronia, Faculty of Law, National and Kapodestrian University of Athens. Access to the aforementioned Diploma Thesis (in Greek) is available at http://www.openarchives.gr/view/510670 (retrieved on 26.09.2017).
The present research has been conducted between November 2009 - June 2017 under the aegis of the Hellenic National Bioethics Commission, with inspiration and invaluable advice received from the Late emer. Professor A. C. Papachristos (Faculty of Law, Departments of Civil Law and Sociology of Law, National and Kapodistrian University of Athens); initially, case-law of the years 2003-2009 has been collected, in December 2009 - January 2010, in cooperation with ms Archontiki Chlomou (barrister, stagiaire, at the time, to Hellenic Bioethics Commission); case - law of the following years is being collected regularly thereon; the compilation of the statistical data has been conducted by Irini Kourou (barrister, doctoral student in Civil Law, University of Athens); strictly statistical/anonymized data was gathered from a total of 281 court decisions issued on applications for the necessary permission to resort to a gestational surrogate mother. The source of the court decisions was mainly the archive of the Athens' Single Member Court of First Instance, Athens'

mentation (2003-2017) and outlines the profiles of intended mothers and fathers[6] as well as the gestational surrogates (marital status, age, nationality and the nature of relation between them). The data is gathered from 281 decisions of the courts that tried applications for permission to have reproductive material transferred to a gestational surrogate. Despite the rather 'technical' nature of this approach, few necessary comments seek to add to an effort to have the core issues raised during the social and legal debate on surrogate motherhood in Greece[7] revisited under the light of an indicative part of its application in practice.

1.1 Social Context

Some demographic information is necessary to help read the findings of this survey into their social context.

According to the latest statistical data available,[8] 105.792 children per year on the average have been born in Greece from 2002 to 2015. The total fertility rate has a serious downward tendency from 1980 (2.2) to 2015 (1.3) thus remaining under the limit of generation renewal, which is set on 2.1. The mean age of mothers at birth was 31.3 years old in 2015 compared to 29.5 years old in 2003 and 26.8 years old in 1975. As far as assisted reproduction is concerned, it is claimed that an average 15 percent of Greek couples in reproductive age experience fertility problems that make them potential clients of the 50 assisted reproductive technology clinics that operate in the country.[9]

District Court and Athens' Multi-Member Court of First Instance, whereas decisions from the Courts of First Instance of other cities (mainly Thessaloniki) were processed in the form that they have been published in the electronic databases of the Athens' Bar Association ("Isokratis", www.dsanet.gr), thus often containing a considerably less amount of data. This fact explains the parts of the charts where "no reference" (N/R) is cited, i.e. "no reference" does not indicate that there have been incomplete court decisions; it most often results from the fact that the relevant information was merely unavailable to the reader of the specific decision, though most certainly all necessary documentation was contained in the files submitted to the court. Wherever cited, case numbers have been altered in order to ensure the protection of the sensitive personal of the parties involved. The author is grateful to Dr. Takis Vidalis (scientific officer to the Hellenic Bioethics Commission) and Dr. Nikos Koumoutzis (Assistant Professor, Department of Law, University of Nicosia) for their insightful comments and their help in reviewing this article. A Greek version of this article, with data gathered from 128 relevant cases (2003-2012) has been published under the title "Surrogate motherhood: a statistical test of the Legislator's expectations" in Papachristos A. - Kounougeri-Manoledaki E. (ed.). *Family Law in the 21st century - from circumstancial to structural changes.* Sakkoulas, Athens-Thessaloniki, 2012.

[6] Case law has -initially- extended to infertile, lonely men the ability to apply for a court permission to resort to a gestational surrogate mother (see infra, chapter 2.1).

[7] The intensity of the debate on surrogate motherhood was in contrast with the political consensus that characterized the enactment of the laws on assisted reproduction; the relatively mild political debate has been justified in the name of the fight against the serious problem of low birth rate and fertility in Greece (see Rethymiotaki E. Maternity and fatherhood: a comparative analysis of the Greek and French legislation on assisted human reproduction. In Maropoulou M. (Ed.). *The Body, the Sex and the Gender Difference*. Editions of the National and Kapodestrian University of Athens and the Study Programme on Gender and Equality Issues (in Greek), Athens, 2008:58. See also the 11.10.2002 Recommendation of the Hellenic National Bioethics Commission on the bill on "Medically Assisted Human Reproduction", comments on Greek Civil Code article 1458, in National Bioethics Commission (2008). *Reflections on contemporary issues, Opinions and Reports 2000-2008*. (in Greek). Athens, 2008:103. See also Kounougeri-Manoledaki E. Surrogate Motherhood in Greece. *The International Survey of Family Law*. 2005: 267.

[8] Source: Hellenic Statistic Authority (ELSTAT) - Living Conditions in Greece (electronic publication, in Greek and in English) http://www.statistics.gr/el/living-conditions-in-greece, http://www.statistics.gr/documents/20181/2810519/LivingConditionsInGreece_0917.pdf/18b5052f-efbb-4030-a94c-7a13d15838fd [retrieved in 26.09.2017]
See also:"Eurostat" statistics with interesting comparative data references to the EU-28 member states, (retrieved on 24.09.2017): http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Total_fertility_rate,_1960%E2%80%932015_(live_births_per_woman)_YB17.png.

[9] Source: Assisted reproductive technology in Europe: results generated from European registers by ESHRE; [European Society of Human Reproduction and Embryology] https://academic.oup.com/humrep/article/31/8/1638/2379971/Assisted-reproductive-technology-in-Europe-2012

Table 1. Demographic indicators.

YEAR	BIRTHS	AVERAGE AGE OF THE MOTHER AT BIRTH	TOTAL FERTILITY RATE	ASSISTED REPRODUCTION TREATMENT CYCLES [10]	COURT DECISIONS GRANTING PERMISSION FOR GESTATIONAL SURROGACY [11]
1975		26,8	2,3		
1980		26,1	2,2		
1990		27,2	1,4		
2000		29,5	1,3		
2002	103.569	29,3	1,3		
2003	104.420	29,5	1,3	9.790	9
2004	105.655	29,7	1,3	9.180	9
2005	107.545	29,9	1,3	11.110	13
2006	112.042	29,9	1,4	3.971 (9)	16
2007	111.926	30,1	1,4	2.503 (9)	17
2008	118.302	30,2	1,5	2.476 (6)	20
2009	117.933	30,3	1,5	2.310 (4)	18
2010	114.766	30,4	1,5	3.693 (9)	20
2011	106.428	30,5	1,4	5.185 (11)	14
2012	100.371	30,7	1,3	8.207 (20)	12
2013	94.134	30,9	1,3		21
2014	92.148	31	1,3		26
2015	91.847	31,3	1,3		35
2016					26
AVERAGE 2002-2015	**105.792**	**30,26**	**1,36**	**10.027**	**18**

Relevant data are also available for previous years. Unfortunately only 4 out of 50 clinics in Greece seem to have reported in 2009, only 6 in 2008 and only 9 seem to have reported in 2006, 2007 and 2010, much less than the 16 out of 49 that reported in 2006 and 2005 and the 22 out of 44 that reported in 2004; hence, the recorded number of 3.693 treatment cycles for 2010 is most probably inaccurate (10.110 treatment cycles were recorded in 2005, 9.180 in 2004, 9.790 in 2003 accordingly).

[10] Source: Assisted reproductive technology in Europe: results generated from European registers by ESHRE; the number in brackets refers to the number of those of the 76 in total fertility treatment clinics operating in Greece that did actually report the relevant data and took part at the annual research of ESHRE [European Society of Human Reproduction and Embryology]. https://academic.oup.com/humrep/article/31/8/1638/2379971/Assisted-reproductive-technology-in-Europe-2012.

[11] This number refers only to the total number of Court decisions that have been monitored in the present survey and is updated until June 2017.

1.2 Legal provisions regarding gestational surrogacy in Greece

Gestational surrogacy is legal in Greece provided that court permission is issued prior to the transfer of reproductive material to the gestational surrogate; the relevant application is submitted by the intended mother to the Multi-Person First Instance Court[12] of the city of her or the gestational surrogate's residence and is tried under the rules of non-contentious jurisdiction.[13] The legal prerequisites for a court permission to be granted are the following:

1) The intended mother has to be medically unable to carry a child to term[14] whereas still in reproductive age,[15] thus not older than 50 years old, according to an age limit specifically set by art.4 of Law 3305/2005.[16] Hence, only a medical necessity justifies the resort to gestational surrogacy. Furthermore, the gestational surrogate and the intended parent(s)[17] have to undergo medical examinations to ensure that they do not suffer from HIV 1, HIV2, hepatitis B, C and syphilis.

2) The gestational surrogate mother has to be medically fit to carry a child to term,[18] thus, it has to be assured that a pregnancy will not be dangerous to her health or the health of the foetus; moreover, she has to undergo a thorough psychological evaluation.[19]

3) The gestational surrogate mother has to be more than 25 years old and less than 45 years old; she must already have given birth to at least one child of her own and she must not have already been subjected to more than two caesarean sections.[20]

4) The Court must be presented with a written agreement between all the parties involved, namely the intended parent(s) as well as the gestational surrogate and her husband or partner (if she is married or has entered a registered partnership),[21] including an expressly stated clause

[12] Initially, the subject matter of gestational surrogacy permissions belonged to the jurisdiction of the Single-Member Courts of First Instance. On 1.3.2012, the jurisdiction had been transferred to the District Courts (art. 9 par. 1 of law 4138/2013). This change proved short-lived and lasted only for 7 months; the subject matter of gestational surrogacy permissions has returned to the jurisdiction of the Single Person Courts of Fist Instance in 11.10.2013 (art. 8 of law 4198/2013). Since 1.1.2016 the jurisdiction over the subject matter of gestational surrogacy permissions has been transferred to the Multi-Member Courts of First Instance, as part of the Greek Government's judicial system reforms, The Multi-Member Courts of First Instance are also competent Courts for granting adoption permissions in Greece. There are 154 District Courts and 64 Courts of First Instance established in Greece. Concentrating the gestational surrogacy cases in fewer and higher-rank courts has obvious advantages, among which are the fostering the judges' experience and the facilitation of necessary monitoring of the relevant case law.

[13] See Book 6 of the Greek Code of Civil Procedure, art.739-781 and art.799. A broad investigative authority of the judge characterises this procedure, aiming to guarantee the conformity of the court's decisions with the relevant legal provisions.

[14] Greek Civil Code art. 1458.

[15] Greek Civil Code art. 1455.

[16] According to the most lenient interpretation of the law [Papachristos A. Family Law (in Greek). P.N. Sakkoulas, Athens, 2014:219], the intended mother shall at least file the relevant application before her 50th birthday.

[17] Namely the intended mother and her husband or male partner (if they are married, engaged, have contracted a registered partnership or have a civil union).

[18] art. 13, par. 1 of law 3305/2005 / Greek Civil Code (AK) art. 1484.

[19] art. 13 and 4 par.2 of Law 3305/2005.

[20] These prerequisites have been introduced as part of the recently published Code of Conduct of Medically Assisted Reproduction, which has been drafted by the *Greek National Authority of Assisted Reproduction* (see par. *1.4* below) and came into force on 07.02.2017 [Resolution no. 73/24-01-2017 of the Greek National Authority of Assisted Reproduction, published in the Issue of the Hellenic Government's Gazette (FEK) B' 293/07-02-2017].

[21] The gestational surrogate's husband or registered partner (but not her partner in a civil union) has to be part of her gestational surrogacy agreement as it undoubtedly constitutes an important decision with a serious impact on their life as a couple; however, any failure to meet this requirement does not affect the validity of the surrogacy agreement itself. In any case, since the intended mother is presumed mother of the child that is born, the principle that the gestational surrogate's husband is the inferred father of a child she gives birth to during their marriage or registered partnership does not apply; (inferred) paternity "follows" and depends on maternity. [Papachristos, op.cit:272, further citing Koumoutzis N. "The establishment of the relation to the father after law 3089/2002" (in Greek), *Chronika Idiotikou Dikeou* 3/2003:499].

that the gestational surrogate shall not receive a reward or financial benefit for her offer.[22, 23]

However, the following do not constitute "reward" according to the law:[24] (a) the cost of achieving pregnancy by transfer of the reproductive material to the gestational surrogate's uterus, as well as expenses relating to the carriage to term, parturition and postpartum period, provided that such expenses are not covered by the gestational surrogate's public insurance scheme; the exact amount of such expenses is proven by receipts and invoices issued according to the relevant taxation laws, (b) any damages the gestational surrogate should incur because of her absence from her job as well as the remuneration she would have earned by her employment, which she loses because of her absence in order to achieve pregnancy, to carry to term, to give birth to the child and to go through the postpartum period; the gestational surrogate drafts a solemn affirmation document declaring the total sum of the above compensation, which, in any case cannot exceed the sum of 10.000,00 Euros.[25] Remuneration for expenses and compensation to the gestational surrogate are due only if the required court permission is given.

5) The reproductive material transferred to the gestational surrogate's uterus must not be her own;[26] this condition is agreed in the written agreement described above.

6) Either the intended mother or the gestational surrogate must be permanent *or temporary*[27] residents of Greece. The law does not set any prerequisite regarding their nationality, thus making the option of gestational surrogacy available to both Greek and foreign nationals.

7) The Best Interests of the Child that will be born must be taken into consideration, as in every case of implementation of methods of assisted reproduction.[28] The existence of a stable and supporting environment for every child that shall be born is a crucial factor; furthermore several other factors regarding the intended parents are of importance, such as their age, their medical history, possible hereditary disease risk as well as their capability to fulfil the needs of the child they wish to have.[29]

Provided that the above described legal procedure is followed, the intended mother is deemed to be the mother of the child that is carried to term by the gestational surrogate; the only legal bond created is one between the newborn child and the parent(s) who wanted to have it.[30] Hence, gestational surrogacy is based on the principle of 'social-sentimental affinity',[31] ac-

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[22] Greek Civil Code art. 1458 and art. 13 of Law 3305/2005.

[23] This agreement is of a strictly personal nature; hence, the parties are not allowed to appoint a legal proxy who would agree on their behalf (xx1/17; on the contrary, -and, undoubtedly, erroneously- an agreement signed by an appointed proxy had not been rejected in case o/16).

[24] art 13 par. 3 of Law 3305/2005.

[25] Resolution no. 36/2008 of the Greek National Authority of Assisted Reproduction, [Issue of the Hellenic Government's Gazette (FEK) B' 670/16-04-2008].

[26] Greek Civil Code (AK) art. 1458.

[27] Temporary residents of Greece are allowed to access gestational surrogacy since summer 2014, when art. 17 of Law 4272/2014 rephrased art. 8 of Law 3089/2002; according to the previous legal requirement both the intended mother as well as the gestational surrogate had to be permanent residents of Greece. The above change regarding the residence prerequisite has received intense (and just) criticism for undermining one of the relevant legislation's core objectives: the discouragement of reproductive tourism and safeguarding against the risk of human trafficking. [Papachristos A. An unfortunate lawmakers' choice (in Greek). *Chronika Idiotikou Dikeou* 8/2014].

[28] art. 1 par. 2 of Law 3305/2005, as well as art. 3 of the Convention on the Rights of the Child and art. 24 of the Charter of Fundamental Rights of the European Union.

[29] Explanatory Report on Law 3305/2005, (in Greek), *Kodikas Nomikou Vimatos* 53, 24; Koutsouradis, A. Issues on Surrogate Motherhood, especially after Law 3305/2005 (in Greek). *Nomiko Vima* 65, p. 335.

[30] Kounougeri-Manoledaki E. Family Law I (in Greek). Sakkoulas, Athens-Thessaloniki, 2012:14.

[31] Greek Civil Code art. (AK) 1464. This presumption of the intended mother's maternity can be overturned only if either the intended mother or the gestational surrogate successfully challenges it through litigation. The relevant proceedings must be initiated within a strict time limit of six months after the birth of the child; practically, this provision gives a solution both to the intended mother as well as to the gestational surrogate in the (extreme) case that either one believes that the newborn child is indeed genetically related to the surrogate, thus conceived by the surrogate with her sexual partner at the same period during which she underwent the surrogacy procedure). There has not been any known record of such a challenge in the relevant case-law.

cording to which the concept of a parent loses its stable biological fundament and the legal kinship is not necessarily established under the light of the biological truth; the most significant factor for the establishment of affinity is the desire of the persons involved.

1.3 Penalties

Whoever takes part in the process of having a child through surrogacy without conforming to the prerequisites of the above mentioned legal provisions[32] is subject to custodial sentence for a period of at least two years plus a fine of at least 1.500,00 Euros. The same provisions apply to whomever publicly or through the circulation of documents, pictures or representations announces, projects or advertises, even in a covered way, the ability to have a child with the help of a gestational surrogate or offers relevant services as a broker.[33]

1.4 Greek National Authority of Assisted Reproduction

The Greek National Authority of Assisted Reproduction is an independent administrative Authority that has been established by law 3305/2005 and is in operation since December 2005. The Authority is vested with the responsibility to monitor the implementation of the relevant laws on medically assisted reproduction by exercising its decisive, supervisory, recommendatory and inspectional duties, according to the law. These duties include the recording of all medically assisted reproduction treatments that take place in Greece. As gestational surrogacy inevitably requires the medically assisted reproduction treatment of the gestational surrogate,[34] the Authority's capability to monitor the treatment(s) theoretically ensures the substantial monitoring of the process and the outcome of all gestational surrogacy agreements that are granted the relevant court permission.[35] Unfortunately -and in spite of its initial members' indubitable efforts and earnestness- the Authority has been practically unable to fulfil its mission.[36] Since May 2014, the Greek Government has proceeded with the necessary administrative actions that led to the Authority's re-activation and its current operation by a new board of members.[37]

The average age of the intended mothers was 40.7 years, whereas the two intended fathers (cases g/08, r/09) were 43 and 33 years old re-

[32] Greek Civil Code (AK) art. 1348, art. 8 of Law 3089/2002 and art. 14 of Law 3305/2005.
[33] Art. 26 of Law 3305/2005.
[34] And, most probably, the treatment of the intended parent(s) as well.

[35] An example of the Authority's key role in the legal framework on gestational surrogacy would be the following: offering oneself to become a gestational surrogate more than once is not expressly prohibited by the Greek law; likewise, there is no explicit rule prohibiting the same intended mother from resorting to gestational surrogates twice or more times, either to repeat an unsuccessful previous effort, or to have more children born. Like any other case, the conformity of such a case's specific facts to the law's prerequisites would be assessed by the court before deciding whether to issue the necessary permission or not; in such case(s), the vigilance of the monitoring conducted by the Authority would ensure that full and candid information would be submitted to the court; [for instance, it is highly improbable that full information has been provided to the judge(s) that tried the marginal case(s) of "Britain's most prolific surrogate's" offer(s) to Greek intended parents (see relevant articles published in Daily Mail and BBC. (Retrieved on 25.08.2017).
www.dailymail.co.uk/news/article-543948/Triplets-make-grand-total-12-babies-super-surrogate-mother.html
http://news.bbc.co.uk/2/hi/health/7851838.stm
http://www.dailymail.co.uk/femail/article-2229021/Carole-Horlock-Why-giving-away-13-babies-Britains-prolific-surrogate-finally-quitting.html
http://www.dailymail.co.uk/news/article-2996312/Hoping-baby-Britain-s-prolific-surrogate-mother-given-birth-15-children-given-13-away.html.
Equally marginal, yet unnoticed, has been decision f/12, where the Court granted permission to have reproductive material transferred to either one of three (!) different gestational surrogates. This case's oddity is also the reason why the total number of cases surveyed (281) is different from the total number of gestational surrogates (283).
[36] A detailed account of the reasons for this, as well as an account of the Authority's -nevertheless important- accomplishments during its first period of action is contained in the relevant expostulatory letter no.44/24-06-2010: http://www.iya.gr/templ/inc_givefile.cfm?fid=16 (in Greek, retrieved 14.08.2011 / no longer available).
[37] More relevant information available on the Authority's website: www.eaiya.gov.gr/en (retrieved on 25.08.2017).

spectively; the vast majority of the intended mothers were married (257/281) and did not have other children (271/281). There have been only fourteen cases in total[38] where unmarried couples resorted to gestational surrogacy to become parents, whereas in another seven cases the intended mothers were lonely (and infertile) women.[39] There have been eight cases where the intended mothers already had a child and wished to have a second one,[40] whereas in two other cases the intended mothers had a child[41] that died (l/05, s/08). Intended mothers were mostly Greek nationals (230/281) (Chart 1).

According to recent case-law findings, the abolishment of the resident-alien-status legal prerequisite seems to have drawn foreign intended mothers' interest to apply for gestational surrogacy permission in Greece (Chart 2).

All intended mothers suffered from deficiencies or diseases that made it medically impossible for them to sustain a pregnancy, whereas they claimed to have already exhausted every remedy that assisted reproduction technology had to offer in their cases[42] before opting to receive the offer of a gestational surrogate mother (Chart 3).

[38] In 1 case the intended mother was engaged (f/10); in the other thirteen cases the intended mothers lived in *unregistered* civil unions with their male partners (b/08, c/09, l/14, k/15, r/15, c/16, f/16, r/16, y/16, ad/16, al/16, h/17, j/17) [5.605 opposite sex civil partnerships have been registered in Greece since the enactment of law 3719/2008 in November 2008 until 31/12/2015 - *interestingly, 1.573 of them in 2014 only and 2.611 in 2015 only*] (see supra note 9) - same sex partnerships are recognized by the law since January 2016 as law 4356/2015 reformed and replaced the previous law 3719/2008. Same- sex couples are able to register their partnerships and, in principle, are entitled to enjoy rights equal to a marital status; however, same-sex couples are still not granted adoption or second-parent parental rights and are not allowed to access medically assisted reproduction as a couple.

[39] j/10, n/13, d/15, d/16, x/16, ag/16, ah/16.

[40] f/05, k/10, b/11, k/15, l/15, f/16, q/16, af/16./

[41] Their first child was carried to term by themselves in the past, before the appearance of the medical reason of their current incapability to sustain a pregnancy.

[42] In those cases, of course, where their medical condition even allowed such a possibility.

Chart 1: INTENDED MOTHERS' MARITAL STATUS AND NATIONALITY

Average Age: **40,7** years old [youngest: 19 years old / oldest: 53 years old (before the enactment of the 50 years' age limit for intended mothers)]
Average Age of Greek Intended Mothers: **40,7** years old
Average Age of Resident Alien Intended Mothers: **39,8** years old
Average Age of Intended Mothers that were foreign nationals / temporary residents: **41,4** years old
Average Age of Intended Mothers that were foreign nationals / foreign residents: **42,2** years old
Age of lonely infertile male applicants: 43 and 33 years old respectively
Age of male applicant for post mortem uxoris assisted reproduction: 42 years old

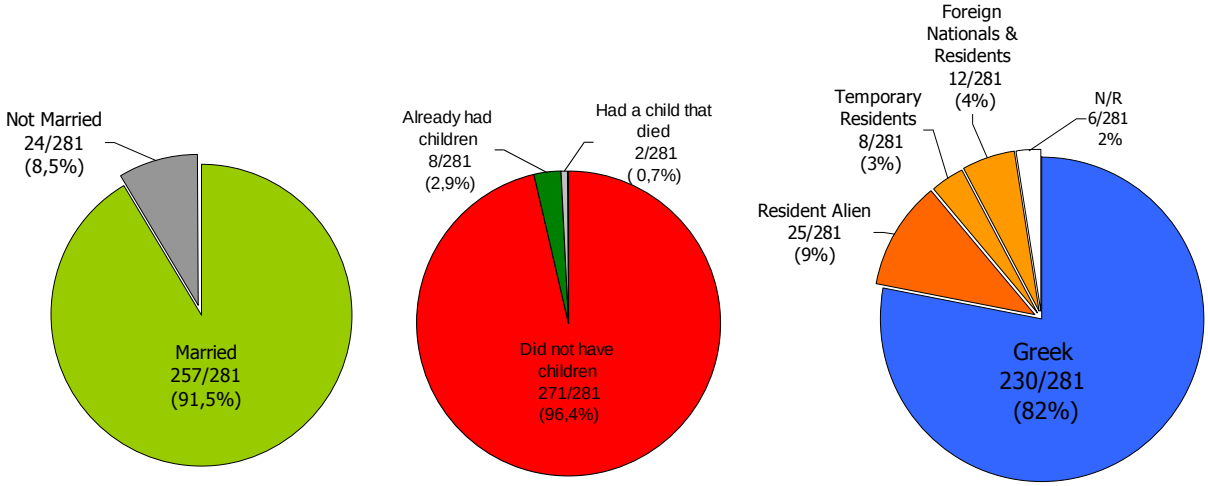


Chart 2: NATIONALITY OF FOREIGN INTENDED MOTHERS

cases with no reference to nationality are omitted;
in 25 cases the foreign intended mother was a resident alien;
in 8 cases the foreign intended mother was a temporary resident of Greece;
in 12 cases the foreign intended mother was also a foreign resident

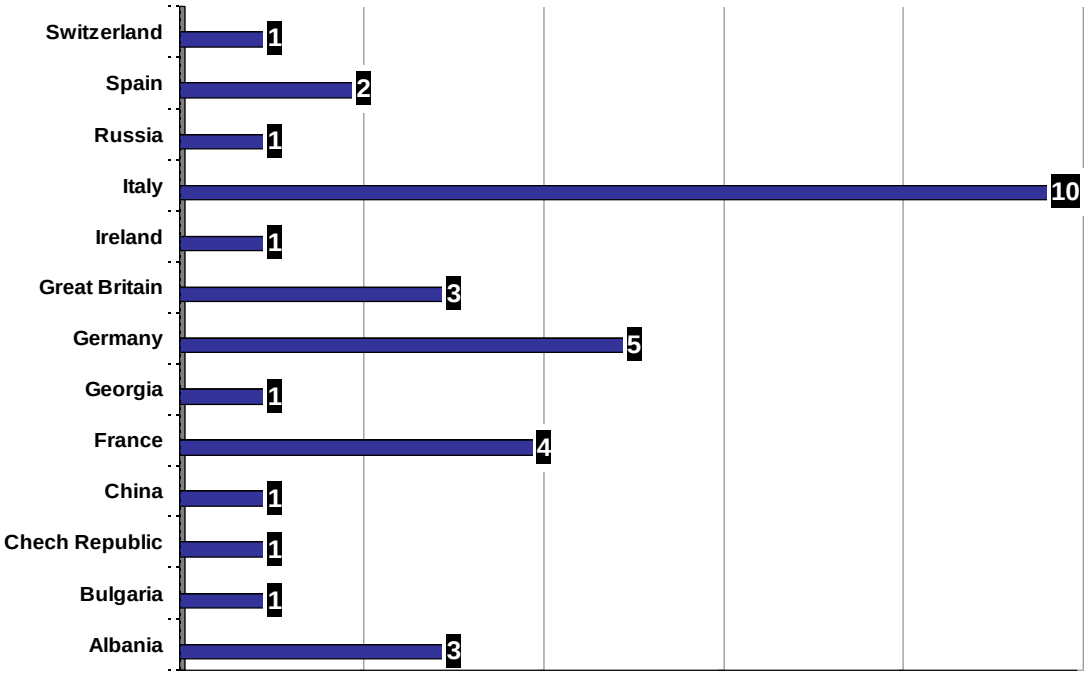
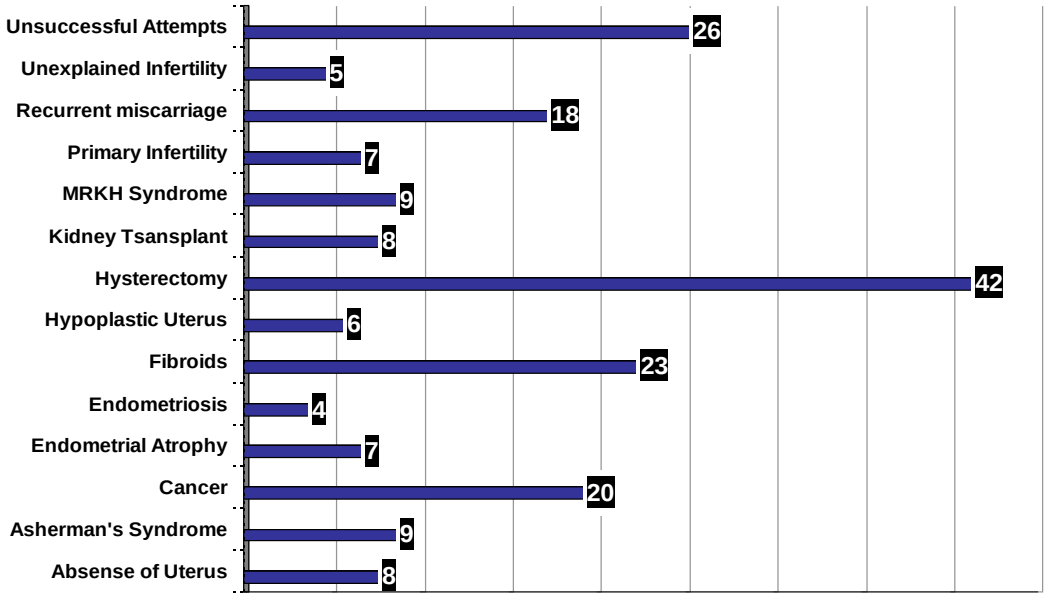


Chart 3: MEDICAL REASON FOR INTENDED MOTHER'S INABILITY TO CARRY A CHILD TO TERM

medical conditions are categorized according to their description in the relevant case;
the chart depicts medical conditions that appeared in four or more monitored cases



2.1. Infertile, lonely men

Initially based on a textual-interpretation-of-the-law argument, legal theory narrowed the ability to resort to gestational surrogacy only to women, as only they can literally be "medically unable to carry to term"; all in all, the scenario of male applicants for the relevant court permission was rather considered "far-fetched".[43] Nevertheless, there have been two cases (g/08, r/09) where the courts of First Instance[44] approved the application of a lonely and infertile man who intended to become father with the help of a gestational surrogate. Both First Instance decisions argued in favour of an interpretative analogy based on the constitutional principles of equality[45] and free development of personality.[46] The Public Prosecutor appealed the first of the two male-applicant decisions (g/08) almost two years after the first male applicant had his twins born with the help of a gestational surrogate. The Athens Court of Appeal ruled that the first instance decision that had granted him gestational surrogacy permission was void. According to the appellate Court's ruling "only a woman can carry to term and give birth to a child, hence only she can be seek for help by a gestational surrogate; […] in order [for infertile lonely men] to have a child, they would need to resort to gestational surrogacy, and thus tackle a medical inability [to carry a child to term] which is not their own".[47] This reversal of the first instance decision did not affect the already established relation between the (intended) father and his twins.[48] The appellate Court's decision has been criticised in legal theory, mainly for failing to fully address the issue of equal rights of women and men in medically assisted reproduction; the invocation of the natural sexual differences between men and women does not sufficiently establish a difference in reproduction rights of lonely infertile persons.[49]

2.2. Post mortem uxoris[50]

Interestingly, and despite the fact that the issue was not in question in the specific cases, both first instance decisions (g/08, r/09) argued that the right to access post mortem medically assisted reproduction should also be extended to widowers, thus interpreting the legal provision according to which post mortem assisted reproduction is allowed only to widows. Such an analogy-based right of widowers to access "post mortem uxoris" assisted reproduction (thus resorting to a surrogate mother to fulfill it) had always been wider accepted by legal theorists.[51] A relevant permission was indeed granted by the District Court of Athens in 2013 (p/13).]

[43] See Spyridakis I. (2003). *The new regulation on artificial insemination and kinship* (in Greek). Sakkoulas, Athens, 2003:29,33. According to legal theorists, there was an equally low possibility that (infertile) lonely women would resort to gestational surrogacy; the statistical data seem to confirm this view. See also Kounougeri-Manoledaki E.. The draft law on medically assisted human reproduction and a response to reactions against it. *Studies of family law and law on biomedicine 1980-2010* (in Greek). Sakkoulas, Athens-Thessaloniki, 2010:485.

[44] g/08 Athens' Court of First Instance, r/09 Thessaloniki's Court of First Instance. The second decision cited and accepted the first decisions' argumentation.

[45] Art. 4 of the Greek Constitution: 1. Greeks are equal before the law. 2. Greeks have equal rights and obligations.

[46] The Court's argumentation was the following: *«[...]According to the prevailing opinion, the right to assisted reproduction is protected by art. 5 par. 1 of the [Greek] Constitution, hence its exclusion is excused only it[s][exercise] contradicts the rights of others, the Constitution or the good morals».*

[47] Decision. 3357/2010, Athens Court of Appeal.

[48] This solution stems from Art 799 of the Greek Code of Civil Procedure regarding non-contentious jurisdiction; the rights acquired in good faith by virtue of first instance decision are not void even if this decision is overturned in the future. That probably explains why the (intended) father did not choose to further take the case to the Supreme Court.

[49] Koumoutzis N. (2013). Reversal of the court permission for assisted reproduction - on the occasion of decision 3307/2010 of the Athens' Court of Appeal. *Chronika Idiotikou Dikeou* 7/2013. p:508.

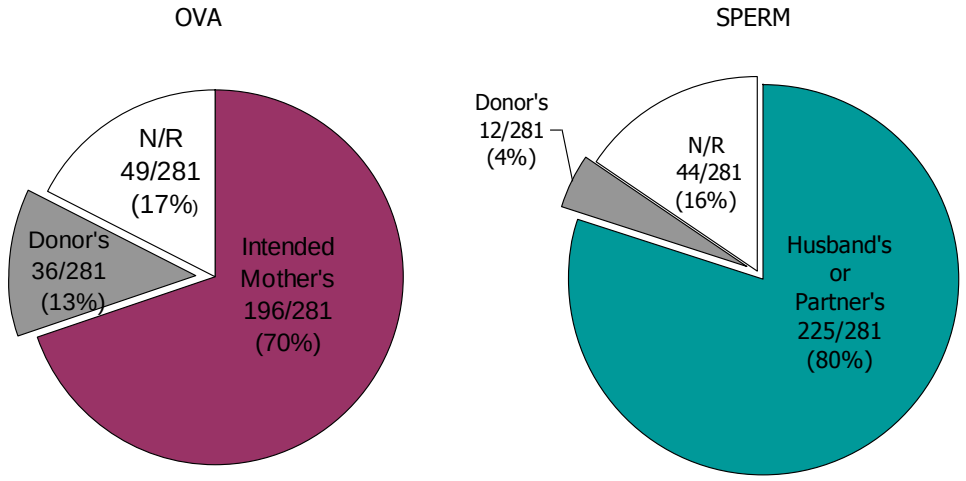
[50] To the author's knowledge, the (very accurate) term "post mortem uxoris" (uxor = wife in latin) has been originally used by Prof. Dimitra Papadopoulou-Klamari, Faculty of Law, National and Kapodestrian University of Athens

[51] Papachristos. 2003:56.

3. Origin of reproductive material

In most cases -practically, whenever this was medically possible- the reproductive material of the intended parents has been used, namely intended mothers' ova and their husband's/ partners / fiancé's sperm (187/281, thus 65.5%). Partial use of the intended parents' own reproductive material (either intended mother's ova or partner's sperm only) was also opted for whenever full use of own reproductive material was not medically possible.[52] The most notable cases where totally foreign reproductive material has been used were those of the two (infertile/lonely) male applicants (g/08, r/09), as well as cases af/15, s/16 and g/17, where the "five parents scheme" has been realized.[53] It is observed in recent case law that intended mothers apply for a "flexible" permission to either use their own ova *or* resort to a donor; though marginal as far as the obedience to the law is concerned, this tendency seeks to tackle a possible failure to achieve fertilisation of the intended mothers' own ova without the need for new (updated) court permission in order to use a donor's ova (Chart 4).

Chart 4: REPRODUCTIVE MATERIAL



[52] The intended mothers' reproductive material has been used in a total of 196/281 cases; the husband's/partner's/fiancé's sperm has been used in a total of 225/281.

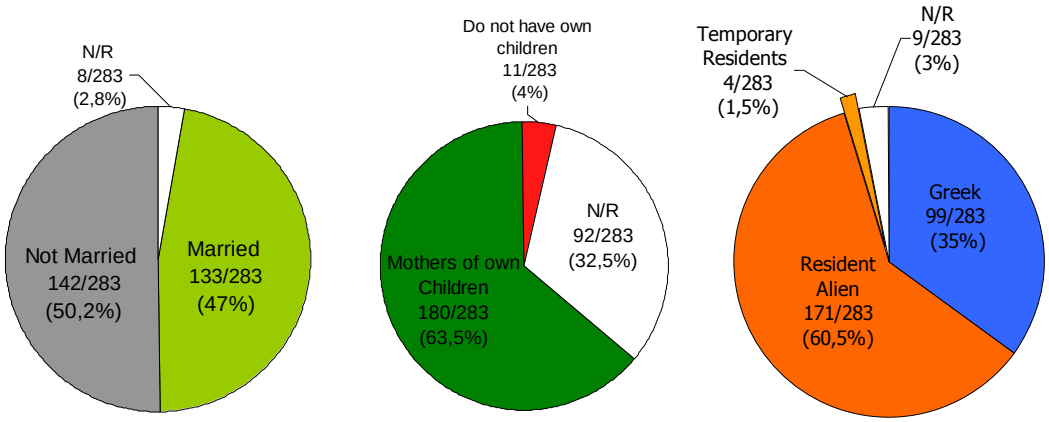
[53] The "five parents scheme" describes the situation where there: 1. a third woman is donating ova, 2. a third man donating sperm, 3. the gestational surrogate carrying the child to term, 4 & 5. The applicant and her spouse or partner are the intended parents. The two cases of the lonely infertile men have been the first to almost realize the "five parents scheme". In their cases, since the male applicants were lonely/unmarried men, the fifth parent, namely their partner, is missing.

4. Gestational Surrogate Mothers' profile

The average age of the women who offered to become gestational surrogates was 34.26 years old. Gestational surrogates were in their majority unmarried (142/283) and they already had been mothers to at least one own child (180/283); more of them were foreign nationals (175/283) than Greek (99/283). A further connection, however, is observed between the gestational surrogates' nationality and their marital status and average age. The Greek gestational surrogates were in their majority married (58/99) and had an average age of 36.6 years, whereas the majority of the foreign gestational surrogates were unmarried (99/171) and had an average age of 31.4 years (Chart 5).[54,55]

Chart 5: GESTATIONAL SURROGATES' NATIONALITY AND MARITAL STATUS

Average Age: **34,26** years old [youngest: 20 years old / oldest: 57 years old, both before the enactment of the recently published Code of Conduct of Medically Assisted Reproduction / Resolution no. 73/24-01-2017 of the Greek National Authority of Assisted Reproduction, according to which gestational surrogate mothers have to be more than 25 years old and less than 45 years old]
Average Age of Resident Alien Gestational Surrogates: **32,9** years old
Average Age of Temporary Resident Gestational Surrogates: **30,0** years old
Average Age of Greek Gestational Surrogates: **36,6** years old



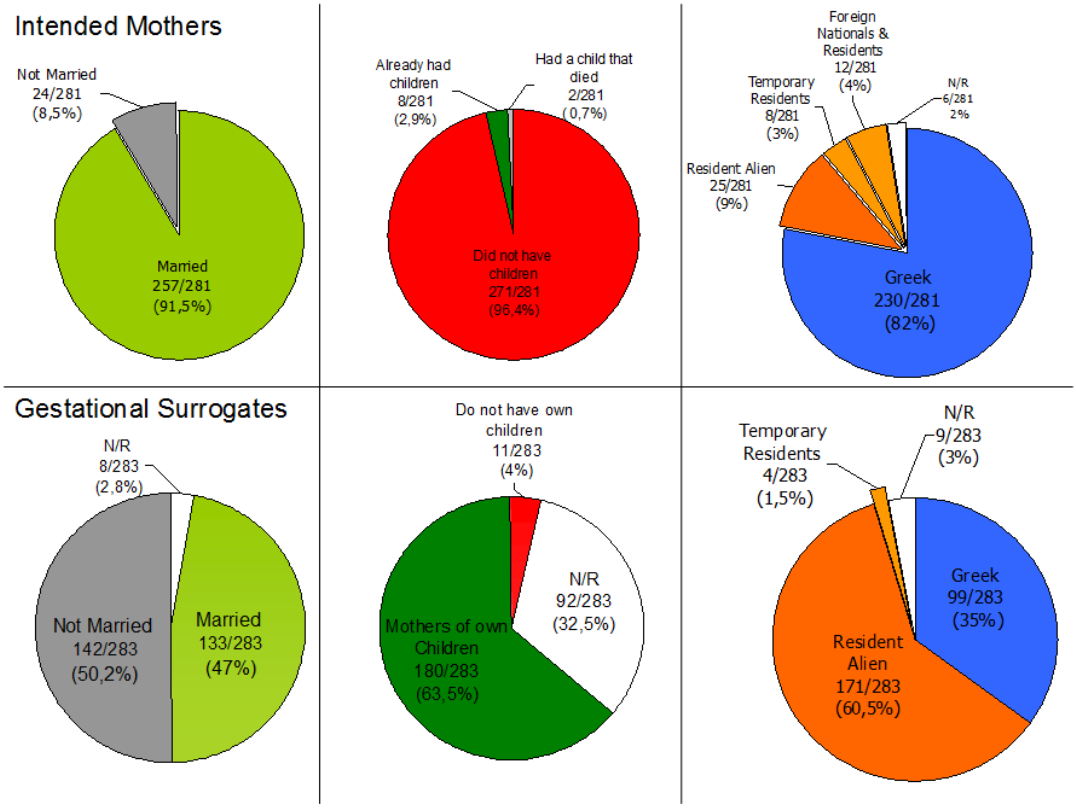
[54] The average age of the foreign gestational surrogates is calculated by adding the average age of resident alien and temporary resident gestational surrogates.

[55] The older average age of Greek gestational surrogates could be partly explained by the fact that, *especially under the -previous- permanent residence prerequisite*, Greek gestational surrogates "monopolized" the cases where the gestational surrogates were members of the intended mothers' family (their mothers, their aunts, their sisters or their sisters-in-law).

5. Intended Mothers' and Gestational Surrogates profiles' graphical display

The differences between the gestational surrogates' and the intended mothers' profiles are depicted in Chart 6.

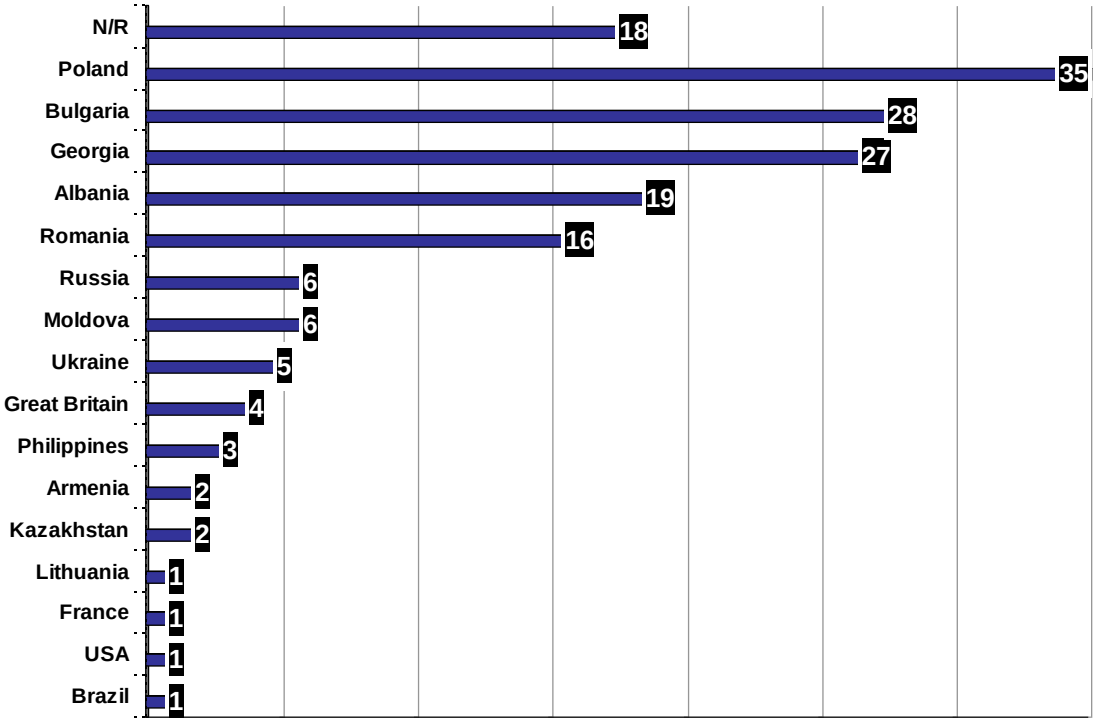
Chart 6: NATIONALITY AND MARITAL STATUS COMPARATIVE DISPLAY



6. Foreign Gestational Surrogates' nationality and ethnicity

The vast majority of 175 foreign nationals that offered to become gestational surrogate mothers were of Eastern European origin (143/175 - 81.7%),[56] whereas most of them were citizens of the neighbouring Balkan countries (76/175 - 43.4%);[57] almost all were resident aliens with the exception of four cases, in which the foreign gestational surrogates appeared as temporary residents of Greece; there has not been a case where the gestational surrogate claimed to be a foreign national residing abroad (Chart 7).

Chart 7: NATIONALITIES OF FOREIGN GESTATIONAL SURROGATES



[56] Poland 35/175, Bulgaria 28/175, Georgia 27/175, Albania 19/175, Romania 16/175, Russia 6/175, Moldova 6/175 Ukraine 5/175, Lithuania 1/175: total 143/175 - 81.7%).

[57] (Bulgaria 35/175, Albania 19/175, Romania 16/175, Moldova 6/175: total 76/175 - 43.4%).

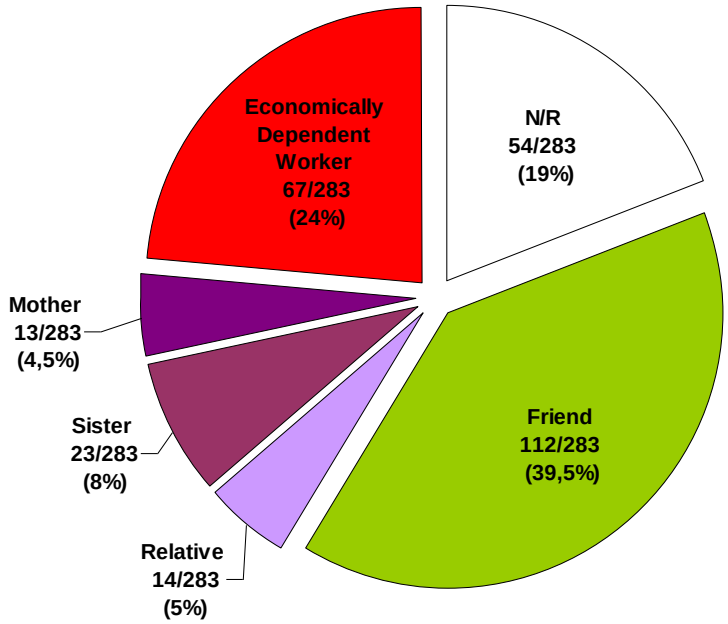
7. Social relationship between gestational surrogates and intended mothers; socio-economic status indications

Almost one fifth of the court decisions that were surveyed did not make any reference to the nature of the relation between the intended mother and the gestational surrogate (54/283), whereas more than one third (112/283) contained a -rather stereotypical, and often even identical[58]-reference to the "friendship that grew between the intended mother and the gestational surrogate", the latter having thus "personal knowledge of the intended parents' fruitless efforts to have a child" (Chart 8).

In one sixth of the cases (49/283), the gestational surrogate was the sister (23/283), the mother (12/283) or a relative[59] (14/283) of the intended mother.

Almost one quarter of the court decisions that were surveyed did include indications regarding the gestational surrogates' relationship with the intended mothers; interestingly, their relationship, in those cases, can be categorized as an economically dependent worker-to-employer relationship (65/283) in the broader sense.[60] This finding lead to a further comparison between the different relations and the gestational surrogates' nationality.

Chart 8: GESTATIONAL SURROGATES' RELATIONSHIP WITH INTENDED MOTHERS



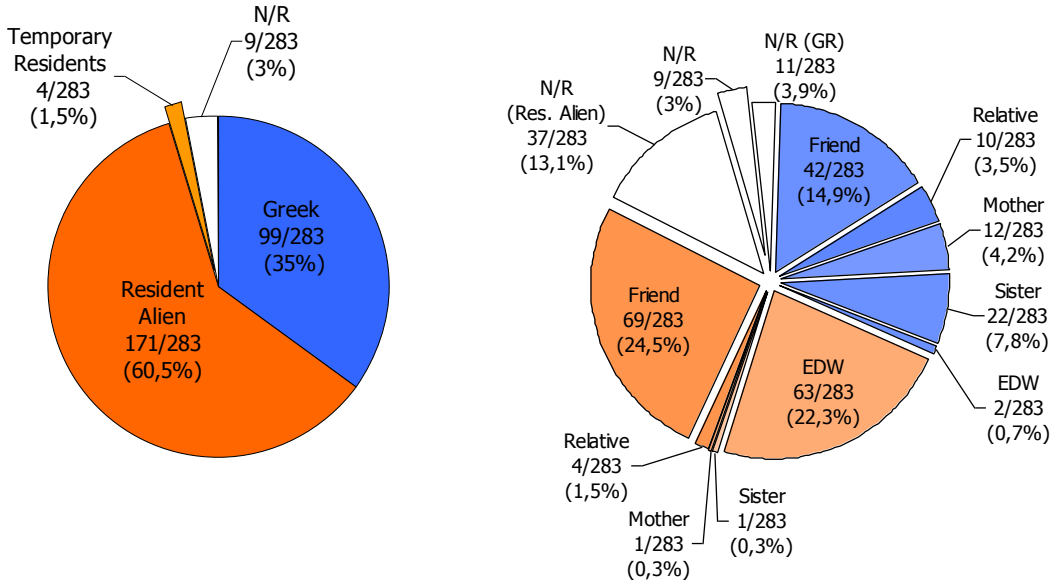
[58] In the sense that it seemed more as if the court decision was citing a similar reference that had been included the applicant's legal documents, rather than a conclusion to which the judge came after the court's hearing.

[59] Namely the intended mother's sister-in-law, and in one case her aunt.

[60] A variety of employments, most often "in-house" (e.g. charlady), but also independent (e.g. manicurist, hairdresser) or dependent (e.g. clerk) have been included in this category.

Almost half of the Greek gestational surrogates (44/99) were either the sisters (22/99), mothers (12/99) or relatives (10/99) of the intended mothers, whereas the relationship between more than a third of the foreign gestational surrogates and the intended mothers for whom they offered (63/175) can be categorized as one of an economically dependent worker-to-employer, in a broader sense (Chart 9).

Chart 9: GESTATIONAL SURROGATES' NATIONALITY & RELATIONSHIP WITH INTENDED MOTHERS (COMPARATIVE VIEW)



8. Comments

The statistical data confirm that, in reality, gestational surrogacy in Greece has been an uncommon method of assisted reproduction, as it seems to have been the last resort in the intended mothers' efforts to have children of their own. What is more, the law's initial aim to discourage attempts of reproductive tourism, which was, *until recently*, eloquently depicted in the necessary precondition of permanent residence of both the intended mother and the gestational surrogate in Greece,[61] seems to have been fulfilled, at least as far as the intended mothers were concerned. Hence, until July 2014 -thus before the law change regarding the parties' residence- no concrete indications had been observed to support a suspicion that foreign intended mothers have travelled to Greece just in order to have a child born with the help of a gestational surrogate; recent case-law findings, though, show an increase of the number of cases where foreign intended mothers made use of the new, lenient prerequisite regarding the "temporary residence of either the intended mother or the gestational surrogate in Greece". What is more, it has to be pointed out that, even under the previous legal requirement of permanent residence in Greece, the courts have not been strict when examining the gestational surrogates' domicile.[62]

As the law refrained from setting any restrictions regarding the nationality of the parties involved, gestational surrogacy is available for both Greek and foreign nationals. Interestingly, though, this foreign element[63] has been unequally distributed among the parties: intended mothers were mostly Greek nationals whereas more gestational surrogates were foreign nationals[64] than Greek nationals. Greek gestational surrogates dominated the (presumed as 'in principle' altruistic) mother-to-daughter, sister-to-sister and relative-to-relative categories.

In parallel, almost whenever there has been a concrete indication of the *prior* existence of any kind of professional relationship between the parties, the gestational surrogate was a foreign national and she had most often been the "employee", in a broader sense. The absence of a single case where a woman broadly defined as "employer" would offer herself as a gestational surrogate for an intended mother broadly defined as her "employee"[65] does not help dispel the re-

[61] See initial text of art. 8 N.3089/2002, supra note 23. Recent case-law findings show an increase of the number of cases where foreign intended mothers made new, lenient prerequisite regarding the "temporary residence of either the intended mother or the gestational surrogate in Greece".

[62] Various degrees of permanence of a foreign national's domicile in Greece supported by different kinds of documents produced by the parties like permit of residence, tax declaration, contract of lease of an apartment etc., or, even *temporary asylum residence permits* (!) have been accepted to establish their resident alien status; see also Rokas K. In Trimmings. K., Beaumont. P. (Ed.). International Surrogacy Arrangements. Hart Publishing, Oxford and Portland, 2013.

[63] This foreign element did not constitute a reason for recourse to public international law in any of the court decisions studied; offers by foreign nationals (resident aliens) to become gestational surrogates in Greece is substantially facilitated by the presumption of motherhood, which directly establishes legal kinship between the intended mother and the child (Greek Civil Code art.1464). Without this presumption, the only solution would be the adoption of the child by the intended mother; however, that would indeed raise issues of public international law in cases when a child was born by a foreign gestational surrogate. [See decision no. 122/2008 Court of First Instance of Chania/Crete, (in Greek; NOMOS database, http://lawdb.intrasoftnet.com, number 452907, retrieved in 23.09.2017)].

[65] [Without rejecting the possibility of candid offers, even when the relation between the gestational surrogate and the intended mother is one of social-financial inequality] see Vlachou E. Work as an embodied privacy and the limits of legal recognition: From 'psychokores' to the immigrants working in the domestic space. In *The Body, the Sex and the Gender Difference*, supra note 2: 153-168. The author investigates and brings out the relation between the feminine identity and "the aim to serve". The article's epicentre is the examination of the pre-modern institution of "psychokores*]*" and practices that characterized it [*psyckokores [ψυχοκόρες]:* young poor girls from the Greek province that moved to the city in order to work "in-house" for rich(er) families aiming to earn their future marriage portion in exchange], in comparison to this institution's current transformation depicted in the status of the foreign-immigrant women that work nowadays in the Greek households. The article attempts to depict the gradual confusion that befalls as the notion of "work" moves from the public space to the private sphere, i.e. the household, and

proach that (also gestational) surrogacy involves the risk of commercialisation and *mutual* exploitation of needs. The law's attempt to address the issue, confined to the aforementioned prohibition of financial benefits for the gestational surrogates, seems hardly sufficient to conceptualise the complex nature of the relation between an intended mother and a gestational surrogate.

The different judges[66] that tried the relevant applications appear to have made scrupulous efforts to examine the facts of each particular case before granting the requested permission. However, one cannot fail to discern how courts practically endorsed the law's focus on the need of the intended mother for a child, while the gestational surrogate remained *less visible*,[67] in the sense that the major events of the offer of her body and her separation of a child that she carried to term were outbid by a basic assumption of her genuine altruism.

an attempt is made to discern how then "simple" forms of "work" transform into diffused bodily offers that one can hardly aim to categorize.

[66] The judges were mostly women; during the period of competence of the Single Member Courts of First Instance, female judges had tried 174/241 cases where the permission for gestational surrogacy has been granted; female judges have most frequently joined or presided the Multi-Member Courts of First Instance that tried relevant cases granting permission for gestational surrogacy since January 2016.

[67] Also literally, as the law does no require the gestational surrogate's presence in court. According to the relevant information mentioned within the text and/or the minutes of the studied court decisions, the gestational surrogate mothers appeared in Court in only 64/281 cases.