# The mutual recognition of decisions under the EU Proposal: much ado about nothing?

3rd EAPIL Webinar: Analysing the EU Parenthood Proposal, 17 May 2023

*Alina Tryfonidou, Professor of European Law, Neapolis University Pafos & Visiting Professor, University of Reading*

# STRUCTURE OF THE PRESENTATION

## Definitions

## The scope of application of the proposed Regulation

- The requirement for a cross-border element
- The requirement for recognition of parenthood *established in an EU Member State*

## Analysis of the provisions of the proposal regarding the mutual recognition of decisions (Articles 24-34)

- The general rule of recognition (Article 24)
- The procedural aspects of recognition (Articles 26-30)
- Refusal of recognition
  - The grounds (Article 31)
  - The procedures (Articles 25, 32-34)

# DEFINITIONS (Art. 4 of the proposal)

'court' = 'an authority in a Member State that exercises judicial functions in matters of parenthood'

'court decision' = 'a decision of a court of a Member State, including a decree, order or judgment, concerning matters of parenthood'.

Broad definitions & less specific than those laid down in other EU PrIL instruments in the family law field which touch on matters concerning children

- Is this a conscious choice on the part of the Commission?
- flexibility vs. legal certainty (esp. in the light of *TB* (2022))?

# THE SCOPE OF APPLICATION OF THE PROPOSED REGULATION – CROSS-BORDER SITUATIONS

- The Regulation does not apply in purely domestic situations where there is no cross-border element.
  - All situations involving a request for recognition by Member State B of a judgment through which parenthood was established in Member State A are cross-border by nature and are thus covered by the Regulation.

# THE SCOPE OF APPLICATION OF THE PROPOSED REGULATION – PARENTHOOD ESTABLISHED *IN A MEMBER STATE*

- Article 3(3) of the proposal: 'This Regulation shall not apply to the recognition of court decisions establishing parenthood given in a third State […]'.
  - Thus, there will be no requirement of recognition of court decisions establishing parenthood issued in a third State (the question of recognition in such instances will continue to be governed by the national law of each Member State)
    - Is this compatible with a free movement rationale? (cross-border recognition of names cases – 'serious inconvenience'; also status established in a third-country is sometimes recognised for the purposes of EU free movement law see e.g. *S.M.* (kafala – Algeria) but see *V.M.A.*
      - Could recognition be required for parenthood established *or recognised* in an EU Member State?
    - Is this compatible with human rights requirements?
      - Discrimination on the grounds of birth?
      - The non-recognition of judgments establishing parenthood in a third-country is bound to disproportionately affect surrogate-born children
    - Note that the proposed Regulation shall apply to situations involving non-EU citizens (child and parents)
  - ECtHR already provides some solutions in situations involving parenthood established through a court order in a third country (*Wagner* (adoption order); *Mennesson* and other cases (surrogacy)); HCCH might provide a solution in the future?

# THE REQUIREMENT OF RECOGNITION OF COURT DECISIONS – THE GENERAL PRINCIPLE

- Art. 24(1): 'A court decision on parenthood given in a Member State shall be recognised in all other Member States without any special procedure being required'.
  - Art. 24(2): 'no special procedure shall be required for updating the civil-status records of a Member State on the basis of a court decision on parenthood given in another Member State and *against which no further appeal lies* under the law of that Member State'.
  - Article 24(3): '[w]here the recognition of a court decision is raised as an incidental question before a court of a Member State, that court may determine that issue'.
- NB. Recital 2 – the recognition of parenthood should be effected 'for all purposes' (relationship with *V.M.A.* which requires cross-border recognition of parenthood for the *purposes of the exercise of EU free movement rights*).

# THE REQUIREMENT OF RECOGNITION OF COURT DECISIONS – PROCEDURAL ASPECTS

- Art. 26 specifies the documents that need to be produced by a party who wishes to invoke in a Member State a court decision given in another Member State:
  - A copy of the **court decision** that satisfies the conditions necessary to establish its authenticity

  AND

  - The **attestation** (arts. 29 & 30)
    - attestations are issued, upon application by a party, by the court of the Member State of origin (of the court decision) (the court issuing the attestation must be communicated to the Commission – as per Art. 71 – as competent to issue attestations), using the form set out in Annex I of the proposal

# THE REQUIREMENT OF RECOGNITION OF COURT DECISIONS – PROCEDURAL ASPECTS

- If the party applying for recognition of a court decision is **unable to produce the documents** required by Art. 26, Art. 27 provides that 'the court or other competent authority before which a court decision given in another Member State is invoked may specify a time for its production, accept equivalent documents or, if it considers that it has sufficient information before it, dispense with its production'.
- Art. 28 provides that the court before which a court decision establishing parenthood and given in another Member State is invoked may **stay its proceedings** a) where an ordinary appeal against that court decision has been lodged or b) an application has been submitted for a decision that there are no grounds for refusal of recognition or for a decision that the recognition is to be refused on the basis of those grounds.

# REFUSAL OF RECOGNITION – THE GROUNDS

- The proposal includes an exhaustive (recital 63) list of grounds on which recognition may be refused.
- These **grounds** are laid down in Art. 31(1):

  a) 'if such recognition is manifestly contrary to the **public policy** of the Member State in which recognition is invoked, taking into account the child's interests'.

  b) where it was given in **default of appearance** if the persons in default were not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable them to arrange for their defence, unless such persons have accepted the court decision unequivocally.

  c) upon application by any person claiming that the court decision **infringes his fatherhood or her motherhood** over the child **if** it was **given without such person having been given the opportunity to be heard**.

  d) if it is **irreconcilable with a later court decision** relating to parenthood given **in the Member State in which recognition is invoked.**

  e) If it is **irreconcilable with a later court decision** relating to parenthood given **in another Member State provided that the later court decision fulfils the conditions necessary for its recognition in the Member State where recognition is invoked**.

# REFUSAL OF RECOGNITION – THE GROUNDS: PUBLIC POLICY

- **Public policy exception** must be applied in observance of the fundamental rights and principles laid down in the Charter (in particular, Art. 21) – explicitly noted in explanatory memorandum that (as per *V.M.A.*) public policy cannot be relied by a Member State in order to refuse recognition of the parenthood of the children of same-sex parents
- Public policy: concept determined under national law but outer boundaries imposed by EU law
  - must be interpreted restrictively, on a case-by-case basis, and a proportionality assessment must be conducted
- 'Fuzzy' concept = its strength and weakness at the same time (important to carefully monitor its application!)

# REFUSAL OF RECOGNITION - PROCEDURE

- Art. 32 – procedure through which a party can apply for refusal of recognition relying on Art. 31 grounds; applicant needs to provide the court with a copy of the court decision and attestation, unless the court dispenses with the production of these documents because it already possesses them or considers it unreasonable to require the applicant to provide them.
  - Applicant not required to have a postal address in the MS in which proceedings for non-recognition are brought. If required by law of MS where proceedings are brought the the applicant will need to have an authorised representative in that MS.
- Art. 25 – 'Any interested party may, in accordance with the procedures provided for in Articles 32 to 34, apply for a decision that there are no grounds for refusal of recognition referred to in Article 31' (a matter for national law to determine who is an 'interested party').