

Family status, Identities and Private International Law A Critical Assessment in the Light of Fundamental Rights

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AN INTRODUCTION

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Parentage and parenthood - Same-sex marriages

- ❑ Claims for recognition of foreign decisions/authentic instruments on family/personal status **V**

Refusal/resistance opposed by States where no access is granted to such family/personal status (same-sex marriages and parenthood, parental ties established via surrogate motherhood, etc.)

- ❑ No EU regulation so far in both matters
- ❑ Fundamental rights legal reasoning (Arts. 8, 14)
- ❑ Judicial activism – ECtHR – CJEU – national courts

Exemplary case: Circulation of public documents on parenthood - surrogate motherhood.

Best interest of the child – ECtHR’s general statements (A)

As **biological parenthood** is a component of **the child’s identity**, depriving the child of a legal relationship of this nature **is not in his/her interests** (MENNESSON v FRANCE, 2014)

However, it may be outweighed by the **best interest of the child** in particular cases (A.L. v FRANCE, 2022)

Where no biological tie exists between the child and the intentional parents, the refusal to recognize their parenthood is not either arbitrary or unreasonable, provided that safeguards to protect applicants’ family life have been taken (VALDÍS FJÖLNISDÓTTIR and Others v. ICELAND, 2021)

Best interest of the child – ECtHR's general statements (B)

Regarding **intentional parenthood**, the State's "wish to reaffirm its exclusive competence to recognize a legal parent-child relationship – and this solely in the case of a biological tie or lawful adoption" - is legitimate, **with a view to protecting children** (PARADISO AND CAMPANELLI v. ITALY, 2018)

The choice of means of establishing a parental tie between the child and the intentional parents falls within the States' margin of appreciation (Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, requested by the French Court of Cassation (Request No. P16-2018-001))

Simple adoption is regarded as a legitimate means to establishing a parent-child relationship between the intentional parent and the child (C and E v. FRANCE, 2018, D v. FRANCE, 2018)

Cascade effects – national courts 1.

France

Cour de Cassation 18 December 2019 - Two male spouses, surrogacy in Nevada

Cour de Cassation 4 November 2020 – Single father, surrogacy in India

Cour de Cassation 18 November 2020 - Two male partners, surrogacy in Canada

Full transcription of the birth certificates (acte de naissance), if regularly formed in the foreign country – mere evidentiary effects

2. Italy

Court of Cassation 8 May 2019, no 12193 – Two male partners, surrogacy in Canada

Surrogacy as contrary to public policy - No transcription allowed - Simple adoption as allowed means of establishing a form of parenthood between the intentional parent and the child – residual differences

Constitutional Court 28 March 2022, no. 79 – Two male spouses, surrogacy abroad

Simple adoption establishes a family relationship between the child and the intentional parents' relatives (best interest of the child)

Constitutional Court 28 January 2021 no. 33 - Two male partners, surrogacy in Canada

Simple adoption unfit

Court of Cassation 21 March 2022, no 9002 – reference to the Grand Chamber

3. Germany

BGH 5 September 2018 - heterosexual couple, surrogacy in Colorado – foreign judgement

No contrast with international public policy

Recognition of the foreign judgment

BGH 20 March 2019 - heterosexual couple, surrogacy in Ukraina – no foreign judgement – birth certificate

Surrogate mother as legal mother, adoption as means of establishing a form of parenthood between the intentional parent and the child

Judicial incrementalism V hard law

- ❑ Detecting the approximation of national legislations via judicial incrementalism
- ❑ Investigating Private International Law projects of regulation
- ❑ Granting certainty and continuity of legal parenthood (best interest of the child)
- ❑ Strengthening human rights protection