

# **Spanish case law after the ECHR decisions on surrogacy**

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**JOAQUÍN BAYO-DELGADO**

**Barrister**

**Former Senior Judge at Barcelona Appellate Court**

- *Mater semper certa est?*
- Article 10 Law 14/2006: surrogacy contract null and void, mother is birth mother.
- Ordre public?
- Child's right to private life and child protection
- Avoidance of trafficking (=international adoption)
- Do we reach parenthood in a twisty way?

CASE  (California)	GAY/LESBIAN/  SINGLE INTENDED PARENTS	Is birth mother in the birth certificate?	Is there a judicial decision in the birth Estate	BIOLOGICAL MOTHERHOOD/ FATHERHOOD	POSSIBILITY OF ADOPTION/recognition of <i>de facto</i> family status
Supreme Court 835/2013 Dec. 16  (Grand Chamber)	GAY COUPLE	NO	YES	It “could” be possible (not enough data available)	It “could” be possible (not enough data available)
<ul style="list-style-type: none"> <li>- Recognition was denied, on public order basis, dignity of birth mother and child, avoidance of trafficking and privilege of wealthy intended parents.</li> <li>- Public order is stronger as stronger is the connexion of the case with Spain (Spanish intended parents). Prohibition of surrogacy is shared by other countries</li> <li>- No male homosexual discrimination. A lesbian couple, a single parent or unmarried parents would get the same decision.</li> <li>- The legal parental link with the birth mother must be cut before a link can be established with the non-biological intended father</li> <li>- There is a dissenting opinion of 4 judges. Majority 5/4.</li> </ul>					

CASE  (California)	GAY/LESBIAN/ SINGLE INTENDED PARENTS	Is birth mother in the birth certificate?	Is there a judicial decision in the birth Estate	BIOLOGICAL MOTHERHOOD/ FATHERHOOD	POSSIBILITY OF ADOPTION/recognition of <i>de facto</i> family status
Supreme Court Order Feb. 2, 2015 (& March 11, 2015)	GAY COUPLE	NO	YES	It "could" be possible (not enough data available)	It "could" be possible (not enough data available)
<p>- <b>After Mennesson, Labasseé and Paradiso &amp; Campanelli, dismissing nullity of Judgement 835/2013</b></p> <ul style="list-style-type: none"> <li>- No discrimination based on different kind of filiation</li> <li>- No parallelism with X and others v. Austria (adoption of Lesbian partner of mother)</li> <li>- No parallelism with Labassee or Mennesson, as no rejection of parenthood based on biological fatherhood, adoption o recognition of <i>de facto</i> family status (<i>fraus omnia corrumpit</i>)</li> <li>- No parallelism with Paradiso &amp; Campanelli: no removal of the child from intended parents</li> </ul>					

CASE  (Mexico)	GAY/LESBIAN/  SINGLE INTENDED PARENTS	Is birth mother in the birth certificate?	Is there a judicial decision in the birth Estate	BIOLOGICAL MOTHERHOOD/ FATHERHOOD	POSSIBILITY OF ADOPTION/recognition of <i>de facto</i> family status
Appellate Court, Madrid, 947/2020, Dec. 1	Single intended mother	NO	YES	NO	NO possibility of adoption (difference of age, max 45 years)  ONLY possibility of recognition of <i>de facto</i> family status
<ul style="list-style-type: none"> <li>- It analyses Supreme Court decision of 2014 and orders of 2015 and ECHR Advisory opinion of Apr. 10, 2019</li> <li>- Superior interest of the child; child protection</li> <li>- Not against public order as there is no recognition of foreign decision: only legal effects of a <i>de facto</i> situation</li> <li>- <b>Spanish public order forbids discrimination of different kinds of filiation</b></li> </ul>					

CASE  (Mexico)	GAY/LESBIAN/ SINGLE INTENDED PARENTS	Is birth mother in the birth certificate?	Is there a judicial decision in the birth Estate	BIOLOGICAL MOTHERHOOD/ FATHERHOOD	POSSIBILITY OF ADOPTION/recognition of <i>de facto</i> family status
Supreme Court 277/2022,  March 31  (Grand Chamber)	Single intended mother	NO	YES	NO	Possibility of adoption (with a “flexible” interpretation)
<ul style="list-style-type: none"> <li>- The Supreme Court repealed Madrid Appellate Court 947/2020, Dec. 1</li> <li>- Surrogacy is against Spanish public order</li> <li>- <b>Interest of the child: adoption by the intended mother through a “flexible” interpretation of the adoption legal requisites:</b> no limit of difference of age, provided <i>de facto</i> guardianship is assimilated to preparatory placement of the child for adoption</li> <li>- <b><u>ECHR:</u></b> “provided that the procedure laid down by domestic law ensures that it can be implemented promptly and effectively”.</li> <li>- <b>In any case, solutions are twisty and inconsistent.</b></li> </ul>					

CASE  (Colombia)	GAY/LESBIAN/  SINGLE INTENDED PARENTS	Is birth mother in the birth certificate or judicial decision?	Is there a judicial decision in the birth Estate	BIOLOGICAL MOTHERHOOD/ FATHERHOOD	POSSIBILITY OF ADOPTION/recognition of <i>de facto</i> family status
Appellate Court, Barcelona, 104/2021, Mar. 17	Non married heterosexual father and mother	YES (afterwards annulled)	YES: foreign decision annulling birth motherhood	Registry mother is birth mother	In Spain, the case is on exequatur of the foreign decision
<ul style="list-style-type: none"> <li>- Paramount interest of the child; no problem concerning public order</li> <li>- Exequatur granted, but the father should ask for the inscription of his fatherhood in the Civil Registry (as this is not object of the exequatur)</li> </ul>					

CASE  (Colombia)	GAY/LESBIAN/ SINGLE INTENDED PARENTS	Is birth mother in the birth certificate or judicial decision?	Is there a judicial decision in the birth Estate	BIOLOGICAL MOTHERHOOD/ FATHERHOOD	POSSIBILITY OF ADOPTION/recognition of <i>de facto</i> family status
Appellate Court, Barcelona, 220/2021, Apr. 6	Intended father, husband of biological father	Biological mother  Birth mother	YES	Biological father  Biological mother	- <u>The child's birth cannot be inscribed in the Spanish Civil Registry as his biological father is not Spanish. Adoption is not possible.</u>
<ul style="list-style-type: none"> <li>- <b>Public Prosecutor (representing the child's interests) invokes child interest is part of the Spanish public order as paramount criterium. The Court agrees, but still surrogacy business has to be prevented.</b></li> <li>- No extensive interpretation of Spanish prohibition of surrogacy (<i>fraus NON omnia corrumpit</i>)</li> <li>- ECHR Advisory opinion of Apr. 10, 2019</li> <li>- Catalan law applicable: no recognition of <i>de facto</i> family status; <b>matrimonial presumption of parenthood</b></li> </ul>					



CASE  (Russia)	GAY/LESBIAN/ SINGLE INTENDED PARENTS	Is birth mother in the birth certificate or judicial decision?	Is there a judicial decision in the birth Estate	BIOLOGICAL MOTHERHOOD/ FATHERHOOD	POSSIBILITY OF ADOPTION/recognition of <i>de facto</i> family status
Appellate Court, Palma of Majorca, 207/2021, Apr. 27		YES	YES	NO	NO possibility of adoption (difference of age, max 45 years)  ONLY possibility of recognition of <i>de facto</i> family status
<ul style="list-style-type: none"> <li>- Motherhood does not breach Russian law</li> <li>- It analyses Supreme Court decision of 2014 and orders of 2015 and D. v. France (July 16, 2020)</li> <li>- <b>The datum of who is the birth mother (legal mother for the Spanish law) does not prevent recognition of <i>de facto</i> family status, given the specific circumstance</b> (no genetic link with birth mother, unknown contact data with her, etc.)</li> <li>- <b>Respect for the child's private life</b></li> </ul>					

# Practice, until now, of the inscription in the Civil Registry

The Direction General of Registries, Ministry of Justice, has issued three instructions:

- Instruction of 5 October 2010
  - Foreign judgement + recognition
- Instruction of 14 February 2019
  - Consular inscription: biological proof, foreign judgement, etc.
- Instruction of 19 February 2019:
  - No inscription in the Consular Civil Registry
  - Foreign judgement + recognition

THANK YOU VERY MUCH

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