JUST PARENT
handbook

edited by Federico Pedrini

Mucchi editore

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info@mucchieditore.it
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INTRODUCTION

This Handbook collects the most important research and studies done during the project "*JUST-PARENT. Legal Protection for Social Parenthood*" (funded by the European Union).

With this volume we sought to provide: an effective and useful toolkit for scholars, who wish to delve into the most important and current issues related to parenthood, and in particular those parental relationships not based solely on biological or genetic ties; a guide for legal practitioners (registrars, judges, lawyers, notaries etc.); and a model for national and European policy makers.

To fulfill these three functions, the volume is divided into three parts. The first is devoted to recommendations for legislators and practitioners. The second brings together the insights carried out by all the project teams (*Università degli Studi Milano-Bicocca*, *Universidad de Granada*, *Uppsala Universitet* and *KT-Notare*) on Italy, Spain, Sweden and Germany. In this way, we were able to have a "cross-section" of the different regulatory models present in Europe on the topic of parenthood, so that we could hypothesize some solutions that could be functional in so-called "cross-border relationships", always keeping at the center the best interest of the child and the protection of all other interests at stake. Finally, the third part portrays a proposal for a European directive.

I would like to take this opportunity to point out that this important activity has not been the only and perhaps not even the most important among the activities of these last two years of the project: ten workshops open to legal practitioners (but also to scholars and students), lectures within Ph.D. courses, a moot court competition, a podcast, and a Mooc freely accessible on the *Eduopen* platform are only the most important milestones we have achieved. And this was only possible thanks to the cooperation of all the members of our teams whom I would like to thank for that.

Federico Pedrini

POLICY RECOMMENDATIONS

POLICY RECOMMENDATIONS

The Phenomenon

Social parenthood is an umbrella term used to describe the relationship between a person assuming parental status or parental responsibility and a child, in the absence of a genetic, biological, and gestational contribution between the former and the latter. The category includes all forms of filiation resulting from the various types of adoption, including stepchild adoption, as well as filiation resulting from donor-gamete-based medically-assisted reproduction, medically-assisted procreation (MAP) using a couple's own gametes, surrogacy, *post-mortem* procreation (use of gametes after a natural parent's death), adoption of embryos, and heterologous MAP by mistake (switched gametes at the lab resulting in a child not biologically related to the intended parents).

Social parenthood further includes functional/de facto parenthood by adults in actual parenting roles with a child and parenthood founded on informed consent more generally. In the free-movement context, it includes cases in which certain countries provide legal status to a parent-child relationship while in other states the parent and child are treated as "legal strangers".

By including the concept of social parenthood in legal regulation of the family, such legal harms can be avoided and more emphasis can be placed on what is central for the child: enduring care for the development of the identity of the child, in coordination with the document "EU strategy on the rights of the child". The approach is supported by research findings from the studied jurisdictions that document existing rules of domestic law aimed at the preservation of a social parent-child relationship, that is to say a non-biological *status filiationis* for the protection of the best interest of the child. The term is highly relevant to EU legal development because it includes both the above-described non-biologically-based forms of parenthood/filiation based on national law and the filiation status that circulates between EU Member States and in cross-border cases between EU and non-EU countries.

For the above-mentioned reasons, especially those related to lack of cross-border recognition, the definition of the term "social parenthood" is broader for the purposes of this comparative research project (which has resulted in these policy recommendations) than for example the definition developing in the UK and USA, which often limits relationships

deemed to involve "social parenthood" to ones where no legal status has been extended, thus excluding for example adoptive parent-child relationships once an adoption has been finalized.

From our broad definition of social parenthood, it is possible to isolate two constituent components relevant to the category. The first, identified as the *positive prerequisite*, relates to the potential social parent's assumption of responsibility for the procreation resulting in the child's birth, followed by the assumption of the parental responsibility as a conscious and responsible choice by the adult, as a single parent, as a part of a couple or as a part of a different social formation. The second element, identified in the *negative prerequisite*, relates to the lack of relevance of genetic or biological heritage between both parents and the child born or lack of a gestation carried out by one of the intended parents prior to the child's birth.

The units of the project studied different social parenthood cases:

- full adoption
- mild adoption
- simple adoption (where different from the mild one)
- MAP (both homologous, not requiring any donated gametes, and heterologous)
- MAP by mistake
- Post-mortem application of MAP
- ROPA (Receiving oocytes from the partner)
- surrogacy
- embryo sharing or embryo adoption
- kafala

The list is illustrative and not exhaustive.

General Premises to the Policies we Recommend

Methodological introduction: Research (*i.e.* investigations leading to a report on all forms of social parenthood in each jurisdiction) was carried out in each of several EU Member States, based on the selection criteria contained in the project proposal which emphasized that the study design would allow comparisons between contrasting EU legal systems. The phenomenon of social parenthood as a whole was defined broadly, as described in the introduction, to avoid a narrow compartmentalization of the phenomena of parenthood and filiation in each studied legal system and to allow a sectoral study of the cross-border "downgrading" phenom-

ena commonly experienced by social parents and their families in cross-border situations.

In addition, internal but also external parenthood and filiation phenomena were studied: phenomena arising from the evolution of the family in each individual system studied and phenomena arising from the movement of families and thus family statuses between different states.

A study was made of not only enacted statutory law (such as, for example, in civil law jurisdictions, civil codes), although statutory law is the main source of law on family status filiation in each Member State studied; the analysis also extended to "sectoral laws," taking into account the evolution of the law over time, the way it is applied and interpreted by case law and its elaboration by academic literature.

Best scenario and comparison with reality: We are aware that the European Commission has, during the implementation period of this Just Parent research project, made a proposal for a Council Regulation on a topic that intersects with this research, as far as the "circulation of statuses" is concerned.

During the course of the project, it was noted at an early stage that the EC sees a Regulation and thus uniformity as a best-case scenario for EU legal involvement in this area, because it is understood to be the most protective solution for those individual Union citizens and families involved.

In response, the project explored the idea of a Regulation, but quickly noted the reaction to the proposed Regulation of some Member States, for whom it would be unacceptable to form a uniform civil status act and/or alternatively to introduce a system of automatic mutual recognition for any national legal act concerning family and parenting matters, as envisaged in the 2010 Green Paper "Less bureaucracy for citizens" (COM (2010)747 final), which preceeded the promulgation of EU Reg. 1191/2016. As scholarship from several Member States has noted, in general there is a marked need for harmonization of national legal systems, which may have been achievable by harmonizing EU legislation historically, during the period of inquiry which led to those proposals. In the current period, however, there is increased political resistance and critique of a supplanting role played by the European courts, which, although respecting the states' margin of appreciation, are carrying out a more effective harmonization process than that carried out by the legislature in this area.

The project therefore notes and continues to advocate and aim for the formulation of a harmonization proposal that respects the discretion of Member States.

The objectives of this policy brief:

I) Eliminating all negotiation and indirect effects of negotiation in biolaw: The goal we recommend is to exclude negotiation in the treatment of the human body and to proceduralize medical treatments with legal effects in the context of parenthood law; the recommended approach makes no distinction between parenthood-generating institutions, whether based or not based in biological, genetic or gestational links: parenthood derives from the consent (to a medical treatment or to a multistep procedure);

II) Prioritizing women's dignity: The research was carried out in consideration of all those involved in the techniques that can determine intentional filiation. The study also addressed those who are often extraneous to the field of study of the discipline but who are directly and indirectly affected: e.g., biological parents versus social parents in adoption; donors in MAP practices; pregnant women in surrogacy; surviving and deceased parents in posthumous practices; and caregivers in cases arising from Islamic law. In this area, special consideration was given to the condition of women: thus, the need emerged to identify effective means of protection of subjects in a condition of vulnerability and asymmetry, both informational and economic, and, at the same time, the need for protection of non-negotiated forms of manifestation of self-determination, while respecting human dignity.

III) Promoting equality: This research aimed to study the phenomenon of filiation and parenting by adopting an intersectional approach, which considers a wide number of factors that can lead to phenomena of discrimination against children and those involved in the family ménage. As intersectionality theory postulates, a combination of such factors can lead to particularly unacceptable discriminatory rules and application of rules. Thoughts run to:

1) **Age** (in view of the potential parent age limits limiting access to MAP);

2) **Economic status** (in view of the status circulation hypothesis: MAP *is* accessible to those who can afford it by resorting to private clinics or international healthcare providers);

3) **Nationality** (in view of inter-Member State differences: while in Germany the public order clause is interpreted favorably to the effects of filiation by surrogacy, this is not the case in Italy; while some forms of posthumous procreation are allowed in Italy because of an imprecise legal dictate, they are not allowed in Spain because the legal system provides stricter rules for informed consent to MAP);

4) **Health** (given that the concept of health has evolved: from the protection of physical integrity from forms of impairment, we have come to the WHO notion of a condition of overall well-being, in which physical well-being, even in MAP treatments, takes on particular relevance; moreover, the finding of certain physical conditions is differently considered in filiation disciplines: while a serious pathology, such as cancer, may result in preclusion from adoption, this pathology may justify the use of MAP techniques);

5) **Gender** (because we find that only some of the studied jurisdictions allow medically assisted procreation (MAP) techniques to trans people, which is discriminatory especially considering that surgical sex change or sterilization is now no longer legally required for change of legal gender (in the Member States where this is permitted in law); furthermore, access to MAP techniques may differ between men and women, or between couples formed by people of the same or different sexes);

6) **Sexual orientation**;

7) **Civil status** (because access to medically assisted procreation techniques is not always given to form a family in the absence of a two-person couple, such as to single persons; moreover, the requirement for access may vary according to marital status: some Member States require a marital union in marriage while for others another form of registered union or non-registered cohabitation suffices).

The instrument: Abstractly, the most effective choice would be to have a single legal instrument through which to regulate the phenomenon of social parenting while respecting the best interests of the child and simultaneously protecting the dignity of all stakeholders (e.g., the pregnant woman in gestational surrogacy), this one instrument covering all of the "new" procreative processes (MAP) at once. The instrument, a single source of law, would allow the European Union to meet the needs of systematic order and intelligibility of the system, which would benefit Member State legislation, to the benefit of stakeholders in the application of the law. In this regard, our recommended choice would be a Council Directive, as it

would allow respect for the specificities of individual states' legal environments. The Member States would in turn be better able to identify the most appropriate national legal tools to achieve the objectives set at the European level.

Nonetheless, part of the national law to be amended is already addressed at the EU level by the Tissue Directive and the Blood Directive (2004/23/EC, 2002/98/EC); another part of existing regulation of this area is contained in Regulation (EU) 2016/1191, and yet another part is contained in proposed Regulation (EU Reg. COM(2022) 695 final 2022/0402 (CNS). Requirements of effectiveness and economy thus dictate a Directive be used that in part amends or replaces these pre-existing Directives. This approach is complementary to other researcher and expert group recommendations that have already proposed comprehensive reforms to the Tissue Directive, as well as to EU law on the free circulation of status documents and the current version of the proposed Parenting Regulation.

In sum, the Directive approach allows for respect for the competences reserved to the EU and to the Mamber States respectively.

EU competence: The problem of EU competence over these issues has not been adequately addressed in the recent proposed Parenting Regulation, and in fact has also been the subject of criticism among scholars and experts. One way to circumvent the problem would be to modify pre-existing EU legislation, having as as its main subject matter other issues than parenting (family law); this approach is proposed in the recommendations in the remainder of this section. Such an approach might also encourage a greater majority of Member States to "accept" such interventions as not overtly inherent to filiation.

The counterlimits: Following the meetings, workshops, papers and reports conducted for this research project, we have concluded that it is appropriate and also necessary to carry out additional, suitable research involving all MS jurisdictions regarding each jurisdiction's notion of family public policy (for TFEU Article purposes), as well as family national identity (pursuant to TFEU Article). The use of these clauses is certainly an escape valve for systems that, as is the case for civil law systems, prefer the certainty, predictability and precision of the rules enacted by parliaments, even or especially in the face of new and exogenous phenomena. However, it has been found that the use of these clauses has occurred quite differently, not only between legal systems that differ from each other, but also between

very similar systems (e.g., application of the public policy clause to cases of recognition of filiation by subrogation in Italy and Germany).

Critical remarks: As was recently noted by the French Senate opinion on the proposed Parenthood Regulation on filiation, research conducted on a partial sample of a few Member States, such as the JP research comparing four jurisdictions, can certainly be a pilot tool for future policy development on the subject. However, it cannot give a suitably comprehensive answer that captures the international consensus. While the Regulation proposed would satisfy the needs for harmonization that have emerged in other European jurisdictions, it would also obliterate a number of cases that have not yet emerged in the four jurisdictions studied but have already emerged elsewhere. In this second respect, we note that the project involves a Western-centric perspective on social parenting types and issues, mainly focused on the movement of family members within the EU and between the EU and other Western Legal Tradition orders such as the UK and the US. The project also, however, observes how social and functional parenthood also arises from the circulation of institutions of Islamic law, e.g., kafala. Such findings have emerged from our study of the enforcement in practice of the general public policy clause.

A. POLICY RECOMMENDATIONS FOR THE HARMONIZATION OF SOCIAL PARENTHOOD IN THE EU TOWARDS A BETTER PROTECTION OF MINORS AND AN EFFECTIVE PARENTAL RESPONSIBILITY

Amendments to Directives 2004/23/EC and 2002/98/EC

1) **Governance and management of genetic heritage:** Directives 2004/23/EC and 2002/98/EC (the so-called Tissue Directives) should be amended. The amendment should introduce techniques for controlling determine the shipment of human genetic material and governing the methods of tissue retrieval and transfer, all in accordance with the general principle of informed consent to medical treatment. Consent, understood as authorization for interference with the body, should be constructed as a unilateral, non-negotiable act, not subject to commercial or contract rules.

Rules for governing, managing and determining the use of one's genetic material after death (such as the use of gametes, cells and tissues) must be established. The requirements for governance and management of the genetic material in the movement of body parts must also be established.

Thus, it is necessary to:

a) Update national-level regulation that is not now in accordance with science by adding positive obligations on Member States to consult the people, specifically through (i) implementation of direct democracy mechanisms (e.g., popular consultations and referendums), and (ii) periodic updating of all national rules in this subject area to ensure high-quality and research-proven contents (e.g., contingency management clauses).

b) Firmly establish the principle of consent as a constitutive element of any transfer of body parts.

c) Establish the principle of gratuitousness for all forms of super-ethic or supererogatory services, except for reimbursement of expenses and inconvenience (VUD, voluntary unpaid donation). Since these services are characterised by a high social and moral value, and since they have an impact on the body, they should not be susceptible to contractualization and negotiation to an extent that would commercialize them. These services should be characterized by solidaristic purposes, while not unreasonably denying donors reasonable expenses and appreciative compensation. The right to reconsideration (*ius poenitendi*) should always be guaranteed, and only and exclusively indirect forms of incentive to withdrawal

and disposal should be allowed (e.g., so-called social gratitude in the forms of the free offer of screening and medical examinations to ascertain the donor's health status or compensation for expenses and inconveniences by the center in the form of indirect remuneration or with reimbursements *tout court* that do not consider the quantity of donated samples but rather the activity performed by the donor in verifying suitability for donation, performing the retrieval and giving after-care post-surgery, if any).

d) Expand the range of infertility/infertility treatment techniques, also in this regard taking into account the different forms of super-ethic benefits (*supra c*) and treatments considered most suitable and appropriate by the scientific community.

e) Identify the effects of the general rule of consent: if the treatment, whatever it may be, is based on consent or on a series of unilateral, non-negotiated, revocable, gratuitous, solidaristic consents, there is no room for negotiation, for contracts contrary to mandatory rules, public order and morality, or for forms of commodification of the body and violation of human dignity

In this sense, and in the vein of the complementary approach, the contents of the proposed regulation on the subject are valued: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0338

2) **Knowledge of own origins:** more actions are recommended in this regard.

Undifferentiated and generalized access to information concerning one's origins, i.e., the personal identity of possible cell donors and pregnant women, should be precluded, in order to protect the confidentiality of the latter, unless consent is given to the display of the aforementioned information. Thus, the general principle of anonymity in body part harvesting and donation procedures must be reaffirmed; the need to protect the fundamental right to health has emerged, so that there is a need for a harmonization of the rules of interpellation and access to information with therapeutic purposes, suitable for the prevention and treatment of genetically transmissible diseases.

In this sense, the findings of the report Anonymous donation of sperm and oocytes: balancing the rights of parents, donors and children, February 20, 2019, No. 14935, https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=25439, can in this way be honored, again for the benefit of complementarity and efficiency.

Consider, as well, the recent conclusions reached on the issue by the ECHR in the case European Court of Human Rights, Sec. V, Sept. 7, 2023, appeals Nos. 21424/16 and 45728/17- Gauvin Fournis and Silliau v. France.

As has been noted, the anonymity of gamete donations, as protected by national legal orders such as in France, dictates several of the requirements we recommend be enacted and harmonized at the EU level, along with the canons of voluntariness and gratuitousness. Anonymity safeguards the safety of cell donations and the protection of therapeutic self-determination, as opposed to forms of coercion and trafficking. In addition, the principle protects the unity of the legal family, as opposed to the biological dimension.

Again, by this route the risk of a substantial decline in the number of gamete donations is avoided. For these reasons, at least in the provisions in force in the first decades of the MAP rules, anonymity was protected absolutely, unconditionally and irreversibly.

The values mentioned were, then, affirmed several times by European institutions and, most recently, by the Council of Europe's 2019 Recommendation 2156.

Unlike the donor's health information, which is functional for the reconstruction of a clinical picture for the protection of the health of those born following the use of heterologous MAP techniques, access to one's origins through the acquisition of the donor's non-therapeutic personal information constitutes, on the contrary, only a "trend," moreover of recent emergence.

Only a few states recognize a personal right to know for the person born and provide for procedures for access to donor information upon request, yet there is still no international consensus on the point. It is also noted that some states, such as the Czech Republic, Greece, Latvia, Montenegro, North Macedonia, Poland, Serbia, Slovenia, and Ukraine, always prevent access to donor information, whereas other states, including Spain, Sweden, Switzerland, Germany, Austria, Norway, the Netherlands, the United Kingdom, Ireland, Malta, and Portugal, allow access to donor information only if it serves an eminently therapeutic function. Only a few states, such as Belgium, France, and Iceland, have recently reformed the regulations on this point and have allowed some donor information to be displayed, subject to the donor's consent, for data without a correlation to the petitioner's right to health.

In contrast, Italian adoption law, coordinated with the national rules on civil status, recognizes an adoptee's right to know his or her origins, in

the case of an anonymous birth, but only after one hundred years from the issuance of the birth assistance certificate, after the adoptee has very likely died; it becomes more a right of an adoptee's descendents. For this reason, in Godelli v. Italy, the European Court affirmed that the Italian law on the adoption of minors (Art. 28 l. No. 184/1983) does not provide for a balance between the adoptive child's right to know his or her origins and the right of the parturient to respect for her choice of anonymity. This was because the Italian law lacked a mechanism of confidential interpellation to verify the actuality of the woman's determination. After the European Court's condemnation in the Godelli case, the Italian Constitutional Court declared illegitimate Art. 28, par. 7, l. no. 184/1983, insofar as, in the face of the parturient's declaration that she does not wish to be known pursuant to Art. 30, par. 1, Presidential Decree no. 396/2000, it does not provide for the possibility for the judge to hear the woman, at the child's request, in a procedure established by law to determine if the information (or some information) should nonetheless be revealed. The Court held also that the procedure would need to ensure maximum confidentiality for the judicial proceeding records themselves, in case the woman might in the future choose to revoke her declaration.

Despite the submission of some bills, the procedure has not been regulated in any way, so it was the case law (Cass., S.U., 1946/2017) that outlined a procedure to be followed. It has been held that the correct statutory law to apply in these cases is found in the rules on proceedings in chambers, and in the rules on the protection of personal data, as well as based on the guidelines and protocols disseminated by the Italian courts. Different considerations apply, on the other hand, to those born from artificial procreation techniques regulated by l. Feb. 19, 2004, No. 40, which has never undergone reform since its enactment. In its original structure, the law did not allow any form of gamete donation, so that the issue regarding the split between identity and filiation did not arise. However, declarations of constitutional illegitimacy of bans on cryopreservation and heterologous fertilization later led to the possibility of births of persons without a shared genetic heritage with legal parents. For this reason, Italian doctrine has questioned whether the rules on interpellation applied to adopted children can also be applied to those born from MAP; on the other hand, there has been no lack of reflection regarding the distinction between the forms of filiation.

However, the distinction between the two forms of filiation must be considered. In the former, birth determines the acquisition of substan-

tive ownership of the *status filiationis* between the born and the biological parent; however, with the configuration of the state of "abandonment" involved in Italian adoption law, extinction of the inherited familial civil status is being legally determined as a condition of the adoption. With adoption then comes the creation of a new status of the adoptee vis-à-vis the adoptive parent. In this scenario, a status is identified for the biological or birth parent, then a relinquishment is established and, finally, a new civil status is granted that takes the place of the first. In contrast, in artificial procreation there is no such succession, but the substantive ownership of the filial relationship involves only the child born and those who give informed consent to the treatments. With this determination, the patients assume, first, procreative responsibility and then parental responsibility over the child, according to Articles 6, 8 and 9 l. No. 40/2004. There is never an abandonment of the child as of the moment of birth and, therefore, there is no extinction of the *status filiationis*, since the donor surrenders, exclusively and jointly, his or her reproductive cells. Moreover, as the law expressly provides, gamete and oocyte donors cannot assume any form of liability to the MAP birth.

3) ***Post mortem* techniques:** There is a need for any legal instrument regulating this area to specify rules for decisionmaking over human reproductive cells and embryos after a genetic parent's death, in view of the possible occurrence of death during the MAP and cryopreservation cycle. On this point, little homogeneity has been found between the Member States studied: while some states have regulated management methods, through the implementation of informed consents with formal safeguards, in other states no specific rules have been introduced and solutions are left, in an area where the legislature has wide discretion, to case law. Moreover, where the decision is left to jurisprudence, it appears that the application of the rules of the more protective domestic law of succession has been ruled out as an exception to the principles of exclusivity and uniqueness.

The desirable instrument of control is always informed consent, accompanied, however, by formal safeguards, such as a requirement for the consent to be given in writing or in the presence of witnesses for purposes of validity. In the absence of an express determination, since cells cannot be abandoned to prescriptive acquisition by biobanks, the application of domestic inheritance law is suggested, insofar as it relates to dispositions with non-patrimonial content. This respects the competence of the Mem-

ber States in matters relating to civil law and allows the predictability and intelligibility of the system to be protected.

4) **Cell management in case of donor's death without provisions for it:** Although this is an ethically sensitive issue, where room is left in proposed EU legislation for the national legislature's discretion, the EU legislation should require that Member States bring national rules into line with the indications of the scientific community and provide for a harmonious system, for the protection of safety, individual and public health, and legal certainty (to prevent a high rate of litigation of individual cases). Only a few EU jurisdictions have provided themselves with precise rules on the duration for retention and the legally-permissible destinations of cells in the event of donor death; in others , determination is left to the controversy of the specific case, resulting in unequal treatment at the territorial level. Moreover, failure to adopt these rules results in overproduction of cells and embryos to be kept without subsequent utilization, affecting the sustainability of the system given limited resources among MAP providers. Therefore, it is recommended that regulations be adopted on the duration of storage of human reproductive cells and embryos, destinations, and interpellation procedures. As a result, reproductive cells can be safety obtained and the overproduction of new cells for storage can be avoided, while subjects also can be allowed to determine, through the granting of their informed consent, how their cells will be used and to whom they will be released, including with respect to the posthumous use of their already collected cells capable of transmitting their genetic heritage to a future generation. This allows for the determination of control over the cell, without the loss of the power to govern the cell, precluding the acquisition of property rights by biobanks.

Amendments to the EU Reg.
Proposal COM(2022) 695 final 2022/0402 (CNS)

1) **Public order:** The change to the notion of public policy indicated in proposed EU Reg. COM(2022) 695 final 2022/0402 (CNS) is not necessary; it should be specified in the public policy rules that the public policy compliance check always applies to cases where a single European certificate is used;

2) **Public order:** In paragraph 2 of Article 21 of the proposal, concerning the public order clause, it should be specified that the public order clause

will be applied by the courts and other competent authorities of the Member States in compliance not only with the fundamental rights and principles enshrined in the Charter and its Article 21 on the right to non-discrimination, but also with all provisions of the Charter.

3) **Applicable law:** We support Article 17 of the proposal, which states that "[t]he law applicable to the establishment of parenthood shall be the law of the State of the habitual residence of the person giving birth at the time of birth or, where the habitual residence of the person giving birth at the time of birth cannot be determined, the law of the State of birth of the child"; this provision precludes the phenomenon of forum shopping by prohibiting the couple from choosing the jurisdiction;

4) **Scope of the proposed regulations:** the scope of the proposal is too generic and wide;

5) **Objective scope of applicability of the Regulation.:** It is necessary to specify whether the EU Regulation can also apply to foreign acts and measures formed in non-European countries. Some scholars have asserted that the Regulation does not apply to foreign acts and measures formed outside the EU in the manner of Article 3 (as this Regulation does not apply to the recognition of judicial decisions establishing parentage rendered in a third state, nor to the recognition or, as the case may be, acceptance of public acts establishing or proving parentage drawn up or registered in a third state). Other scholars, however, have been concerned about the possibility of applying the rules contained in the Regulation to obtain recognition of the effects of foreign acts and measures formed in a third state, and then obtaining the single filiation certificate and thus obtaining recognition of the effects even in other Member States where the effects of that act or measure do not appear to be compatible with public policy and thus could otherwise remain unrecognized due to Member State discretion recognized by the public policy clause. However, as pointed out in the annex to the Proposed Regulation on the single filiation certificate, it too is subject to the public policy test, so that it should not produce the outcomes feared by this second group of scholars. It would nonetheless be desirable to overcome these uncertainties by clarifying the proper scope of application for the clause by explicitly including the single European Filiation Certificate.

6) **Partial transcription:** It should be specified that the Reg. cannot preclude partial registration of the birth certificate, i.e., registration of only the biological, genetic, gestational parent (who, conversely, must always have the link to the genetic, biological, gestational parent recognized).

Amendment to EU Reg. 2016/1191 on the circulation of public documents

Expanding the scope of EU Reg. 2016/1191 to public documents on social parenthood: Regulation (EU) 2016/1191, which promotes the free movement of citizens by simplifying the requirements for the submission of certain public documents in the European Union, allows citizens of the European Union to move from one Member State to another without the need for legalization or other similar formalities (e.g., apostille) of certain public documents; the regulation also simplifies the formalities related to the translation of public documents and certified copies.

The catalog and type of public documents to which the Regulation applies are circumscribed by Article 2: in family matters, in particular, the Regulation applies to public documents attesting to birth, filiation, and adoption. Member States have been asked to notify the European Commission of the list of public documents to which the Regulation applies, which is published on the European Justice Portal.

However, the catalog of existing public documents on parenting – and particularly social parenting – is much larger than that included by the Regulation and those submitted to the European Commission by Member States. The non-application of the benefits of the Regulation to public documents on social parenting is an obstacle to the movement of families within the European Union.

It would therefore be appropriate that, as Article 26 of the Regulation provides, the objective scope be broadened in the future to include public documents on social parenting, such as those on: 1) representation and guardianship of the child (act of appointment of guardian by the parent; order of appointment of guardian); 2) custody of the child (agreements regarding custody of the child, financial obligations to the child, including out-of-court agreements); 3) informed consent to medically assisted artificial procreation; withdrawal of informed consent; 4) custody of the child ("fostercare") or "private placement"; 5) act of acknowledgement of the child; act of recognition of child before his birth; 6) acts from adoption proceedings (for example: declaration of consent of one parent to the

adoption of the child by the other parent in the case of stepchild adoption); 7) cohabitation or cohabitation between the social parent and the child (such as: Italian registry family certificates; act of cohabitation, etc.); 8) act with which legal custodians to a child (usually the parents) transfer some of their right to a parental leave to a person that is not the child's parent or equated with a parent (with reference to the Swedish legal system); and 9) parenting power of attorney (documents with which a legal parent delegates or shares a certain decision making authority).

Amendments to the proposal for EU Reg. COM(2022) 695 final 2022/0402 (CNS)

Establishment of a European filiation certificate with effect limited to rights guaranteed by European Union law: EU Reg. proposal COM(2022) 695 final 2022/0402 (CNS) seeks to establish a European filiation certificate. Some Member States – for example, Italy – have objected and rejected the proposal, as they believe that the provision of a European filiation certificate violates the principles of competence and subsidiarity. Given the absence of consensus on the part of all Member States on such a sensitive issue, it seems appropriate to provide for the establishment of a filiation certificate with effects limited to the law of the European Union (for example: a European filiation certificate that would have the effect of allowing the full exercise of the right to free movement between Member States of the child).

The legal basis for such a certificate would be Articles 20-21 TFEU and Directive 2004/38/EC, and in addition the case law of the Court of Justice of the European Union, which obliged a Member State (Bulgaria) to register a birth certificate with two mothers for the sole purpose of applying European Union law (C-490/20: VMA case, "Pancharevo").

In other words: each citizen of the European Union would have both a filiation certificate issued by his or her Member State (valid and effective in the state that issued it and in states that register or recognize it) and a certificate relating to European filiation that is automatically valid and effective throughout the European Union.

This solution would also obviate the difficulties produced by the Court of Justice's ruling in the VMA case, according to which the Member State (Bulgaria) must register a foreign (Spanish) birth certificate for the sole purpose of producing the legal effects emanating from European Union law: in many Member States – not only Bulgaria, but also Italy – it is not

possible to register an act “with limited effects” or “with partial effects,” separating the legal effects of the act. There is a clear alternative: either the public officer registers a foreign act, with full effects, or he or she does not register it.

Determination of incidental question falling with the scope of the Regulation: The EU Reg. proposal COM(2022) 695 final 2022/0402 (CNS) sets the criteria under which a state has jurisdiction to resolve a filiation dispute. However, the proposal allows a Member State to make a decision on filiation if it is an incidental decision in a matter not centrally focused on the question of filiation.

In more detail, recital no. 45 reads as follows: “In the interests of procedural economy and procedural efficiency, if the outcome of proceedings before a court of a Member State not having jurisdiction under this Regulation depends on the determination of an incidental question falling within the scope of this Regulation, the courts of that Member State should not be prevented by this Regulation from determining that question. Therefore, if the object of the proceedings is, for instance, a succession dispute in which the parent-child relationship between the deceased and the child must be established for the purposes of those proceedings, the Member State having jurisdiction for the succession dispute should be allowed to determine that question for the pending proceedings, regardless of whether it has jurisdiction for parenthood matters under this Regulation. Any such determination should be made in accordance with the applicable law designated by this Regulation and should only produce effects in the proceedings for which it was made”.

Article 10 of the proposal, consistently, provides the following clarifications: “Incidental questions 1. If the outcome of proceedings in a matter not falling within the scope of this Regulation before a court of a Member State depends on the determination of an incidental question relating to parenthood, a court in that Member State may determine that question for the purposes of those proceedings even if that Member State does not have jurisdiction under this Regulation. 2. The determination of an incidental question pursuant to paragraph 1 shall produce effects only in the proceedings for which that determination was made”.

This provision conflicts with the principles of procedural law of some Member States, such as Italy. In fact, the Italian legal system prohibits a matter in filiation matters from being decided incidentally. In Italy, a determination in filiation matters must always be final and never inci-

dental. In other words: if, in the course of the trial, the Italian court must ascertain a filiation relationship, it must do so in a final manner, effective even outside the trial, and cannot limit the decision on filiation to the pending trial. If the court does not have jurisdiction and cannot decide the filiation issue, it must stay the proceedings and wait for the decision from the competent court. In this way, Italian law seeks to avoid the existence of different and contradictory decisions on parenting matters: for example, in Florence it could be ruled that A is the son of B in a trial on inheritance law; in Taranto, on the other hand, it could be ruled that A is not the son of B in a trial on the right to child maintenance. This is an unacceptable effect for the Italian legal system.

Similarly, it would be unacceptable for the Italian legal system to have the same contradictions occur within the states of the European Union (e.g., in Brussels it is incidentally determined that A is the son of B; in Rome, on the other hand, it is incidentally determined that A is not the son of B). Therefore, the proposed Rules should be amended to provide a mechanism whereby when it is necessary to determine the filiation between two persons and the court does not have jurisdiction, the court should stay the proceedings and have the matter decided by the competent court in a final and effective manner in any trial, including future trials.

Indication of the competent body to decide a conflict between authorities of Member States in matters of jurisdiction: the proposal EU Reg. COM(2022) 695 final 2022/0402 (CNS) dictates a set of criteria for identifying jurisdiction and applicable law in filiation matters (Articles 6 et seq.). It seems necessary to make explicit in the proposal which body should resolve the conflict between several authorities from different states, if more than one authority claims to have jurisdiction to decide the filiation dispute. Article 14 of the proposal merely provides that the authority second seized shall suspend the proceedings ex officio until the jurisdiction of the court first seized is established. The criterion for resolving the antinomy where there is a positive conflict of jurisdiction between two authorities from two different states needs to be identified.

Streamline access to and use of IMI: If the proposal Reg. EU COM(2022) 695 final 2022/0402 (CNS) should be approved, the IMI (Internal market information system) interchange system should be implemented. Authorities of Member States (e.g.: civil status offices, Courts, public administrations…) should access IMI to get in touch with the authority of another Member State that issued the public document on filiation to verify not

only its authenticity, but also its compliance with domestic law, etc. More generally, the use of IMI for the exchange of information between authorities in different Member States on legal and social parenthood should be encouraged. Local authorities should be able to access IMI (e.g.: local civil status office; local court…) without necessarily seeking the intermediation of a central authority.

Applicable law in case of cross-border MAP: It is very common for a couple or an individual citizen of a Member State of the European Union to travel to another Member State to access artificial procreation. There are a variety of reasons that may induce an individual or couple to move to another Member State: for example, the greater efficiency in the application of the procreation technique; the greater financial savings; the better applicable discipline, which makes artificial procreation accessible even to individuals who in their state of origin could not resort to artificial procreation (e.g.: homosexual couple; single person; etc.).

According to Article 17 of the proposal EU Reg. COM(2022) 695 final 2022/0402 (CNS), the law applicable to the establishment of filiation is the law of the state of habitual residence of the one who gives birth at the time of the birth or, if the habitual residence of that person at the time of the birth cannot be established, the law of the state of birth of the child.

In cases of artificial procreation, a further, different and alternative criterion can be identified. an alternative or additional criterion to the one already indicated is conceivable: the law applicable to filiation in fact could be the law governing informed consent to artificial procreation. If, for example, the informed consent was signed in Spain and Spanish law applies, the establishment of filiation could take place according to Spanish law. The benefits of such a provision would be significant: for example, when an Italian couple or an Italian individual makes use of artificial procreation in Spain, by signing the informed consent in Spain, Spanish law would apply and not Italian law.

Separation between legislative act on filiation and legislative act on surrogacy: Surrogacy is the subject of both ethical and legal debate. It is regulated in different ways in Member States: in some, it is allowed, under certain conditions (Greece); in others, it is prohibited and criminally sanctioned (Italy). Some Member States oppose the proposed Regulation because it is ambiguous: the Regulation, if approved, could force states to recognize, register and execute birth acts issued after surrogacy.

For this reason, the EU Commission might consider doing what was suggested by the Expert group on the Parentage / Surrogacy project, formed by the Hague Conference on Private International Law. The expert group wrote the "Final Report 'The feasibility of one or more private international law instruments on legal parentage'". In the report, the expert group concluded that in order to respect the policy concerns of many States, as well as the various approaches to surrogacy globally, the most feasible way forward would be to exclude legal parentage resulting from ISAs (surrogacy) from the scope of an instrument on legal parentage generally (a Convention) and address such legal parentage in a separate instrument (a Protocol).

The same approach could be used by the European Commission, which could make a proposal for a Regulation on parenthood and draft a separate act on surrogacy: the latter could provide for an opt-in or opt-out mechanism by Member States.

Separation of the two acts (the first on filiation, the second on surrogacy) would have several advantages: it would be respectful of Member States' sensitivities on maternity surrogacy; it would promote the approval of the act on parenting, once the doubt that it is applicable to cases of parenting resulting from maternity surrogacy is removed. The separate surrogacy act could also apply to transnational cases even outside the European Union.

Amendments to Directive 2011/24/EU on the application of patients' rights in cross-border healthcare

Cross-border healthcare and artificial procreation: Directive 2011/24/EU on the application of patients' rights in cross-border healthcare stipulates that the Member State shall ensure that the costs incurred for the health care of a person insured in another Member State shall be reimbursed by his or her Member State of affiliation, provided that the health care in question is among the benefits to which he or she is entitled in the Member State of affiliation (art. 7: "the Member State of affiliation shall ensure the costs incurred by an insured person who receives cross-border healthcare are reimbursed, if the healthcare in question is among the benefits to which the insured person is entitled in the Member State of affiliation; recital 31: "This Directive does not aim to create an entitlement to reimbursement of the costs of healthcare provided in another Member

State, if such healthcare is not among the benefits provided for by the legislation of the Member State of affiliation of the insured person").

The national regulations that implemented the directive also reiterate this principle: the Italian implementing decree, for example, stipulates that cross-border health care is provided, within the Italian national territory, in accordance with the fundamental ethical choices of the Italian state (in other words: the Italian state reimburses the costs incurred in another Member State for health care, provided that the health care provision is in accordance with its ethical choices).

Consequently, couples or individuals travel to another Member State of the union to access artificial procreation are not always entitled to reimbursement of health care costs incurred, but only in cases where the technique performed is permitted by the legislation of their state. For example, Italian female couples cannot access artificial procreation in Italy and therefore travel to other union member states to access artificial procreation (such as Spain, Denmark, Belgium, France, Austria…). Such couples are therefore unable to obtain reimbursement for health care costs incurred because Italy does not allow artificial procreation in this scenario.

However, Italy recognizes, executes, and registers foreign birth certificates with two mothers (including two Italian citizens) issued after access to the artificial procreation technique in a foreign state; in fact, Italian authorities believe that these acts are not contrary to Italian public policy (the Italian Constitutional Court and the Court of Cassation have ruled that the Italian legislature could expand access to artificial procreation to female couples as well, since this technique would not be contrary to Italian constitutional principles). Therefore, it seems appropriate to provide for an amendment to Directive 2011/24/EU that expands the possibilities of obtaining reimbursement for healthcare costs incurred abroad: today the requirement is that the healthcare in question is among the benefits to which the insured person is entitled in the Member State of affiliation. It could be provided that the condition for reimbursement is that the healthcare in question is not against the fundamental constitutional principles, values, identity of the Member State of affiliation, or not against its public policy.

This solution would prevent only wealthy peoples from having access to artificial procreation, as opposed to poor people: in other words, it would prevent discrimination in access to parenthood on the basis of income.

Information about origins in adoption and GDPR

Interrogation procedure for therapeutic access to donor health information: As highlighted above, the need has emerged to protect the fundamental right to health of children born from techniques involving, in any capacity, artificial procreation and the use of cells allogeneically. Having recognized the right to health, the enforcement of this right must be made effective through the provision of rules for donor questioning and access to information for therapeutic purposes. In this way, a twofold objective is pursued: the first is the prevention and treatment of genetically transmissible diseases; the second is traced to the prevention of reproduction between blood relatives.

For these reasons, the suggested strategy is the modification of the discipline contained in the GDPR in the part on health status information, without, however, providing for a modification of the discipline on access to GDPR data in the part on personal information related to the donor's identity, unless the donor expressly consents.

The interpellation procedure must guarantee and protect both the rights of the applicant and the rights of the donor.

B. POLICY RECOMMENDATIONS FOR JUDGES AND ADMINISTRATIVE AUTHORITIES FOR THE PREVENTION OF DOWNGRADING

Applicative space of the public order clause

The receiving authority (administrative or judicial) should interpret the public order clause in the following way:

Public order and effects of the act: The current wording of Article 31 of the proposed Regulation stipulates that recognition of a court decision shall be refused by the receiving authority "if, taking into account the interest of the children, it is manifestly contrary to the public policy of the Member State in which it is invoked"; similar provisions are provided in the section on recognition of public acts having binding legal effects (Article 39) or public acts without binding legal effects (Article 45).

It seems appropriate to consider whether a more effective formulation of these rules might provide that recognition of a foreign act is denied if its effects are contrary to public policy. Similar wording is provided, for example, in Italian private international law: under Article 65 of Law No. 218 of May 31, 1995, in fact, "1. The foreign judgment is recognized in Italy without the need for any proceedings when (…) g) its provisions do not produce effects contrary to public policy". Applying the latter formulation, the authority of a Member State that has to decide whether to recognize a deed issued in another Member State does not have to assess in the abstract whether the foreign provisions placed as the legal basis of the foreign deed are contrary to public policy; likewise, it does not have to assess whether the factual prerequisites that preceded the formation of the deed are contrary to public policy; instead, the receiving authority only has to verify whether the effects that such a deed would produce in the domestic system would be contrary to public order.

Thus, for example, in cases where a birth certificate or a judgment has been formed after the commissioning parents have resorted to surrogacy, the authority receiving the act does not have to assess the compatibility between foreign legislation on surrogacy and public policy, nor does it have to scrutinize the factual prerequisites of the surrogacy process (gratuitousness, onerousness, etc.); instead, the authority should only assess whether the effects of the act (i.e.: the attribution of parenthood to the persons named on it) are in accordance with public policy.

In studying the techniques of interpreting national case law and analyzing judicial precedents, different approaches to the public policy clause have emerged. While in cases of factual and functional filiation, e.g., kafala, the public policy clause has been applied without considering the institution but only the effects in protecting the child, this has not been the case in cases of intentional filiation, where the clause has been applied to the institution and not the effects. So that the strategy to be implemented consists of the compliant application of public policy, always to the effects and never to the prerequisite.

Guidelines and training: the development of interpretive guidelines on the general public order clause, illuminated in the light of the best interest of the child, from the values of international comity is recommended. The implementation of training for administrative and judicial authorities in the application of this clause is suggested.

Interpretation of the foreign institution of filiation/parenting and the distinction between prerequisite and effect

Technical expertise: Two strategies are suggested on this point, depending on the case.

It would be advisable to seek technical expertise whenever the recognition of effects of foreign acts and pronouncements relating to filiation is sought from procedures and techniques prohibited in the state in which the recognition is being pursued; solicit the judge in recognition proceedings for the acquisition of the opinions of foreign experts on the subject, so as to obtain a reliable briefing on the professional, scientific and academic level; it is therefore necessary to have reliable information on the foreign institution acquired, considering the origin from legal traditions even different from the Western one, in view of the national laws that allow it.

Conversely, in jurisdictions where the above cannot be done due to domestic procedural law, it is recommended that the court and administrative authority consider punctually the connection between the language gap and the scientific gap: literal translation and subsumption of a foreign institution within the categories known to the target system is deemed insufficient.

Likewise, the use of translators who do not specialize in the subject matter is deemed insufficient.

In addition, the subsumption of the foreign category within general categories formulated by the doctrine and jurisprudence of the receiving

state is deemed inappropriate, but reference must be made in effect to the law of the state of departure as if the court were applying the law in this state.

Downgrading prevention

Prevention of cross-border "downgrading" of child status: In some countries, there is a system of "mild" or "semi-mild" adoption, such as in France and Italy, where adoption is provided for in special cases under Art. 44 l. 184/83: this type of adoption is applicable, for example, to cases of adoption of a partner's child (this is the s.c. "step parent" or "stepchild" adoption).

When a foreign judgment of adoption of a partner's child is transcribed in Italy, the Italian registrar applies Italian law to the registered foreign adoption (resulting in the production of the legal effects provided for by Italian law): in essence, the foreign adoption of a partner's child (e.g., the French adoption, which in France produces full effects and constitutes a parental relationship equal to all others) is recognized in Italy as a "semi-parent" or "mild" adoption. There is thus a downgrading, i.e., a compression of the child's rights: the passage from the French border to the Italian border generates a reduction of the child's rights, which, conversely, are re-expanded once the child returns to France. This phenomenon also occurs in cases of adoption by the single person: in Italy, the foreign adoption of the single person undergoes "downgrading": the discipline of "mild adoption" under Art. 44 l. 184/1983 applies to this institution, even though abroad, where the adoption was established, the adoption is full.

The phenomenon of downgrading is a serious obstacle to the movement of persons, families and statuses. It is therefore appropriate for legal practitioners (registrars, judges, etc.), when they have to register, recognize or execute a foreign act in filiation matters, to ensure that the child in the receiving state has the same rights as he or she has in the state of origin.

In other words, it is not enough that there is a circulation of statuses, but it is necessary that these statuses circulate effectively and fully, without downgrading.

An alternative solution to the downgrading phenomenon could be to provide for a rule requiring States to give certain minimum legal effects when recognising legal parentage (e.g., rights equivalent to those resulting from legal parentage established under domestic law rules; or only certain rights, such as nationality, parental responsibility or maintenance).

Recommendations on dialogue with EU courts

For the implementation and effectiveness of inter-court dialogue, several strategies are recommended:

1) implementing the use Protocol 16 para ECHR;

2) use of interlocutory referral: interlocutory referral to the Court of Justice of the European Union should not be used as a tool for interpretation of the public policy clause as it is not within its competence, but it may suggest use to verify the relationship between domestic procedural law and implementation of the recommendations in the policy brief.

Distinction public order and national identity

Distinction between general clauses/vague legal concepts: Careful and differentiated use of the general clauses, including the public policy and national identity clause, is recommended: public policy must not be used as a synonym for national identity; if national identity is to be opposed as a limitation, counter-limits must be opposed.

Likewise, the scope of national identity must be distinguished from the general Best Interests of the Child clause. However, careful use of the clause is recommended, as such interests cannot become "tyrants" over others at stake, relating to other subjects, potentially vulnerable for reasons other than a minor's age and therefore vulnerable status.

Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation

Social parenthood and equal treatment in employment and occupation: Directive 2000/78/EC lays down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

In many States, the lack of legal recognition of a family produces discrimination of various kinds: among them, discrimination in employment and welfare. For example, the social parent does not have access to leave or work leave to be able to care for his or her child in cases where the child is ill, or has a disabling illness, or disability, etc.

National authorities should therefore interpret domestic law in accordance with directive 2000/78/EC and thus disapply domestic law that produces any discrimination against social parents in employment.

ANALYSIS OF THE REGULATORY MODELS ON SOCIAL PARENTHOOD

ITALIAN CHAPTER*

Disciplines, statutes and laws cited

1. Civil code (R.D. 16 marzo 1942, n. 262);
2. Code of civil procedure (R.D. 28 ottobre 1940, n. 1443);
3. Code of criminal procedure (D.P.R. 22 settembre 1988, n. 447);
4. Criminal code (R.D. 19 ottobre 1930 n. 1398);
5. Costitution of the Italian Republica;
6. Child's right to a family (L. 4 maggio 1983, n. 184)
7. Rules on medically assister procreation (L. 19 febbraio 2004, n. 40);
8. New Rules on Administrative Procedure and the Right of Access to Administrative Documents (L. 7 agosto 1990, n. 241);
9. Regulation of same-sex civil unions and regulation of cohabitation (L. 20 maggio 2016, n. 76);
10. Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012;
11. Presidential regulation on resident population (D.P.R. 30 maggio 1989, n. 233);
12. Regulation for the revision and simplification of the civil status system (D.P.R. 396/2000);
13. Reform of the Italian system of private international law (L. 31 maggio 1995, n. 218);
14. Consolidated text of laws and regulations on legal costs (D.P.R. 30 maggio 2002, n. 115).

Abbreviations

C. App.	Court of Appeal
C. Cost.	Constitutional Court
C.c.	Civil code
C.p.	Criminal code
C.p.c.	Civil procedure code

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C.p.p.	Criminal procedure Code
Cass.	Court of Cassation
D.l.	Law decree
D.Lgs.	Legislative decree
D.p.r.	Decree of the President of the Italian Republic
R.d.	Royal decree
Reg. UE	European Regulation
Trib.	Tribunal

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I. General principles and definitions on family and parenthood

A. The main stages of Italian Family law

Italian law does not expressly define the concept of "family": as observed by a jurist in the past, Carlo Arturo Jemolo, in his essay *The Family and the Law*, "The family is an island that the sea of law can only lap"[1], an aphorism that has become very famous among Italian family law scholars.

This is evidenced by the significant changes in Italian family law over time. These changes have been brought by both legislative reforms, Constitutional Court rulings, and case law that can be considered radical during the 20th century and 2000.

It is possible to describe the evolutionary stages of the concept of family as follows[2].

1. The family in the 1942 Fascist Civil Code

The idea of the pre-eminence of men over women and of fathers over mothers, within the family, is present in the 1942 Fascist civil code: the authoritarian state, during Fascism, no longer agrees to stop at the threshold of the family, in accordance with the idea, in vogue at the time, that "the individual does not exist except insofar as he is in the state". The State, in essence, considered it its duty to protect certain weaker subjects within the family: hence the provision of laws entrusting magistrates with the power to intervene (even ex officio) to resolve problems relating to the material and spiritual interests of minors. This explains the creation of the juvenile court (in 1934) and the tutelary judge (in 1939).

2. The family in the Italian Constitution of 1947

The entry into force of the Italian Constitution brought an important breath of fresh air to family law as well. There are three articles that specifically deal with the subject[3]:

- Article 29 of the Constitution provides: "the Republic recognises the rights of the family as a natural society founded on marriage (para. 1). Marriage is ordered on the moral and legal equality of the spouses, with

[1] See C.A. Jemolo, *La famiglia e il diritto*, in *Annali del Seminario Giuridico dell'Università di Catania*, III-1949, Jovene, 2017.

[2] G. Iorio, *Corso di diritto privato*, Giappichelli, 2022, 963 ff.

[3] G. Iorio, *Corso di diritto privato*, Giappichelli, 2022, 963 ff.

the limits established by law to guarantee family unity (2nd para.)". The fundamental principle of equality between spouses is enshrined, which will find full consecration with the 1975 Reform of Family Law.

- Article 30 of the Constitution, then, establishes that "it is the duty and right of parents to maintain, educate and bring up their children, even if they are born out of wedlock (1st para). In cases of parental incapacity, the law provides for the fulfilment of their duties (2nd para). The law provides children born out of wedlock with all legal and social protection, compatible with the rights of legitimate family members (3rd para). The law lays down the rules and limits for the search of paternity (4th paragraph)'. The innovation is evident: marriage is founded on the moral and legal equality of the spouses. Moreover, natural children (which means children born out of wedlock) are ensured every legal and moral protection, compatible with the rights of members of the legitimate family. It should be noted how, in this last aspect, the constitutional law establishes a hierarchy between the 'legitimate' family (which is accorded pre-eminence) and the 'natural' family; at present, however, it is no longer possible to discuss the 'legitimate' family and, therefore, the hierarchy envisaged by the Constitution must be considered superseded.
- Article 31 of the Constitution proclaims that "the Republic shall facilitate, by means of economic measures and other provisions, the formation of the family and the fulfilment of its tasks, with particular regard to large families (1st para.). It shall protect maternity, childhood, and youth, encouraging the institutions necessary for this purpose (2nd para.)". The Constitution, in this way, admonishes the legislature to ensure protection for the mother from the moment of conception to the first months of the child's life. The working mother, in particular, is the recipient of a threefold form of protection: employment protection (which prevents the dismissal of the woman from the beginning of gestation until she is one year old); physical protection (which imposes quantitative and qualitative limits on work during the period of pregnancy and breastfeeding); economic protection (which translates, inter alia, into the provision of allowances for the working mother during the period of abstention from work).
- Article 2 of the Constitution, for which the Republic recognises and guarantees the inviolable rights of man, both as an individual and in the social groups in which his personality is developed. The constitutional provision, in referring to 'social formations', does not only refer to the

traditional family, *i.e.* that founded on marriage, but also to other families (such as those founded on civil union, cohabitation contract or *de facto* cohabitation).

3. The Constitutional Court rulings of the 1960s and 1970s

The constitutional principles on the family, on the other hand, were not implemented immediately: it was not until the end of the 1960s that a (normative and jurisprudential) direction was established to make the constitutional dictate operative within the family.

In particular, in 1968, the Constitutional Court declared the illegitimacy of the rules that, on the subject of separation, considered the husband's adultery differently from that of the wife[4]. A previous ruling had declared illegitimate the different configuration of adultery offences committed by the man or the woman[5].

Again, in 1970, the Constitutional Court declared illegitimate the different legal treatment of separated husbands and wives, insofar as it stated that the husband was always obliged to provide maintenance, while the wife was only obliged to do so if the husband did not have sufficient means to do so[6]. And again, certain discriminations between "legitimate" and "natural" children in matters of succession were eliminated[7].

4. The reforms of the 1970s and 1980s

The legislature, in those years, also played a fundamental role: in 1970 the law on divorce was introduced (law no. 898 of 1.12.1970, as amended); in 1975, then, there was an organic reform of large areas of family law (law no. 151 of 19.5.1975).

These were the main innovations introduced by the legislature in 1975, some of which will be taken up again in the following discussion: raising of the age required to enter into marriage; revision of the causes of invalidity of marriage; full equality between men and women in the management of the family and in the exercise of parental authority (now called "parental responsibility"); abolition of separation for "fault", which may now be pronounced with "debit" against one spouse; introduction of com-

[4] Constitutional Court, no. 127/1968.

[5] Constitutional Court, no. 126/1968; with ruling no. 147/1969, the same offence of adultery was cancelled.

[6] Constitutional Court, no. 133/1970.

[7] Constitutional Court, no. 205/1970, no. 79/1969.

munity of "acquisitions" as a legal patrimonial property regime between the spouses; substantial (though not complete) equal treatment of "natural" and "legitimate" children; recognition also for the mother and child of the action for disavowal of paternity.

5. The 2012 reform

And again, Law No. 219 of 10.12.2012, containing "Provisions on the recognition of natural children", definitively affirmed the principle of the legal equality of all children, regardless of whether they were born in or out of wedlock (Art. 1 of Law No. 219/2012 expressly provides for the replacement of the words 'legitimate children' and 'natural children', wherever they occur in the Civil Code, by the word 'children'; the new Article 315 of the Civil Code states that "all children have the same legal status").

6. The introduction of civil unions and registered partnerships in 2016

Until 2016, there was no general statute for the non-marital family. After a long and troubled journey, the Parliament approved, the law no. 76 on the "regulation of civil unions between persons of the same sex" and the "regulation of cohabitations". The law demonstrates the gradual evolution that has taken place around the family phenomenon: from marriage as a natural society legally protected under Article 29 of the Constitution, we have come to the "family archipelago", within which the other social formations protected by Articles 2 and 3 of the Constitution are also protected.

7. The plurality of family models in today's Italian law

Today, in the light of the evolution of family law, it is possible to say that there is a plurality of family models protected by the Italian legal system. They are:

1) The family founded on marriage, governed by the Civil Code;
2) The family founded on civil union between persons of the same sex, governed by Law 76 of 2016;
3) The family founded on de facto cohabitation, governed by Law 76 of 2016;
4) The registered family, governed by art. 4 of DPR no. 223 of 30.05.1989;

5) The de facto family, whose bond is not in any way formalized by a document, a contract, a formal act;

B. The notion of "parenthood" and its evolution over time in the Italian legal system

Italian law does not give a specific definition of parenthood. However, it is possible to outline the types of parenthood existing in the Italian legal system and their basis as follows:

1. Parenthood based on presumption of law (in the case of a child born during a marriage)

If two persons are married, the parents are: 1) the one who delivered the child (the mother); 2) the husband. In fact, Article 231 of the Civil Code provides for a "legal presumption" of paternity, so that "the husband is the father of the child conceived or born during the marriage". It is possible, however, to prove that the father is not the husband through the legal action known as an "action for disownment of the child". It is thus possible to establish that the child was not conceived by the mother's husband. A child shall be presumed to have been conceived during the marriage when three hundred days have not yet elapsed from the date of the annulment, dissolution or cessation of the civil effects of the marriage (Art. 232, § 1, Civil Code).

2. Parenthood based on recognition

If two persons are not married, the parents are: 1) the one who delivered the child (the mother) and who declares that she recognises the child as her own child; 2) the man who declares that he recognises the child as his own child (Art. 250 Civil Code).

The legal relationship between the unmarried parents and the child is created through a solemn act called "recognition of the child born" or through a state court action. For the creation of the legal relationship, therefore, a personal initiative is required: of the parents, in the case of recognition of the child; of the child, or of the other qualified persons in the case of a judicial declaration of paternity and maternity.

3. Will-based parenting (adoptions)

In Italian law, adoption is governed by Law No. 184 of 1983. It is a legal instrument that allows a parental relationship to be established between two adults and a child. Parenthood is independent of a genetic link between parents and children (see below for further details on the Italian adoptions).

4. Parenthood based on the consent or conclusive facts of the parents (medically assisted procreation)

In Italian law, medically assisted procreation is governed by Law No. 40 of 2004. Article 8 of the law provides that, in the case of heterologous fertilisation, the parent is not the gamete donor (male gamete or oocyte), but the parents who have given informed consent to the medically assisted procreation techniques. Here too, parenthood does not derive from a genetic link between parents and children (see below for further details on Italian law on artificial procreation).

II. The principles of "Favor veritatis" and "Favor minoris"

The concepts of "*favor veritatis*" and "*favor minoris*" are known in Italian literature and jurisprudence.

A. Favor veritatis

"*Favor veritatis*" expresses the concept whereby, when it is necessary to determine whether there is a parental and filial relationship between two persons (parent and child), the "truth", understood as biological truth, must be considered and prevail. Under the "favor Veritatis", in other words, parentage is established only through a biological link between parent and child.

The following rules constitute examples of *favor veritatis*:

1) The fact that the child may bring an action for acknowledgement of paternity without any time limit, i.e. without a deadline. The imprescriptibility of the action of recognition of paternity in respect of the child constitutes confirmation of the fact that favor veritatis is recognised, in current legislation and in the social conscience, as an essential legal principle in matters of personal status[8].

[8] Cass., 21 February 2018, no. 4194. With an important clarification, however, by the most recent case law: in the matter of recognition of paternity, one cannot establish a strict prevalence

2) She who gives birth (i.e., delivers the child) is the mother (art. 269 Civil Code);
3) Each of the spouses and their heirs may prove that the child born after the three hundred days following the annulment, dissolution or cessation of the civil effects of the marriage was conceived during the marriage (Art. 234, § 1, Civil Code). Article 234 of the Civil Code is inspired by the principle of *favor veritatis*, permitting proof of a gestation that has lasted exceptionally long, even longer than three hundred days; this allows the presumption laid down in Article 231 of the Civil Code to operate, which may only be removed by an action of disavowal.

B. Favor minoris

"*Favor minoris*" expresses the concept whereby, when it is necessary to establish whether there is a parental and filiation relationship between two subjects, it is possible to overcome the biological truth so that the best interests of the child prevail. In other words, thanks to *favor minoris*, it is possible to derogate from the rule of biological truth (according to which the parents are those who have a genetic or biological link with the child). Numerous Italian norms are an expression of *favor minoris*. The *favor veritatis* (understood as biological truth) has been attenuated on the basis of norms introduced over the years, which have created a set of provisions by virtue of which there are forms of parenthood not based on the biological datum, in which the voluntary or social-affective datum prevails[9]. Some significant examples, among many possible, of the favour towards the rec-

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of *favor veritatis* over *favor minoris*. Instead, a balance must be struck between the right to personal identity (linked to the affirmation of biological truth) and the interest in the certainty of status and the stability of family relationships. Such balancing cannot be the result of an abstract assessment, as a concrete ascertainment of the minor's best interests in the events concerning him/her is necessary, with particular reference to the effects of the requested measure in relation to the need for harmonious development from a psychological, affective, educational and social point of view (Cass., 6 March 2019, no. 6517; see also Corte cost., 18 December 2017, no. 272).

[9] With an important clarification, however, by the most recent case law: in the matter of disavowal of paternity, one cannot establish a strict prevalence of favor veritatis over favor minoris. Instead, a balance must be struck between the right to personal identity (linked to the affirmation of biological truth) and the interest in the certainty of status and the stability of family relationships. Such balancing cannot be the result of an abstract assessment, as a concrete ascertainment of the minor's best interests in the events concerning him/her is necessary, with particular reference to the effects of the requested measure in relation to the need for harmonious development from a psychological, affective, educational and social point of view (Cass., 6 March 2019, no. 6517; see also Corte cost., 18 December 2017, no. 272).

ognition of parenting separate from the biological bond in the Italian legal system are:

1) Article 8 of Law no. 40 of 2004 on heterologous medically assisted procreation (that is, artificial procreation with donation of a gamete by a man or a woman): under this provision, the parent is not the donor of the gamete, but those who have signed the consent to the artificial procreation technique; thus, the parental relationship disregards the genetic link and is based on the signing of the health care document (informed consent) or, alternatively, on "conclusive facts" put in place by the intentional parents; at the same time, this provision prevents the gamete donor from being the father or mother of the child.
2) Art. 250, par. 4, of the Civil Code, which does not allow the recognition of the child by the parent, and therefore the attribution of parenthood, at a time after the birth, when this may contrary to the child's interest, or might constitute a disruptive element of an ongoing educational process and family relationships that are now stable (this refers to the case where, for example, the birth certificate was formed only indicating the mother and, months or years later, the father intends to recognise the child as his own son);
3) Art. 244, para 4, of the Italian civil code provides that the parent who recognised the child after the birth assuming he was the biological parent can disestablish/disclaim paternity within a deadline of 5 years from the birth of the children; as a consequence, once the time limit has expired, the child maintains a parent which is not his/her biological one[10]. Art. 244, para 4, of the Civil Code, in other words, provides for

[10] In jurisprudence, it has in fact been held, precisely with regard to the action of disavowal, with statements of principle that are also valid in the present case, that: "The principle of *favor veritatis* must be pursued when not in conflict with *favor minoris*: art. 30 of the Constitution does not attribute an indefectibly preeminent value to biological truth over legal truth". Trib. Genova, 6 October 2015, in *dejure*, so that "the judge – called upon to decide on the action for disavowal of (legitimate) paternity brought in respect of a minor child – must therefore assess the latter's interest in order to avoid that any change in the family "status" may prejudice the existing affective, psychological and educational balance"; see Cass. no. 3529/2000: "The favor veritatis is not a value of absolute constitutional importance, especially since Article 30 of the Constitution confers on the ordinary legislature the power to implement, in a delicate matter such as that of personal and family status, a fair and fruitful balance between the need for truth and the need for certainty"; Cass. 20254/2006: "Notwithstanding the accentuated fervour to ensure that the "status" conforms to the reality of procreation – clearly expressed in the progressive legislative extension of the hypotheses of ascertaining the biological truth – the "favor Veritatis" does not constitute a value of absolute constitutional importance to be affirmed in any case, given that art. 30 of the Constitution did not attribute an indefectibly pre-eminent value to the dictates of the rules and limits for the search of paternity", it delegated to the ordinary legislator the power to privilege, in respect of the other values of constitutional rank, legal paternity over natural paternity, as well as to establish

a time limit within which an action for disavowal of paternity may be brought: this time limit is intended to "crystallise" a parental link even if there is in fact no genetic or biological link between them and the child (e.g.: the husband of a child born within the marriage is presumptively considered to be the father and therefore indicated in the birth certificate; if he finds out that his wife had an adulterous relationship nine months before the birth, he may bring an action for disavowal, but within a deadline fixed by law, beyond which the filiation relationship is crystallised even in the absence of a biological relationship);

4) Art. 263, paras. 3 and 4, Civil Code, which prevents the author of the recognition of a child born out of wedlock, or the other legitimated persons, from challenging such an act on the ground of lack of truthfulness once five years have elapsed since its annotation on the birth certificate: also in this case, the rule blocks a legal, and not a biological, filiation relationship in the child's interest;
5) Law 184 of 1984, on adoption, in which a filiation relationship is created regardless of the biological fact on the basis of the adoptive parents' willingness to assume parental duties (both in the case of full adoption and adoption in special cases).

III. Types of parenthood in Italian family law

All the norms now seen lead to the conclusion that in the Italian legal system, legal parenthood – that is, the parental relationship formed on the basis of the law (a voluntaristic fact) – is an alternative and complementary system to biological parenthood[11]. This statement is confirmed by Article

the conditions and procedures for asserting the latter, thus entrusting him with the general evaluation of the most suitable solution for the realisation of the interests of the minor"; App. Milan, 18 March 1997: "The judge called upon to decide on the action for disavowal of (legitimate) paternity brought with regard to a minor child, must assess the latter's interest for the purposes of the need to avoid that any change in the "status" of the family may jeopardise its affective, psychological and educational balance"; see more recently: Cass. 8617/2017, according to which "favor veritatis does not constitute a value of constitutional relevance to be affirmed in any case, given that art. 30 has not attributed an indefectibly pre-eminent value to biological truth over legal truth"; this case law, rather than absolutizing the principle of the truth of filiation, has privileged the concrete interest of the child (in the present case the public prosecutor, without assessing the position of the child concerned, asks the court to appoint a special curator so that he or she may bring the action for disavowal of paternity. The husband's judges rule that the husband is not the biological father of the child born during the marriage. The cassation, however, overturns the appellate ruling, as the judges did not assess the child's capacity of discernment.

[11] *Nascita in U.S.A. mediante fecondazione eterologa: autorizzazione alla trascrizione, in Italia, del certificato di nascita*, in *Stato civ. it.*, 2011, 10, 17: "In the light of the legislature's animus, it may be said that what needs to be protected is, undoubtedly, the unity and intangibility of the

30 of the Constitution, a provision that protects all forms of parenting. Jurisprudence has also pointed out, moreover, that legal filiation does not necessarily coincide with genetic descent, as is clear from Article 30, paragraph 4, of the Constitution. In our legal system, therefore, there is biological parenthood (of the donor of the sperm and the oocyte) and affective and psychological parenthood[12].

Even the Court of Cassation has affirmed "favor veritatis is not a value of absolute constitutional relevance"[13].

A. Social parenthood

1. Definition of social parenthood and examples

Social parenthood is the relationship between parent and child without a genetic, biological or gestational link. Some examples of social parenthood are:

- Adoption: again, a filiation relationship without genetic and biological ties can be established by adoption (law no. 184 of 4 May 1983);
- Medically assisted procreation (whether homologous or heterologous: here there is a lack of shared genetic heritage, when certain types of artificial procreation are used in which gametes or ova belonging to donors outside the couple are used. In such a case, patients may use a donated ovum or gamete or both reproductive cells obtained from anonymous donors in the assisted fertilisation treatment, voluntarily and free of charge; although there is no genetic or biological link between parents and children, parenthood has legal cover in the cases just mentioned: the mother is the one who has given consent to the treatments and gives

family: therefore, the ius veritatis cannot remain an end in itself and absolute but must be instrumental to the protection of the offspring and the related socio-familial situations. More precisely, the favor affectionis is relevant: this aspect may well be identified with the heterologous consent and be understood as socially relevant in terms of formal and substantive responsibility and, thus, constitute the ius legitimatis".

[12] App. Perugia, 21 November 2019, p. 10 ff, point 5.1, on the subject of the formation of a birth certificate with two mothers as a result of PMA: "our legal system does not provide for a parenting model based exclusively on the biological bond between the parent and the child born: due to both scientific-technological evolution and the evolution of customs and culture, it now configures three different types of parenting (i.e. the attribution of the relevant status, which is what is of interest here): that of natural procreation, that of legal adoption (l. 184/83 and that by PMA (l. 40/2004), of which only the former is anchored to the biologicogenetic datum while in the other two, sometimes defined as 'social' and affective forms of parenting, the voluntaristic datum prevails, the identity of status being firm"; in the same sense: App. Trento, 16 January 2020, p. 14 f.; in the same sense, again in an identical case, Trib. Rimini, 25 January 2020, p. 4; Trib. Cagliari 28 April 2020, p. 10 ff.

[13] Court of Cassation, no. 3529/2000.

birth after the assisted procreation, in accordance with Art. 269, para 3, of the Civil Code; the father is the one who has consented, together with the mother, to the carrying out of the treatments in question, pursuant to arts. 6 and 8, l. no. 40/2004.

- surrogacy (in such a case, the parents are exclusively the intentional parents; the gestational carrier or the gamete donors are not the parents);

From the exemplification and listing, the jurist can identify two components relevant to the construction of a unitary category: the first, identified in the positive, relates to the assumption of the office of parental responsibility as a conscious and responsible choice by the parent. The second, identified in the negative, concerns the lack and irrelevance of the same genetic or biological heritage between both parents and the child.

Social parenthood differs from filiation under the Italian Civil Code in further relevant respects. More precisely, it is different from filiation outside marriage because the principle of truth or *favor veritatis* is not a principle of the discipline and phenomenon; unlike filiation in marriage, no relevance is attributed to marriage, except as a subjective requirement for access to certain institutions included in the category, such as certain types of adoption.

2. The protection of forms of social parenthood in Italy

Forms of social parenthood are sometimes regulated by the Italian legislature: for example, this is the case with Law No 184 of 4 May 1983 on adoptions, or Law No 40 of 19 February 2004 on assisted procreation.

In other cases, as we shall see later, it was case law that gave protection to certain forms of social parenthood. For example, case law has protected social parenting:

- by declaring the ban on heterologous procreation to be constitutionally unlawful, which made it possible to resort to fertilisation by means of gametes and ova from donors outside the couple[14];
- by extending the scope of application of the rules on adoptions in special cases (Article 44 of Law 184 of 1984) to the same sex couples[15];

[14] Corte cost., no. 162/2014.

[15] Cass., no. 19599/2016; Cass., no. 14878/2017; App. Torino, 29 October 2014; for furhter judgments, see *articolo29.it*; jurisprudence has given legal significance to the factual, significant and stable relationship between the partner and the other partner's child, with an innovative interpretation of Article 44 (d) of Law 184/1983. In accordance with the new interpretation, the applicative prerequisite of the impossibility of pre-adoptive fostering of the child, provided for by the law, is to be understood as an impossibility in fact and also in law: the established impossibility

- by admitting that a birth certificate may be formed with the indication of the father, even if the father had died when the mother was fertilised abroad from his sperm by means of medically assisted procreation procedures (in essence, violating the Italian prohibition of fertilisation after the husband's death)[16];

B. De facto parenthood

De facto' parenthood exists when a person takes care of a child, acting as a parent, in the absence of a formal bond legal with that child. This may occur, for example:

- When the new partner of a man or woman takes care of the child born out of a previous previous marriage.
- When a relative or friend assumes a parental role with respect to a child;

The parental role is to be understood as the assumption of the parental functions (care, education, maintenance) mentioned in the Italian rules on filiation (art. 147 Civil Code)[17].

In such cases, there is *'de facto'* parenthood because there is no link and no legal protection of the relationship.

In such cases, the instruments of protection that enable a legal bond between the child and the de facto parent are:

1) Adoption in special cases (art. 44 of Italian law on adoption), for which the consent of the legal or biological parents is required (see below);
2) Judgment in accordance with Art. 333 of the Italian civil code, in which the judge may take measures in favour of the child, including measures relating to attendance with a person who has assumed a parental role. Art. 333 of Italian civil code aims at protecting the child from any kind of unjust conduct of the legal parent: this rule might assure legal protection for social relationship between a child and his/her mere "social parent" who did not, for any reasons such as lack of requisites, adopt him/her, by allowing the social parent to deposit a claim to the Court; the Court might issue an order to the legal parent which obliges him

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of pre-adoptive fostering, therefore, does not depend only on the declared state of abandonment, but also on a legal impediment to the pre-adoptive fostering of the child, determined by the absence of the state of abandonment, which allows to give prominence to the factual situation illustrated.

[16] In particular, following the patient's use of cryopreserved embryos after the death of her husband, case-law has attributed parenthood to her husband, even though he died before implantation and conception, notwithstanding the prohibition and administrative sanction laid down for artificial fertilisation techniques for couples whose members are not both living.

[17] The current wording of Article 147 of the Civil Code (Duties to children) provides for the duty of parents to provide for the maintenance, education and upbringing of their children, even if born out of wedlock, in accordance with their inclinations, abilities and aspirations.

or her to let the children meet, educate, maintain, go on holiday with the social/de facto parent, etc. This rule has also been applied to same sex families.

C. Intentional parenthood

An intentional parent is one who intends to give birth to a child and assume a parental role, function and behaviour towards the child. For example:

1) Parents who intend to access medically assisted procreation and undergo medical treatment;
2) Parents intending to have access to surrogacy;
3) Parents intending to adopt.

IV. Public documents on parenthood

A. Civil status office and civil status records

The law does not define what civil status is. The literature considers it to be "the set of personal statuses that make up the legal personality of a natural person"[18] or, in clearer terms, the set of citizen's statuses (citizenship, birth, marriage, civil partnership and death).

The function of the civil status service is to ascertain these statuses by means of the administrative registration in public documents of all the events, declarations and manifestations of will and legal facts that constitute, modify or extinguish the conditions and personal situations relating to the aforementioned statuses. These statuses are ascertained by means of specific legal acts known as "civil status acts" (act of birth; act of citizenship; act of marriage; act of civil union; act of death).

In the Italian legal system, this function is carried out by the civil registrar, who works at the civil registrar's office, which is located in each municipality (Art. 1 D.P.R. 396/2000).

[18] L. Barassi, *Istituzioni di diritto civile*, Vallardi, 1942, 40. Non dissimile era stata in precedenza la definizione di Coviello, *De' giudicati di stato*, in *Arch. giur.*, 1891, XLVII, 153, according to which "the state is the very personality of man as seen in its relations with political society and the household".

B. The population registrar's office ("anagrafe italiana") and population certificates

There is a distinction between recorded facts and information that fall under the narrow notion of 'civil status' (as mentioned above: birth, death, marriage, civil partnership, citizenship) and are recorded in the 'civil status files' and documented in the 'civil status records', and other recorded facts or personal information that do not fall under this notion, but still relate to the same person.

These facts, relating to a person, are also recorded elsewhere, such as in the "*registri anagrafici*", which might be translated as "population registers": for example, an individual's domicile or residence is recorded in the population registers set up in each Italian municipality by the civil registrar[19].

Presidential Decree 233/1989 regulates the register of the resident population, the population registers and the registry officer.

Article 1 provides that the resident population register is the systematic collection of all the positions relating to individuals, families and cohabiting couples who have established their residence in the municipality[20]. The population office contains: a) individual cards: relating to the individual resident in the municipality, containing the individual's personal data and status[21]; b) family cards, relating to the family unit established in the municipality[22]; c) cohabitation cards, relating to cohabitees, including those not bound by a relationship of affection[23].

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[19] But these data are also recorded in other public archives, such as tax archives.

[20] As well as the positions of homeless persons who have established their domicile in the municipality

[21] According to Article 20: "Each person residing in the commune must have an individual card in their name, on which they must indicate their surname, first name, gender, date and place of birth, tax code, nationality, and home address. The card must also indicate the following data: paternity and maternity, and details of the birth certificate, marital status, and modifying events, as well as details of the relevant deeds, the surname and first name of the spouse (or of the party to the civil partnership), the profession or non-professional status, the educational qualification, the details of the identity card, the digital address, the homeless status".

[22] According to Art. 21: "For each resident family, a family card must be filled in, in which the registry positions relating to the family and its constituent persons must be indicated".

[23] According to Article 22: "For each cohabitee residing in the commune, a cohabitation form must be filled in, indicating the registry positions relating to that cohabitee and to the cohabitees, the type and name of the cohabitee, and the name of the person who runs it. For each cohabiting couple residing in the commune, a cohabitation form must be filled in, in accordance with the specimen prepared by the Central Statistics Office, in which the registry positions relating to the cohabiting couple and those of the resident cohabitees must be indicated".

The population registrar issues public documents called "*anagrafe*'s certifications" (population certification) indicating the facts and conditions recorded in the individual cards, family cards or cohabitation cards. For example, the officer issues the birth certificate, death certificate, residence certificate, family certificate, etc. (Art. 33 Presidential Decree 223/1989).

In 2022, the online population registry office of the resident population was set up: in other words, a national database accessible telematically was created, through which everyone can request and download registry certificates online[24]. It is therefore no longer necessary to physically go to the registry office of the municipality where one has one's residence or to connect to the website of one's municipality, but it is sufficient to access the telematic portal to instantly obtain the registry certificates relating to the individual, the family, and cohabitation. All the municipalities in Italy are part of the national registry office.

C. The contents of the act of birth

The content of the birth certificate is determined by Article 29 of the Civil Status Regulations (DPR 396/2000), the title of which is 'birth certificate' and provides: "The birth certificate shall indicate the place, year, month, day and hour of the birth, the particulars, citizenship, and residence of the parents of the child born in wedlock as well as of those who make the declaration of recognition of the child born out of wedlock and of those who have expressed by public deed their consent to be named, the sex of the child and the name given to the child in accordance with Article 35. If the birth is multiple, this shall be mentioned in each of the acts, indicating the order in which the children were born. If the declarant does not name the child, the registrar shall make up for it".

The birth certificate therefore does not indicate whether the child was born naturally (by sexual intercourse) or artificially (by medically assisted procreation or surrogacy). It is indicated whether the child was born in or out of wedlock, although current legislation no longer discriminates between "legitimate" and "natural" children, *i.e.* between children born in or out of wedlock. The indication derives from the use of ministerial formulas for drawing up birth certificates that have not been updated since the last reform.

Certain "events" in the holder's life are then noted on the birth certificate, for instance: the fact that he was adopted; marriage, civil partnership

[24] The portal is accessible via this link: https://www.anagrafenazionale.interno.it/.

and their dissolution; the fact that he was recognised as a child after his birth by his father or mother[25]; in this case, there are subsequent notes that are written on the birth certificate, which represents a kind of "legal biography" of the person[26].

The order of the parents indicated on the birth certificate, whether in the case of a different-sex couple or a same-sex couple, is irrelevant (for example, the order in which two fathers or two mothers are indicated on a birth certificate is irrelevant and does not indicate the fact that the first parent is biologically linked to the child and the second is not).

[25] Art. 43 DPR 396/2000 contains a specific rule for the recognition of child after birth: (Annotations) 1. The declaration of recognition of a child (born out of wedlock), made in accordance with Article 254 of the Civil Code, shall be annotated in the birth record.

[26] Art. 49 Presidential Decree 396/2000 contains a general rule on the annotations to be made on birth certificates: "1. In birth certificates, the following shall be noted: a) Adoption and revocation orders; b) orders to revoke or terminate affiliation; c) notices of the opening and termination of guardianship, except in cases of legal disqualification; d) decrees appointing and revoking the guardian or provisional curator pending the interdiction or incapacitation proceedings; e) judgments of interdiction or incapacitation and those revoking them; f) marriage documents and judgments from which the existence of the marriage is evidenced, acts of constitution of the civil partnership, registered also in accordance with Article 70-octies, paragraph 5, and judgments from which the existence of the civil partnership is evidenced;) g) judgments pronouncing the nullity, dissolution or cessation of the civil effects of the marriage (and those pronouncing the nullity or dissolution of the civil partnership) g-bis) agreements reached as a result of a negotiation convention assisted by one or more lawyers or authorised, concluded between spouses with a view to reaching a consensual solution for the termination of the civil effects of the marriage and the dissolution of the marriage (and those concluded between the parties to the civil partnership with a view to reaching a consensual solution for the dissolution of the civil partnership) (g-ter) agreements on the dissolution or termination of the civil effects of the marriage (and those on the dissolution of the civil partnership) received by the civil registrar; (5) (h) the orders of the Court of Appeal provided for in Article 17 of Law no. 847 of 27 May 1929, and the judgements pronouncing the annulment of the transcription of a marriage celebrated before a minister of religion; i) the acts and measures relating to the acquisition, loss, renouncement or re-acquisition of Italian nationality; j) the declaratory judgements of absence or presumed death and those which, in accordance with Article 67 of the Civil Code, declare the existence of the persons whose death was declared or ascertain their death k) the acts of recognition (of a child born out of wedlock), in whatever form; l) applications to challenge the recognition, when its annotation is ordered, and judgments rejecting them; m) judgments pronouncing the nullity or annulment of the act of recognition; n) LETTER DELETED BY P.R. 30 JANUARY 2015, NO. 26; o) judgments declaring or disallowing that the child was born in wedlock; p) orders determining the change or modification of the name or surname of the person to whom the act relates; those that determine the change or modification of the surname of the person from whom the holder of the deed has derived the surname, except in cases where the said holder, if of age, has exercised the right to retain the surname previously held; q) judgments relating to the right to use a pseudonym; r) death certificates; s) rectification orders relating to the deed already recorded or transcribed in the registers".

D. Public documents related to social parenthood and *de facto* parenthood

As mentioned above, the act of birth (in civil status registry) and the birth certificate (in population registry) have a standard content and no information is given on the procreation technique (natural or artificial), or on the link (biological, genetic, gestational): the mother, for example, is indicated as such without further details, even if she has no genetic link with the child because there was a surrogacy, an artificial or assisted procreation with egg donation, or an adoption.

Social parenthood, however, is documented by acts of various kinds and nature (such as court documents, or administrative acts such as certificates, or private deeds) that in some cases constitute parenthood. For example:

- in the case of adoption, the constitutive act of parenthood is the judgment of adoption (whether full or external adoption, adoption in special cases or adoption of an adult); the judgment of adoption is noted on the act of birth of the child or of the adult;
- in the case of medically assisted procreation, the constitutive prerequisite for parenthood is the document containing the informed consent to undergo artificial procreation, signed by both intended parents;
- in the case of surrogacy, the constitutive act of parenthood is necessarily a foreign public document (as it is illegal in Italy pursuant to art. 12 of law no. 40 of 2004): usually, it is a court order called "pre-birth judgments" by which a court attributes parenthood to the intended parents and extinguishes it for the pregnant woman and her partner and the gamete donor, if any;
- in the case of a registered family, parentage is indicated in a certificate called a "family status certificate", which indicates membership of the same "registered family". Belonging to the same registered family confers certain rights and duties on the family members (attributed by towns' or village's statutes).

E. Access to public documents

Although civil status and civil registration records are public records, they are not available to just anyone. Full access is reserved only to civil registrars (for civil status records) and population officials (for population records), as well as to judicial authorities.

In some cases, private individuals may also have access to the content of civil status and civil registry acts, but with limitations. In particular, access to the content of civil status records is allowed with the issue of:

1) extracts by full copy, only when there is a legally relevant interest that must be declared by the applicant (art. 107 DPR 396/2000)

2) extracts by summary, which may be issued to anyone, taking into account the limits of the law (e.g. in the matter of adoptions) (art. 108 DPR 396/2000)

3) certificates, which may be issued to anyone (art. 108 D.P.R. 396/2000).

Access to registry certificates (residence, family status and any other data contained in the registry file, with some exceptions) is allowed to anyone who requests them, subject to identification of the applicant (art. 33 D.P.R. 223/1989).

V. Presumptions of law and parenthood

A. The presumptions governing the attribution of paternity in the case of a child born or conceived during marriage

In the Italian legal system, the mother is the one who gives birth and delivers the child. In fact, Article 269 of the Civil Code provides that "maternity shall be proved by proving the identity of the person who claims to be the child and of the person who was delivered by the woman, who is assumed to be the mother".

In some cases, the father's parentage is determined on the basis of a legal presumption: in particular, the husband is presumed to be the father of the child conceived or born during the marriage. The fundamental rule, which is based on a presumption, is in fact this: "the husband is the father of the child conceived or born during the marriage" (Art. 231 of the Civil Code). It is possible to bring an action to disown the child, *i.e.* to have it established that the child was not conceived by the mother's husband (e.g. because the wife conceived her husband with another man).

When is the child conceived during the marriage? There is another presumption: a child is presumed to have been conceived during marriage when three hundred days have not yet elapsed from the date of the annulment, dissolution or cessation of the civil effects of the marriage (Art. 232, § 1, Civil Code)[27].

[27] The presumption, on the other hand, does not operate when three hundred days have elapsed since the pronouncement of legal separation or the approval of a separation by mutual con-

Consistent with the system of presumptions, established by the Civil Code, is the rule on the formation of the birth certificate: if the woman giving birth is married, her personal details and those of her husband are indicated in the birth certificate (Art. 30 DPR 396/2000).

Each of the spouses and their heirs may prove that the child born after the three hundred days following the annulment, dissolution or cessation of the civil effects of the marriage was conceived during the marriage (Art. 234, § 1, Civil Code). They may similarly prove conception during cohabitation when the child was born after the three hundred days following the judgment or separation agreement (Article 234, para 2, of the Civil Code). In any case, the child may prove that he/she was conceived during the marriage (Art. 234, 3rd sentence of the Civil Code). Article 234 of the Civil Code is inspired by the principle of *favor veritatis*, allowing proof of a gestation that has lasted an exceptional length of time, even longer than three hundred days; this allows the presumption laid down in Article 231 of the Civil Code to operate, which may only be annulled through the action of disavowal, which we shall now deal with.

B. Overcoming presumptions through an action for disavowal of paternity

An action for disavowal of paternity of a child born in wedlock may be brought; the action may be brought by the husband, the mother and the child himself (art. 243-bis, para. 1, Civil Code; the legitimacy of other parties is excluded).

It should be noted how, unlike what was provided for before the reform of family law brought by Legislative Decree No. 154/2013, the existence of specific prerequisites (such as adultery, impotence, non-cohabitation) is no longer required for the exercise of the action for disavowal of paternity. This corresponds to a more modern view of the institution, which can also be resorted to in cases that were previously unknown (suffice it to say that an action for disavowal of paternity has been admitted in our courts in cases where heterologous fertilisation took place without the husband's knowledge)[28].

sent, or since the date of the spouses' appearance before the judge, when the spouses have been authorised to live separately during the proceedings for separation, annulment, dissolution or cessation of the civil effects of the marriage (Art. 232, § 2, Civil Code).

[28] Cass., 11 July 2012, no. 11644; Cass., no. 28 March 2017, no. 7965.

C. The use of DNA evidence and its probative value

The person bringing the action is entitled to prove that there is no filiation relationship between the child and the alleged father (art. 243-bis, para 2, Civil Code). The mother's declaration alone does not exclude paternity (art. 243-bis, para 3, Civil Code). It is therefore necessary to provide proof that the child has genetic or blood group characteristics that are incompatible with those of the alleged father (or, in any case, other suitable proof that conception did not occur on the part of the mother's husband). DNA testing may be carried out, although no one can be compelled to undergo a DNA test; the refusal to take the test, however, may be a presumptive index from which to deduce the existence or non-existence of a biological parental relationship.

Of particular importance nowadays are haematological and genetic tests, which require an expert's report[29]. These are investigations that can be carried out, with particular caution, even after the death of the subject whose paternity is to be ascertained[30]. It must also be said, however, that biological compatibility alone between the alleged parent and the alleged child is not sufficient to declare paternity, since the conclusions that result from such investigations are subject to error, even using the most sophisticated instruments. Accordingly, the data must be supplemented with further elements, even presumptive ones: the attendance or ascertainment of a relationship between the alleged father and the mother during the period of conception, the alleged father's participatory presence in gestation, his involvement in the choice of the child's name, his concern for the child's health conditions[31]. Between the immunohematological investigations and the historical evidence of the enumerated indices there is no subordinate relationship, by virtue of the principle of freedom of evidence[32].

The party remains free to refrain from taking the necessary samples for the evidentiary experiment; however, from the reasons for such refusal the judge may draw evidence for his decision[33].

D. The absence of presumptions in the case of filiation during the civil partnership

If a child is born during the civil partnership, he or she is recognized:

[29] Cass., no. 13880/2017.
[30] Trib. Milan, 31 May 2016.
[31] Cass., no. 15201/2017.
[32] Cass., no. 783/2017.
[33] Cass., no. 24292/2016; Cass., no. 6025/2015.

- as the child exclusively of the parturient mother in the case of artificial procreation (even if the parturient mother has no genetic link with the child, for instance because the oocyte was donated by her partner) (see below for further details);
- as the child exclusively of the biological father or mother, in the case of surrogacy (see below for further details);

Since no type of medically assisted procreation technique is allowed in Italy for same-sex couples, if they have children, there can be no presumption that they are the children of both parents who are part of the civil union. This is one of the most significant differences between civil union and marriage. In other words, in civil unions the presumptions of parenthood do not operate (Art. 1, Law no. 76 of 2016 on civil partnership in same sex couples, which explicitly provides that the discipline on filiation provided by the Civil Code does not apply to same sex couples).

VI. Adoptions

Italy recognises various forms of adoption, which will be examined below. The rules on adoption are set out in Law No. 184 of 1983 and, as far as adoption of a person over the age of majority is concerned, in the Civil Code (Article 291 *et seq*.). It may be anticipated that these are very different adoptions: they have different requirements and produce different effects. One fact common to all adoptions is that the authority that pronounces the adoption decision is always a court (in the case of adoption of minors, the Juvenile Court; in the case of adoption of adults, the ordinary court): adoption, therefore, in all cases, represents the final step in a judicial process.

A. Adoption of minor (under eighteen years of age)

1. The child's right to a family

The Adoption Law (Law No 184/1983) starts from a fundamental assumption: "the child has the right to grow up and be educated within his or her own family".

There is an awareness, therefore, that the family is the place where the child's needs can best be provided for, in accordance with his or her wishes, aptitudes and personality. To this end, it is provided that the judge shall report to the municipalities "the situations of indigence of family units that require support interventions to allow the child to be educated within his or her family" (art. 79-bis l. no. 184/1983, inserted by Legis-

lative Decree no. 155/2013). The social services must implement family support interventions in order to allow the minor to remain in the family of origin.

At the same time, the legislator acknowledges that, sometimes, the family is unable to perform (despite public support: art. 31, para 1, Const.) any role of maintenance, assistance, upbringing and education towards the child. This may depend on a variety of factors: absence of parents and relatives, serious illnesses and ailments on their part, material and economic problems, cultural backwardness, and so on.

When these circumstances occur, the institution of adoption of minors is intended to make up for the impossibility and/or the educational incapacity of the family of origin by placing the minor child in his or her new family.

The rules on adoption are in line with the Constitution, according to which "in cases of parental incapacity, the law provides for the fulfilment of parents' duties" (art. 30, 2nd paragraph, Constitution). And again: the Republic "protects (…) childhood and youth, favouring the institutes necessary for that purpose" (Art. 31, 2nd paragraph, Const.).

Adoption, then, is arranged to make up for the permanent and definitive inability of the family to perform its educational function[34]: the child or adolescent is given a new family, while the link with the original one is eliminated. In particular, the filiation relationship between the child and the parent is eliminated, while a new filiation relationship (adoptive filiation) is created with the adoptive parents. The adoption procedure excludes the possibility of choosing a specific child to adopt.

2. The requirements of those who want to adopt

Precisely because of its function, adoption requires that the adoptive parents be physically and morally fit to educate, instruct and maintain the abandoned child: that is, they must have certain requirements (Art. 6 of Law No. 184/1983). Adoption is permitted to spouses who meet the following requirements:

a) they must have been married for at least three years. There must be no personal separation between the spouses, not even *de facto*, within the last three years;
b) the spouses must be between 18 (minimum) or 45 (maximum) older than the child that needs to be adopted (this age gap may, however, be

[34] See Cass., 13 February 2020, n. 3643, which considers adoption as the last resort.

waived in certain specific cases, and in any case whenever non-adoption would cause serious harm to the child);

c) the spouses must be “actually fit and able to educate, instruct and maintain the children they intend to adopt”.

3. The child’s requirements

The adoptee must (arts. 7-8 law no. 184/1983)

a) be under eighteen years of age;

b) have been declared in a state of adoptability, which may be pronounced when the child is in a state of abandonment.

A state of abandonment exists when:

1) the child is deprived of material and moral care by parents and relatives obliged to provide for him/her;

2) the inability to provide material and moral assistance is not due to force majeure of a transitory nature. Force majeure does not exist if the parents or relatives refuse the support measures offered by the social services and this refusal is deemed unjustified by the court[35].

There is also a state of abandonment when the parents and relatives are unknown or deceased.

The adoptee, if he or she has reached the age of twelve, must always be heard; the hearing may be ordered, regardless of the child’s age, in relation to his or her capacity of discernment. For adoption, on the other hand, the adoptee’s consent is required if he or she is at least fourteen years old (art. 25, para 1, Law 184/1983; see also art. 12 of the 1989 New York Convention on the Rights of the Child). If the application is made by spouses who have descendants, these, if over twelve years of age, must be heard (Art. 25, para 2, Law no 184 of 1983).

[35] In the case law, serious abuse of the child, inducement to begging, sexual abuse, malnutrition, drug addiction (Court of Cassation, 6 November 2019, no. 28522), mental illness of the parents (Court of Cassation, 31 October 2019, no. 28207) are taken into consideration. The state of detention of the parents may also give rise to the state of abandonment (Cass., 10 January 2020, no. 319). The judge is always called upon to verify the seriousness and irreversibility of the child’s condition, considering the parents’ possible path to recovery (Cass., 23 February 2018, no. 4493; Cass., 11 December 2019, no. 32412). Jurisprudence has recently ruled out the state of abandonment of the child in the case of psychological subjection of the mother to the father for cultural reasons and ill-treatment, as well as serious and repeated violence by the latter to the former: adoption constitutes an extrema ratio, the conditions of material and moral abandonment must be punctually proven and to hinge a judgement for the sole purpose of having the child declared in a state of abandonment with respect to the mother ill-treated by the spouse constitutes a form of secondary victimisation (Cass, SS.UU., 17 November 2021, no. 35110).

4. The adoption stages

Adoption proceedings are carried out in three stages.

5. The first phase

The first phase culminates in the ruling on the declaration of adoptability (Articles 8-21 of Law No. 184/1983).

The Juvenile Court, after carrying out all the necessary checks (also with the help of the social services), declares the state of adoptability of children who are in a state of abandonment. Adoptability may be declared not only if the parents fail to comply with the judge's prescriptions "aimed at guaranteeing the moral assistance, maintenance, education and upbringing of the child" (art. 12 Law No. 184/1983), but also when it is proved "that the parents' capacities are not recoverable for a reasonable time" (art. 15 Law No. 184/1983, as amended by Legislative Decree No. 154/2013). The judgment declaring the child's adoptability may be appealed by the family members (art. 15, para. 2, l. no. 184/1983) and may be revoked if, later, the state of abandonment ceases to exist (Cass., 3.10.2019, no. 24790).

6. The second phase

The second phase is that of pre-adoptive fostering (arts. 22-24 of Law No. 184/1983). Among all the couples who have applied, the Juvenile Court, in the presence of an abandoned child, chooses those who, having demonstrated that they meet the legal requirements, are considered the most suitable. In the suitability assessment, which is formulated with the help of the social services, the couple's personal, professional, economic and health conditions, as well as the family environment and psychological aptitudes are taken into consideration.

The chosen couple receives the minor in pre-adoptive foster care: the adoptee is taken in by the man and the woman, who begin a period of cohabitation, intended to verify whether the minor's new living situation is suitable for his or her healthy and proper development.

The period of pre-adoptive fostering lasts for one year, which may be extended by another year. If difficulties and insuperable problems arise during this period, the court revokes custody and a search is commenced for another couple, who in turn receive pre-adoptive custody of the child.

7. The third phase

If the fostering period has a positive outcome (the family environment is serene and the child is destined to find a suitable environment in which to grow up) the last phase of the procedure opens: the court, by a judgment, pronounces the declaration of adoption (Articles 25-26 of Law No 184/1983), which must be transcribed in the civil status registers.

8. The effects of adoption

The adopted child acquires the status of the adoptive parents' child (Art. 27, para 1, Law No. 184/1983). The adoptive parents, therefore, have parental responsibility over the adopted child, who takes the paternal surname and has new siblings, uncles, grandparents, cousins. The adoptee, as a child, has the inheritance rights that the law provides for all other children.

On the other hand, all ties with the family of origin are eliminated: blood parents are no longer father and mother; the same applies to blood grandparents, blood siblings and so on.

Marriage impediments between blood relatives simply continue to exist (Art. 27, para 3, Law No. 184/1983).

9. Irrevocability of adoption

This type of adoption is irrevocable.

10. The obligation to provide information in adoption matters

The adoptive parents have learnt to know the sensitivities and inclinations of their child: they are therefore in a position to find the moment and the way to make him aware of the existence and identity of the blood parents. The Adoption Law, in fact, requires the parents to provide the child with information on his or her status as an adoptive child, in the manner and within the terms they deem appropriate (Art. 28, para. 1, Law No 184/1983).

11. The adoptee's right to know his or her origins

The adopted person, once he or her has reached the age of twenty-five, may have access to information concerning his origin and the identity of his biological parents.

He may also do so once he has reached the age of majority if there are serious and proven reasons relating to his psychophysical health. The application must be filed with the Juvenile Court (art. 28, para 5, Law no. 184/1983).

Before the child reaches the age of eighteen, information concerning the identity of the biological parents may be provided to the adoptive parents, as the persons exercising parental responsibility, with the authorization of the Juvenile Court, only if there are serious and proven reasons (art. 28, para 4, Law no. 184/1983).

The Juvenile Court shall proceed to hear the persons whose hearing it deems appropriate; it shall take all the social and psychological information in order to assess that access to the information would not seriously disturb the applicant's psycho-physical balance. Once the preliminary investigation has been completed, the Juvenile Court shall authorise access to the information requested by decree.

B. Adoption in special cases

1. Overview

The Adoption Law provides for "adoption in special cases".

Article 44 of Law No 184/1983 provides that children may be adopted even when the conditions set out in Article 7, para 1, of Law no, 184/1983 are not met, *i.e.* the conditions required to adopt a child in a state of abandonment[36]. These are therefore exceptional cases of adoption, with less stringent requirements. Their function is to ensure protection for the child in 'special' cases where the requirements of general adoption are not met.

2. The "special cases"

Minors may therefore be adopted:

a) by persons united with the child by kinship ties up to the sixth degree or by a pre-existing stable and durable relationship, even during a prolonged period of fostering, when the child is fatherless or motherless;

[36] E.g. being a married couple for at least three years, whilst a single person may also be adopted in this case; age gap between the adopting parents and the child; state of abandonment of the child: see above.

b) by the spouse in the case where the child is the child of his or her spouse, even adoptive; e.g.: following a divorce between two people, their child goes to live with the mother and her new partner: the new partner may adopt the child, if the father gives his consent; there is thus a case where the child may have two legitimate parents and one adoptive parent (so-called polygenitoriality); in this case, the consent of both biological parents is required;
c) when the child is handicapped and is fatherless and motherless. The law provides the notion of handicap: "a handicapped person is one who has a physical, psychic or sensory impairment, whether stabilised or progressive, which causes difficulties in learning, in relations or in work integration and which is such as to determine a process of social disadvantage or marginalization";
d) where it is established that pre-adoptive fostering is impossible.

In the cases referred to in (a), (c) and (d), adoption is permitted not only to spouses but also to non-married persons. However, if the adoptive parent is a married and unmarried person, adoption may only be ordered following a request by both spouses (Art. 44, para 3, of Law No. 184/1983). In the cases referred to in letters (a) and (d), the age of the adoptive parent must be at least eighteen years older than that of the person he or she intends to adopt (Art. 44, para 4, of Law No. 184/1983).

3. Ascertaining the best interests of the child

For the purposes of pronouncing the adoption judgment, the court is not only required to verify the existence of the conditions laid down in Article 44 of Law No. 184/1983; it also verifies that the adoption corresponds to the best interests of the child (Article 57 of Law No. 184/1983).

4. Effects of adoption

If the child is adopted by two spouses, or by the spouse of one of the parents, the parental responsibility for the adopted child and the exercise thereof belongs to both (Art. 48, para 1, of Law No 184/1983).

Nonetheless, the Constitutional Court has held that adoption in special cases does not determine the adoptive parent's parental responsibility over the adoptee, without further clarifying the nature of the bond between the parties[37].

[37] Constitutional Court, 9 March 2021, no. 33.

The adoptive parent is obliged to maintain the adoptee, instruct him/her, educate him/her and assist him/her morally, in accordance with the provisions of the new Article 147 of the Civil Code (art. 48, para 2, Law No. 184/1983).

The adopting party administers the minor adoptee's property. The adopting party in such a case does not have legal usufruct over the property, but may use the income for the child's maintenance, education and upbringing expenses, with the obligation to invest the surplus in an interest-bearing manner (Art. 48, para 3, of Law No 184/1983).

The adoptee acquires succession rights.

Adoption in special cases does not produce the acquisition of a legally relevant link between the adopted children and relatives in the ascending line of the adopter: on this point, however, a declaration of constitutional illegitimacy has recently been issued, affirming the illegitimacy of 55 Law No. 184/1983, in the part where, by reference to Article 300, paragraph 2, Civil Code, provides that adoption in special cases does not induce any civil relationship between the adoptee and the adopter's relatives[38].

5. Rovocation of the adoption

Adoption in particular case may be revoked (unlike the adoption of minors under Article 6 ff. of Law No. 184/1983, which is characterised by irrevocability).

The revocation of the adoption may be initiated by the Public Prosecutor as a result of the violation of the adoptive parents' duties (Article 53, para 1, lett. A, of Law No. 184/1983).

Moreover, revocation of the adoption may be pronounced by the court at the request of the adoptive parent when the adoptee who is more than fourteen years of age has made an attempt on his or her life or that of his or her spouse, descendants or ascendants, or has been guilty of an offence punishable by a penalty of at least three years' imprisonment (Art. 51, para 1, of Law No. 184/1983).

When the acts referred to in Article 51 of Law No. 184/1983 have been committed by the adoptive parent against the adoptee, or against the adoptee's spouse or descendants or ascendants, revocation may be pronounced at the request of the adoptee or at the request of the Public Prosecutor (Art. 51, para 1, Law No. 184/1983).

[38] Corte cost., 28 March 2022, n. 79.

C. Adoption of a person of full age

1. Function

Adoption of persons of full age governed by Article 291 et seq. of the Civil Code. It has, essentially, the function of making possible "elective offspring", which attributes the surname and the status of heir to the adopted person.

2. Prerequisites

Adoption is permitted to persons who have reached the age of thirty-five and are at least eighteen years older than the age of those they intend to adopt (art. 291 Civil Code). The Constitutional Court has declared Art. 291 of the Civil Code partially unlawful in so far as it does not permit adoption by persons who have adult and consenting offspring[39]. In addition, the Supreme Court has called for a historical-systematic review of the institution, which, having regard to the circumstances of the individual case under consideration, would allow a reasonable reduction of this age gap, in order to protect family situations that have been consolidated for a long time and are based on a proven *affectio familiaris*[40].

Children may not be adopted by their parents (Article 293 of the Civil Code).

3. Necessity of consent

Adoption requires the consent of the person seeking to adopt and of the person to be adopted (Art. 296 of the Civil Code). Adoption also requires the consent of the adoptee's parents and the consent of the adoptee's spouse, if married and not legally separated (Art. 297, para 1, Civil Code). Where the consent referred to in the first paragraph has been refused, the Court, having heard the interested parties, may, at the request of the adoptive parent, if it considers the refusal to be unjustified or contrary to the adoptee's best interests, nevertheless pronounce the adoption, unless the consent of the parents exercising parental responsibility or of the spouse, if cohabiting, of the adoptive parent or the adoptee is involved. Similarly, the court may pronounce the adoption when it is impossible to obtain the

[39] Corte cost., no. 557/1988.

[40] Cass., 3 April 2020, no. 7667.

assent due to the incapacity or unavailability of the persons called upon to give it (Art. 297.2 of the Civil Code).

In any case, the court, having obtained the appropriate information, shall verify not only whether the legal conditions are met but also whether "the adoption is convenient for the adoptee" (Article 312 of the Civil Code). The ascertainment on suitability must not be limited to the assessment of financial advantages; it must concern, more generally, the consequences on the change of status and name, in relation to the conditions of the adoptee's family of origin and the adoptee's own family. The subject of the investigation must be, for example, the reputation and social position of the persons concerned. Importance shall be attached to the existence of a lasting relationship between the adoptee and the adoptee, characterised by daily acquaintance[41].

4. Proceedings

The court, after hearing the opinion of the public prosecutor, shall issue a judgment (Article 313, para 1, of the Civil Code).

5. Effects of adoption

As already mentioned, the effects are limited to the assumption of the surname and the capacity of heir of the adopting party.

The adopted person takes the adoptive parents' surname and places it before his or her own (Art. 299, para 1, of the Civil Code).

Notwithstanding the taking of the surname, the adoptee retains all rights and duties with respect to the family of origin (Art. 300, para 1, of the Civil Code). One thinks of maintenance obligations towards biological parents or siblings.

Moreover, the adoption under consideration does not entail any legal relationship between the adoptee and the adoptee's family, nor between the adoptee and the adoptee's relatives, except for the exceptions established by law (Art. 300, para 2, of the Civil Code). An exception, for instance, consists in the prohibition of marriage between the adoptee's children and the adoptee's spouse and child (Art. 86, para 7, 8, 9, Civil Code).

Adoption does not confer any right of succession on the adopting party (Art. 304, para 1, Civil Code). There is, of course, nothing to prevent the

[41] Trib. Milano, 10 July 2019.

adoptee, by means of a will, from instituting the adoptee as heir, subject to the entitlements of the legitimates.

The rights of the adoptee in the succession of the adopter are governed by the rules contained in the Second Book of the Civil Code (art. 304, para 2, Civil Code).

The provision just mentioned, therefore, refers back to the rules contained in the Book of Succession, putting the adoptive child, in relation to the adoptee, on an equal footing with the children born in or out of wedlock (see, in particular, Arts. 536 and 567 of the Civil Code).

6. Possibility of revocation of the adoption

The adoption of persons of full age may be revoked in the cases expressly provided for. Here they are:

a) revocation on account of the adoptee's unworthiness. Revocation of the adoption may be pronounced by the court at the request of the adoptive parent, when the adoptee has tried to kill him or her, or his or her spouse, descendants or ascendants, or has been guilty towards them of an offence punishable by a sentence of not less than three years' imprisonment (Art. 306, para 1, of the Civil Code). If the adoptive parent dies as a result of the attempt, revocation of the adoption may be requested by those to whom the estate would devolve in the absence of the adoptee and his or her descendants (Art. 306, para 2, of the Civil Code);
b) revocation on account of the adoptee's unworthiness. When the acts referred to in Article 306 of the Civil Code have been committed by the adoptive parent against the adoptee, or against the adoptee's spouse or descendants or ascendants, revocation may be pronounced at the request of the adoptee (Art. 307 of the Civil Code).

The adoption of an adult by the adoptee on the ground that he or she has children is not null and void, so that the adoptee's interest cannot be sacrificed by the revocation of the adoption and the loss of the acquired surname[42].

[42] Trib. Roma, 17 July 2020.

D. Adoption for same-sex couples

1. Inadmissibility of full or external adoption

The new law on civil unions (law no. 76 of 2016) does not allow 'full' adoption by the parties to the civil partnership, and therefore does not allow same-sex couples to adopt a child in a state of abandonment (so-called 'external' adoption).

2. Admissibility of stepparent or stepchild adoption

For some time now, some Italian courts have been allowing same-sex couples to adopt in special cases pursuant to Article 44, para 1, letter (d) of Law No. 184/1983.

A case submitted to the Court of Rome in 2014 had the following characteristics: a five-year-old girl had been conceived in Spain as part of a procreative project of a couple formed by two women. The child was genetically the daughter of only one of the women (the younger, who was able to guarantee less risk to the pregnancy). The non-biological mother's request for adoption was justified on the basis of sub-paragraph (d) of the rule on adoptions in special cases, which provides, as we have seen, that it is possible to adopt a child even in the case of "impossibility of pre-adoptive fostering". It is worth recalling that, at first, jurisprudence had interpreted the "impossibility of pre-adoptive fostering" as a *de facto* impossibility: it should have been discussed, in essence, in cases where it was not possible to foster the child, who had already been declared in a state of abandonment, because of his or her precarious state of health or the unavailability of a family to take him or her in[43]. The Court of Rome, on the other hand, followed a different interpretation (more in line with the child's needs): it interpreted the established impossibility of pre-adoptive fostering as a factual impossibility, but also as a legal impossibility. In this way, Article 44, para 1, letter d, can also be applied to cases, such as the one decided, in which the child, because he or she is cared for, cannot be declared in a state of abandonment and, consequently, placed in pre-adoptive foster care[44].

[43] Trib. min. Ancona, 15 January 1998; Trib. min. Potenza, 15 June 1984.

[44] Thus Trib. min. Rome, 30 July 2014, confirmed by App. min. Rome, 23 December 2015; in the same sense Trib. min. Rome, 22 October 2015; Trib. min. Rome, 23 December 2015; Trib. min. Rome, 30 December 2015; App. Turin, 27 May 2016; Trib. min. Genoa, 3 July 2019. See also, on the expression "established impossibility of pre-adoptive fostering", Constitutional Court, no. 198/1986, cited by the Roman judges.

The Italian Supreme Court in 2016 also ruled that: "on the subject of adoption in special cases, Art. 44, 1st para, lett. (d), of l. no. 183/1984, allows for adoption whenever it is necessary to safeguard the affective and educational continuity of the relationship between the adoptive parent and the adoptee, as an element characterising the child's concrete interest in seeing the bonds developed with other caregivers recognised, with the sole provision of the *condicio legis* of the "established impossibility of pre-adoptive fostering", which is to be understood, in keeping with the state of development of the system of the protection of minors and biological and adoptive filiation relationships, as an impossibility 'in law' to proceed with pre-adoptive fostering and not as an impossibility 'in fact', resulting from a situation of abandonment of the child in the technical-legal sense. The lack of specification of the subjective requirements of the adopting and adoptee, moreover, implies that access to this form of *nonlegitimating* adoption is allowed to single persons and *de facto* couples, without the examination of the conditions and requirements imposed by law, both in the abstract (the impossibility of pre-adoptive fostering) and in the concrete (the investigation of the child's interest), being able to take place by giving prominence, even indirectly, to the sexual orientation of the applicant and the consequent relationship established by him/her with his/her partner"[45].

3. Admissibility of registration of foreign adoptions

Italian jurisprudence considers that foreign judgments or adoption orders in which the two parents are two persons of the same sex must be registered and enforced in Italy. In fact, it is held that such adoption orders are not contrary to public order and may therefore be registered.

All types of adoption in favour of a same-sex couple are therefore effective in Italy: both stepparent adoption[46] and full adoption of a child in a state of abandonment[47] (see below for further details).

[45] Cass, 22 June 2016, no. 12962; Cass., 26 June 2019, no. 17100.

[46] Cass. n. 14007/2018.

[47] Cass. No. 9006/2021: "[T]he recognition of the effects of a foreign judicial decision to adopt a child by a male homosexual couple conferring parental status according to the full or legitimating adoption model is not contrary to the principles of international public order, since the fact that the adoptive child's family unit is homogenous does not constitute an obstacle to the adoption if the pre-existence of a maternity agreement as the basis of the filiation is excluded".

E. Adoption for single persons

As we have seen, single persons cannot in Italy adopt children in a state of abandonment, *i.e.* have access to so-called "full" adoption. They may, however, have access to adoption in special cases provided for by Article 44 of Law 184/1983. The adoption sentence pronounced abroad in favour of a single adult may be recognised and registered in Italy, as it is not contrary to public order (see below for further details).

F. Public documents relating to adoption

In the case of adoption, the constitutive act of parenthood is the judicial judgment of adoption (whether full or external adoption, adoption in special cases or adoption of an adult); the judgment, in general, of adoption is recorded on the birth certificate of the child or adult (Art. 49 DPR396/2000).

Civil status records are public: however, the birth certificate of the adopted person with full adoption must not bear any information concerning the adoption (this is to protect the confidentiality of the adopted person). In fact, Article 28 of the Adoption Law provides that any civil status certificate referring to the adopted person must be issued with only the indication of the new surname and with the exclusion of any reference to the child's natural paternity and maternity and the annotation of the adoption judgment.

Any public official shall refuse to provide documents or certificates from which the adoption relationship may in any case be inferred, unless expressly authorised by the judicial authority. Authorisation is not necessary if the request comes from the registrar of marital status, in order to check whether there are any matrimonial impediments.

Conversely, in the case of adoption in special cases (pursuant to Art. 44 of Law no. 184 of 1983) or adoption of an adult, the copy of the birth certificate issued also to third parties shall indicate the adoption.

VII. Medically assisted procreation techniques

A. Legislation on medically assisted procreation and its purpose

Medically assisted procreation is regulated in Italy by a special law (Law No 40 of 2004). It is therefore a set of rules placed outside the Civil Code. With a delay compared to all the other European countries, in fact, in Italy a specific discipline on the matter has been introduced, which limits and regulates cases of medically assisted procreation and, as observed by recent case law, the regulation of filiation by medically assisted procreation configures an alternative and different system to the codified one.

B. The requirements for access to medically assisted procreation

1. Objective requirements

Medically assisted procreation is permitted only for the purpose of facilitating the solution of reproductive problems arising from human sterility or infertility. Art. 1 of the law in fact specifies its purpose: "1. In order to favour the solution of reproductive problems arising from human sterility or infertility, the use of medically assisted procreation is permitted, under the conditions and according to the modalities provided for by this law, which guarantees the rights of all the subjects involved, including the conceived. 2. Recourse to medically assisted procreation shall be permitted where there are no other effective therapeutic methods for removing the causes of sterility or infertility".

For the part that is of interest here, these are the cases in which medically assisted procreation may be used:

a) a medical document attesting to a situation of sterility or infertility is required. It should be noted, moreover, that the European Court of Human Rights, in its judgment of 28 August 2012, ruled that law 40/2004, in so far as it does not allow access to medically assisted fertilisation also to fertile couples suffering from serious genetically transmissible pathologies, is in breach of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Applying these principles, the Court of Rome, in its judgment of 26 September 2013, established the right of a fertile couple, but healthy carriers of cystic fibrosis, to have access to assisted fertilisation treatment.

More recently, the Constitutional Court has ruled that "Articles 1(1) and (2) and 4(1) of law no. 40/2004 are constitutionally unlawful in so far as they do not allow fertile couples suffering from transmissible genetic diseases that meet the seriousness criteria set out in Article 6(1)(b) of law

no. 194 of 22 May 1978 and have been ascertained by public authorities to have recourse to medically assisted procreation techniques. It is in fact unreasonable to prohibit indiscriminately access to PMA, with reimplantation diagnosis, by fertile couples suffering from serious hereditary and transmissible genetic pathologies, liable (according to scientific evidence) to transmit significant anomalies or malformations to the unborn child. This is because the Italian legal system in any case allows such couples to pursue the objective of procreating a child not affected by the specific hereditary pathology of which they are carriers, through the undeniably more traumatic modality of the voluntary interruption (even repeated) of natural pregnancies, that is to say the termination of pregnancy permitted by art. 6, para. 1, lett. (b), law no. 194/1978"[48].

2. Subjective requirements

Only couples of full age, married or cohabiting, of potentially fertile age (Article 5 of Law 40/2004) may have access to the artificial fertilisation technique provided for by the law. The possibility of assisted procreation is therefore excluded for single persons, same-sex couples, persons whose age is incompatible with natural procreation, and deceased persons. Access is granted to both married and unmarried couples. Access is allowed to couples and not to polyamorous families, *i.e.* more than two persons.

3. Permitted or prohibited techniques

The law originally only provided for homologous fertilisation: that is, fertilisation that takes place exclusively by resorting to gametes belonging to the couple; the Italian legislature, therefore, had prohibited heterologous fertilisation (art. 4, para 3, law no. 40/2004), which requires the use, anonymously and voluntarily, of one or both gametes (so-called double heterologous fertilisation) of persons unrelated to the couple of the future parents.

The Constitutional Court, however, declared the constitutional illegitimacy of the ban on medically assisted heterologous fertilization: the determination of whether or not to have a child, even for the absolutely sterile couple', the law judges observed, concerns 'the most intimate and intangible sphere of the human person' and therefore 'cannot but be incoerci-

[48] Corte Cost., 5 June 2015, no. 96.

ble'[49]. The prohibition, in fact, presented evident profiles of unconstitutionality for violation of Articles 2, 3, 13 and 32 of the Constitution, in line with the Strasbourg Court's affirmation that such discipline was in conflict with Articles 8 (right to respect for private and family life) and 14 (prohibition of discrimination) of the ECHR. Recourse to heterologous fertilisation, the Constitutional Court states, is subject to the condition that the doctor must establish the existence of a pathology that is an irreversible cause of absolute sterility or infertility. Despite the declaratory ruling, the donation of cells by third parties, which is functional for heterologous fertilisation techniques, has only recently been regulated by Presidential Decree No 131 of 23 August 2019.

Assisted procreation techniques such as ROPA are not permitted: ROPA provides for fertilisation with donor sperm from a woman's egg and implantation of the embryo thus created in the womb of another woman, her partner (a technique that would violate the prohibition on women's couples' access to medically assisted procreation).

Similarly, post mortem fertilisation techniques are not permitted.

Section 12 of the Act prohibits surrogacy, which is punished as a criminal offence.

4. The medically assisted fertilisation procedure

The procedure for medically assisted fertilisation consists of the following steps:

1) the couple's wishes must be expressed in writing on the basis of an 'informed consent' (art. 6 l. no. 40/2004), dated and signed in the presence of the doctor;
2) at least seven days must elapse between the expression of consent and the medical intervention;
3) consent may be revoked "up to the time of fertilisation of the ovum" (Art. 6, para 2, of Law 40/2004).

The stages just mentioned make it clear why the procedure in question is called "medically assisted procreation".

[49] Constitutional Court, 10 June 2014, no. 162.

5. Deadline for revocation of consent by intentional father and mother

After fertilisation of the embryo, revocation of consent by the man is ineffective: the woman, once the embryo is fertilised, may accept the graft of the ovum[50].

On the other hand, the woman may revoke her consent even after the embryo has been fertilised: even if fertilisation of the embryo has taken place, the fertilised ovum cannot be forcibly transferred into the woman's womb (see art. 32, para. 2, of the Italian Constitution, which prohibits coercive medical treatment, except where there is a need to protect collective health).

6. The status of the child born with assisted reproduction

If the parents who have undergone medically assisted procreation are married, the child that is born (even with heterologous fertilisation) has the legal status of a child born in wedlock. If the parents are cohabiting, the child born is a recognised child, born out of wedlock (Article 8 of Law No. 40/2004). As we have seen, there is no longer any distinction between a child born in wedlock and out of wedlock after the most recent reforms of Italian family law.

Where heterologous medically assisted procreation techniques are used, the spouse or cohabiting partner who has signed the informed consent or who has expressed consent by concluding acts or conduct may not bring an action for disavowal of paternity (that is, he may not obtain a ruling declaring that he is not the father) or the challenge of recognition of paternity (art. 9, § 1, l. no. 40/2004).

The mother may not declare her wish not to be named in the birth certificate (art. 9, para 2, law no. 40/2004).

The sperm or egg donor, in the case of heterologous insemination, "does not acquire any legal parental relationship with the child born and cannot assert any rights or be the holder of any obligations towards him" (Art. 9, para 3, Law 40/2004).

[50] Cass., 18 December 2017, no. 30294.

7. Post mortem reproduction treatments

As stated above, access to the technique is allowed only to the living couple. Consequently, post-mortem reproduction treatments are not allowed by Italian national law, nor posthumous sperm retrieval. The transfer of reproductive cells is not allowed after the death of one of the patients. The embryo transfer is not allowed after the death of one of the patients.

However, it has occurred that a woman had herself fertilised in Spain with the sperm of her husband who had died of cancer and asked the Italian civil registrar's office to form a birth certificate also indicating her husband as the father of the child. According to the case-law of the Court of Cassation, art. 8 of law 40 of 2004 is also applicable in this case, which provides, as we have seen, that a child born in breach of the law nevertheless acquires the status of a child. The aforesaid Article 8 of Italian law, in substance, is also applicable to the hypothesis of homologous post-mortem fertilisation by means of the use of the cryopreserved semen of a person who, after having given (jointly with his wife or cohabitee) consent to access to medically assisted procreation techniques (pursuant to art. 6 of l. no. 40/2004), then died before the embryo was formed, having also authorised, for after his own death, his wife or cohabitee to the said use[51].

8. Access to medical assisted reproduction during the couple crisis or after the divorce

Article 6 of the law provides that: "The will [to have access to medically assisted procreation techniques] may be revoked until the moment of fertilisation of the ovum". Jurisprudence has thus established that if the ovum is fertilised, and then the couple has separated, the woman may proceed with the implantation of the embryo and the birth certificate will be formed with the indication of the father and mother having signed the informed consent. In other words: if the egg has been fertilised, the couple's separation or divorce does not affect the mother's right to implantation and the child's right to legal recognition of both parents; that is to say: consent given to medically assisted procreation is not revocable a posteriori in the event of the couple's separation. In essence, the breakup between husband and wife cannot prevent the woman from pursuing the pathway to becoming a mother, a pathway that, as mentioned above, had originally been shared by the man, who intended to become a father,

[51] Cass, 15 May 2019, n. 13000.

and had already taken the form of the cryopreservation of four embryos intended to be implanted in the woman's uterus[52].

9. Access to medical assisted reproduction for same-sex female couples

The Constitutional Court declared inadmissible the question of the unconstitutionality of, inter alia, Article 5 of the law, in so far as it limits access to medically assisted procreation techniques only to couples of different sexes. The ratio of the law, the judges of the laws observe, is to provide a remedy against human sterility or infertility, and not to prepare a tool for the realisation of the desire for parenthood in general[53]. Moreover, the violation of the subjective requirements for access and, in particular, the performance of artificial fertilisation techniques in favour of same-sex couples determines the impossibility of attributing parental status in favour of those who do not share their genetic heritage with the child born. The relationship may, if anything, be legally protected through the application of adoption in special cases[54].

C. Embryosharing

1. Admissibility of the technique

Embryo-sharing[55] is a practice of sharing embryos produced in supernumerary in assisted fertilisation cycles previously concluded with a positive or negative outcome. It is a practice aimed at preventing the abandonment of reproductive cells and results in a peculiar form of heterologous fertilisation, in which the object of the transfer is not individual reproductive cells from third-party donors but a zygote produced by a couple in accordance with the purposes of the law. Italian law does not mention or regulate embryo sharing.

[52] Trib. Santa Maria Capua Vetere, 27 January 2021.

[53] Corte cost., 23 October 2019, no. 221.

[54] Cass., 4 April 2022, no. 10844; Cass., 25 February 2022, no. 6383.

[55] For a more in-depth analysis, on the matter see S.P. PERRINO, *Embryoadozioni: A Brave New World?,* in *Giustizia civile*, 1 February 2021.

2. The reasons behind the lack of a legal framework on embryo-sharing

This Italian legal approach derives from the prohibitions that characterised Law 40 of 2004: heterologous fertilisation and cryopreservation of embryos were prohibited. After the declaration of the constitutional illegitimacy of these prohibitions, the new phenomenology of embryo abandonment was highlighted.

This phenomenon arises especially since there are no time limits on the duration of storage and the deletion of supernumerary cryopreserved embryos is not permitted. Deletion is criminally sanctioned and results in heavy disqualification penalties for doctors and clinics.

The Italian legislator didn't reform the legal framework in almost 20 years, and this situation is possible because in the Italian law there is no provision for dealing with social, legal and scientific contingencies in laws affecting science and bioethics, unlike in France and Spain.

3. Non-admissibility of the embryo-sharing.

Although not expressly prohibited, embryo-sharing does not seem possible because informed consent to treatment allows the couple obtaining the embryo to use it for reproductive purposes in the interests of the couple. There are no different purposes in the consent or in the rules that apply to informed consent.

Furthermore, the embryo-adoption has been discussed before the law approval. However, this technique was not considered compatible with the high level of protection accorded to the human embryo in Italian law, nor with the principle of human dignity accorded to the human embryo. According to the most common interpretative option, the transfer to third parties would have led to a danger of adultery, a danger to the marriage of the patient couple and the commodification of the embryo

Several congressmen have presented this issue to parliament, but no bill has identified or proposed a solution.

4. The solution proposed by the Comitato Nazionale per la Bioetica: the embryo-adoption.

The National Bioethics Committee[56] has, on several occasions, examined solutions to the growing problem of abandoned embryos and has not reached a uniform solution. Firstly, the option of destination for research, which meets the limits of suppression and experimentation that are criminally sanctioned, has been examined. Secondly, the option of embryo adoption or embryo-sharing has been explored, under the name of Adoption for birth (*Adozione per la nascita - APN*)[57].

At the time of the discussions held by the National Bioethics Committee, no country in the European Union had envisaged embryo-sharing. Only in the United States are piecemeal solutions identified, such as snowflakes adoptions; only in the last five years have some European countries adopted suitable solutions to deal with the problem of abandoned embryos, as was the case in Sweden, Spain and France.

It is precisely the limitations arising from the structure of the informed consent in artificial reproduction and the strict law that have prevented the use of embryo-sharing.

Some interpreters have explored the possibility of applying adoption rules to embryos; however, this is not an enforceable solution.

5. The non-admissibility of the embryo-adption within the current legal framework

The adoption discipline under the code applies to the adult; the discipline outside the code applies to the child in a state of abandonment.

The embryo cannot yet be considered a person and has no legal capacity; moreover, the embryo cannot be in a state of abandonment in the manner provided by law.

According to the guidelines provided by the Ministry of Health in 2004, in the event of the death of the embryo's owners or other case of abandonment, the biobanks must allocate the zygotes to the national biobank, which may eventually use those embryos for therapeutic purposes, not otherwise specified.

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[56] L. Lodevole, *Embrioni abbandonati,* Ariccia, 2016, 60; L. Eusebi, *Crioconservazione e adottabilità degli embrioni umani,* in Aa.Vv., *Embrioni crioconservati quale futuro? Atti del X Congresso Nazionale 23-24 Novembre 2012,* in *Quaderni di scienza e vita, 2013,* 11, 57 ss.

[57] C.N.B., *L'adozione per la nascita (APN) degli embrioni crioconservati e residuali derivanti da procreazione medicalmente assistita*, November 18, 2005, in *www.governo.it/bioetica*.

The implementation of an interpretative solution with unchanged legislation does not seem likely to be accepted, for the following reasons:

a. the application of the adoption rules would result in the jurisdiction of the courts outside the scope of the law;
b. it would allow the use of embryos outside the scope of the law;
c. there is no specific solution for the tests that adoptive parents must carry out prior to implantation in the case of embryo-sharing;
d. there is no specific solution for the embryos that are not viable for birth because of their poor quality or because they are affected by transmissible genetic diseases.

Thus, there is a need for regulation in Italy on the national use of abandoned embryos.

6. Cross-border filiation by embryo-adoption

As regards filiation determined by embryo-sharing abroad and for which recognition is sought in Italy, there are no traces in case-law or doctrine. These cases are difficult to identify and cannot be distinguished from heterologous fertilisation techniques.

The absence of an express prohibition or public policy rules determines the compatibility of the effects produced abroad with domestic public policy. For this reason, patients can achieve filiation by embryo-sharing abroad and have their status recognised in Italy.

VIII. Surrogacy

A. The prohibition of surrogacy

All forms of surrogacy are expressly prohibited by Article 12, para. 6, Law No. 40/2004). According to the interpretation of the Constitutional Court and the Court of Cassation, the prohibition serves to protect: a) the human dignity of the pregnant woman, b) fundamental human relations; c) adoption regulations (which could be "circumvented" by surrogacy). Moreover, the prohibition is based on the abovementioned principle of *favor veritatis*.

The provision not only prohibits surrogacy, but also punishes it with imprisonment and a fine. It provides that: "Anyone who, in any form, carries out, organises or publicises surrogacy shall be punished by imprisonment of three months to two years and a fine of EUR 600,000 to EUR 1 million".

The interpretation of the provision is debated. According to the majority opinion, the rule does not apply to intended parents, who would therefore not be punishable for the offence of surrogacy. Conversely, the rule would apply to all those who assist or offer services to the intentional parents, such as intermediaries, health care providers, and professionals who perform surrogacy.

If a surrogate motherhood is practised in Italy, the legal mother of the child would be only the one who gave birth, not the intentional one. Article 269, para 3, of the Civil Code states in general terms that the mother is the one who has given birth and delivered the child (uterine or gestational mother): not, therefore, the so-called social or intentional mother, nor the egg donor[58].

B. Registration of a foreign act of birth issued out of surrogacy

The Supreme Court has ruled on the registration in the Italian civil status register of foreign birth certificates issued after surrogacy (birth certificates that therefore indicate both the intended parent and the biological parent).

On that occasion, the Supreme Court stated that the birth certificate is registrable in part, i.e. only in the part relating to the biological parent. On the other hand, it is not registrable in the part relating to the non-biological parent, who may adopt the child through adoption in special cases (art. 44 lett. d) Law no. 184 of 1983). In fact, the recognition of parenthood between the child born through surrogacy and the non-biological parent is not permitted, as the relationship would be created in violation of the offence of surrogate motherhood, pursuant to art. 12, para. 6, law no. 40/2004. This offence is placed to protect the dignity of the pregnant woman and to safeguard the discipline of adoptions, the only discipline set up for the establishment of a bond between subjects without a shared genetic heritage. This is rule of public policy that cannot be circumvented through the use of surrogacy abroad.

For that reason, the recognition of the parental relationship between the child and the intentional parent conflicts with a principle of public policy set up to protect fundamental values. The best interest of the child may succumb when it is necessary to protect the dignity of women and human relations and to preserve the institution of adoption. In any

[58] Corte cost., 18 December 2017, no. 272; Trib. Roma, 10 May 2016.

case, the child is adequately protected by the adoption carried out by the intending parent[59].

Subsequently, the Constitutional Court stated that the instrument of adoption in special cases is not an adequate means of protection for the child born after surrogacy, as it presents some relevant problematic profiles. In particular, adoption "constitutes a form of protection… not entirely adequate to the yardstick of the constitutional and supranational principles recalled. Adoption in particular cases does not attribute parenthood to the adopting party (…), it is still controversial whether adoption in particular cases also allows kinship ties to be established between the child and those who socially appear, and he or she perceives, to be his or her grandparents, uncles and aunts, or even brothers and sisters, in cases where the adopting party already has other children of his or her own. It also requires, for its completion, the necessary consent of the 'biological' parent".[60]

Jurisprudence has subsequently attempted to "solve" the problems and lack of protection to the child identified by the Constitutional Court through an innovative interpretation of the law. In particular, recently, the discipline of adoption in special cases was declared contrary to the Italian Constitution and therefore illegitimate in the part in which it does not allow the adopted child to establish a legally relevant bond with the adopting parent's family (and therefore does not allow him/her to acquire grandparents, uncles, etc.)[61].

Moreover, the Court of Cassation recently reiterated that the foreign birth certificate issued after surrogacy cannot be fully registered in Italy: the intended parent must therefore adopt the child. However, if the biological parent does not give consent to the adoption (consent that is required under the Adoption Law), the refusal of consent may be overcome by the courts, in the best interests of the child, on a case-by-case basis[62]. In other

[59] Cass., 8 May 2019, no. 12193.

[60] Corte cost., 9 March 2021, no. 33.

[61] Corte cost., 28 March 2022, no. 79.

[62] Cass. 30 December 2022, no. 38162. Since the practice of surrogacy, whatever the mode of conduct and the aims pursued, intolerably offends a woman's dignity and deeply undermines human relations, a foreign court decision, and a fortiori the original birth certificate, cannot automatically be transcribed if it indicates as the child's parent the intended parent who, together with the biological father, has wanted the child to be born by resorting to surrogacy in a foreign country, even if in accordance with the lex loci. Nonetheless, the child born through surrogacy also has a fundamental right to recognition, including legal recognition, of the bond that arose by virtue of the emotional relationship established and experienced with the person who shared the parental design. The inescapable need to ensure that a child born through surrogacy has the same rights as other children born under different conditions is guaranteed through adoption in special cases, pur-

words: the refusal of consent by the biological parent might be surmountable since the best interests of the child must prevail. According to the Supreme Court, the adoption solution in special cases appears to be in line with the jurisprudence of the European Court of Human Rights. However, a major problem remains to be solved: what is the instrument to protect the child in cases where the intended parent does not want to establish a legal bond with him/her. Certainly, the child cannot "force" the intended parent to adopt him/her. Thus, in this case, an important protection gap remains, the solution to which is now very complex.

C. Parents who request the registration of the birth certificate do not commit the crime of "alteration of civil status".

Article 567 of the Italian Criminal Code provides that: "Art. 567. Alteration of status. Anyone who, by substituting a newborn child, alters its civil status is liable to imprisonment for a term of three to ten years. A term of imprisonment of five to fifteen years shall be applied to anyone who, issuing a birth certificate, alters the civil status of a new-born child by means of false certification, false attestation or other falsity". According to the Court of Cassation, those who request the registration in Italy of a birth certificate formed as a result of gestation for others do not commit the offence of altering status[63].

suant to section 44(1)(d) of Law No. 184 of 1983. At the state of development of the legal system, adoption is the instrument that makes it possible to give legal recognition, with the attainment of child status, to the de facto bond with the partner of the genetic parent who has shared the procreative design and has helped to care for the child from the moment of birth.

[63] Cass. 11 October 2016, no. 48696. It does not constitute the offence of alteration of state, provided for in Article 567, second paragraph, of the Criminal Code. The transcription in Italy of a birth certificate legitimately drawn up abroad cannot be considered ideologically false as the certificate conforms to the legislation of the child's country of birth, even where procreation took place in a manner not permitted in Italy. (Case in point concerning a child born in Ukraine, a country that allows heterologous surrogacy where at least half of the child's biological heritage belongs to one of the two parents).

See also: Cass. 13 October 2020, no. 31409. According to the Court of Cassation: "For the purposes of integrating the offence referred to in Article 567(2) of the Criminal Code. , a material activity of alteration of status is required that constitutes a *quid pluris* with respect to the mere false declaration and is characterised by its aptitude to create a false attestation, since a certificate conforming to the legislation of the child's country of birth cannot be considered ideologically false, not even in the case where procreation has taken place in a manner not permitted in Italy. (In its grounds, the Court affirmed the continuing validity of the principle also following the judgment of the Civil Sections no. 12193 of 2019, which, without touching on the issue of the existence of the objective and subjective elements of the offence, held that it was contrary to public order to recognise the effectiveness of the foreign court order that had ascertained the filiation relationship between a child born in Ukraine through the use of surrogacy and the parent who was an Italian citizen).

IX. Discrimination related to parenthood

In the following part, both legal and practical obstacles that may create discrimination in access to parenthood will be analysed.

A. Discrimination in access to plain adoption

In view of the subjective requirements for access to plain adoption (*i.e.* the adoption of a child in a state of abandonment), it is possible to state that the following are not eligible for adoption:

a) Single persons, since the requirement of a "marriage" between two persons that has lasted at least three years, provided by the Adoption Law, is lacking; on several occasions, the Constitutional Court has ruled that this rule is not contrary to the principles and norms of the Italian Constitution: the Parliament has the discretion to extend access to adoption to single persons (however, despite numerous attempts and bills filed in Parliament, adoption is still reserved for married couples)[64];
b) Homosexual couples, as the requirement of "marriage" is missing (in fact, homosexual couples can only enter a civil union, and not a marriage; however, as seen above, foreign adoption judgments in favour of a homosexual couple are recognised and enforced in Italy, as they are not contrary to public policy);
c) Polyamorous families, since access is limited to couples united in marriage, and thus to families consisting of only two parents;
d) Cohabiting couples, since the marriage requirement is not met.

Indirect discrimination may also occur in the adoption process: for instance, those who aspire to adopt a child may be deemed ineligible because they are suffering from illness at the time of the application (e.g., because they have cancer): the presence of a disabling and uncertain illness such as cancer makes it difficult to prognosticate whether the parent will be able to survive and thus adequately care for the child, so that, in practice, the couple aspiring to adopt is deemed ineligible.

[64] See E. Pesce, *La lunga marcia verso l'adozione piena da parte del single: una decisione originale*, *Famiglia e Diritto*, n. 2/2018; G. Iorio, *Le adozioni in Italia fra diritto vivente e prespettive di riforma,* in *Familia*, 4, 2022, 495.

B. Discrimination in access to adoption of a person of full age

As we have seen, one of the legal requirements for the adoption of an adult is the age difference of at least eighteen years between the adoptive parent and the adoptee (Article 291 of the Civil Code). This requirement prevents adoption in many cases where there is a strong emotional bond, but there is no age difference of at least eighteen years. Therefore, the Supreme Court recently stated that: "in today's social context, the limit of eighteen years of age set by the legislator for the adoption of an adult, constitutes a relevant and unjustified obstacle, and takes the form of an undue interference by the State in the family structure, in contrast with Article 8 of the ECHR. Regarding the adoption of an adult, the provision of Article 291 of the Civil Code, in requiring the difference of eighteen years of age between the adopter and the adopted, places an unjust limitation on the formation of families between persons who, although of age, are bound to each other by strong personal, moral and civil ties. The court, having regard to the circumstances of the individual case, may reduce that age gap to protect already established family situations".[65]

C. Discrimination in access to artificial procreation

1. Discrimination caused by subjective requirements

As we have seen, Law 40 of 2004 on medically assisted procreation ensures access to artificial procreation techniques only to those who meet certain objective requirements such as infertility or sterility (Article 2) and subjective requirements (Article 5). It follows that the following cannot have access to the techniques:

1) Single persons (e.g., single women cannot access heterologous fertilisation, with sperm donation);
2) female homosexual couples. On this point, the Constitutional Court issued Judgment No. 221 of 23 October 2019. The Court recalls the function of PMA, which the law configures as a remedy for human sterility or infertility having a pathological cause and not otherwise removable. It is therefore excluded that PMA represents an alternative and equivalent way of realising the "desire for parenthood" to natural conception. Moreover, the law places a series of subjective constraints on access to ART, expressly aimed at ensuring that said nucleus reproduces the family model characterised by the presence of a mother and a

[65] Cass., 3 April 2020, no. 7667.

father. Therefore, the rule precluding access to artificial procreation for female couples is not unconstitutional.

3) Couples in which one of the partners has died, either before or after access to artificial procreation (on post-mortem fertilisation see what has been written above).

However, there are many obstacles to the application of and access to Law 40 of 2004, and there is also discrimination between region and region in Italy, since the implementing regulation of the law is attributed by the Italian Constitution to regions (Art. 117 Constitution). For example:

2. Discrimination caused by age

There is inequality in the criteria for access to artificial procreation. The requirements vary according to region: for example, in Friuli Venezia Giulia the age limit for access to heterologous assisted procreation is 50 years; in Sardinia it is 46 years… this creates differences in access and discrimination between different places in Italy.

3. Discrimination caused by economic condition

Waiting lines are very long in Italy: if a couple go to public clinics, they can wait up to 18 months; this produces the following consequence: people turn to private clinics, which are much more expensive than public clinics. The problem is that people often realise they have sterility or infertility problems very late (usually when they are over 35 years old), so there is an urgency to proceed with the artificial procreation technique and they are willing to pay, as they cannot wait any longer. But all this discriminates against less wealthy couples.

Moreover, the Italian State does not give couples economic incentives to access artificial procreation.

4. Discrimination in the case of hereditary and genetically transmissible diseases.

There is a lack of laboratories and health professionals specialised in pre-implantation diagnosis. This effectively excludes persons with genetic diseases from medically assisted procreation.

D. Children's rights discrimination

In Italy, discrimination in children's rights has gradually been overcome. The status of children's rights can be schematised as follows:

1. Children born in wedlock and out of wedlock

The legal status of a child is identical, regardless of whether he or she is born in or out of wedlock. The 2012 and 2013 reforms eliminated the last existing discrimination between 'natural' children (*i.e.* born of two unmarried persons) and 'legitimate' children (i.e. born of two married persons). In fact, today the Civil Code states that the status of child is 'unique', meaning that there can be no discrimination between children: there are no longer natural children or legitimate children, but only children (Article 315 of the Civil Code).

2. Adopted children

Adopted children in the case of full/plain adoption also have a legal status equivalent to that of non-adopted children (art. 27 of the Adoption Act provides: "As a result of adoption, the adopted child acquires the status of legitimate child of the adoptive parents, whose surname he assumes and transmits").

3. Children born through medically assisted procreation techniques permitted or prohibited in Italy

Children born through medically assisted procreation also have full legal status. Article 6 of Law 40 of 2004 in fact provides: "1. Children born as a result of the application of medically assisted procreation techniques shall have the status of legitimate children or recognised children of the couple that has expressed the will to resort to such techniques". As stated above, children born in violation of medically assisted procreation techniques acquire in any case the status of children of the woman giving birth and of the partner or husband who consented, even by material acts, to the technique, or signed the informed consent (art. 9 Law 40 of 2004). The mother cannot ask not to appear on the birth certificate and the partner or husband cannot disown the child.

On the birth certificate, in other words, the intended parents and not the donor will necessarily be indicated. This provision reaffirms the so-

called "principle of procreative responsibility", according to which the couple who have given their consent, which may also be inferred from mere conclusive conduct, to the application of a heterologous assisted procreation technique, once prohibited but now permitted as a result of Constitutional Court sentence no. 162/2014, may not change his or her mind ("venire contra factum proprium", meaning "come against oneself own facts"), and thus be deprived of the legal obligations assumed vis-à-vis the unborn child: the giving of consent to heterologous fertilisation (with the donation of sperm or ovum by a third party) is, therefore, an irrevocable act, which cannot be set aside by he or she who, reconsidering his or her position, decides to free himself or herself of his or her duties on the ground that the unborn child will have no biological connection with him or her.

The rationale of the rule is to legally protect the child, in his or her best interest: that is, to guarantee him or her the right to bi-genitoriality and to prevent both the biological and the non-biological parent from freeing themselves of their legal obligations by revoking their informed consent and, consequently, their parental status. Even if the child is not bound by a biological bond with the parent – whether father or mother – he or she acquires *ex lege* the status of an unremovable child. This rule also applies where other provisions of the law are violated (such as post-mortem fertilisation), but not where the ban on artificial insemination for female couples is violated or where the ban on surrogacy is violated (see above for further details).

4. Incestuous children

The 2012 reform also brought some novelties with regard to incestuous children: they may be recognised by their parents, with the authorisation of the court. Recognition gives them the legal status of children, like any other non-incestuous child. In particular, Article 251 of the Civil Code provides that incestuous children are the children born of persons between whom there is a kinship bond in the direct line to infinity or in the collateral line to the second degree, or a bond of affinity in the direct line. The child may only be recognised if there is an authorisation from the court: the court must consider the child's interest and the need to avoid any prejudice to the child.

5. Adopted children in special cases

On the other hand, some uncertainties remain concerning children adopted under Article 44 of Law 184/1983. This adoption, in fact, is subject to a special legal regime.

The rules on adoption in special cases, for instance, provide that:

1) The adoptive parent administers the child's property, but does not have usufruct over that property (unlike the common parent; in other words: there is a special legal regime for the administration of the child's property, different from that provided for other types of filiation (Art. 48 Law 184 of 1983);
2) The adoptive parent does not inherit the child's property; in other words, if the child dies, the adoptive parent does not inherit his or her estate;
3) Adoption does not constitute a kinship link between parent and adoptive child, and therefore does not give the adoptee grandparents, uncles, aunts and uncles; in other words, adoption produces a two-way legal link, only between the adoptee and the adoptee, and not between the adoptee and the rest of the family (art. 55 Law 184 of 1983); the Constitutional Court declared the article illegitimate in so far as it provides that adoption in special cases does not give rise to any civil relationship between the adoptee and the adopter's relatives, for violation of Constitutional Articles 3 (equality and non-discrimination), 31 (the child's interest and the child's right to a family) and 117, para 1, with reference to Article 8 of the ECHR, which enshrines the right to private and family life.
4) Adoption creates a legal bond that can be revoked in the presence of a justified reason, while in no other case the legal bond between parents and children could be removed (Art. 51 Law 184 of 1983[66]).

[66] Article 51 provides: "a revocation of the adoption may be pronounced by the court at the request of the adoptive father/mother when the adoptee who is more than fourteen years of age has made an attempt on his or her life or on that of his or her spouse, descendants or ascendants, or has been guilty of an offence punishable by law towards them. his or her descendants or ascendants, or has been guilty towards them of an offence punishable by a penalty involving deprivation of liberty of at least restriction of personal liberty of not less than a minimum of three years. If the adoptive parent dies as consequence of the attack, the revocation of the adoption may be requested by those to whom the inheritance would be inheritance in the absence of the adoptee and his/her descendants. The Court, having taken information and carried out any appropriate checks and enquiries, after hearing the Public Prosecutor the adoptive parent and the adoptee, shall hand down the judgment. The Court, after hearing the Public Prosecutor and the child may also issue appropriate measures by decree in chambers concerning the child's care, representation the child's person, representation and administration of property. Articles 330 et seq. ff. of the Civil Code shall apply.

There is currently a debate in the literature: according to some authors, the rules providing for a 'special' legal status for children adopted in special cases were tacitly repealed by the 2012 and 2013 reforms; in particular, the rules that enshrined in the Civil Code that the legal status of a child is unique (Art. 315 Civil Code) would have *de facto* eliminated the rules, even if those rules were not expressly and explicitly repealed by the legislature (this is tacit repeal, which occurs when a later rule is incompatible with the earlier one, with the consequence that the later one prevails).

According to another view, on the other hand, the provisions governing adoption in particular cases have not been tacitly repealed: in fact, although the legislature has reformed family law, it has not expressly cancelled them. Confirmation of this comes from the recent Constitutional Court ruling, Nos. 32 and 33 of 2021, which affirmed that discrimination still persists between adoptive children in special cases and other children and that legislative intervention is necessary.

Then there is another kind of indirect discrimination: the adoption procedure is often very long and laborious, also in view of the delays and lengthy times of Italian trials (the Italian judicial system is notoriously flooded): this situation creates a precarious condition for the child who often has to wait years before being adopted.

X. General rules on the recognition of public documents

A. The recognition of public documents concerning parenthood

In Italy, the rules governing the recognition of foreign public documents issued by a foreign authority regarding parenthood vary according to the nature of the document. In particular, the rules governing the registration and enforcement of public documents issued by an administrative authority are different from those governing documents issued by a judicial authority. It is therefore necessary to analyse the two hypotheses separately.

1. Public acts or certificates relating to parenthood

Article 18 of DPR 396/2000 provides that foreign civil status documents may only be registered in Italy if they are not contrary to public policy. In the category of acts covered by the rule, one can include birth

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In cases where the measures referred to in Paragraph 4 are taken, the court shall report them to the guardian judge for the purpose of appointing a guardian".

certificates, full extracts of birth certificates, summary extracts of birth certificates and foreign birth certificates (and in general acts and certificates relating to parenthood, filiation, family).

In cases where the public document is considered contrary to public policy, the registrar refuses to register it in the civil status register. The negative decision may be challenged before the ordinary court, pursuant to Article 95 of DPR 396/2000. Before the court there is a summary and rapid procedure, which is known as a “cameral procedure”. The public prosecutor takes part in the proceedings and the civil registrar may be heard.

2. Adoption and parental orders

Foreign measures concerning full adoption or stepchild or stepparent adoption are recognisable in accordance with Article 64 of Law 218 of 1995 on private international law.

The provision provides: “Art. 65. Recognition of foreign measures. Foreign measures relating … to the existence of family relationships … are effective in Italy … when they … are not contrary to public order and the essential rights of the defence have been respected”.

Foreign measures are immediately effective. If someone contests the effectiveness of the measure (for instance, if the civil registrar refuses to register the act or if a public authority refuses to recognise a right that derives from parenthood), it is possible to institute the proceedings governed by Article 67 of Law 218 of 1995.

Article 67 provides: “1. In the event of non-compliance with or challenge to the recognition of the foreign judgment or the foreign measure of voluntary jurisdiction, or when it is necessary to proceed to enforcement, anyone with an interest may request the ordinary judicial authority to ascertain the requirements for recognition”.

The judicial proceedings take place in the Court of Appeal (and not in the Court of First Instance, as in the case of contesting civil status acts or certificates).

The public prosecutor participates in the proceedings.

B. The public policy clause

As we have seen, both of the aforementioned rules on the recognition and registration of acts concerning parenthood provide that a public document has effect in Italy and may be transcribed only on condition that it is not contrary to public policy.

It is then necessary to give a definition of public policy in the Italian legal system. In this respect, there are various interpretations, which have changed over time.

1. The previous theory of the Court of Cassation

According to a first reconstruction, prevailing in past case-law: "public policy, the contrariety to which prevents the transcription in Italy of civil status documents issued abroad, pursuant to art. 18 DPR 396/2000, relates to the requirements of the protection of fundamental human rights, inferable from the Constitutional Charter, the founding Treaties and the Charter of Fundamental Rights of the European Union, as well as the European Convention on Human Rights"[67]. Public order, in other words, consists of the "set of fundamental principles characterising the domestic legal system in a given historical period, but inspired by the requirements of protection of fundamental human rights common to the various legal systems and placed at a higher level than ordinary legislation"[68]. The concept of public policy under consideration is not, therefore, identified with that of domestic public policy, "because otherwise the conflict rules would be operative only if they led to the application of material rules with similar content to Italian rules, cancelling the diversity between legal systems and rendering the rules of private international law useless"[69].

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[67] Cass., no. 14878/2017.

[68] Cass., no. 19599/2016, recalling in turn, "among many others, Cass. nos. 1302 and 19405 of 2013, 27592 of 2006, 22332 of 2004, 17349 of 2002"; see in the same sense also App. Milan, 28 December 2016, in *Nuova giur. Civ. comm*, 2017, 5, 657, with a note by G. Cardaci, *La trascrizione dell'atto di nascita straniero formato a seguito di gestestazione per altri*; the one under examination is, in other terms, the so-called "international public order", to be contrasted with the so-called "domestic public order", which is irrelevant in the present case, i.e. in the set of specific and peculiar principles of the Italian legal system; on the merits, for this definition, in the case law that has upheld the application for transcription of a birth certificate formed as a result of gestation for others, see: Trib. Livorno, 14 November 2017; App. Milano, 28 December 2016, in *Nuova giur. Civ. comm.*, 2017, 5, 657, with note by G. Cardaci, *La trascrizione dell'atto di nascita straniero formato a seguito di gestazione per altri;* App. Trento, 2 February 2017: all in *dejure.it* and *articolo29.it*.

[69] Cass., no. 10215/2007.

2. The current theory of the Court of Cassation

According to the most recent jurisprudence of the Court of Cassation, the assessment of conformity or contrariety with public order must be carried out in consideration "not only of the fundamental principles of our Constitution and those enshrined in international and supranational sources, but also of the manner in which they have been embodied in the ordinary discipline of the individual institutions, as well as of the interpretation provided by constitutional and ordinary jurisprudence, whose work of synthesis and recomposition gives form to that living law from which the reconstruction of the notion of public order cannot be prescinded"; in other words not only the Constitution and international treaties on the protection of human rights, but also the law, jurisprudence, and principles, contribute to delineating the notion of public order. The rules of law and case law cannot be such sources and formants "downgraded" to mere detailed provisions: paraphrasing the Court, therefore, it can be said that public policy is "the distillate" of the entire legal system or a complete "mosaic", inclusive, therefore, among its tesserae, even of case law[70].

While therefore the past theory considered only the Constitution and treaties, the present theory also considers law, regulations, case law, and interpretation.

3. The rule for which the assessment in matters of public policy must be carried out considering the 'best interest of the child'

When the jurist (judge, public official, public registrar, etc.) has to decide whether a parenting act (act of birth, act of adoption, etc.) is in accordance with or contrary to public policy, he or she must consider the best interest of the child, as laid down in numerous international conventions and rules of domestic law (e.g., Art. 3 New York Convention on the Rights of the Child)[71]. It is important, in other words, when assessing the

[70] Cass., no. 12191/2019.

[71] The aforementioned principle is carved out: 1) by Article 3 of the New York Convention on the Rights of the Child of 20 November 1989, ratified by Law 176/1991, according to which "in all judgments concerning children, whether made by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the child's best interests must be a primary consideration"; by Article 23 of EC Regulation No. 2201/2003, entitled 'grounds for non-recognition of judgments relating to parental responsibility', provides that judgments relating to parental responsibility shall not be recognised where 'having regard to the best interests of the child, recognition would be manifestly contrary to public policy'; 2) by Article 24 of the Charter of Fundamental Rights of the European Union (c. so-called "Nice Charter"), according to which

contrary to public order, the position and protection of the child's rights: it is a 'rock' on which all decisions affecting the child's life must rest[72]. As held by the case law on the protection of incestuous children (C. Cost. 494/2002)[73], in fact, "the consequences of the violation of legal prohibitions cannot fall negatively on the person born as a result of such violations, who in any case has a fundamental right, which must be protected, to the preservation of the *status filiationis* and the continuity of affective relations"[74].

Also the case-law on the transcription of birth certificates with two fathers, issued after surrogacy, states that: "The set of normative sources cited [New York Convention, art. 3; Charter of Fundamental Rights of the European Union, art. 24, etc.), as interpreted also by international jurisprudence, affirms, on the subject of family relations, the prevalence of the child's right to a certain parental relationship, and this in particular in cases such as the one in question, taking into account that it is not a question of introducing a non-existent legal situation, but of guaranteeing legal cover to a *de facto* situation that has existed for some time, in the exclusive interest of children from birth raised by the applicants, whom the law recognises both as fathers"; moreover, "the non-recognition of the

"in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration"; 3) by numerous provisions of domestic law, such as Article 31, paragraph 2, of the Constitution and Articles 316, 330, 336-bis, 337-ter, 337-quater, 337-sexies, 317-bis of the Civil Code, etc. 4) from the ECHR jurisprudence.

[72] In scholarship, it has been pointed out that, whenever it is a question of deciding whether to give foreign measures concerning minors entry into our legal system, the child's best interests should be the main parameter in the application of the limit of public order, as it may also constitute a 'counter-limit', in particular when it comes to the recognition of the effects of relationships validly arising abroad: see F. Mosconi, C. Campiglio, *Jurisdiction and Recognition of Judgments in Matrimonial Matters and Parental Responsibility*, in *Dig. Disc. Pubbl., Aggiornamento*, 2005, 336: P. Palmeri, *Il Tribunal Supremo a proposito di status familiari e maternità di sostituzione*, in *articolo29.it*, for whom the principle of public order illuminated by the best interests clause "allows the refusal to be maintained in respect of acts or practices considered contrary to the domestic legal system, saving, however, in certain respects, the consequent effects, in function of the real protection of the subjects involved and in particular of those who are in a position of greater fragility".

[73] Trib. Roma, 11 maggio 2018, *in articolo29.it*.

[74] On this point, cf. the observations of M.C. Venuti, *La condizione giuridica dei bambini nati da gestazione per altri*, in *articolo29.it*, 6, who observes: "The question is – from a normative point of view, certainly not a phenomenological one – similar in some respects to what occurs in incestuous procreation. There too, the sexual act – or even the relationship – between the persons referred to in Article 564 of the Criminal Code is criminally sanctioned, but this extreme, as is well known, no longer affects the condition of the offspring thus generated, whose recognisability (or judicial declaration of paternity and/or maternity) is prevented only if it proves prejudicial to the child (Article 251; Article 278 of the Civil Code). The disvalue of the conduct – which, moreover, is sanctioned independently of procreation – does not, therefore, spill over onto the position of the child, allowing the bond with the ascendants to be legally affirmed".

status filiationis would cause serious and obvious harm to the children, who would not have the rights inherent in that status recognised in Italy in respect of one of their parents and would suffer the loss of the family and social identity legitimately acquired abroad, in the State of their birth, since the parental bond established in the foreign country would not have any obstacle in the domestic legal system"[75].

4. The principle that mere diversity between domestic and foreign law does not constitute a ground of contrariety to public policy

Supreme Court jurisprudence has affirmed the rule that mere diversity between foreign and domestic law cannot constitute a ground of contrariety to public policy. This principle has also been repeatedly reaffirmed by case-law on the transcription of birth certificates indicating two mothers of the same sex, formed as a result of medically assisted procreation techniques lawful in the foreign country but not permitted in Italy: "a foreign

[75] These are the words of Trib. Livorno, 14 November 2017, in *dejure* and *articolo29.it*. See case law, fully produced sub. doc. 9, in particular: Trib. Milan, 16 November 2018; Trib. Milan, 24 October 2018; Trib. Rome, 11 May 2018, according to which "the American birth certificate of minors does not appear to be in conflict with public order and with the requirements of the protection of fundamental human rights, guaranteeing indeed in particular, on the one hand, the protection of the superior and pre-eminent interest of the minor, and, on the other hand, the right of persons to self-determine and form a family, values these already present in our Constitutional Charter (Articles 2, 3, 31, 32 Const.) and the protection of which is strengthened by supranational sources… considering that in the case in question the children's pre-eminent interest appears to be that of preserving their legitimate status as children of both applicants recognised to them by the valid US civil status act, in accordance with the principle of favor filiationis under l. no. 218/1995"; Trib. Pisa, 18 September 2018, unpublished; Trib. Pisa, 22 July 2016, in *iusexplorer.it*; Trib. Milano, 12 June 2015, in *iusexplorer.it*; Also noteworthy is the case law that has recognised and ordered the transcription in Italy pursuant to art. 65 l. 218/95 of a Canadian court order that ordered the formation of a birth certificate with two fathers: App. Venice, 16 July 2018, in *articolo29.it*, according to which: "It would therefore be contrary to public policy if, outside the territory of the state of birth, in the territory of the Italian State, of which he also possesses the citizenship, the minor is deprived of his parental references and is exposed to a different legal condition of the tuto with evident prejudice of family relations and references, with external incidence also on the representation and responsibility on the minor"; App. Trento, 23 February 2017, in *articolo29.it*; See also App. Bari, 13 February 2009, in *iusexplorer.it*, which recognised in Italy ex art. 65 l. 218/95 and ordered the transcription of a UK court order that ordered the formation of a birth certificate following gestation for others to which a couple formed by a man and a woman had resorted. See also the decisions that ordered the transcription of the birth certificate bearing the indication of only the biological parent who had resorted to gestation for others: App. Milano, 28 December 2016, in *articolo29.it*; Trib. Forlì, 25 October 2011, in Dir. famiglia, 2013, 3, 532; Trib. Napoli, 1 July 2011, in iusexplorer.it (for a summary of the cited case law: S. Tonolo, *La trascrizione degli atti di nascita derivanti da maternità surrogata: ordine pubblico e interesse del minore*, in *Riv. dir. int. priv. e proc*, 2014, 1, 81; C. Campiglio, *Italian rules on assisted procreation and international parameters: the creative role of jurisprudence*, in *Riv. dir. int. priv. e proc.*, 3, 2014, in spec. 507).

birth certificate showing the birth of a child by two mothers (one having donated the ovum and the other having given birth) does not, in itself, contravene public policy on the ground that the procreative technique used is not recognised in the Italian legal system by Law no. 40 of 2004, which represents one of the possible ways of implementing the regulatory power attributed to the ordinary legislature on a matter, albeit ethically sensitive and of constitutional importance, on which legislative choices are not constitutionally obligatory"[76]. In the assessment of compatibility between foreign act and public policy, it would therefore be wrong to make the following equation: "public policy = compliance with domestic legislation on medically assisted procreation", making the concept of public policy coincide with the sole set of rules of national law (enclosed, moreover, in law 40/2004 alone).

It follows, for example, that the mere discrepancy between Italian law on medically assisted procreation (l. 40/2004) and foreign law cannot be regarded as a valid ground of contrariety to public policy[77-78].

[76] Cass., no. 19599/2016: "the non-conformity of the Spanish law [or, in general, foreign law, ed.] with respect to the Italian law is not cause, per se, of violation of public order, unless it is demonstrated that Law no. 40 of 2004 contains fundamental and constitutionally obligatory principles and that, therefore, it would not be allowed to the Italian legislator to establish a discipline similar or assimilable to the Spanish one. This possibility is to be ruled out, since this is a matter in which the regulatory power is wide and, therefore, the spectrum of possible choices by the ordinary legislature, as recognised by the Constitutional Court itself (in sentence no. 162 of 2014, § 3.5), which observed that these are ethically sensitive issues, in relation to which "the identification of a reasonable balance between the opposing requirements, with respect for the dignity of the human person, belongs primarily to the assessment of the legislature". "If the legislature's discretion in the concrete regulation of the matter is wide, this means that there is no constitutional constraint from the point of view of content, and therefore public policy cannot be invoked to prevent the entry into domestic law of T.'s birth certificate, only because it was drawn up abroad in accordance with rules that do not comply with those currently provided for by ordinary Italian laws, albeit imperative, but abstractly modifiable by the future legislature"; it seems appropriate to point out that in the case dealt with by the Supreme Court, the ovum, fertilised with donor sperm, had been implanted in the womb of the egg donor's partner: the pregnant woman had therefore merely carried the pregnancy, and had no genetic relationship with the unborn child; in the same sense, with regard to gestation by others: App. Milan, 28 December 2016, in *Nuova giur. Civ. comm.*, 2017, 5, 657, with note by G. Cardaci, *La transcrizione dell'atto di nascita straniero formato a seguito di gestazione per altri*; App. Trento, 2 February 2017: both in *dejure.it* and *articolo29.it*.

[77] On the other hand, this is what has already been ruled by the very case law that has deemed transcribable a birth certificate or a parental judgment formed as a result of gestation for others, where it has been observed that "the positive regulation of medically assisted procreation must… be considered not as an expression of constitutionally obligatory fundamental principles, but rather as the point of balance currently reached at the legislative level": thus App. Trento, 23 February 2017, in *Corr. giur.*, 7. 2017, p. 935 ff.

[78] As stated in case law, the discrepancy between domestic and foreign law on gestation for others "cannot constitute a violation of international public order. Enhancing the orientation followed by the Supreme Court in a consolidated manner [see. supra, ed.], such a violation would be

5. The principle that the object of the assessment of conformity with public policy is the legal effect of the act and not its factual antecedent or foreign law

When the judge or civil registrar has to assess whether a foreign act is in conformity or contrary to public policy, they are not required to scrutinise the compatibility with public policy of either the techniques and methods by which the child was born or the foreign legislation.

They must assess whether the legal effects that the foreign act would produce, once transcribed, in the Italian legal system are contrary to public policy: in fact, it was stated that "respect for public policy must be guaranteed… having regard not to the abstract wording of the foreign provision or to the correctness of the solution adopted in the light of the foreign or Italian legal system, but to its effects"[79]; more specifically, it was written that "the assessment of compatibility [with public policy] must take place on the effects that the ruling may have in the Italian legal system[80].

Emblematic, in this sense, is the casuistry always dealt with by the jurisprudence of legitimacy: in particular, among the many cases, that of the so-called act of 'telematic marriage', recently dealt with by the Court of Cassation, which ordered the transcription in the civil-status register of a marriage act celebrated, in accordance with the foreign legal system, with-

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recognisable only if it could be argued that the Italian legislature is not permitted, because prohibited by fundamental and constitutionally compulsory principles, to lay down rules analogous or assimilable to those of countries that allow recourse to heterologous fertilisation or surrogacy practices", but "it certainly cannot be concluded in the sense that a discipline similar or assimilable to that which in other jurisdictions allows surrogacy would in itself be contrary to the supreme and/or fundamental principles of the Constitution, the founding Treaties and the Charter of Fundamental Rights of the European Union, as well as the European Convention on Human Rights, which bind the ordinary legislator".

Trib. Livorno, 14 November 2017; in the same sense: App. Milan, 28 December 2016, App. Milano, 28 December 2016, in *Nuova giur. Civ. comm.*, 2017, 5, 657, with a note by G. Cardaci, *La trascrizione dell'atto di nascita straniero formato a seguito di gestazione per altri*, according to which "The fact that the child was brought into the world through an assisted procreation practice not permitted in Italy cannot be relevant for the purposes of transcribing a birth certificate. The non-conformity of the foreign law permitting gestation for others with the Italian law is in fact not in itself a cause of violation of public order, to be understood as a set of fundamental human rights inferable from the Constitution, the founding Treaties and the Charter of Fundamental Rights of the European Union, as well as the European Convention on Human Rights"; both in *dejure.it* and *articolo29.it*.

[79] Thus, Cass. 9978/2016; Cass. 10070/2013; in the same sense: Cass. S.U. 16601/2017, which affirmed the principle of law, on the subject of the recognition of foreign punitive damages orders, according to which one must "have regard, during deliberation, solely to the effects of the foreign act and their compatibility with public policy".

[80] Cass. 9483/2013; see also case-law in the previous footnote.

out the physical presence of the bride and groom and with the aid of the medium of communication via the Internet: a modality that is incompatible with the national legal system, and yet considered not to be contrary to international public order, since "respect for public order must be guaranteed, during deliberation, by having exclusive regard 'to the effects' of the foreign act" (in the case in point: the effect would have been that of publicity, proof, and therefore opposability to third parties, in Italy, of the status of spouse established in a foreign State)[81].

The same jurisprudence that ordered the transcription of a birth certificate formed following gestation for others bearing the indication of two fathers, also affirmed that "the non-conformity with public order must be verified … considering the effect that the provisions intended to be applied would produce in Italy. In other words, it is not the rule on the

[81] Thus, Cass. 15343/2016, according to which "It follows that if the matrimonial act is valid for the foreign legal system, inasmuch as it is considered by it to be capable of representing the consent of the spouses in a conscious manner, it cannot be considered to be in contrast with public order only because it was celebrated in a form not provided for by the Italian legal system"; another emblematic decision, this time in a case of recognition of a jurisdictional measure, is Cass. 16511/2012, which recognised the effectiveness in Italy of a sentence sentencing the Supreme Court of the Bahamas to the payment of USD 1,200,000 deriving from a debt incurred for *gambling*, which is certainly contrary to Italian law, so much so that its exercise and participation in it are prohibited pursuant to Articles 718 and 720 of the Criminal Code and no action for its payment is admitted pursuant to Article 1933 of the Civil Code, but not contrary to international public order: Also in that case, the Court of Cassation reiterated that "it is not a question of ascertaining the diversity – not infrequently found in deliberation proceedings – of the rules underlying the foreign judgment with respect to our system, but, as already mentioned, of verifying whether the effects of its application pass the test of lawfulness in the light of the principles of public order; it must also be noted that, should the examination be focused solely on the divergence of the rules underlying the deliberated decision with respect to the provisions of the first paragraph of Art. 1933 Civil Code, account should be taken, on the one hand, of the concrete scope of the effectiveness of the recognition, consisting in the reaffirmation of the principle, universally shared, of the debtor's patrimonial liability…"; see also Court of Cassation 10215/2007, with regard to a *foreign license ad nutum*, according to which "public order… must be guaranteed, when reviewing the legitimacy of judicial measures, with regard not to the abstract formulation of the foreign law, but 'to its effects'"; Court of Cassation 9483/2013, which confirmed the Court of Cassation's decision to uphold the principle of the law of the State of origin, which is the only one that can be upheld by the courts. 9483/2013, which confirmed the judgement of the appellate court that recognised the effectiveness in Italy of a US divorce decree that assigned a property to the wife despite the fact that the spouses were, in Italy, in a regime of separation of property, since "the effects that the decree may determine in the Italian legal system" do not determine a violation of international public order; the point has also been emphasised in scholarship: N. Irti, *Digressioni intorno al muto 'concetto' di ordine pubblico*, in *NGCC*, 2016, 3, 481, "in using the 'filter' of public order, the problem that domestic courts face (or should face) is not that of judging the lawfulness or non-lawfulness of the act – formed elsewhere on the basis of foreign legislation – but that of assessing in concreto whether the effect produced – the attribution of a filiation relationship , possibly devoid of a biological link – is or is not unacceptable to our system, in so far as it is incompatible with the ethical, economic, political principles of the system itself".

basis of which the foreign judgment – or the measure – was rendered that is relevant for the purposes of recognition, but the concrete result that the recognition produces in the system that carries out the relevant review of admissibility”[82].

C. Public documents relating to parenthood that have not been recognized, executed nor registered in the civil status registry

Listed below are the cases in which public documents related to parenthood established in another State was not recognised in Italy. In every case, the reasons invoked by the national authorities for not recognising the parenthood established in another State was that they were against public policy. The only parent who was recognised was the biological one.

1. Birth certificates with two mothers

Until recently, Italian civil status registrars did not recognise the legal effects of a birth certificate issued in another Member State with two women being listed as parents.

In 2016 and 2017, the Italian Court of Cassation ruled for the first time that a similar certificate issued by a foreign country (Spain) is not contrary to public policy and can be registered in the Italian civil status registry (in the first case, one partner provided the ovule and the other carried the child[83]; in the second case, there was no biological link to the second woman[84]).

However, even today, the topic is controversial and many civil status registrars do not register birth certificates with two mothers[85].

2. Birth certificates issued after surrogacy

Birth certificates of children born out of surrogacy issued in another Member State (such as Greece and, in the past, the United Kingdom) or

[82] Trib. Pisa, 22 July 2016, in *dejure.it*, with specific reference to the case of a birth certificate formed following gestation for others bearing the indication of the biological father and the intended mother.

[83] Cass., no 19599/2016.

[84] Cass., no. 14878/2017.

[85] E.g. Court of Appeal of Bari, 3rd February 2020, concerning a birth certificate issued in the United Kingdom in 2016.

in a third country (such as Canada or USA) cannot be registered in Italy since they are contrary to public policy[86].

3. Stepchild adoption in same sex couples

The legal effects of foreign same-sex second-parent adoption are now recognised in Italy[87].

4. Full adoption in same-sex couples

The Court of Cassation has ruled that it is possible to recognise and register a judgment of full adoption for same-sex couples: "A foreign court order (in this case, of the State of New York) to adopt a child by a male homo-affective couple (both American citizens, one also an Italian citizen), which confers a parental status corresponding to full or legitimising adoption, may be recognised as effective, given that (a) such a measure does not produce effects contrary to the principles of international public policy, the sexual orientation of the adoptive couple not being an obstacle in this regard, and such principles are not supplemented by the reservation of legitimising adoption, under domestic law, to married couples only, but rather by the recognition of the primacy of the interest of all children, without discrimination, in determinations affecting their right to identity and affective stability (b) such recognition presupposes, first, that there is no prior agreement to surrogate motherhood and, second, that the foreign measure, even if pronounced, as in the present case, after obtaining the consent of the child's biological parents, has positively assessed the adoptive parents' parental suitability"[88].

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[86] In regard to Canadian document, see Cass., no. 12193/2019, which ruled that only biological parent can be registered, whereas the intentional parent should adopt the child; see also Cass., no. 38162/2022.

[87] E.g. Trib. Napoli, 5 April 2016, recognized a French second-parent adoption.

[88] Cass., no. 9006/2021, according to the judgment: "[I]t is not contrary to the principles of international public policy to recognise the effects of a foreign judicial decision to adopt a child by a male homosexual couple granting parental status according to the full or legitimating adoption model, since the fact that the adoptive child's family unit is homogenous does not constitute an obstacle to the adoption if the pre-existence of a maternity agreement as the basis of the filiation is excluded; see also the "twin" judgments Trib. Min. Florence, 7 March 2017 and Trib. Min. Florence, 7 March 2017, in articolo29.it, which recognised the effectiveness in Italy of two full external adoption judgments by two men pronounced in the United Kingdom and the United States (See also App. Naples, 5 April 2016, in *dejure*, which recognised the effectiveness in Italy of a French adoption judgment, with full and legitimising effects, by a woman in respect of her wife's child): as is clear from the operative part of the judgments, the Registrar was ordered to transcribe the measure in the civil status register in the registers of birth certificates of minors "with

5. Single-parent adoption

The recognition of foreign single-parent adoption is also a matter of debate[89]. However, the prevailing view is that a single-parent adoption judgment must be recognised, enforced and transcribed in Italy.

In this case, however, there is a debate on the effects of recognition.

The Court of Cassation, has ruled that the adoption of a foreign child by singles only produces in Italy the 'mild', 'semi-full', 'non-legitimising' effects of adoptions in special cases provided for by Article 44 of the Italian Adoption Law (it has already been seen that this adoption does not produce 'full' parenthood). For example, if a foreign adoption is recognised in Italy for a single person, the child's relationship with the family of origin may be maintained, and the parent does not inherit the child's property if the child dies. The Court of Cassation stated that, in order to be recognised in Italy, foreign adoption must comply with "the fundamental principles of our legal system concerning the family and minors": these principles include, according to the Court of Cassation, the requirement laid down in Law 184/83 that only couples united in marriage may be eligible for adoption, this condition being appropriate, according to the Italian legislature, in the child's best interests.

The only cases permitted in Italy of adoption for single persons are those provided for by Article 44 of the Adoption Law, with "mild" effects: with the consequence that even a foreign adoption for a single person must produce the same effects in Italy[90].

D. Costs of non-recognition of filiation established in another State

When a public document is not recognised and registered, the parents have to undertake an expensive lawsuit before the court. The lawsuit is often very expensive. By virtue of Article 10 of DPR 115/2002 (Italian regulation on court costs), court proceedings relating to the registration of civil status and, more generally, to parenthood, are exempt from court fees. Applicants must pay the costs of legal advice, regulated by Ministerial Decree 55/2014. The complexity of the case and the stage of the proceedings (Court, Court of Appeal, Supreme Court) may influence costs. The

the consequent amendment of their birth certificate"; the adoption judgment by two men was also deemed transcribable: App. Genoa, 1 September 2017, in *articolo29.it*; App. Milan, 9 June 2017, in *articolo29.it*.

[89] E.g.: App. Potenza, 9 April 2020.

[90] Cass. 3572/2011.

court proceedings regulating the recognition of the legal effects of a foreign act establishing filiation are voluntary proceedings (non-contentious): according to the table annexed to the aforementioned decree, legal costs range from €2225.00 to €4320.00 only before the Court (plus VAT). The costs of proceedings before the Court of Appeal are similar.

It is rare for the Court to recognise the reimbursement of the winning applicant's legal costs at the expense of the public authority that caused the litigation.

XI. Effects of non-recognition of filiation established in another State

The consequence of non-recognition of the second parent is that the child has no legal and juridical relationship with the second parent, and vice versa.

A. Violation of the rights of the child

The lack of recognition undermines their fundamental rights, such as the following ones.

1. Violation of the child's right to private and family life under Article 8 ECHR (absence of inheritance rights, legal representation, work leave, etc.).

In the absence of a birth certificate indicating a parent, the legal relationship between that parent and the child is effectively annulled: the child does not inherit; administrative bodies – such as public schools, hospitals – do not recognise the legal relationship between unregistered parent and child. If the biological parent dies, the unregistered parent remains legally a stranger to the child; the same danger could arise if the unregistered parent decided to leave the family home: in such a case, he or she could do so without legal consequences: the child could not claim any rights, e.g., to financial maintenance, against his or her parent.

In addition, the child, in the absence of legal recognition of his or her relationship with the parent, cannot become the holder of rights provided for by specific rules that have as a prerequisite the recognition of the condition of "dependent" child of a given person: for example, the unrecognised parent cannot take a work permit or leave to assist the child; the child cannot take over the parent's lease contracts; etc.

Consequently, the right to private and family life is violated, pursuant to Art. 8 ECHR: it is precisely a case similar to the present one that has led, in the cases ECHR Mennesson v. France and ECHR Labasse v. France, to the condemnation of France for violation of Art. 8 ECHR on the right to respect for private life, for not having transcribed the birth certificates of two girls formed as a result of gestation for others in California (see, in a footnote, the most salient paragraphs of the decision, where the ECHR reiterates, with many examples, how the French State's refusal seriously endangered the private life of the girls: e.g. by jeopardising their capacity to inherit, if not as legatees, etc.)[91].

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[91] As the Court noted, §§ 88-89-90, in fact, the girls "since they have no documents attesting to their French nationality and family status, they are obliged to produce unregistered US civil status documents, accompanied by a sworn translation, whenever they request access to a right or service requiring proof of their family relationship, and are therefore often treated with suspicion, or at least incomprehension, by the person dealing with the request. They report difficulties encountered in registering the third and fourth applicants [i.e., young Domenica and Fiorella, ed. Moreover, as a consequence – at least, in the current state of affairs – of the fact that the two girls under French law do not have a legal relationship with the first and second applicants [i.e., with their parents, ed. This circumstance complicates the possibility of travelling as a family and raises concern (…) with respect to the possibility of the third and fourth applicants [the girls Fiorella and Domenica, *n.d.t.*] to remain in France"; although the French Government defended itself by arguing that the girls could obtain a certificate of nationality, and although the Court invited it to specify its position more precisely, "the Court notes that this is not at all clear whether this possibility really exists" and ends up, indeed, arguing against the Government's deduction, considering that this is not possible (see para. 90); the Court also held that the children's right to privacy was violated: see paras. 96-101: 'As the Court observed, respect for private life requires that each person be free to assert the details of his or her personal identity as an individual human being, which includes the legal relationship between parent and child; an essential element of the identity of individuals is in jeopardy when the parent-child relationship is at issue (see paragraph 80 above). Under current domestic law, the third and fourth applicants [the girls, ndt] are in a position of legal uncertainty. (…) The refusal to grant any effect to the US judgment and consistently to record the details of the birth certificates shows that the relationship is not recognised by the French legal system. In other words, even if France is aware that the girls have been identified in another state as daughters of the first and second applicants, France nevertheless denies them that status under French law. This Court finds that such a contradiction undermines the children's right to identity within French society. 97. Even if Article 8 of the Convention does not guarantee the right to acquire a particular nationality, the fact remains that nationality is an element of one's personal identity (see Genovese v. Malta, no. 53124/09, para. 33, 11 October 2011). As the Court has already pointed out, although their biological father is French, the third and fourth applicants face a worrying uncertainty as to whether they will be able to obtain recognition of their French nationality under Article 18 of the Civil Code. This uncertainty is likely to have negative repercussions on the definition of their personal identity. 98. The Court observes that the fact that the third and fourth applicants are not identified under French law as daughters of the first and second applicants has consequences in respect of their inheritance rights. It notes that the Government deny this circumstance, but observes that the Conseil d'État has ruled that in the absence of recognition in France of a parent-child relationship established abroad with respect to the intended mother, a child born abroad following a subrogation agreement cannot inherit the mother's estate unless the latter has appointed him or her as legatee, the inheritance taxes being calculated as if he or she were a third party… that is to say, less favourably. The same situation arises with

2. Violation of the child's right to personal identity under Article 2 of the Constitution and Article 8 of the Convention on the Rights of the Child

The lack of legal recognition in the Italian legal system of the filiation relationship between a parent and child violates the fundamental right to the child's personal identity: as the ECHR jurisprudence has emphasised, the status of child constitutes a founding element of personal identity, as a "legally protected interest in not seeing one's intellectual, ethical and social heritage altered or misrepresented externally"[92] is protected by Article 2 of the Constitution and, above all, in the present case, by Article 8 of the Convention on the Rights of the Child, according to which "States Parties undertake to respect the right of the child to preserve his or her identity, including his or her nationality, name and family relations, as recognised by law, without unlawful interference"[93].

3. Violation of the right to bigenitorial parenting under Article 24(3) of the Charter of Fundamental Rights of the European Union.

The absence of legal recognition of parenthood infringes Article 24 of the Charter of Fundamental Rights of the European Union, according to which "The child shall have the right to maintain on a regular basis a per-

regard to the inheritance of the estate of the intending father, even if he is the biological father, as in this case. This, too, is a component of their identity: their kinship link, as children born as a result of a surrogacy agreement finalised abroad, is deprived. 99. The Court can accept that France may wish to discourage its citizens from going abroad and taking advantage of assisted reproduction methods that are prohibited in its territory (see paragraph 62 above). In view of this, however, the effects of French law's non-recognition of the parental relationship between the children thus conceived and their intended parents are not confined to the parents alone, who have chosen a particular method of assisted procreation prohibited by the French authorities. They also affect the children themselves, whose right to respect for private life – which implies that everyone is free to determine the essence of their identity, including the parental bond – is significantly affected. Consequently, a serious question arises as to the compatibility of such a situation with the best interests of the girls, which must guide any decision concerning them"; identical reasoning in the sister case ECHR Labasse v. France, No. 65941/2011.

[92] Court of Cassation, no. 987 of 7 February 1986, which emphasised that this right has its direct basis in Article 2 of the Constitution.

[93] An important reference to the child's personal identity is also provided in Article 29 of the same Convention, where it is stated that "States Parties agree that the child's education shall have as its purpose: (…) (c) to develop in the child respect for his or her parents, identity, language and cultural values, as well as respect for the national values of the country in which he or she lives, the country of which he or she may be a native and for civilisations other than his or her own".

sonal relationship and direct contact with both parents, unless that is contrary to his or her interests".

4. Violation of the child's right to non-discrimination on the basis of his or her birth under Article 2 of the New York Convention on the Rights of the Child.

The absence of recognition of the legal bond between a social parent and the child, moreover, could produce today an intolerable discrimination for the child, based on a personal condition, that is, on the fact of having two parents of the same sex, or on the fact of having been born through a certain artificial procreation technique: such discrimination is prohibited by Art. 2 of the New York Convention on the Rights of the Child, which states that States Parties undertake to respect the rights set forth in the present Convention and to ensure those rights to every child within their jurisdiction without distinction of any kind and irrespective of the child's or his or her parents' or legal guardians' race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, financial situation, disability, birth or other status; States Parties shall take all appropriate measures to ensure that the child is effectively protected against all forms of discrimination or punishment based on the social status, activities, professed opinions or beliefs of the child's parents, legal representatives or family members.

It is clear that the legal system can neither create distinctions between children, *i.e.* between children born through medically assisted procreation or in the "traditional" way, or between children born of same-sex or heterosexual couples, nor can it refuse to recognise the existence of one or the other and thus hinder the exercise of their fundamental rights.

B. Violation of the rights of the second parent (social parent)

The absence of recognition of the legal bond also infringes the father's rights vis-à-vis the child. For instance: the right to inherit the child's estate, if he dies; the right to claim maintenance from the child, if he or she is in a serious state of economic hardship and indigence; the right to personal identity, consisting also of the identity of being a father or mother, etc.

SPANISH CHAPTER*

Summary

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I. Introduction

The essay represents the result of the research activity carried out by the Just Parent unite of the University of Granada. The intention is trying to offer an overview of the main aspects of filiation and, above all, of social parenthood in the Spanish legal system. The relevance of this study, in a comparative perspective with the other regulations interested by the project, depends on the entry into force of the Spanish Constitution in 1978. From some points of view, as will be seen, this Constitution, younger than others studied in the aim of the JUST-PARENT Project, is proving to be more in line with some of the most current demands of society around parenthood.

This is a general consideration that takes as its starting point the gender equality within marriage as well as to the so-called egalitarian marriage. As will be pointed out, in fact, the elements that make it possible to speak of the Spanish legal system as a system more favorable to the configuration of models of social parenthood descend precisely from the rules regarding

* This chapter represents one of the results of the research activity carried out by the University of Granada Unit, composed of: Prof. A Pérez Miras (P.I.), Dr. G. Palombino, Prof. E. Guillén López, Prof. A. Galera Victoria and Dr. L.F. Martínez Quevedo.

marriage[1]. Just to give an example, leaving it to the pages that follow for more in-depth consideration, consider that Spain, at the same time as regulating same-sex marriage, also approved adoption by same-sex couples, a step that in other European legal systems (such as Italy, for example) still finds some resistance[2].

Beyond all this, however, there is no doubt that also the Spanish legal system, like the others studied in the context of the project, also opposes resistance to some instances which, from a strictly legal point of view, still do not enjoy a definitive framework (as regarding surrogacy). In this work, therefore, we will try to describe the state of the art in these matters, highlighting their critical issues and/or prospects.

II. The concept of family in the Constitution of 1978

It is clear that the enactment of the Constitution in 1978, setting the pace for the birth of Spanish democracy after the years of Franco's totalitarian regime, profoundly changed Spanish society[3]. Family law has also been interested by these developments[4]. The constitutional principles, indeed, have changed the vision of the legal system about the family, transforming the old conception of *family* contained in the pre-constitutional system,

[1] A. L. Cabezuelo Arenas, *Matrimonio y parejas de hecho. ¿es necesaria una reforma del sistema matrimonial español? A propósito de una inexistente discriminación por motivos étnicos*, in *Derecho Privado y Constitución*, n. 21, 2007, 9-62. https://www.cepc.gob.es/sites/default/files/2023-04/25902dcp21001.pdf.

[2] E. Alonso Crespo, *Adopción nacional e internacional*, in *La Ley Actualidad*, 2004; R. Bercovitz Rodríguez-Cano, *Comentarios al Código Civil*, Tomo I, Tirant lo Blanch, 2013; C. Callejo Rodríguez, *Cuestiones controvertidas en la nueva regulación de la adopción tras la Ley 26/2015, de 28 de julio, de modificación del sistema de protección de la infancia y la adolescencia*, in *Revista Doctrinal Aranzadi Civil-Mercantil*, num. 6/2017 parte Doctrina, 2017; A. Cañizares Laso, P. De Pablo Contreras, J. Orduña Moreno, R. Valpuesta Fernández, (dirs.), *Código civil Comentado*, vol. I, ed. II, Aranzadi SA, 2011; P. González Navasa, *Acogimiento familiar y adopción*, in *Shinè Psicología y Coaching*, S.L-Universidad de La Laguna, 2018; C. Martínez De Aguirre Aldaz, *Curso de Derecho Civil (IV), Derecho de Familia*, Edisofer S.L, 2016; M.V. Mayor Del Hoyo, *La Adopción en el Derecho Común Español*, Tirant lo Blanch, 2019.

[3] F. Balaguer Callejón (Dir.), *Introducción al Derecho constitucional*, ed. XI, Madrid, Tecnos, 2020; F. Balaguer Callejón, (Coord.), *Manual de Derecho Constitucional*, vol. I, ed. XVII, Tecnos, 2022; F. Balaguer Callejón, *Capacidad creativa y limites del legislador en relación con los derechos fundamentales. La garantia del contenido esencial de los derechos*, in M.A. Aparicio Pérez (Coord.), *Derechos Constitucionales y pluralidad de ordenamientos*, Cedecs, 2001, 93-116; F. Balaguer Callejón, *Constitución normativa y ciencia del Derecho*, in Aa.Vv., *Estudios de derecho Publico en Homenaje a Juan José Ruiz-Rico*, vol. I, Tecnos, 1997.

[4] J.L. Lacruz Berdejo (Dir.), *Elementos de Derecho civil*, vol. IV, *Familia*, Dykinson, 2010; E. Llamas Pombo, *Manual de Derecho civil*, vol V, *Derecho de familia*, Wolters Kluwer Legal & Regulatory, 2021.

based exclusively on the matrimonial legal relationship, and inspired by a patriarchal and heterosexual idea of the society[5].

This model was imprinted around the idea that the essential social function of the family was the procreation of the progeny. This explains why, in the context of this section devoted to the study of the Spanish legal system, reasoning on the regulation of marriage in the direction of delving into social parenthood should be considered crucial[6]. The shaping of social parenthood, *de facto*, also passes through the regulation of affective unions because it is on the basis of these that the family, the oldest social formation subject to legal protections, takes shape[7].

Nevertheless, it's interesting observe that just in the Civil Code of 1889 children were deeply discriminated because of their filiation; a list of anachronistic and humiliating filial classifications was contained in the Code, whose main purpose was to discriminate the so-called illegitimate children, natural or not natural, putative, and adoptive, in relation to the legitimate children, born or conceived into the marriage. In other words, the family descripted by the original version of the Spanish Civil Code was the echo of the common thinking of that period[8].

Among the years, the Civil Code changed and the patriarchal and authoritarian conception of the family, founded on marriage and linked to the strong idea of legitimate filiation, disappeared after several legislative reforms[9]. Furthermore, the Spanish family legal system was adapted to the values of the family system established in the French Revolution of 1789 and enshrined in the Universal Declaration of Human Rights. As known, the notion of family in that contest was built on the idea of coexistence, qualified by the circumstance of supposing a mutual personal and economic commitment. Moreover, this is the moment when the refer-

[5] E. Llamas Pombo, *op. cit*.

[6] J.V. Gavidia Sánchez, *La libertad de elección entre el matrimonio y la unión libre*, in *Derecho privado y Constitución*, n. 12, 1998, 223: https://www.cepc.gob.es/sites/default/files/2021-12/10059dpc012069.pdf; N. Álvarez Lata, *Las parejas de hecho: perspectiva jurisprudencial*, in *Derecho privado y Constitución*, n. 12, 1998, 7: https://www.cepc.gob.es/sites/default/files/2021-12/10058dpc012007.pdf; M.I. Ramos Quintana, *Uniones de hecho, protección social y relación de trabajo*, in *Derecho privado y Constitución*, n. 12, 1998, 223: https://www.cepc.gob.es/sites/default/files/2021-12/10062dpc012223.pdf.

[7] F.A. Rodríguez Morata, *El principio de no discriminación en las relaciones de filiación*, in *Derecho Privado y Constitución*, n. 38, 2021, 157-194.

[8] J.L. Lacruz Berdejo (Dir.), *op. it.*; E. Llamas Pombo, *op. cit.*

[9] The reforms had place in the following years: 1981 (cf. Law 11/81, of May 13 and Law 30/1981, of May 7, 1981), 1990 (cfr. Law 11/1990, of October 15, 1990), 2005 (cfr. Law 13/2005, of October 15, 2005), 2005 (cfr. Law 13/2005, of July 1 and Law 15/2005, of July 8) and 2015 (Law 15/2015, of July 2, 2015).

ence to the founding function of procreation changes and this is not considered anymore a decisive element in the construction of the family relationship[10].

Starting from this point of view, the idea of family introduced in the Spanish Constitution determines an approach on the matter of social parenthood strictly adaptive: arts. 32 and 39 of the Constitution[11], indeed, do not contemplate and protect a single and closed model of family, but rather a plurality of socially family models; therefore, this approach offers recognition and protection by the public authorities and by private individuals[12].

Therefore, the Constitution doesn't approve a single type or model of family, but a plurality of constitutionally recognized "families". For example, in the guarantees of articles 32 and 39 of the Constitution, the family based on marriage contracted by two heterosexual individuals and matrimonial filiation is not the only (model) concerned, but also extramarital filiation and marriage contracted by two individuals of the same sex, *de facto* unions, the single-parent, extended or nuclear family are included (today, for example, one of the recognized family models is based on the notion of a marriage contracted by two persons, whether of different [heterosexual] or equal [homosexual] sex, with identical responsibility for decision-making in personal and economic relations, and on a system of filiation built on the principle of the responsibility of the parents or of those who exercise legally recognized parental authority over the children)[13].

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[10] G. Cámara Villar, *El sistema de los derechos y las libertades fundamentales en la Constitución española*, en F. Balaguer Callejón (Coord.), *Manual de Derecho Constitucional*, vol. II, ed. XIV, Tecnos, 2019, 78.

[11] Art. 32: "1. Men and women have the right to marry with fully legal equality. 2. The law shall regulate the forms of marriage, the age at which it may be entered into and the required capacity therefore, the rights and duties of the spouses, the grounds for separation and dissolution, and the consequences thereof.». Art. 39: «1. The public authorities shall ensure the social, economic and legal protection of the family. 2. The public authorities likewise shall ensure full protection of children, who are equal before the law, irrespective of their parentage and the marital status of the mothers. The law shall provide for the investigation of paternity. 3. Parents must provide their children, whether born within or outside wedlock, with assistance of every kind while they are still under age and in other circumstances in which the law is applicable. 4. Children shall enjoy the protection provided for in the international agreements which safeguard their rights".

[12] J. Aparicio Tóvar , J.L. Monereo Pérez, C. Molina Navarrete, M. Nieves Moreno Vida, *Comentario a la Constitución socio-económica de España*, Granada, Comares, 2002; Ó. Alzaga Villaamil, *Comentario sistemático a la Constitución Española de 1978*, Marcial Pons, 2017.

[13] M. Martín Casals, *Aproximación a la Ley catalana 10/1998, de 15 de julio, de uniones estables de pareja*, in *Derecho privado y Constitución*, n. 12, 1998, 143: https://www.cepc.gob.es/sites/default/files/2021-12/10060dpc012143.pdf; M. Núñez Grañón, *Régimen tributario de las uniones de hecho*, in *Derecho privado y Constitución*, n. 12, 1998, 189: https://www.cepc.gob.es/sites/default/files/2021-12/10061dpc012189.pdf; N. Álvarez Lata, *op. cit.*; M.I. Ramos Quin-

III. An opened concept of family and legal system of filiation

On the basis of art. 39 of the Spanish Constitution[14], we can affirm that the current Spanish legal system concerns an 'opened concept' of family[15]. The protection offered to this by mentioned article cannot be limited to families constituted by marriage, but to *any form of human cohabitation*, qualified by the circumstance of presupposing a *mutual personal and economic commitment* without an anticipated termination period, based on affection or reciprocal help between its members. In this sense, the Constitutional Court had a relevant role to affirm the so called "open model" of family based on the constitutional principles. In many sentences, the Court affirmed that the type of family contemplated in the Constitution is a plural model[16] and the family which constitutional guarantees are directed to protect admits different modalities of stable cohabitation, more than that based on marriage[17].

In the same perspective, it's clear that the Constitution determines a relevant impact also on the legal system of filiation. The Spanish Constitution profoundly transformed this latter (see arts. 108 to 141 and 175 to 180 CC), which is why we can assume that the Spanish filiation system is one of the areas of civil law where the 1978 Constitution has most intensely projected its values and principles[18]. This constitutes an important step in order to culminate the transition experienced by family law from an institutional and organic vision to one that is not only associative, but also markedly individualistic. Even though, as it will be developed later, it is still an unfinished system and, in some specific aspect, in crisis[19].

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tana, *op. cit.*; M.E. Rovira Sueiro, *La "Familia de hecho" en Italia: estado actual de la cuestión*, in *Derecho privado y Constitución*, n. 12, 1998, 223: https://www.cepc.gob.es/sites/default/files/2021-12/10063dpc012269.pdf; J.V. Gavidia Sánchez, *op. cit.*

[14] E. Aranda Álvarez, S. Sieira, A. Rastrollo Ripollés, *Artículo 39*, in *Índice sistemático de la Constitución*, Congreso de los Diputados, 2017. https://app.congreso.es/consti/constitucion/indice/sinopsis/sinopsis.jsp?art=39&tipo=2.

[15] C. Molina Navarrete, *la multiculturalidad, el pluralismo de relaciones de convivencia en pareja y el derecho social: entre tradición y renovación*, in *Derecho Privado y Constitución*, n. 21, 2007, 275-311: https://www.cepc.gob.es/sites/default/files/2021-12/25908dcp21007.pdf.

[16] On this point, see A. Sánchez-Rubio García, *La legislación sobre parejas de hecho tras las sentencias del Tribunal Constitucional 81/2013, de 11 de abril y 93/2013, de 23 de abril*, in *Revista de derecho aragonés*, n. 20, 2014, 183-200.

[17] In this direction, F.J. Cañal García, *Matrimonio y uniones de hecho en la reciente jurisprudencia constitucional*, in *Ius Canonicum*, XXXV, N. 69, 1995, 287-300.

[18] N. Álvarez Lata, *op. cit.*; M.I. Ramos Quintana, *op. cit.*, 223; M.E. Rovira Sueiro, *op. cit.*, 223.

[19] A.H. Puleo, *Nuevas formas de desigualdad en un mundo globalizado. El alquiler de úteros como extractivismo*, in *Revista Europea de Derechos Fundamentales*, n. 29, 2017, 165-184; E. Farnós

In particular, the principle of equality and non-discrimination on the grounds of birth has a special projection in the filiation system. This latter is inspired by the following principles: **a**) the principle of equality of children, the greatest exponent of which is specified in the prohibition of any discrimination for reasons, among others, of the born or other conditions, personal or social circumstance; **b**) public powers will ensure the comprehensive protection of children, who are equal before the law regardless of his affiliation, which is nothing more than a concretion of the principle of equality enshrined in art. 9.2 of the Constitution[20]; **c**) the principle of parenthood investigation outlined in art. 39.2 of the Constitution[21], whose positive consecration has enabled or legitimized the definition of limits to the action of investigation of paternity and maternity, that is, to the actions filiation in whose process proceeds to the investigation of parenthood, even with biological tests (e.g., short periods of expiration date, legitimation, circumstantial evidence, etc.)[22].

The introduction of the principle of non-discrimination based on birth in the filiation system had an immediate reflection on the legal position attributed to extramarital children and on the new configuration of filiation actions. More specifically, the consecration of the new aspects of filiation was made in Spain through a Law of special relevance and incidence in the filiation regime of the Civil Code: *Ley 11/1981, de 13 de mayo de 1981, de modificación del Código civil en materia de filiación, patria potes-*

AMORÓS, *Inscripción en España de la filiación derivada del acceso a la maternidad subrogada en California. Cuestiones que plantea la Resolución de la DGRN de 18 de febrero de 2009*, in *InDret – Revista para el análisis del derecho*, n. 1, 2010.

[20] "It is incumbent upon the public authorities to promote conditions which ensure that the freedom and equality of individuals and of the groups to which they belong may be real and effective, to remove the obstacles which prevent or hinder their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life".

[21] "1. The public authorities shall ensure the social, economic and legal protection of the family. 2. The public authorities likewise shall ensure full protection of children, who are equal before the law, irrespective of their parentage and the marital status of the mothers. The law shall provide for the investigation of paternity. 3. Parents must provide their children, whether born within or outside wedlock, with assistance of every kind while they are still under age and in other circumstances in which the law is applicable. 4. Children shall enjoy the protection provided for in the international agreements which safeguard their rights".

[22] M.C. GONZÁLEZ CARRASCO, *La prestación del consentimiento informado en materia de salud en el nuevo sistema de apoyos al ejercicio de la capacidad*, in *Derecho Privado y Constitución*, n. 39, 2021, 213-247; F.A. RODRÍGUEZ MORATA, *El principio de no discriminación en las relaciones de filiación*, in *Derecho Privado y Constitución*, n. 38, 2021, 157-194; M. NÚÑEZ BOLAÑOS, I. M.ª NICASIO JARAMILLIO, E. PIZARRO MORENO, *El interés del menor y los supuestos de discriminación en la maternidad subrogada, entre la realidad jurídica y la ficción*, in *Derecho Privado y Constitución*, n. 29, 2015, 227-261.

tad y régimen económico del matrimonio[23], that imposed a new regime for the filiation.

First, the decision maker tried to balance the delicate interests concerned by the marital affiliation. Thus, marriage does not take precedence over for the purposes of filiation, but its existence has importance at the time of discriminating the titles of its determination, as well as to articulate the system of actions[24].

With these pillars, it addresses the differentiation of terms and active legitimation to facilitate the adaptation of the legal affiliation to the social one, that is, the one that is lived by the possession of state, and to put obstacles or limits to the contestation of matrimonial affiliation. In short, in this first post-constitutional legislative phase, in the Civil Code is introduced the non-discrimination of non-marital affiliation, consecrating the equality between marital and extramarital affiliation fuller, by granting extramarital children not only a mere *status filiae*, but a full *status familiae*; the admission of the action of paternity investigation; and the idea that the "interest of the child" is pre-eminent with respect to that of the parent. This can be seen from the fact that this one is always legitimized for the exercise of claim actions of affiliation, as well as that the person of legal age may refuse to recognize by his parent[25].

[23] Art. 112: "La filiación produce sus efectos desde que tiene lugar. Su determinación legal tiene efectos retroactivos siempre que la retroactividad sea compatible con la naturaleza de aquéllos y la Ley no dispusiere lo contrario. En todo caso, conservarán su validez los actos otorgados, en nombre del hijo menor o incapaz, por su representante legal, antes, de que la filiación hubiere sido determinada". Art. 113: "La filiación se acredita por la inscripción en el Registro Civil, por el documento o sentencia que la determina legalmente, por la presunción de paternidad matrimonial y, a falta de los medios anteriores, por la posesión de estado. Para la admisión de pruebas distintas a la inscripción se estará a lo dispuesto en la Ley de Registro Civil. No será eficaz la determinación de una filiación en tanto resulte acreditada otra contradictoria". Art. 114: "Los asientos de filiación podrán ser rectificados conforme a la Ley de Registro Civil, sin perjuicio de lo especialmente dispuesto en el presente título sobre acciones de impugnación. Podrán también rectificarse en cualquier momento los asientos que resulten contradictorios con los hechos que una sentencia penal declare probados".

[24] Art. 127: "En los juicios sobre filiación será admisible la investigación de la paternidad y de la maternidad mediante toda clase de pruebas incluidas las biológicas. El Juez no admitirá la demanda si con ella no se presenta un principio de prueba de los hechos en que se funde". Art. 128: "Mientras dure el procedimiento por el que se impugne la filiación, el Juez adoptará las medidas de protección oportunas sobre la persona y bienes del sometido a la potestad del que aparece como progenitor. Reclamada judicialmente la filiación, el Juez podrá acordar alimentos provisionales a cargo del demandado y, en su caso, adaptar las medidas de protección a que se refiere el párrafo anterior". Art. 129: "Las acciones que correspondan al hijo menor de edad o incapaz podrán ser ejercitadas indistintamente por su representante legal o por el Ministerio Fiscal". Art. 130: "A la muerte del actor, sus herederos podrán continuar las acciones ya entabladas".

[25] Art. 131: "Cualquier persona con interés legítimo tiene acción para que se declare la filiación manifestada por la constante posesión de estado. Se exceptúa el supuesto en que la filiación

IV. Childhood in the 1978 Constitution: the best interests of the minor

Still with a view to providing general elements that can define the perimeter of the investigation from the Spanish perspective, it is also appropriate to offer some insights regarding the dimension of childhood in the 1978 Constitution[26].

Childhood lacks specific constitutional regulation. It has traditionally been linked to the family and, therefore, has been framed within parent-child relationships[27]. As we know, the family is recognized as a guiding principle in art. 39 CE, so a series of measures are foreseen by the public powers that guarantee the comprehensive protection of children. This is in accordance with the provisions of the Convention on the Rights of the Child when it recognizes that "la familia, como grupo fundamental de la sociedad y medio natural para el crecimiento y el bienestar de todos sus miembros, y en particular de los niños, debe recibir la protección y asistencia necesarias para poder asumir plenamente sus responsabilidades dentro de la comunidad".

It is in this framework that section 4 of art becomes relevant. 39 CE because it offers us specific treatment for children, as their own subjects and not linked to their filial status. This section did not appear in the Constitutional Draft but was introduced by an amendment by Senator Villar

que se reclame contradiga otra legalmente determinada" Art. 132: "A falta de la correspondiente posesión de estado, la acción de reclamación de la filiación matrimonial, que es imprescriptible, corresponde al padre, a la madre o al hijo. Si el hijo falleciere antes de transcurrir cuatro años desde que alcanzase plena capacidad, o durante el año siguiente al descubrimiento de las pruebas en que se haya de fundar la demanda, su acción corresponde a sus herederos por el tiempo que faltare para completar dichos plazos". Art. 133: "La acción de reclamación de filiación no matrimonial, cuando falte la respectiva posesión de estado, corresponde al hijo durante toda su vida. Si el hijo falleciere antes de transcurrir cuatro años desde que alcanzare plena capacidad, o durante el año siguiente al descubrimiento de las pruebas en que se funde la demanda, su acción corresponde a sus herederos por el tiempo que faltare. para completar dichos plazos". Art. 134: "El ejercicio de la acción de reclamación, conforme a los artículos anteriores, por el hijo o el progenitor, permitirá en todo caso la impugnación de la filiación contradictoria. No podrá reclamarse una filiación que contradiga otra determinada en virtud de sentencia". Art. 135: "Aunque no haya prueba directa de la generación o del parto, podrá declararse la filiación que resulte del reconocimiento expreso o tácito, de la posesión de estado, de la convivencia con la madre en la época de la concepción o de otros hechos de los que se infiera la filiación, de modo análogo".

[26] A. Pérez Miras, *La regulación constitucional y estatutaria de la infancia*, in M.C. Pérez Villalobos (Coord.), *Los conflictos armados y la protección de la infancia: un estudio multidisciplinar desde la perspectiva de los derechos humanos*, Aranzadi, 2020, 357-381.

[27] E. Aranda Álvarez, S. Sieira, A. Rastrollo Ripollés, *Artículo 39*, in *Índice sistemático de la Constitución*, Madrid, Congreso de los Diputados, 2017. https://app.congreso.es/consti/constitucion/indice/sinopsis/sinopsis.jsp?art=39&tipo=2.

Arregui in the Plenary debate. Its literality tells us that "Los niños gozarán de la protección prevista en los acuerdos internacionales que velan por sus derechos", Therefore, it offers us an interesting subjective perspective for the protection of children. These agreements have their greatest exponent in the Convention on the Rights of the Child, made in New York on November 20, 1989[28].

However, we cannot forget that this falls within the guiding principles, and despite the goodness of the reference to the international treaty, from the constitutional point of view it implies a lower level of guarantees. As a fundamental right in the strict sense, we only find a reference to its protection in the field of communicative freedoms[29]. Indeed, art. 20.4 CE establishes the protection of youth and childhood as an extrinsic limit[30]. From all this we can deduce that constitutional regulation is scarce.

It was not until the "Ley Orgánica del menor" (LOPJM)[31], in 1996, that our Ordinance made explicit the best interest of the minor, in accordance with the provisions of art. 3.1. Convention on the Rights of the Child when it states that "in all measures concerning children taken by public or private social welfare institutions, courts, administrative authorities or legislative bodies, a primary consideration shall be the best interests of the

[28] B. Aláez Corral, *Minoría de edad y derechos fundamentales*, Tecnos, 2003, 64.

[29] A. Pérez Miras, *Libertad de expresión y menores*, en F.J. Durán Ruiz (Dir.), *Desafíos de la protección de menores en la sociedad digital: Internet, redes sociales y comunicación*, Tirant lo Blanch, 2018, 235-256.

[30] E. Alba Ferré, *La protección del libre desarrollo de la personalidad del menor en los procesos de custodia compartida*, en A. Pérez Miras, G.M. Teruel Lozano, E.C. Raffiotta, M.P. Iadicicco (Dirs.), C. Montesinos Padilla (Coord.), *Setenta años de Constitución italiana y cuarenta años de Constitución española,* vol. II. *Derechos fundamentales*, CEPC-BOE, 2020, 387-389.

[31] Ley Orgánica 1/1996, de 15 de enero, de Protección Jurídica del Menor, de modificación parcial del Código Civil y de la Ley de Enjuiciamiento Civil (LOPJM), where it is affirmed "La Constitución Española de 1978 al enumerar, en el capítulo III del Título I, los principios rectores de la política social y económica, hace mención en primer lugar a la obligación de los Poderes Públicos de asegurar la protección social, económica y jurídica de la familia y dentro de ésta, con carácter singular, la de los menores […] a presente Ley pretende ser la primera respuesta a estas demandas, abordando una reforma en profundidad de las tradicionales instituciones de protección del menor reguladas en el Código Civil. En este sentido - y aunque el núcleo central de la Ley lo constituye, como no podía ser de otra forma, la modificación de los correspondientes preceptos del citado Código -, su contenido trasciende los límites de éste para construir un amplio marco jurídico de protección que vincula a todos los Poderes Públicos, a las instituciones específicamente relacionadas con los menores, a los padres y familiares y a los ciudadanos en general. Las transformaciones sociales y culturales operadas en nuestra sociedad han provocado un cambio en el status social del niño y como consecuencia de ello se ha dado un nuevo enfoque a la construcción del edificio de los derechos humanos de la infancia. Este enfoque reformula la estructura del derecho a la protección de la infancia vigente en España y en la mayoría de los países desarrollados desde finales del siglo XX, y consiste fundamentalmente en el reconocimiento pleno de la titularidad de derechos en los menores de edad y de una capacidad progresiva para ejercerlos".

child". But it is not until the 2015 reform of the LOPJM that the best interests of the minor take on a much more complete dimension. Indeed, in the original wording it was established in art. 2 LOPJM as a general principle that the best interest of the minor would take precedence over any other legitimate interest that may arise in the application of that Law. Although this was already an important milestone, we believe that the new and more extensive drafting of art. 2 LOPJM, which has become directly concerned with the best interests of the minor, is more consistent with the effective protection that must be pursued in the protection of children[32].

Furthermore, the reform has meant a change in the nature of the precept. In the original wording of art. 2 was ordinary in nature. However, the new wording given by LO 8/215 has given organic nature to the article, in the sense of art. 81 CE affecting the development of fundamental rights. As we have seen, there is no doubt that the wordy wording of 2015 has an impact on the fundamental rights of minors. We especially care about art. 2.1 LOPJM in which the best interest of the minor is considered a right that undoubtedly affects both the public and private spheres, so that it must always be valued and considered paramount in all actions and decisions that concern them[33].

Although we continue to move within the legal field, there is no doubt that the change has strong value because it introduces the best interest of the minor into the spectrum of fundamental rights. Given the constitutional absence, we can at least consider it a small step towards what, from our point of view, should be the just nature of the best interest of the minor, in accordance with its transversal dimension in the Ordinance, that is, its inclusion As a basic constitutional principle, it would be desirable to achieve a better regulatory correspondence of what, in a practical way, already acts as an element that directly affects the system of rights, preponderantly tipping the balance always towards greater protection of the

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[32] C. Florit Fernández, *La protección del menor del artículo 39 de la Constitución en las medidas a adoptar en cuanto a su custodia*, in A. Pérez Miras, G.M. Teruel Lozano, E.C. Raffiotta, M.P. Iadicicco (Dirs.), C. Montesinos Padilla (Coord.), *Setenta… op. cit.*, 408-411.

[33] E. Gómez Calle, *La responsabilidad civil del menor*, in *Derecho privado y constitucion*, n. 7, 1995, 87: https://www.cepc.gob.es/sites/default/files/2021-12/9979dpc007087.pdf; M.V. Mayor Del Hoyo, *En torno al tratamiento de la adopción en la convención de la ONU sobre los derechos del niño*, in *Derecho privado y constitucion*, n. 7, 1995, 135: https://www.cepc.gob.es/sites/default/files/2021-12/9980dpc007135.pdf; E. Ramos Chaparro, *Niños y jovenes en el Derecho civil constitucional*, in *Derecho privado y constitucion*, n. 7, 1995, 167: https://www.cepc.gob.es/sites/default/files/2021-12/9981dpc007167.pdf; M. Salanova Villanueva, *El derecho del menor a no ser separado de sus padres*, in *Derecho privado y constitucion*, n. 7, 1995, 167: https://www.cepc.gob.es/sites/default/files/2021-12/9982dpc007231.pdf.

minor, in so much so that no harm is caused. Therefore, the sole reference of art. 20.4 CE seems insufficient to extrapolate said transversal character which, on the other hand, and although it comes close, we cannot fully include it in art. 39.4 EC. For this reason, a regulation similar to that provided for in art. 24 CFUE, which autonomously offers a subjective holistic vision of the elementary needs that the Law must provide for the minor. Thus, an express mention at the constitutional level of the best interests of the minor would help to further strengthen the protection of children and, without a doubt, would be the fair and dignified place that our minors deserve. The consolidation of the principle at the legal level in these years, with the support of art. 3 Convention on the Rights of the Child, facilitates this elevation, so that the order would gain coherence, since it is difficult to assume an interpretation of fundamental rights as a whole that is not necessarily accompanied by that principle that irremediably affects the system of fundamental rights[34].

V. The family legal system in a changing social reality

As known, social reality visibly changed from the 1978, not just in habits but also in a scientific and technological perspective. This consideration can be clearly developed from many points of view, and one of these is also the family system. Indeed, the traditional filiation model enshrined in the Civil Code by the Law 11/1981 was soon not attuned with the social reality, both in what refers to the foundation of paternity and within reach of its effects[35]. The identification of legal affiliation with the embodiment of a biological relationship is connected to the incidence of assisted reproductive techniques, the assumption of parental functions by those who are not biological parents, to a consideration of the psychological aspects of the child and to an anthropological vision of parenthood[36].

Consequently, the reform of the Civil Code that had place in 1981 entailed a profound alteration in the system of legal filiation actions, making more accessible the legal actions of the child through an adequate

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[34] E. Guillén López, *Servicios sociales, voluntariado, menores y familia*, in F. Balaguer Callejón, L.I. Ortega Álvarez, G. Cámara Villar, J.A. Montilla Martos (Coords.), *Reformas estatutarias y distribución de competencias*, IAAP, 2007, 655-674; F.J. Durán Ruiz, *Derechos y principios relacionados con las personas mayores, las menores de edad y la integración de la juventud*, in F. Balaguer Callejón, L.I. Ortega Álvarez, G. Cámara Villar, J.A. Montilla Martos (Coords.), *Reformas estatutarias y declaraciones de derechos*, IAAP, 2008, 435-460.

[35] N. Álvarez Lata, *op. cit.*, 7; M.I. Ramos Quintana, *op. cit.*, 223.

[36] A.H. Puleo, *op. cit.*; E. Farnós Amorós, *Inscripción…, op. cit.*; M.C. González Carrasco, *op. cit.*

application of the constitutional principle of paternity recognition outlined in art. 39.2 of the Constitution.

However, for this reason it was necessary overcome certain objections and doctrinal and jurisprudential resistance of the time in relation to the interpretation of the repealed art. 127 of the Civil Code, in the reformulation dictated by Law 11/1981, referring to the practice of evidence biological tests to determine extramarital affiliation. Indeed, a few years after the entry into force of the reform, a conflict related to the practice of those biological tests in case of refusal of the defendant was raised in the courts, claiming due respect for the right to integrity and to personal privacy of the parents on the base of arts. 15 and 18.1 of the Constitution.

Unexpectedly, the Supreme Court upheld the sentence of the Provincial Court of Madrid that had declared the paternity of the defendant considering as an indication of the same, in addition to others, the defendant's refusal to practice of the biological tests, both in the instance and in the trial phase. On the contrary, the STS of April 30, 1992 (rec. 1126/90), reflecting on the impossibility of its practice, considered paternity not proven and dismissed the claim.

Appeal for *amparo* filed by the mother, representative of the minor whose filiation was claimed, and the Constitutional Court dictates its famous judgement no. 7/1994[37], by which upholds the appeal for protection of the right to effective judicial protection of the plaintiff. The Court affirmed that there is no violation of fundamental rights in the judicial order based on the practice of biological evidence tests to determine parentage. This criterion, later assumed by the Supreme Court[38], received legal endorsement in the current art. 767.4 LEC.

According to the argument of the Constitutional Court, the right to physical integrity is not infringed when it comes to performing a test provided by law and reasonably agreed upon by the judicial authority into a process. At the same time, privacy is violated when certain limitations are imposed because of duties and legal relationships that the legal system regulates, as it is the case of research of paternity and maternity through biological tests in a judgment on filiation.

This position was assumed by the Constitutional Court in its AATC 103/1990 and 221/1990, where judges declared that, in this class of law-

[37] BOE, no. 41, of February 17, 1994), in rec. 1407/92.

[38] Sentences of March 8, 2017, May 28 and 12, 2015, April 11, 2012, January 30, 2007, September 1, 2004, June 17, 2004, 28 March 2000, September 26, 2000, April 28, 1993, between others.

suits, it produces a collision between the fundamental rights of different parties involved. So, there is no doubt that, in the cases of affiliation, prevails the social interest and public order that underlies the statements of paternity. Therefore, the constitutional rights to privacy and physical integrity cannot be converted in a kind of consecration of impunity, with ignorance of the burdens and duties resulting from a conduct that has a close relationship respecting possible family ties. The defendant in a lawsuit of non-marital affiliation could only legitimately refuse to submit to biological tests if there were no serious indications of the behavior that attributed to him[39] or there could be a very serious injury to his health.

VI. Access to parenthood

In this line of reasoning, it is interesting to analyze the forms of access to parenthood in the Spanish legal system. This constitutes the heart of the JUST-PARENT Project because correspond to the space where the influence of the social and scientific evolution is clearer. Indeed, thinking about parenthood today means to understand in which way an individual can become a parent, or to be more precise, a social parent[40].

In this regard, if the definition of *social parent* now finds some correspondence on a "terminological" level in all legal systems, the same cannot be said for its concrete legal configuration. By analysing the Spanish legal system, for example, it is possible to observe how the legal configuration of situations that can be connected to the concept of *social parenthood* is affirmed more frequently thanks to the recognition of egalitarian marriage. The affirmation of the latter institution (which in a certain sense corresponds to a real principle, considering that it ends up translating into a stronger affirmation of the principle of equality) determines, under some points of view, an easier access to parenting, thus undermining those discriminatory positions that occur elsewhere. However, it must be highlighted that even in Spain prohibitions persist which, affecting situations that do not depend on the type of union of the aspiring social parents, prevent the access to parenthood. Below, all the methods of access to parenthood distinct from the biological one will be analysed to offer a legal framework of the Spanish legal system[41].

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[39] STC 35/1989, of February 14, 1989.

[40] E. Alonso Crespo, *op. cit.*; R. Bercovitz Rodríguez-Cano, *Comentarios al Código Civil*, Tirant lo Blanch, 2013.

[41] C. Callejo Rodríguez, *op. cit.*; A. Cañizares Laso, P. De Pablo Contreras, J. Orduña Moreno, R. Valpuesta Fernández (Dirs.), *op. cit.*; P. González Navasa, *op. cit.*; C. Mar-

A. Adoption by same-sex couples

What was stated before applies first and foremost to the adoption regime. However, we do not want to focus so much on adoption in general, but rather on adoption by same-sex couples as it is believed that this is the area in which the Spanish legal system can offer the most food for thought.

Unlike other European countries, where the law continues to provide some obstacles to adoption by same-sex couples, in Spain this has been permitted for some time. Indeed, Law 13/2005, of July 1, 2005, which amends the Civil Code regarding the right to marry (BOE No. 157 of July 2, 2005), by legalizing same-sex marriage, extended the possibility of adoption to married same-sex couples and, with it, the possibility of establishing the filiation of a minor in favor of two men or two women[42].

In reality, however, this parallel regulatory evolution (homosexual marriage and adoption by same-sex couples) was possible, as well as 'easy', because the previous Spanish legislation had already been characterized by openings in favor of forms of social parenting.

In fact, before the new legislation of 2005, other laws had already modified the matter in question, and more specifically: on the one hand, Law 21/198758 which modified the Civil Code in matters of adoption. And on the other hand, Law 35/198859 which regulated for the first time Assisted Reproduction Techniques, opened *de facto*, although only partially in some cases, homo-parenthood from the legal system.

In the first case, access was authorized to single individuals – the individual in question could be homosexual, if he/she concealed his/her sexual orientation during the process of suitability in the course of an adoption. In the second case, a single woman – also concealed her sexual orien-

tínez De Aguirre Aldaz, *op. cit.*; M.V. Mayor Del Hoyo, *La Adopción en el Derecho Común Español*, Tirant lo Blanch, 2019.

[42] At the regional level, although the Resolution does not mention it because the facts suggest that the law applicable to the case was not that of an Autonomous Community with its own civil law, some laws had already been granting this possibility to unmarried same-sex couples. The first Autonomous Community law to authorise joint adoption by same-sex couples was the *Ley Foral 6/2000, Igualdad Jurídica de las parejas estables de la Comunidad Foral de Navarra* (BON nº 82, 7.7.2000). Later, *Ley 2/2003, de 7 de mayo, reguladora de las parejas de hecho del País Vasco* (BOPV nº 2003100, 23.5.2003); *Ley 2/2004, de 3 mayo, de modificación de la Ley 6/1999, de 26 de marzo, relativa a parejas estables no casadas de Aragón* (BOA nº 54, 12.5.2004); *Ley catalana 3/2005, de 8 de abril, de modificación del Código de Familia, la Ley de Uniones estables y el Código de Sucesiones* (DOGC nº 4366, 19.4.2005); finally, *Ley 1/2005, de 16 de mayo, de Parejas de Hecho de la Comunidad Autónoma de Cantabria* (BOC nº 98, 24.5.2005).

tation –, in addition to being able to adopt individually, was also allowed to become a single biological mother through in vitro fertilization (IVF)[43].

In both situations, it was possible, only in some cases that went unnoticed, for homosexual couples to indirectly raise children. However, only one of the partners in the same-sex union had parental custody of the child he or she had adopted as a single parent or, in the case of female couples, had fathered through IVF[44].

As of 2000, four autonomous communities (Aragon, Navarre, the Basque community, and Catalonia) regulated joint adoption by homosexual domestic partners. In others (Andalusia, Asturias and Cantabria) only the fostering of minors by homosexual unions was legalized. Already with Law 13/2005,67 Spain was the first country to establish full equality in terms of adoption and marriage for same-sex couples[45].

B. Medically assisted reproduction (MAR): *ley sobre técnicas de reproducción humana asistida – ley* 14/2006

In this context of study, another method of access to parenthood that boasts regulation in Spain is medically assisted reproduction (MAR). The MAR have been subject to legal protection in the Spanish legal system more than two decades ago[46]. Currently, the reference law that we must take into account to verify the current state in Spain is the Ley 14/2006, Ley sobre técnicas de reproducción humana asistida (LTRHA).

The Law is divided into VIII chapters: the first one regulates the general provisions, as well as the object and scope of application (art. 1.), specifying what is meant by pre-embryo (art. 1.2)[47]. On the other hand, it lists the techniques that meet the circumstances of scientific accreditation and

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[43] A. Cañizares Laso, P. De Pablo Contreras, J. Orduña Moreno, R. Valpuesta Fernández (Dirs.), *op. cit.*; P. González Navasa, *op. cit.*; C. Martínez De Aguirre Aldaz, *op. cit.*; M.V. Mayor Del Hoyo, *La Adopción en el Derecho Común Español*, Tirant lo Blanch, 2019.

[44] E. Alonso Crespo, *op. cit.*; R. Bercovitz Rodríguez-Cano, *Comentarios al Código Civil*, vol. I, Tirant lo Blanch, 2013.

[45] N. Álvarez Lata, *op. cit.*; M.I. Ramos Quintana, *op. cit.*

[46] Indeed, Law No. 14/2006 is preceded by Law 35/1988. of November 22, specific, on Techniques of Assisted Reproduction, in addition, sufficiently developed and pioneer in a European context. Subsequently, Law 42/1988 of 28 November on the donation and use of embryos and fetuses' humans (from day 14 after fertilization) for reproductive. Finally, ruling on the treatment of pre-embryos cryopreserved or frozen, thus allowing their use for research purposes, law no. 45/2003 arose, on November 21st.

[47] "A los efectos de esta Ley se entiende por preembrión el embrión in vitro constituido por el grupo de células resultantes de la división progresiva del ovocito desde que es fecundado hasta 14 días más tarde".

clinic, referring its enumeration to annex (A)[48]. Continue indicating the personal conditions of the application of the techniques (art. 3). In this provision, it can be verified that the legislator limits the transfer of pre-embryos to a maximum limit of 3 (art. 3.3)[49]. It ends with the indication of the requirements that must be comply with assisted reproduction centers and services, submitting the conditions of application (article 4.2)[50].

Chapter II is dedicated only to the participants in MAR. Article 5 is very complete and specific in terms of donors (gametes and pre-embryos), as well as in the regulation of the donation contract[51]. It even determines that the maximum number of children generated with gametes from the same donor must not exceed six (article 5.7). It also proves to be innovative compared to other legal systems, the fact of not distinguishing between

[48] "1. Inseminación artificial. 2. Fecundación in Vitro e inyección intracitoplásmica de espermatozoides con gametos propios o de donante y con transferencia de preembriones. 3. Transferencia intratubárica de gametos".

[49] "1. Las técnicas de reproducción asistida se realizarán solamente cuando haya posibilidades razonables de éxito, no supongan riesgo grave para la salud, física o psíquica, de la mujer o la posible descendencia y previa aceptación libre y consciente de su aplicación por parte de la mujer, que deberá haber sido anterior y debidamente informada de sus posibilidades de éxito, así como de sus riesgos y de las condiciones de dicha aplicación. 2. En el caso de la fecundación in vitro y técnicas afines, sólo se autoriza la transferencia de un máximo de tres preembriones en cada mujer en cada ciclo reproductivo. 3. La información y el asesoramiento sobre estas técnicas, que deberá realizarse tanto a quienes deseen recurrir a ellas como a quienes, en su caso, vayan a actuar como donantes, se extenderá a los aspectos biológicos, jurídicos y éticos de aquéllas, y deberá precisar igualmente la información relativa a las condiciones económicas del tratamiento. Incumbirá la obligación de que se proporcione dicha información en las condiciones adecuadas que faciliten su comprensión a los responsables de los equipos médicos que lleven a cabo su aplicación en los centros y servicios autorizados para su práctica. 4. La aceptación de la aplicación de las técnicas de reproducción asistida por cada mujer receptora de ellas quedará reflejada en un formulario de consentimiento informado en el que se hará mención expresa de todas las condiciones concretas de cada caso en que se lleve a cabo su aplicación. 5. La mujer receptora de estas técnicas podrá pedir que se suspenda su aplicación en cualquier momento de su realización anterior a la transferencia embrionaria, y dicha petición deberá atenderse. 6. Todos los datos relativos a la utilización de estas técnicas deberán recogerse en historias clínicas individuales, que deberán ser tratadas con las debidas garantías de confidencialidad respecto de la identidad de los donantes, de los datos y condiciones de los usuarios y de las circunstancias que concurran en el origen de los hijos así nacidos. No obstante, se tratará de mantener la máxima integración posible de la documentación clínica de la persona usuaria de las técnicas".

[50] "1. La práctica de cualquiera de las técnicas de reproducción asistida sólo se podrá llevar a cabo en centros o servicios sanitarios debidamente autorizados para ello por la autoridad sanitaria correspondiente. Dicha autorización especificará las técnicas cuya aplicación se autoriza en cada caso. 2. La autorización de un centro o servicio sanitario para la práctica de las técnicas de reproducción asistida exigirá el cumplimiento de los requisitos y condiciones establecidos en el capítulo V de esta Ley y demás normativa vigente, en especial, la dirigida a garantizar la accesibilidad de las personas con discapacidad".

[51] "La donación de gametos y preembriones para las finalidades autorizadas por esta Ley es un contrato gratuito, formal y confidencial concertado entre el donante y el centro autorizado".

women according to their marital status or sexual orientation (article 6.1, in fine), despite the fact that, logically, the consent of the husband, if the woman is married (article 6.3).

Article 7 establishes the canons for the filiation of children born through MAR, and article 8 is more specific because it addresses the rules of the legal determination of the affiliation. Articles 9 and 10 deal, respectively, with the situations of pre-mortem of the husband and pregnancy of substitution.

Chapter III is dedicated to the regulation of Cryopreservation conditions (of gametes and pre-embryos article 11) and other techniques adjuvant to those of assisted reproduction, such as preimplantation diagnosis especially for disease detection serious/untreated hereditary disorders, or other disorders that may make the viability of the pre-embryo impossible (article 12). Therapeutic techniques in the pre-embryo are also addressed, always and only to, according to the law, "treat diseases or prevent its transmission, with reasonable guarantees and proven" (article 13)[52].

For its part, Chapter IV deals with the conservation and research on gametes and pre-embryos (articles 14 to 16), allowing its use for research purposes, counting that they are subsequently used for the purposes of assisted human reproduction – so much is not allowed here gametes and pre-embryos are transferred to the woman's uterus (article 14.2 and 15.1). Measures regarding health centers and equipment biomedical is provided for in articles 17 and 19 – qualification, authorization, operating conditions and audits[53].

[52] "1. Cualquier intervención con fines terapéuticos sobre el preembrión vivo in vitro sólo podrá tener la finalidad de tratar una enfermedad o impedir su transmisión, con garantías razonables y contrastadas. 2. La terapia que se realice en preembriones in vitro sólo se autorizará si se cumplen los siguientes requisitos: a) Que la pareja o, en su caso, la mujer sola haya sido debidamente informada sobre los procedimientos, pruebas diagnósticas, posibilidades y riesgos de la terapia propuesta y las hayan aceptado previamente. b) Que se trate de patologías con un diagnóstico preciso, de pronóstico grave o muy grave, y que ofrezcan posibilidades razonables de mejoría o curación. c) Que no se modifiquen los caracteres hereditarios no patológicos ni se busque la selección de los individuos o de la raza. d) Que se realice en centros sanitarios autorizados y por equipos cualificados y dotados de los medios necesarios, conforme se determine mediante real decreto. 3. La realización de estas prácticas en cada caso requerirá de la autorización de la autoridad sanitaria correspondiente, previo informe favorable de la Comisión Nacional de Reproducción Humana Asistida".

[53] C. Lasarte Álvarez, *La reproducción asistida y la prohibición legal de maternidad subrogada admitida de hecho por vía reglamentaria*, in *Diario La Ley*, 7777, 1-15; J.S. Mill, *Sobre la libertad y otros escritos*, Ministerio de Trabajo y Seguridad Social, 1991; M. Pereña Vicente, *Autonomía de la voluntad y filiación: los desafíos del siglo XXI*, in *Revista IUS*, 6, (29), 2012, 130-149: https://doi.org/10.35487/rius.v6i29.2012.59; A. Pérez Miras, *La regulación de la reproducción humana médicamente asistida: una perspectiva comparada entre Italia y España de la fecundación heteróloga,* in

The National Commission for Assisted Human Reproduction occupies a chapter with a single article. It is an organ collegiate in charge of advising, warning and guiding on MAR, as well as assisting in the modernization, updating and expansion of science in the matters in question, also competes "…the development of functional criteria and structural aspects of the centers and services where they are carry out" (article 20.1). Between articles 21 and 23 is the regulation of National assisted reproduction registries, thus occupying the Chapter VII of Law 14/2006[54].

F. Balaguer Callejón, E. Arana García (Coords.), *Libro homenaje al profesor Rafael Barranco Vela*, Thomson Reuters Aranzadi, 2014, 1661-1682; Y. Gómez Sánchez, *El derecho a la reproducción humana*, Universidad Complutense de Madrid, 1994.

[54] "1. La Comisión Nacional de Reproducción Humana Asistida es el órgano colegiado, de carácter permanente y consultivo, dirigido a asesorar y orientar sobre la utilización de las técnicas de reproducción humana asistida, a contribuir a la actualización y difusión de los conocimientos científicos y técnicos en esta materia, así como a la elaboración de criterios funcionales y estructurales de los centros y servicios donde aquéllas se realizan. 2. Formarán parte de la Comisión Nacional de Reproducción Humana Asistida representantes designados por el Gobierno de la Nación, las comunidades autónomas, las distintas sociedades científicas y por entidades, corporaciones profesionales y asociaciones y grupos de representación de consumidores y usuarios, relacionados con los distintos aspectos científicos, jurídicos y éticos de la aplicación de estas técnicas. 3. Podrán recabar el informe o asesoramiento de la Comisión Nacional de Reproducción Humana Asistida los órganos de gobierno de la Administración General del Estado y de las comunidades autónomas, así como las comisiones homólogas que se puedan constituir en estas últimas. Los centros y servicios sanitarios en los que se apliquen las técnicas de reproducción asistida podrán igualmente solicitar el informe de la Comisión Nacional sobre cuestiones relacionadas con dicha aplicación. En este caso, el informe deberá solicitarse a través de la autoridad sanitaria que haya autorizado la aplicación de las técnicas de reproducción asistida por el centro o servicio correspondiente. 4. Será preceptivo el informe de la Comisión Nacional de Reproducción Humana Asistida en los siguientes supuestos: a) Para la autorización de una técnica de reproducción humana asistida con carácter experimental, no recogida en el anexo. b) Para la autorización ocasional para casos concretos y no previstos en esta Ley de las técnicas de diagnóstico preimplantacional, así como en los supuestos previstos en el artículo 12.2. c) Para la autorización de prácticas terapéuticas previstas en el artículo 13. d) Para la autorización de los proyectos de investigación en materia de reproducción asistida. e) En el procedimiento de elaboración de disposiciones generales que versen sobre materias previstas en esta Ley o directamente relacionadas con la reproducción asistida. f) En cualquier otro supuesto legal o reglamentariamente previsto. 5. La Comisión Nacional de Reproducción Humana Asistida deberá ser informada, con una periodicidad al menos semestral, de las prácticas de diagnóstico preimplantacional que se lleven a cabo conforme a lo dispuesto en el artículo 12.1. Igualmente, con carácter anual deberá ser informada de los datos recogidos en los Registros nacionales de donantes y de actividad de los centros a los que se refieren los artículos 21 y 22. 6. Las comisiones homólogas que se constituyan en las Comunidades Autónomas tendrán la consideración de comisiones de soporte y referencia de la Comisión Nacional de Reproducción Humana Asistida y colaborarán con ésta en el ejercicio de sus funciones. 7. Los miembros de la Comisión Nacional de Reproducción Humana Asistida deberán efectuar una declaración de actividades e intereses y se abstendrán de tomar parte en las deliberaciones y en las votaciones en que tengan un interés directo o indirecto en el asunto examinado".

Finally, Chapter VIII is dedicated only to the determination of infractions and consequent sanctions – articles 24 (general rules) until the end, article 28 (sanctioning competence).

Starting from the main guidelines of the LTRHA from the point of view of the principles of the Civil Code, we can emphasize four major pillars or rules. The first refers to women. As we have seen, it is necessary that the recipient women: a) be of legal age and have full capacity to act; b) are sufficiently informed; c) give their consent.

The second states about the donation of gametes and pre-embryos. Thus, it specifies what the legal purposes are and how the donation can occur – through contract free, formal and confidential, between authorized center and donor. Knowledge of the donor is also prohibited, except when there are risks to life. The idea is that between donor and child there is no type of parent-child relationship[55]. Furthermore, all that regime is reflected in article 5 of the Law.

The last pillar is a rule aimed at the own Civil Registry services. It is provided for in article 7.2 and is refers to the prohibition of manifesting the origin of filiation[56].

VII. Surrogacy in Spain

Among the issues addressed by the Just-Parent Project, the topic of surrogacy is probably the one that is characterized by the main points of interest. This is a consequence of the many critical issues that surrogacy causes. Demonstration of this is the current European debate, which is developing both within individual legal systems and, in general, at the European Union level[57]. Even within the Spanish legal system, the topic is still the subject of intense debate at a political and, naturally, strictly legal level, especially in light of its social and ethical implications.

[55] E. Farnós Amorós, *La Filiación derivada de reproducción asistida: voluntad y biología,* in *Anuario de Derecho Civil*, 68 (1), 2015, 5-61; C. Lasarte Álvarez, *La reproducción…, op. cit.*

[56] Comité De Bioética De España, *Informe sobre el derecho de los hijos nacidos de las técnicas de reproducción humana asistida a conocer sus orígenes biológicos*, 2020: https://bit.ly/3j-GvBnj; J.R. De Verda Y Beamonte, *Libertad de procreación y libertad de investigación (algunas reflexiones a propósito de las recientes leyes francesa e italiana sobre reproducción asistida)*, in *Diario La Ley*, 6161, 2005, 1-23.

[57] Comité De Bioética De España, *Informe sobre los aspectos éticos y jurídicos de la maternidad subrogada,* 2017: https://bit.ly/34EaugY; Comité De Bioética De España, *Informe sobre el derecho de los hijos nacidos de las técnicas de reproducción humana asistida a conocer sus orígenes biológicos*, 2020: https://bit.ly/3j-GvBnj.

As well as in other countries, gestation by substitution is illegal in Spain. Art. 10 of LTRHA (*Ley 14/2006, de 26 de mayo, sobre técnicas de reproducción humana asistida*) affirms:

1. Será nulo de pleno derecho el contrato por el que se convenga la gestación, con o sin precio, a cargo de una mujer que renuncia a la filiación materna a favor del contratante o de un tercero. 2. La filiación de los hijos nacidos por gestación de sustitución será determinada por el parto. 3. Queda a salvo la posible acción de reclamación de la paternidad respecto del padre biológico, conforme a las reglas generals.

Therefore, this type of contract is expressly prohibited by an imperative rule, whose infringement generates the full nullity of the contract. Parenthood is determined by childbirth, foreseeing, as a consequence of the invalidity of the contract: the attribution of filiation to the pregnant woman (art. 10.2 LTRHA), and the possibility of the biological father claiming his affiliation (art. 10.3 LTRHA)[58].

The purpose pursued by the parties —that is, the attribution of the paternity and/or maternity of the born to the principals—cannot result from the gestation contract by substitution; in other words, the legal system doesn't admit the scope properly reached by this contract as an expression of the private autonomy[59].

On the other hand, about the nullity of the contract, it is possible, however, funding some legal effect because of the birth of a baby[60]. In this sense, the Spanish decision maker choses to answer affirmatively to the question regarding to whether the exercise in Spain of filiation actions for the determination of paternity in these cases, in accordance with the general rules[61].

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[58] M. Jorqui Azofra, *La difícil conciliación de la gestación por sustitución en nuestro ordenamiento jurídico con los derechos fundamentales involucrados*, in *Derecho Privado y Constitución*, n. 37, 2020, 381-426.

[59] O. Salazar Benítez, *La gestación por sustitución desde una perspectiva jurídica: algunas reflexiones sobre el conflicto entre deseos y deberes*, in *Revista de Derecho Político*, 99, 2017, 79-120: https://doi.org/10.5944/rdp.99.2017.19307; E. Roca Trías, *Dura lex sed lex. O de cómo integrar el interés del menor y la prohibición de la maternidad subrogada,* in P. Benavente Moreda, E. Farnós Amorós (Coords.), *Treinta años de reproducción asistida en España: una mirada interdisciplinaria a un fenómeno global y actual*, Boletín del Ministerio de Justicia, 2015, 301-338; C. Lasarte Álvarez, *Acerca de la constitucionalidad, o no, de la maternidad subrogada: Sentencia 225/2018 del Tribunal Constitucional portugués,* in *Dilemata. Revista Internacional de Éticas Aplicadas*, 28, 2018, 137-151.

[60] J.S. Mill, *Sobre la libertad y otros escritos*, Ministerio de Trabajo y Seguridad Social, 1991; M. Pereña Vicente, *op. cit.*

[61] Grupo De Ética Y Buena Práctica Clínica De La Sociedad Española De Fertilidad (SEF), *Propuesta de bases para la regulación en España de la gestación por sustitución*, 2015: https://bit.ly/3mw2dSt; I. Heredia Cervantes, *La Dirección General de los Registros y del Notaria-*

The nullity of the surrogacy contract means that the rights and obligations agreed by the parties do not produce any effect. So, if this type of contract is entered into, the consequences would continue to be that the mother is the surrogate and not the one established in the contract[62].

Consequently, the biological father can claim his parenthood if he provided his genetic material. To the partner of the principal, once his paternity is recognized, he has the option of adoption, if the pregnant mother settles it, as we have indicated, six weeks after the birth of the child. Thus, she would become the adoptive mother and legal, even if she is the one who provided the genetic material.

When there is no biological link between the minor conceived by gestation by substitution and the intending father, it should consider the possibility of fostering or adoption procedure. In this sense, we can observe that the Spanish system articulates mechanisms that, although they do not allow registering in the Civil Registry the affiliation of a baby born through this type of contract in favor of the principal party, this is resolved, where appropriate, through adoptive filiation[63].

Likewise, from a legal point of view, the nullity of this type of contract based has been defended on the illegality of the object (art. 1271. I CC), and to the contravention of the limits of the autonomy of the will, such as the morality and public order (art. 1255 CC)[64]. Also, of the illegality of the cause (art. 1275 CC), determining the exclusion of any restitution claim of the amount paid if the transaction is onerous (art. 1306 CC)[65].

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do ante la gestación por sustitución, in *Anuario de Derecho Civil*, 66 (2), 2013, 688-715; E. Lamm, *Gestación por sustitución. Realidad y Derecho*, in *InDret*, 2, 2012, 1-49.

[62] A.S. Fernández-Sancho Tahoces, *Eficacia jurídico-registral del contrato de gestación subrogada*, in *Revista Aranzadi Doctrinal,* 6, 2011, 1-13; A. Durán Ayago, *El acceso al Registro Civil de certificaciones registrales extranjeras a la luz de la Ley 20/2011: relevancia para los casos de filiación habida a través de gestación por sustitución, in Anuario Español de Derecho Internacional Privado*, 12, 2012, 265-308; K. Ekis Ekman, *El ser y la mercancía. Prostitución, vientres de alquiler y disociación*, Bellaterra, 2017.

[63] E. Farnós Amorós, *Inscripción en España de la filiación derivada del acceso a la maternidad subrogada en California,* in *InDret*, 1, 2010, 1-25; M.P. García Rubio, M. Herrero Oviedo, *Maternidad subrogada: dilemas éticos y aproximación a sus respuestas jurídicas,* in *Anales de la Cátedra Francisco Suárez*, 52, 2017, 67-89; E. Lamm, *Gestación por sustitución y género: repensando el feminismo*, in R. García Manrique (Coord.), *El cuerpo diseminado. Estatuto, uso y disposición de los biomateriales humanos*, Thomson Reuters Aranzadi, 2018m 191-220. C. Lasarte Álvarez, *La reproducción op. cit.*; C.M. Romeo Casabona, *Las múltiples caras de la maternidad subrogada: ¿aceptamos el caos jurídico actual o buscamos una solución?* in *Revista de Derecho y Genoma Humano*, 49, 2018, 15-32: https://doi.org/10.30860/0034; A. Salas Carceller, *Gestación subrogada. Hacia una ley reguladora,* in *Revista Aranzadi Doctrinal*, 10, 2017, 1-4.

[64] A. Durán Ayago, *op. cit.*

[65] A.H. Puleo, *op. cit.*; S. Quicios Molina, *Regulación por el ordenamiento español de la gestación por sustitución: Dónde estamos y hasta dónde podemos llegar,* in *Revista de Derecho Privado*,

VIII. Recognition and enforcement of public documents related to parenthood issued in another country

The current situation in Spain raises the problem related to the eventual access to the Spanish Civil Registry of those born abroad through this practice, maintaining two different postures starring, on the one hand, by the DGRN (*Dirección General de los Registros y del Notariado*) and, on the other hand, by the Supreme Court (in forward, TS). The fact that triggered these two conflicting positions is based on the case of a couple of Spanish men who requested, before the Consular Civil Registry of Spain in Los Angeles (California), the registration of the birth of their children born in San Diego by gestation replacement as marital children. For this, they presented the certification of birth of minors, issued by the San Diego Registry.

The Consular Civil Registry denies the registration of the babies as children of this couple, invoking the LTRHA, whose art. 10.1 establishes a "categorical prohibition" of this practice. He rejected registration and appeal filed against the refusal order, the resolution of the DGRN of February 18, 2009 and ordered the registration, in the consular Civil Registry, of the birth of the minors that was recorded in the foreign registration certification presented, with the mentions of double paternal affiliation.

Subsequently, the Valencia Prosecutor's Office appealed the registration made through the resolution of the DGRN. The appeal was admitted to proceeding by the Court of First Instance of Valencia, which, in resolution of September 15, 201035, annulled the birth registration. The Provincial Court of Valencia, in a judgment of November 23, 201136, dismissed the appeal and the Supreme Court declares, in a judgment of 6 February 201437, there was no space for the appeal filed against this resolution (albeit with a dissenting individual vote). The decisions of the ECtHR generated the opening of an annulment motion promoted against the sentence, which was dismissed by means of the TS Order of February 2 of 2015[66].

1, 2019, 3-46; M.J. García Alguacil, *¿Injerencia justificada del Estado en la determinación de la filiación o de la autonomía de la voluntad en las relaciones familiares?*, in *Revista Doctrinal Aranzadi Civil-Mercantil*, 5, 2016, 1-32; R. García Manrique, *La dimensión corporal de la ciudadanía*, in R. García Manrique (Coord.), *El cuerpo diseminado. Estatuto, uso y disposición de los biomateriales humanos*, Thomson Reuters Aranzadi, 2018, 13-32.

[66] P. Blanco-Morales Limones, *Una filiación: tres modalidades de establecimiento. La tensión entre la ley, la biología y el afecto*, in *Bitácora Millennium dipr: Derecho Internacional Privado*, 1, 2015, 1. A. Durán Ayago, *op. cit.;* E. Farnós Amorós, *Inscripció a Espanya de la filiació derivada de l'accés a la maternitat subrogada a Califòrnia*, in *Indret: Revista para el Análisis del Derecho*,

Before the appearance of new cases, the DGRN issues the Instruction of October 5, 2010, on the registration system of the affiliation of those born through surrogacy, in which a series of criteria establishes the conditions of access to the Spanish Civil Registry. The main objective of this instruction is to protect both the best interest of the minor and other interests involved in these cases. In this perspective, the purpose is to establish instruments directed to consent the access to the Spanish Civil Registry when one of the parents is Spanish. Furthermore, the intention is to prevent international traffic of minors and to protect the minor's right to know their biological origin. Indeed, one of the main problems is to guarantee women who decide to accept this practice, renouncing their rights as mothers, freely and voluntarily lend their consent, once the necessary information has been received[67].

To safeguard these interests, it is required as a prerequisite upon registration, the presentation before the person in charge of the Civil Registry of a judicial decision issued by the competent court of the country of origin that establishes the filiation of the minor[68]. If the foreign decision was issued in the framework of a judicial proceeding of a contentious nature, it will deny the registration, unless it is accompanied by an acknowledgment in Spain through exequatur. On the contrary, if the court decision originated in a procedure analogous to a Spanish one of voluntary jurisdiction, the Registrar will control incidentally, as a prerequisite for registration, if such resolution can be recognized in Spain. Verifying, for this, that certain requirements are met. Lastly, the registration of the person born abroad without a resolution that determines the affiliation, the applicant

1, 2010; A. Quiñones Escámez, *Doble filiación paterna de gemelos nacidos en el extranjero mediante maternidad subrogada: en torno a la RDGRN de 18 de febrero de 2009*, in *Indret: Revista para el Análisis del Derecho*, 3, 2009. For a review of the judicial treatment of this problem, from a more critical approach to the figure of surrogacy: M.J. Vaquero Pinto, *¿Debe admitirse y regularse la gestación por sustitución?,* in R. Barber Cárcamo, M.S. Quicios Molina, R.A. Vereda Server, (Coords.), *Retos actuales de la filiación*, Tecnos, 2018, 229-268.

[67] A.J. Vela Sánchez, *Y el sueño se convirtió en pesadilla: el Tribunal Constitucional Portugués declara la inconstitucionalidad de la legislación sobre gestación por sustitución (I),* in *Diario La Ley*, 9237, 2018, 1-17; A.J. Vela Sánchez, *Análisis estupefacto de la Instrucción de la DGRN de 18 de febrero de 2019, sobre actualización del régimen registral de la filiación de los nacidos mediante gestación por sustitución*, in *Diario La Ley*, 9453, 2019, 1-19; A. Urruela Mora, *El Derecho y la Bioética ante el fenómeno de la maternidad subrogada. Consideraciones de lege data y perspectiva de futuro*, in *Derecho y Salud*, 29, 2019, 113-144; M.J. Vaquero Pinto, *op. cit.*

[68] O. Salazar Benítez, *La gestación para otros: una reflexión jurídico-constitucional sobre el conflicto de deseos y derechos*, Dykinson, 2018; E. Lamm, *Gestación por sustitución y género: repensando el feminismo*, *op. cit.;* I. Heredia Cervantes, *op. cit.*; E. Lamm, *Gestación por sustitución. Ni maternidad subrogada ni alquiler de vientres*, Universidad de Barcelona, 2013.

can attempt this registration if he was a biological child by ordinary means regulated in art. 10.3 LTRHA.

The role played by the DGRN is evident —although, with the laudable purpose of defending the best interests of minors in each case concretely, guaranteeing, for this, the continuity of filiation and, therefore, the right to identity and private and family life — eluding the doctrine of the ST. Which, for its part, shows itself contrary to the registration of the affiliations derived from gestation by substitution, without prejudice to providing, also to protect the interest of the minor, the necessary means for the registration of those born under this practice.

IX. Surrogacy in the Supreme Court jurisprudence

As we have pointed out, the Civil Chamber of the Supreme Court established its doctrine in the judgment of February 6, 2014, considering that gestation by substitution in Spain it is a practice contrary to the dignity of the person (art. 10.1 CE)[69].

In this decision, the Court established that, in order to recognize extraterritorial validity of a foreign decision, it isn't required that it respects national substantive law, but the same has to be not manifestly incompatible with Spanish international public order. In this direction, the Court concluded that the registration of the certifications resulting from that kind of contracts would be contrary to Spanish international public order, also on the basis of the best interests of the minor (FD 5.6)[70].

The possibility of registering affiliation which appears in a foreign certification was, therefore, discarded. However, as the Court itself indicated, this does not represent an insurmountable obstacle to the achievement of the objective of establishing the filiation of the minor in favor of the parents, since they can resort to other alternative routes that allow the formalization legal of the real integration of minors into their family nucleus, specifically, the claim of paternity with respect to the biological father and the figures of foster care family and adoption (FD 5.11)[71].

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[69] "1. The human dignity, the inviolable and inherent rights, the free development of the personality, the respect for the law and for the rights of others are the foundation of political order and social peace. 2. The principles relating to the fundamental rights and liberties recognised by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain".

[70] P. Blanco-Morales Limones, (2015), *op. cit.*; A. Durán Ayago, *op. cit.;* E. Farnós Amorós, *Inscripció… op. cit.;* A. Quiñones Escámez, *op. cit.;* M.J. Vaquero Pinto, *op. cit.*

[71] A.J. Vela Sánchez, *Gestación por encargo: Tratamiento judicial y soluciones prácticas. La cuestión jurídica de las madres de alquiler*, Reus, 2015; B. Souto Galván, *Aproximación al estudio*

In this reconstruction, judges consider that it is a commercialization process of both, the pregnant woman, and the newborn, in addition to favoring, in many cases, the exploitation of the state of necessity of women who are in a situation of poverty. Thus, it is affirmed that this practice can only deploy the effects contemplated in art. 10 LTRHA[72].

On the other hand, it is not considered that denying the registration of the affiliation by nature of the subjects born in California in favor of two men is discriminatory. In the case analyzed, the Supreme Court argues that there is no discrimination based on sex because the same solution arises in the cases in which they resort to gestation by substitution marriages or heterosexual or homosexual couples formed by women, or a single person, man, or woman.

Regarding the best interest of the minor, there are several arguments of the Supreme Court that invite us to reflect on how its primary consideration should be interpreted when other inspiring values of national legislation and international conventions can be considered. Thus, it cannot serve to contradict what expressly provided by law. It is considered that it must be weighed with other concurrent rights, such as respect for the dignity and integrity moral of the pregnant woman, avoid the exploitation of the state of necessity of young people living in poverty, or prevent the commodification of pregnancy and of filiation[73].

Therefore, finally, the Supreme Court understands that this interest of the minors must start, according to the case, from the rupture of all their relationship with the woman who gave birth to them, the current existence of a family nucleus made up of the minors and the appellants, and paternity biological nature of any of them with respect to said minors[74].

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de la gestación por sustitución desde la perspectiva del Bioderecho, in *Foro, Nueva Época*, 1, 2005, 275-292; E. Toral Lara, *Las últimas reformas en materia de determinación extrajudicial de la filiación: las importantes omisiones del legislador y sus consecuencias*, in *Derecho Privado y Constitución*, 30, 2016, 289-336; K. Ekis Ekman, (2017), *op. cit.*; A. Emaldi Cirión, *Surrogacy in Spain and the proposal of a legislative change for its regulation. A global phenomenon in Europe*, in *Revista de Derecho y Genoma Humano*, 49, 2018, 75-99.

[72] *Ley* 14/2006, *de 26 de mayo, sobre técnicas de reproducción humana asistida.*

[73] A. Gálvez Criado, *¿Sigue siendo nulo en España el contrato de gestación subrogada? Una duda razonable,* in *Diario La Ley*, 9444, 2019, 1-24; E. Farnós Amorós, *La Filiación derivada… op. cit.*; J. Delgado Echeverría, *El concepto de validez de los actos jurídicos de Derecho privado (Notas de teoría y dogmática)*, in *Anuario de Derecho Civil,* 58 (1), 2005, 9-74; M.R. Díaz Romero, *La gestación por sustitución en nuestro ordenamiento jurídico*, in *Diario La Ley*, 7527, 2010, 1-15;

[74] C. Aragón Gómez, *La legalización de facto de la maternidad subrogada. A propósito de los recientes pronunciamientos de la Sala de lo social del tribunal Supremo con respecto a las prestaciones por maternidad*, in *Revista de Información Laboral*, 4, 2017, 1-26; V. Bellver Capella, *Tomarse en serio la maternidad subrogada altruista,* in *Cuadernos de Bioética*, 28 (93), 2017, 229-243; J.I. Benítez Ortuzar, *Delitos relativos a la reproducción asistida,* Granada, Comares, 1998. A.L. Calvo Cara-

Regarding the right to a unique identity, the Supreme Court understands that there is no violation, since in this case the minors are not related with United States. Nor, according to the High Court, it is violated the right to respect for private and family life (art. 8 CEHD). The reason is that the two requirements that justify, according to ECtHR, State interference, on the one hand, it is provided in the law that requires respect for international public order and, on the other, it is necessary in a democratic society, since it protects the interest of the minor and other legal assets of constitutional significance[75].

Finally, on the question related to the possible lack of protection, it would be left to the minors, it is maintained —following the interpretation of the ECHR of article 8 ECHR— that where a family relationship with a child exists, the State must act to allow for this link to develop and allow legal protection that makes possible the integration of the child in their family[76]. This is to be achieved by figures provided for in our legal system, such as foster care or adoption, which allow the legal formalization of the real integration of the minors in the family nucleus, without forgetting the legal claim of paternity with respect to the biological father[77]. Also, it is required that the denial of recognition of California registration certification exclusively affects the affiliation and not the rest of its content, in order to comply with the provisions of art. 7.1 of the Convention on the Rights of the Children (hereinafter, CDN), which requires the immediate registration of the birth and the right from the birth of the child to a name and to acquire a nationality[78].

In the particular vote formulated into this STS in February 6, 2014, it was considered, instead, that the question to be clarified is based on whether a decision valid and legal foreign according to its regulations, whether or not it is contrary to the public order. Understood from the consideration that the guardianship of the best interest of the minor, and

vaca, J. Carrascosa González, *Gestación por sustitución y derecho internacional privado. Más allá del Tribunal Supremo y del Tribunal Europeo de Derechos Humanos*, in *Cuadernos de Derecho Transnacional*, 7 (2), 2015, 45-113.

[75] A. Durán Ayago, *op. cit.*

[76] M.C. González Carrasco, *Gestación por sustitución: ¿Regular o prohibir?*, in *Revista CESCO de Derecho de Consumo*, 22, 2017, 117-131.

[77] J.R. De Verda y Beamonte, *Notas sobre la gestación por sustitución en el Derecho Español*, in *Actualidad Jurídica Iberoamericana*, 4, 2016, 349-357; J. Delgado Echeverría, *op. cit.*; M.R. Díaz Romero, *op. cit.*

[78] J.R. De Verda y Beamonte, *Libertad de procreación y libertad de investigación (algunas reflexiones a propósito de las recientes leyes francesa e italiana sobre reproducción asistida)*, in *Diario La Ley*, 6161, 2005, 1-23.

not from the perspective of disagreement with internal regulations. Thus, it is estimated that the interest of the minor (superior and public order) is seriously affected, since minors are placed in an uncertain legal limbo regarding the resolution of the conflict and to the answer that must be given in a case in which some children who continue to grow and create irreversible affective and family bonds. It is stated that this interest is protected before and after the pregnancy[79].

It was done by the American courts in the first case and has been denied in the second one. It is concluded that, in the face of a fait accompli — such as the existence of some minors in a family that acts socially as such and that has acted legally in accordance with foreign regulations—, apply the regulations internal law as a matter of public order harms children, who could find themselves forced into situations of helplessness, and are deprived of their identity and his family, contrary to international regulations that require care to the best interest of the minor[80].

The appeal to this basic principle has served the Supreme Court to maintain a favorable position to recognize the right to maternity. In order to give priority to the best interests of the minor, it is defended, among other reasons, the need to distinguish between the nullity of the contract of surrogate pregnancy and the situation of minors, which cannot be seen harmed by such nullity. This does not mean that the minor born in those circumstances are deprived of certain rights[81]. If the minors form a family nucleus with the expectant parents – who establish parental care and generate "de facto" family relationships – must protect this link, being an ideal means for this the granting of the maternity allowance. Thus, it is affirmed that the fact that a civil law prescribes the nullity of the contract does not

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[79] F. De Montalvo Jääskeläinen, *Una reflexión sobre la oportunidad de regular la maternidad subrogada desde la perspectiva de la familia como institución garantizada constitucionalmente*, in *Derecho y Salud*, 27, 2017, 26-47; L.I. Arechederra Aranzadi, *No se alquila un vientre, se adquiere un hijo (la llamada gestación por sustitución)*, Thomson Reuters Aranzadi, 2018; M. Atienza, *De nuevo sobre las madres de alquiler,* in *El Notario del siglo XXI*, 27, 2009: https://bit.ly/3e42j0v; M.L. Balaguer Callejón, *La maternidad subrogada en un Estado Social*, Universitat de València-Càtedra, 2017; R. Barber Cárcamo, *La legalización administrativa de la gestación por sustitución en España (Crónica de una ilegalidad y remedios para combatirla)*, in *Revista Crítica de Derecho Inmobiliario*, 739, 2013, 2905-2950.

[80] F.J. Matia Portilla, *La incidencia de los estándares europeos en los ordenamientos nacionales: a propósito de la inscripción de bebés nacidos en el extranjero*, in *Teoría y Realidad Constitucional*, n. 49, 2022, 173-197; I. Alkorta Idiakez, *La regulación jurídica de la maternidad subrogada*, in Aa.Vv., *La subrogación uterina: análisis de la situación actual*, Fundació Víctor Grífols i Lucas, 1990, 78-79.

[81] M. Presno Linera, P. Jiménez Blanco, *Libertad, igualdad y ¿maternidad? La gestación por sustitución y su tratamiento en la jurisprudencia española y europea*, in *Revista Española de Derecho Europeo*, n. 51, 2014, 35.

eliminate the situation of need that has arisen by the birth of the minor and its insertion in a certain family nucleus[82].

X. The registration of birth certificates formed abroad in the practice of Spanish courts

To know the current situation regarding surrogacy in Spanish law, it is actually sufficient to know the jurisprudence of the Supreme Court. Beyond the latter, in fact, there are few profiles that emerge from ordinary justice[83]. Despite this, it can be interesting analyze two decisions of the High Court of Justice of Madrid which, on the subject of recognition of filiation through subrogation practiced abroad, reach different conclusions. More specifically, it can be interesting to observe that the argumentation proposed in these resolutions is not related to the jurisprudence of the Strasbourg Court or to the protection of the best interests of the child.

Both decisions are based on the assumption that the filiation can only be admitted when it has been recognized in a judicial resolution. However, while the 2016 Judgment admits the validity of a Russian birth certificate "in accordance with article 14.2 of the Convention between the Kingdom of Spain and the Union of Soviet Socialist Republics on judicial assistance in civil matters, signed in Madrid on the 26th of October 1990" (FD 5), in the 2017 one the safe conduct is denied because there is neither a foreign judicial resolution nor a biological link between the minor and his intended father or mother has been proven.

Precisely one of the recurring obstacles to the admission of filiation between minors and the intended parents is that the validity of the foreign birth certificate in which such fact is accredited is not accepted. There are several resolutions in which, based on a literal interpretation of the Instruction of October 5, 2010 of the General Directorate of Registries and Notaries, the registration in the Spanish civil registry of a foreign birth certificate is denied. Thus, for example, a judicial resolution affirms that, although the San Diego registry certification states the connection between the born minor and the intended father and mother, there should be no doubt about the recorded fact and its legality. In strict application

[82] S. Álvarez González, *Filiación natural y filiación adoptiva. Aspectos internacionales*, in M. C. Gete-Alonso Y Calera (Dir.) y J. Solé Resina (Coord.). *Tratado de derecho de la persona física*, vol. I, Thomson- Civitas, 2013, 413-468; B. Andreu Martínez, *Una nueva vuelta de tuerca en la inscripción de menores nacidos mediante gestación subrogada en el extranjero: La instrucción de la DGRN de 18 de febrero de 2019*, in *Actualidad Jurídica Iberoamericana*, 10, 2019, 64-85.

[83] F.J. Matia Portilla, *op. cit.*

of the initial position of the Spanish Supreme Court, already examined in previous lines, it can be pointed out that the rejection of surrogacy cannot be altered even by the best interest of the minor (which allows the law to be interpreted and its gaps filled, but not contradict it) nor for the right to private and family life, because we are in the presence of a legitimate restriction[84].

Even if registration is denied, appellants can always claim filiation if there is a biological link or opt for other means of integration (adoption or foster care). We are in the presence of a strict application of the Law that is likely to compromise, at best, the agility required by the European Court of Human Rights. We say 'in the best of cases' because it is also probable that the Spanish regulation of adoption cannot be applied successfully in all cases. That is why it should be minimized that a judicial body, after denying the registration of the minor, born in Russia, that links her to her intended father and mother, urges the Public Prosecutor's Office to exercise and adopt the appropriate actions and measures for the protection of the minor and her integration into the de facto family nucleus[85].

This does not present special problems, in principle, when the national legal requirements linked to adoption are met. Thus, for example, the Provincial Court of León upholds the adoption request of the intended mother of two minors born in Kiev through surrogacy (the registration of the father who shares biological material with them is not discussed). In the opinion of the Chamber, the protection of the best interests of the minor must be sought, and this is achieved, as the Spanish Supreme Court itself has indicated, by facilitating the adoption of minors. Acting otherwise compromises the right of minors to establish a "certain identity", to which the Supreme Court itself alludes, and it would also be absurd to deny it when the legally established requirements for this are met[86].

The question is what happens when a Court considers that the legal requirements to adopt are not met. Some courts choose to apply, exhaus-

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[84] J. Delgado Echeverría, *op. cit.*; M.R. Díaz Romero, *op. cit.*; A. Durán Ayago, *op. cit.*; K. Ekis Ekman, *op. cit.*

[85] E. Farnós Amorós, *Paradiso y Campanelli c. Italia (II): los casos difíciles crean mal derecho*, in *Revista de Bioética y Derecho*, 40, 2017, 231-242; A.S. Fernández-Sancho Tahoces, *op. cit.*; A. Gálvez Criado, *op. cit.;* C. Lasarte Álvarez, *Acerca de la constitucionalidad… op. cit.*; J. S. Mill, *op. cit.*; M. Pereña Vicente, *op. cit.*; A.H. Puleo, *op. cit.*; S. Quicios Molina, *op. cit.*

[86] P. Blanco-Morales Limones, *op. cit.;* A. Durán Ayago, *op. cit.;* E. Farnós Amorós, *Inscripció a Espanya… op. cit.;* A. Quiñones Escámez, *op. cit.* For a review of the judicial treatment of this problem, from a more critical approach to the figure of surrogacy: M.J. Vaquero Pinto, *op. cit.*

tively, the regulations in force. Other courts choose to accept the adoption of the minor, although there may be formal objections to it.

Another controversial point in relation to compliance with the legal requirements for adoption is related to the role of the natural mother. And at this point we also find interesting and contradictory judicial resolutions. As is known, the usual practice is for the surrogacy contract to include among its clauses the early renunciation of custody by the natural mother and any link that may be recognized between her, and the child or children born. Well, the AP Barcelona considers that, in the legal framework of adoption provided for in the Catalan Civil Code, the mother's renunciation of parental authority, before the birth occurs, is illegal, and that the natural mother must expressly consent to adoption[87]. This statement ignores that the usual practice is for the surrogate mother to abandon all contact with her child and the intended parents after giving birth[88]. That is why it seems more logical to understand, as the AP Madrid does, that it is not necessary to ask for the consent of an absent mother, since she is not listed as a mother and has resigned at least thirty days after giving birth[89].

It is true that in this more recent case, the resignation had taken place after giving birth, but the lack of proof of her status as a mother is also noted. In any case, it is not risky to venture that the courts will end up recognizing the relationship between the intended parents and the minors, since it does not seem to favor the best interests of the minors when they are abandoned to their fate or subjected to public guardianship measures, when it is confirmed that there is a *de facto* family life with their intended parents[90].

In the same direction, it can be highlighted the clear interest presented by three judicial resolutions that closely follow the evolution experienced by the French Court of Cassation. In the first of them, it is presumed that the biological paternity of an intended father of a minor born in Mexico

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[87] AP Barcelona (Sección 18.ª) Auto 565/2018, de 16 de octubre (ECLI:ES:APB:2018:6494A, JUR\2018\290468), FD 5.

[88] E. Farnós Amorós, *Paradiso y Campanelli… op. cit.*; A.S. Fernández-Sancho Tahoces, *op. cit.*; A. Gálvez Criado, *op. cit.*; M.J. García Alguacil, *¿Injerencia justificada del Estado en la determinación de la filiación o de la autonomía de la voluntad en las relaciones familiares?*, in *Revista Doctrinal Aranzadi Civil-Mercantil*, 5, 2016, 1-32.

[89] AP Madrid (Sección 22.ª) Sentencia 968/2021, de 11 de octubre (ECLI:ES:APM:2021:12237, JUR\2022\12783), FD 6.

[90] M. Jorqui Azofra, *op. cit.*; Y.B. Bustos Moreno, *La legitimación de los menores de edad a los efectos del reconocimiento legal de su identidad de género. Estado de la cuestión tras la Sentencia del Tribunal Constitucional 99/2019, de 18 de julio de 2019*, in *Derecho Privado y Constitución*, n. 36, 2020, 79-130.

does not need to be judicially accredited when it appears reflected in the gestation contract made before a notary, even if it has not been legalized, and in the registration of Mexico[91].

The second resolution that we want to highlight[92] is based on a curious factual assumption. The intended mother is trying to have a Russian judicial body recognize the parentage of the minor born in Moscow through surrogacy. The Court rejects the appeal because it considers that such affiliation is already recorded in the birth certificate[93]. And the Public Prosecutor's Office is interested in not recognizing this filiation in our country because the intended mother and the minor do not share biological material. The Chamber considers that, taking into account the best interests of the minor, it does not make sense to link the girl, who lives with the intended mother, with her natural mother, who does not share genetic material with the minor and who is missing. Accepting the thesis of the Public Prosecutor's Office "would mean placing the minor in an impossible legal situation, full of insecurity and uncertainty and without signs of a prompt resolution".

It must be remembered that here there is no intended father and adoption cannot be resorted to because there is an age difference between mother and daughter older than that legally admitted (47 and 45 years, respectively) (FD 6), and upholding the appeal would violate the right to privacy of the minor (FD 8). This resolution is very relevant, first of all, because the decision seeks to protect the best interests of the minor above the literal wording of specific provisions included in the Spanish civil code. Secondly, because it also takes into consideration the family life that exists between the intended mother and the minor, a perspective that must always be considered if we want to respect the jurisprudence of the European Court of Human Rights that has been examined in previous lines. And thirdly, because it resolves in the best possible way (perhaps the only one) legal problems that have no solution if the internal rules are strictly applied (in this case due to the age difference between the intended mother and the minor)[94].

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[91] AP Granada (Sección 5.ª) Sentencia 222/2019, de 3 de mayo (ECLI:ES:APGR:2019:1741, JUR\2020\20463), FD 3.

[92] AP Islas Baleares (Sección 4.ª) Sentencia 207/2021, de 27 de abril (ECLI:ES:APIB:2021:660, JUR\2021\163294).

[93] E. Roca Trías, *op. cit.*; C.M. Romeo Casabona, *op. cit.*; A. Salas Carceller, *op. cit.*; O. Salazar Benítez, *La gestación por sustitución desde una perspectiva jurídica: algunas reflexiones sobre el conflicto entre deseos y deberes*, *op. cit.*

[94] J. Delgado Echeverría, *op. cit.*; M.R. Díaz Romero, *op. cit.*; A. Durán Ayago, *op. cit.*; K. Ekis Ekman, *op. cit.*; A. Emaldi Cirión, *op. cit.*

And something similar happens with another Judgment issued by the Provincial Court of Madrid in which another impossible conflict must be resolved[95]. In this case, an intended mother, single and with medical problems that prevent her from procreating on her own, has had a child in Mexico through surrogacy. The Public Prosecutor's Office and Justice, in the first instance, deny her the registration of her son because she is not his natural mother. The problem is that, as the Court itself shows, any alternative solution to filiation is impossible, since adoption is not viable (more than 45 years between adopter and adoptee), and the biological filiation of the father (donor) cannot be claimed. anonymous), nor can foster care be processed (because it would not be based on the facts proven in the proceedings and because it would place the minor in a situation of legal insecurity with respect to his or her identity in society)[96].

The impossibility of following these routes encourages the recognition of the filiation between mother and child in the best interests of the child. Remember, in this regard, that he lives with his mother and grandparents, with whom he maintains a de facto family life[97]. And it concludes that, taking into account the development of the minor and satisfaction of their basic needs, both materials, physical and educational, as well as emotional and affective, that the family environment is adequate and free of violence, and the preservation of identity, (arts. 2.1, a and c and 2.2 LO 1/1996, Legal Protection of Minors)[98], the claim must be upheld and the appellant declared as the mother of the minor.

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[95] AP Madrid (Sección 22.ª) Sentencia 947/2020, de 1 de diciembre (ECLI:ES:APM:2020:14547, JUR\2021\55934).

[96] FD 7.

[97] M. Martín Casals, *op. cit.*; M. Nuñez Grañon, *Régimen tributario de las uniones de hecho*, in *Derecho privado y Constitución*, n. 12, 1998, 189: https://www.cepc.gob.es/sites/default/files/2021-12/10061dpc012189.pdf; N. Álvarez Lata, *op. cit.*

[98] "Todo menor tiene derecho a que su interés superior sea valorado y considerado como primordial en todas las acciones y decisiones que le conciernan, tanto en el ámbito público como privado. En la aplicación de la presente ley y demás normas que le afecten, así como en las medidas concernientes a los menores que adopten las instituciones, públicas o privadas, los Tribunales, o los órganos legislativos primará el interés superior de los mismos sobre cualquier otro interés legítimo que pudiera concurrir. Las limitaciones a la capacidad de obrar de los menores se interpretarán de forma restrictiva y, en todo caso, siempre en el interés superior del menor. 2. A efectos de la interpretación y aplicación en cada caso del interés superior del menor, se tendrán en cuenta los siguientes criterios generales, sin perjuicio de los establecidos en la legislación específica aplicable, así como de aquellos otros que puedan estimarse adecuados atendiendo a las circunstancias concretas del supuesto: a) La protección del derecho a la vida, supervivencia y desarrollo del menor y la satisfacción de sus necesidades básicas, tanto materiales, físicas y educativas como emocionales y afectivas. b) La consideración de los deseos, sentimientos y opiniones del menor, así como su derecho a participar progresivamente, en función de su edad, madurez, desarrollo y evolución personal, en el proceso de determinación de su interés superior. c) La conveniencia de que su vida y desarrollo tenga lugar en un entorno fami-

The interest of this Judgment is that it defends that the best interest of the minor is not a mere indeterminate legal concept, as the Supreme Court held, but rather it must be conceived as a guiding principle that must be applied directly when appropriate.

This resolution invites a summary reflection on the best interests of the minor. Regardless of its legal-normative nature, it is relevant to remember that we are facing a mandate included in both international treaties[99] and internal regulations[100]. From the international perspective, it must be remembered that the Spanish State has committed itself to a finalist obligation, so the courts must protect it even when there are legislative norms that make its protection difficult (control of conventionality). From the national perspective, it is worth highlighting the transcendental review that has been made of article 2 LO 1/1996, on Legal Protection of Minors through LO 8/2015, of July 22, on Modification of the Child and Family Protection System[101].

The current version indicates that the interest of the minor must also take precedence in the actions of the legislator, in line with what is stated in the International Convention on the Rights of the Child adopted by the General Assembly of the United Nations on November 10, 1989. Furthermore, the Law now offers general criteria to specify this best interest, and two of them have to do directly with this work[102].

All these provisions allow us to defend that the connection of the minor with his intended parents must be ensured in a stable and agile way. And that can lead to the fact that, when all the requirements necessary for adoption cannot be met, the courts end up favoring the direct registration of minors[103].

liar adecuado y libre de violencia. Se priorizará la permanencia en su familia de origen y se preservará el mantenimiento de sus relaciones familiares, siempre que sea posible y positivo para el menor. En caso de acordarse una medida de protección, se priorizará el acogimiento familiar frente al residencial. Cuando el menor hubiera sido separado de su núcleo familiar, se valorarán las posibilidades y conveniencia de su retorno, teniendo en cuenta la evolución de la familia desde que se adoptó la medida protectora y primando siempre el interés y las necesidades del menor sobre las de la familia. d) La preservación de la identidad, cultura, religión, convicciones, orientación e identidad sexual o idioma del menor, así como la no discriminación del mismo por éstas o cualesquiera otras condiciones, incluida la discapacidad, garantizando el desarrollo armónico de su personalidad".

[99] *Convention on the Rights of the Child.*

[100] *Art. 2 de la LO* 1/1996, *de Protección Jurídica del Menor*

[101] M.I. Ramos Quintana, *op. cit.*; M.E. Rovira Sueiro, *op. cit.*, 223; J.V. Gavidia Sánchez, *op. cit.*

[102] M.L. Balaguer Callejón, *op. cit.*; R. Barber Cárcamo, *op. cit.*; S. Quicios Molina, *op. cit.*; E. Roca Trías, *op. cit.*; C.M. Romeo Casabona, *op. cit.*; A. Salas Carceller, *op. cit.*

[103] E. Alonso Crespo, *op. cit.*; R. Bercovitz Rodríguez-Cano, *Comentarios al Código Civil*, Valencia, Tirant lo Blanch, 2013; C. Callejo Rodríguez, *op. cit.*

GERMAN CHAPTER[*]

Disciplines, statutes and laws cited

1. BGB; Bürgerliches Gesetzbuch
2. Act on Adoption Placement and Support and on the Prohibition of Surrogacy Placement (Adoptionsvermittlungsgesetz – AdVermiG) - https://www.gesetze-im-internet.de/advermig_1976/BJNR017620976.html
3. Criminal code (Strafgesetzbuch);
4. Rules on medically assisted procreation (Embryonenschutzgesetz);
5. Regulation of same-sex civil unions (Lebenspartnerschaftgesetz);
6. Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012;
7. Draft law on adoption in same sex couples (Referentenentwurf Entwurf eines Gesetzes zur Verbesserung der Hilfen für Familien bei Adoption (Adoptionshilfe-Gesetz);
8. Adoptionshilfegesetz (BGBL. 12.2.2021);
9. Reform of same sex union and marriage (Reformübersicht gleichgeschlechtliche Ehe);
10. Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction

Abbreviations

AG	Court of First Instance
BVerfG	Constitutional Court
BGB	Civil code
StGB.	Criminal code
ZPO	Civil procedure code
StPO	Criminal procedure Code
BGH	Bundesgerichtshof
VO	Law decree
EU-VO	European Regulation
LG	High

* Dr. R. Krause.

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I. General principles and definitions on family and parenthood

A. Parenthood in BGB

The German law of descent and relationship is regulated in the section on Family law in the German Civil Code; Bürgerliches Gesetzbuch (BGB). The law of descent is regulated in substantive law in §§ 1589-1600 d BGB[1]. Special procedural provisions are found in §§ 169-185 FamFG.

The concept of descent as such actually comes from biology and represents the passing on of genes. Legally, parentage is often used in paternity determinations, although there may be differences between biological and legal parentage. Thus, descent also clarifies relationships to one another. Section 1589 of the German Civil Code (BGB) states with regard to kinship:

"(1) Persons whose one descends from the other are related in a straight line. Persons who are not related in a straight line, but are descended from the same third person, are related in the collateral line. The degree of kinship is determined by the number of births conveying it".

Therefore, descent basically establishes kinship.

1. Status principle

The regulation of the BGB on kinship (§§ 1589 ff. BGB) is characterized by the so-called status principle. This is characterized, among other things, by the fact that the legal status of kinship, once established, is linked to diverse and far-reaching legal consequences (for example, obligation to pay maintenance, right of inheritance, nationality, right to a name, right of custody). However, these legal consequences can only be successfully asserted once the parentage has been clarified with legal certainty.

2. Legal maternity

According to § 1591 BGB, the legal mother of a child is the woman who gave birth to it[2]. The BGB thus takes as its starting point the Latin legal adage according to which mater semper certa est. The relationship to the mother is therefore established by birth, which is incidentally also the case in most European countries. So-called genetic maternity, *i.e.* where the egg cell comes from, is not legally relevant. Since the maternity of the

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[1] MüKoBGB/Wellenhofer, 9. Aufl. 2024, BGB § 1589.

[2] § 1591 Mutterschaft - Mutter eines Kindes ist die Frau, die es geboren hat.

mother giving birth is established a priori and unalterably, no parent-child relationship within the meaning of § 169 No. 1 FamFG can be established with the genetic mother. By definition, status proceedings are ruled out.

3. Legal paternity

After the abandonment of the distinction between marital and non-marital descent by the Child and Family Law Reform Act (KindRG) on July 1, 1998, § 1592 places all grounds for attribution of paternal descent on an equal footing. Genetic paternity only leads to paternity in the legal sense if one of the three grounds for attribution specified in § 1592 is present. The catalog of grounds for attribution is exhaustive. Legal effects from the legal relationship with the father that have existed latently since birth can only be asserted once the paternity relationship has been effectively established (§§ 1594 I, 1600d IV BGB).

§ 1592 BGB stipulates that the (legal) father of a child is the man who either

- is married to the child's mother at the time of birth,
- who has acknowledged paternity or
- whose paternity has been judicially established under § 1600 d BGB or § 182 I FamFG.

Paternity on the basis of marriage to the mother (§ 1592 No. 1) differs from paternity on the basis of recognition (No. 2) and judicial determination (No. 3) only in that it arises by operation of law without further acts of attribution and therefore at the time of birth. At the same time, there is a logical order of precedence: paternity on the basis of marriage prevents other attributions as long as it is not eliminated by challenge. This does not imply any distinction in the legal effects. All acts of attribution establish the same paternity. German law does not attach better legal consequences either to paternity on the basis of marriage or to paternity on the basis of - voluntary - recognition.

The biological father therefore only becomes the father in the legal sense if one of the alternatives in § 1592 BGB applies. If the legal father is not the biological father, the latter may have a right of challenge, which is (also) linked to the condition that there is no social-family relationship between the child and its legal father, § 1600 II BGB. According to § 1600 IV 1 BGB, a social-family relationship exists if the (legal) father bears actual responsibility for the child. In this constellation, therefore, the social-familial relationship between a parent and the child is given priority over biological parentage.

The assignment according to § 1592 establishes paternity in the legal sense: There is not only a legal prima facie case of paternity, the child is not "regarded" as the child of the man concerned, but, irrespective of a possible discrepancy between biological truth and legal paternity relationship, it is the child of the man concerned in the legal sense; the assignment therefore has the effect of establishing paternity in law.

The aim of the legal assignment of paternity is nevertheless ultimately to establish the biologically real father. This becomes clear in the legal possibilities of contesting (§ 1599ff.) an incorrect paternity on the basis of marriage or recognition. The tendency in previous law, prior to the late 1990s, to protect "marital" paternity for the sake of its quality, even if it was biologically incorrect, was abandoned by the KindRG 1998.

On the other hand, the aim of truthfulness of status cannot be pursued absolutely, because it is in tension with the aim of clear status relationships. Outside the above-mentioned orderly procedures for the elimination of incorrect paternity, therefore, in the interests of clarity of status, an incorrect (if necessary even deliberately incorrect) acknowledgement of paternity is also effective; a deviating paternity cannot be asserted (§§ 1594 II, 1600d I). On a side note: there is a large number of outright false paternity declarations, with the only aim of obtaining or, more precisely, granting german citizenship to foreign children and their mothers.[3] Despite many intentions, nothing can be done against this abuse of the social system that costs many millions a year. A prohibition for notaries to protocolize such recognitions was introduced in 2017[4]; yet little has changed. As of 2024, there are criminal investigations against notaries in Berlin, Germany due to these large numbers of false paternity recognitions.

4. Social parenthood

There is no definition of Social parenthood in the narrow sense in Bürgerliches Gesetzbuch or other laws. In the context of adoption, social parenting is defined by jurisprudence "as a relationship similar to that according to a bodily parentage and oriented to the average relationships between bodily parents and children"[5]. German legislation is aware of

[3] https://www.nzz.ch/international/sozialbetrug-mit-scheinvaterschaften-kostet-den-staat-millionen-ld.1718985.

[4] https://www.dnoti.de/fileadmin/user_upload/dnoti-reports/rep202017-light-pdf.pdf.

[5] BGHZ 35, 75 = NJW 1961, 1461 = FamRZ 1961, 306; BayObLG BeckRS 2004, 6284 = FamRZ 2005, 546 (547); BeckRS 1999, 30921118 = FamRZ 2001, 118 (119); FamRZ 1982, 644 (645); also Soergel/Liermann Rn. 7;.

social parenthood in the context of revoking paternity. One (albeit inadequate) attempt to describe social parenthood in legal German legislation is the so-called "social-familial relationship" (§ 1600 Para. 4 BGB). It grants a person right of access if this person is married to the mother or has lived with the child for a longer period of time (§ 1600 paras. 2, 3, 4; § 1685 para. 2 BGB). Here, de facto cohabitation becomes relevant as an indicator of a care relationship. At the same time, the construct automatically places the person giving birth (mother) as a parent and privileges the marital couple relationship as well as cohabitation in a household. This attribution of parental status thus remains unaffected, although it is "not a law of nature but a social institution"[6]. Recent proposals for legal reform claim that, even in the case of the heterosexual nuclear family, social parenthood should be the central criterion for legal and social recognition[7]. The construct of the social-familial relationship as a traditional nuclear family instead of as based on de facto strong relationships for the child is therefore, from a feminist perspective, not an adequate means of centering social parenthood and thus rejected by feminists. Social parenthood is regarded as only one aspect (segment, fragment) amongst different aspects of parenthood[8].

The most recent definition of social parenthood is given by sociology[9], rather than legal scholars: instead of being used as a collective term for families beyond the heterosexual, "social parenthood" can also be defined

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[6] A. Peukert, M. Motakef, Mona, J. Teschlade, C. Wimbauer, *Soziale Elternschaft – ein konzeptuelles Stiefkind der Familiensoziologie*, in *Neue Zeitschrift für Familienrecht*, 2018, 5, 7, S. 322–326. https://nbn-resolving.org/urn:nbn:de:0168-ssoar-65749-3.

[7] L.A. Vaskovics, *Soziale Elternschaft*, in *Zeitschrift für Erziehungswissenschaft*, n. 23, 2020, 269–293.

[8] L.A. Vaskovics, *Soziale Elternschaft*, in *Zeitschrift für Erziehungswissenschaft*, n. 23, 2020, 274.

[9] A full overview of the discussion can be found in the following recent literature: D. Schwab, *Die Begriffe der genetischen, biologischen, rechtlichen und sozialen Elternschaft (Kindschaft) im Spiegel der rechtlichen Terminologie*, in D. Schwab, L.A. Vaskovics (Hrsg.), *Pluralisierung von Elternschaft und Kindschaft: Familienrecht, -soziologie und -psychologie im Dialog,* Verlag Barbara Budrich, 2011, 41–56; L.A. Vaskovics, *Soziale Elternschaft*, in *Zeitschrift für Erziehungswissenschaft*, n. 23, 2020, 2, S. 269–293, T. Baumann, T. Hochgürtel, B. Sommer, *Familie, Lebensformen und Kinder*, in Statistisches Bundesamt, Wissenschaftszentrum Berlin (Hrsg.), *Datenreport*, 2018. *Ein Sozialbericht für die Bundesrepublik Deutschland*, Bonn, Bundeszentrale für politische Bildung, S. 51–101; S. Golombok, J. Readings, L. Blake, P. Casey, L. Mellish, A. Marks, V. Jadva, *Children Conceived by Gamete Donation: Psychological Adjustment and Mother-Child Relationships at Age 7*, in *Journal of Family Psycholog*, n. 25, 2, S., 2011, 230–239; P. Gross, A. Honer, *Multiple Elternschaften: Neue Reproduktionstechnologien, Individualisierungsprozesse und die Veränderung von Familienkonstellationen*, in *Soziale Welt*, 41, 1990, 1, S. 97; C. Hoffmann-Riem, *Fragmentierte Elternschaft: technologischer Fortschritt und familiale Verarbeitung*, in K. Lüscher, F. Schultheis, M. Wehrspaun (Hrsg.), *Die „postmoderne" Familie: Familiale Strategien und Famili-*

in terms of content and understood as a cross-cutting issue - that is, as relevant for all family constellations[10]. In this case, social parenthood can be defined as "assuming practical responsibility for children in the process of growing up". This implies a permanent and reliable care relationship between at least one adult and one child. It does not have to be limited to two parents and is not bound to binary coding of the parent(s), such as mother and father[11].

5. *De Facto* parenthood

The term *de facto* parenthood is not used in German law.

6. *Favor maioris / Favor minoris*

The concept of favor maioris / minoris is not known and not used in German law.

B. Intended legislative changes by the 2021 Coalition

a) Two mothers by birth

The "Ampel" Coalition formed by the political parties SPD, FDP und Bündnis 90/Die Grünen signed a *Koalitionsvertrag 2021*[12] and established the following aim: "'Wenn ein Kind in die Ehe zweier Frauen geboren wird, sind automatisch beide rechtliche Mütter des Kindes, sofern nichts anderes vereinbart ist' (When a child is born into the marriage of two women, both are automatically legal mothers of the child, unless otherwise agreed)"[13]. Political parties and stakeholders issued policy papers in 2023[14].

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enpolitik in einer Übergangszeit, Konstanz: UVK, 1988, S. 216–233; M.B. JACOBS, *Parental Parity: Intentional Parenthood's Promise*, in *Buffalo Law Review* 64, 2016, S. 465–498.

K. JURCZYK, *Elternschaftliches Neuland*, in *DJI Impulse,* 4, 17, 2017, S. 4–9.

[10] L. LINEK, A. PEUKERT, J. TESCHLADE, M. MOTAKEF, C. WIMBAUER, *Soziale Elternschaft*, in L.Y. HALLER, A. SCHLENDER (Hrsg.), *Handbuch Feministische Perspektiven auf Elternschaft* (S. 377-387), Opladen, Verlag Barbara, Budrich, 2022, https://doi.org/10.3224/84742367, 30.

[11] K. JURCZYK, A. LANGE, B. THIESSEN, *Doing Family. Warum Familienleben nicht mehr selbstverständlich ist*,Weinheim, Beltz, 2014.

[12] Koalitionsvertrag 2021-2025 zwischen der Sozialdemokratischen Partei Deutschlands (SPD), BÜNDNIS 90 / DIE GRÜNEN und den Freien Demokraten (FDP): Mehr Fortschritt wagen – Bündnis für Freiheit, Gerechtigkeit und Nachhaltigkeit, https://www.bundesregierung.de/resource/blob/974430/1990812/04221173eef9a6720059cc353d759a2b/2021-12-10-koav2021-data.pdf?download=1.

[13] Koalitionsvertrag 2021, S. 101.

[14] https://www.boell.de/sites/default/files/2023-05/e-paper-gwi-elternschaft-rechtlich-neu-denken.pdf

So far, no draft law has been published. Too many issues are at stake, so the Ministry of Justice has not yet (as of February 2024) issued a draft law, only a position paper. The following changes are planned:

Maternity of a woman who did not give birth to the child: In addition to the birth mother, another woman will in future be able to become the mother by virtue of marriage or recognition.

In addition, there are to be transitional solutions for children born after the introduction of “marriage for all” who have not yet been adopted.

Parenthood agreements: In future, it should be possible to determine with legal certainty who - in addition to the birth mother - will be the child’s second parent by means of a notarized agreement. This can be a woman or a man. For example, a parenthood agreement can stipulate that the biological father is to be immediately assigned to the child as the child’s legal father without the need for a marriage with the mother, recognition or a determination by the family court. However, the biological father can also renounce his legal paternity, for which another person another person will stand up for and take responsibility for the child as a parent.

b) Verantwortungsgemeinschaft

A further proposal is established in the coalition treaty of 2021:

Verantwortungsgemeinschaft / Community of responsibility

“We will introduce the institute of community of responsibility, thus enabling, beyond love relationships or marriage, two or more persons of legal age to assume legal responsibility for each other”[15].

In addition to co-motherhood, the coalition is planning a new family law model for cohabiting couples. The coalition agreement does not specify what this new legal institution of joint responsibility (VGM) should look like, and no draft law exists to date. The assumptions about what such a community of responsibility might look like are based on the FDP motion “Selfdefined: Strengthen life plans - Introduce a community of responsibility” from 2020 and on the statements of the Federal Minister of Justice and other FDP politicians. If one follows the FDP application of 2020, then roughly related persons starting from the 2 grade (e.g. grandchildren and grandparents, siblings) and persons in elective relationships such as friends, senior citizens, stepparents with their adult stepchildren, patchwork families or (unmarried) multiple parents should be able

[15] Coalition Agreement 2021, 101.

to enter into a VGM in the future. People who are already married to each other are excluded, because the rights and obligations in a marriage are to be more extensive than in a VGM. Furthermore, parents and their children (relatives of the 1st degree) shall not be allowed to enter into VGM as well as members of an already existing VGM (no double VGM). The maximum number of persons in a VGM has not yet been specified but it should be possible for it to include more than two persons. The rights and obligations arising from a VGM are to be structured on the basis of a tier model. According to the intensity of the intended assumption of responsibility, one could then decide among themselves on the scope of a VGM[16].

II. Public documents on parenthood

A. Standesamt as record keeping public institution

Public records are kept at the local Standesamt. The registry office maintains the Marriage register (§ 15 PStG), Civil partnership register (§ 17 PStG), register of births (§ 21 PStG) and a death register (§ 31 PStG). The register entries consist of a documentary part (main entry and subsequent certifications) with probative force and a reference part without probative force.

The civil status registers are kept electronically. The first certifications in the civil status registers are numbered consecutively each year. Certifications are concluded with the indication of the family name of the registrar. Each certification must be provided with the permanently verifiable qualified electronic signature of the registrar.

The register of births is one of the registers of civil status; it is used to record births. The personal circumstances of the parents, place and time of birth of the child, its gender and name are entered in the register of births (§ 21 PStG). If paternity is not acknowledged or judicially established until after the child's birth has been notarized, this must be noted in the birth entry (§ 27 PStG). The birth of a child must be reported within one week to the registrar in whose jurisdiction it was born. The obligation to notify (verbally) is incumbent on each parent if he or she is (co-)holder of parental care, otherwise on any other person who is present at the birth or is informed of the birth from his or her own knowledge (e.g. midwife, doc-

[16] S. Horsch, «*Ampel plant neuen Bund fürs Leben – Größte familienrechtliche Reform der letzten Jahrzehnte*», 2022, https://www.merkur.de/politik/ampel-verantwortungsgemeinschaft-familienrecht-regierung-berlin-koalitionsvertrag-91228262.html.

tor), and in the case of births in hospitals and the like (in writing) on the institution (§§ 18 ff. PStG). The first names of the child must be notified within one month at the latest (§ 22 PStG).

The documents bear probatory character but can be contradicted, if materially wrong.

§ 54 PStG sets the evidential value of civil status registers and documents:

(1) The certifications in the civil status registers shall prove marriages, the establishment of civil partnerships, births and deaths and the more detailed information provided on them as well as the other information on the civil status of the persons to whom the entry relates. Notes do not have this probative value.

(2) Civil status certificates (Section 55 (1)) shall have the same probative force as the certifications in civil status registers.

(3) Proof of the incorrectness of the recorded facts shall be admissible. Proof of the inaccuracy of a civil status document may also be provided by submitting a certified copy from the corresponding civil status register.

The register does show the fact that established parenthood, in case of adoption or recognition. No other facts are listed. The order in which the parents are listed is set by the form. A female adopter is entered as "mother", a male adopter as "father" If the adopting person is neither male nor female, he or she is entered as "parent". Transgender adopters who have legally changed their marital status prior to the adoption are registered according to their changed marital status (cf. Section 5 (3) and § 11 sentence 1 TSG).

B. Birth certificates with two mothers or two fathers

The entry in the birth certificate follows the entry in the register of births. A female adopter is therefore also to be entered as "mother", a male adopter as "father". An adopting person who belongs to neither the male nor the female sex is to be entered as "parent". This is also confirmed by the Federal Association of German Registrars.

This means that in a two-mother family, there are two mothers in the birth register and on the birth certificate. In a two-father family, there are two fathers. Parents without or with a diverse gender entry are entered as simply as a parent.

Social parenthood is not entered in the register. As mentioned above, the act of birth and the birth certificate have a standard content and no

information is given on the procreation technique (natural or artificial), or on the link (biological, genetic, gestational): the mother who has born the child, for example, is indicated as such without further details, even if she has no genetic link with the child because there was a surrogacy, an artificial or assisted procreation with egg donation, or an adoption.

III. Parenthood by law

A. § 1592 BGB – Legal paternity

See section I. sub Section 3 on Legal paternity for general questions relating to parenthood by law. The following statements are expressed with the view of the author being a German notary public, in charge of acknowledgment of paternity. According to § 1592 BGB, there are three ways of becoming the father of a child: Paternity on the basis of marriage to the mother (No. 1), paternity on the basis of an acknowledgement of paternity (No. 2) or paternity qua judicial determination of paternity in accordance with § 1600d BGB or § 640h II ZPO (No. 3). The three elements of paternity are mutually exclusive. As long as the mother's husband is deemed to be the father under § 1592 No. 1 BGB, another man cannot acknowledge paternity; this applies until the existing paternity is legally contested (§ 1594 II BGB, exception § 1599 II BGB). The judicial determination of paternity under § 1600d I BGB presupposes that there is no paternity under §§ 1592 nos. 1 and 2, 1593 BGB. In the following, the last two facts of paternity, paternity by acknowledgment and paternity by determination, will be dealt with.

B. Paternity by recognition

Acknowledgement of paternity requires a declaration of recognition by a man as a unilateral declaration of intent that does not need to be received. The biological correctness of the declaration is not required, so that even a deliberately incorrect acknowledgement is effective if the other requirements are met; however, even if the acknowledgement is deliberately untrue, it is possible to challenge paternity. The declaration of acknowledgment must meet the requirements of §§ 1594 to 1597 BGB in order to be effective. It must be done at Jugendamt or before a Notary.

a) Admissibility. Recognition can be declared not only after birth, but also prenatally in accordance with § 1594 IV BGB. The possibility of recognition before birth serves to clarify parentage relationships at an early stage, to relieve the psychological burden on the expectant mother and thus indirectly also on the child. A pregnancy must exist at the time of rec-

ognition. Recognition "in advance" is not possible. This is often the case with heterologous insemination as part of artificial insemination. Prenatal recognition takes full effect only with the birth of a living child with legal capacity. The fact that the mother is married at the time of recognition does not lead to the ineffectiveness of the recognition. If the marriage still exists at the time of birth, however, paternity by acknowledgment can only become effective if paternity on the basis of marriage was eliminated by contestation or under § 1599 II BGB. In order for the recognition to become effective, the paternity of the husband must also be eliminated if the mother marries (a third party) after recognition but before the birth of the child.

b) Effectiveness. The effectiveness of the recognition is further subject to positive and negative requirements. Negatively, no existing paternity may be opposed and, in principle, no condition or time limit may be included in the declaration. On the positive side, the highest degree of personality and the requirement that the acknowledgement be in formal form must be observed.

aa) Paternity of another man. According to § 1594 II BGB, the acknowledgement of paternity is not effective as long as the paternity of another man exists. An acknowledgment declared despite existing paternity is not null and void, but is merely pending ineffective. It becomes fully effective if the existing paternity is terminated by a final judgment in contestation proceedings. Exceptionally, a challenge is not necessary if the child is born pursuant to § 1599 II BGB after the pendency of a divorce petition and a third party acknowledges paternity with the consent of all parties at the latest by the end of one year after the judgment granting the divorce petition has become final. In this case, the blocking effect of the existing paternity under § 1594 II BGB does not apply.

bb) Condition and time provision. § 1594 III BGB orders the invalidity of an acknowledgment declared subject to a condition or time provision. In the declaration of recognition, because of this fundamental impossibility of conditions, factual statements that could be interpreted as conditions should be avoided.

cc) Highly personal nature. Recognition is a highly personal legal transaction and for this reason cannot be declared by a proxy pursuant to § 1596 IV BGB. Voluntary representation is not possible because of the significance of the transaction in terms of personal status. For this reason,

recognition in paternity proceedings cannot be declared by the authorized representative for the record of the court or the notary[17].

dd) Form. According to § 1597 I BGB, the declaration of recognition and the declarations of consent must be publicly notarized. The notarial instruction makes the legal significance of their declaration clear to the parties involved, prevents haste and facilitates a review of the validity of the declaration. A review of the biological correctness of the recognition does not take place in the public notarization. In most cases, the certification is carried out free of charge by the responsible officials and employees of the youth welfare office in accordance with § 59 I No. 1 SGB VIII. Furthermore, registrars are responsible for the certification in accordance with § 29a I PStG and notaries in accordance with § 1 BeurkG. In paternity proceedings, the acknowledgement can also be made on the court's record in accordance with § 641c p. 1 ZPO18.

1. Consent

a) Mother: Pursuant to § 1595 I BGB, acknowledgment of paternity requires the consent of the child's mother; this consent cannot be substituted by the court, not even in the case in which the mother's refusal to consent is contrary to the child's best interests. The mother does not give the declaration of consent as the child's legal representative but acts on her own behalf. The reason given for the necessity of her consent was that the legal position of the mother could be affected by the recognition, for example because of the father's right of contact. Unlike in Italy, there is no acknowledgment of maternity.

b) Child. As a rule, consent of the child is neither necessary nor sufficient. The new regulation has abandoned the child's consent in favor of the

[17] A sample recognition to be declared before a notary (ZIMMER, KERSTEN, SZALAI, *Handbuch für Notarfachangestellte*, 7, Auflage, Muster, Vaterschaftsanerkennung: Am … wurde in … von Frau …, geboren am …, wohnhaft …, das Kind mit dem Namen … geboren. Die Geburt ist im Geburtsregister des Standesamtes … unter Nr. … eingetragen. [Alternative: Frau … geboren am …, wohnhaft … ist derzeit schwanger und wird das Kind ca. … zur Welt bringen.] Hiermit erkenne ich, …, an, dass ich der Vater des vorgenannten Kindes bin. Ich wurde darüber belehrt, dass zur Wirksamkeit der Anerkennung die Zustimmung der Mutter erforderlich ist und dass ich die Anerkennung widerrufen kann, wenn sie ein Jahr nach der heutigen Beurkundung noch nicht wirksam geworden ist. Der Notar hat mich weiterhin über die verwandtschaftliche, unterhaltsrechtliche und erbrechtliche Bedeutung der Anerkennung der Vaterschaft belehrt. Ich wurde von dem Notar weiterhin über Inhalt und Umfang des § 1597a BGB belehrt, insbesondere darüber, dass eine missbräuchliche Vaterschaftsanerkennung unwirksam ist und ggf. auch strafrechtliche Konsequenzen haben kann.

mother's consent (§ 1595 I BGB) as a prerequisite for effectiveness. Only if the mother is not entitled to parental care under § 1595 II BGB does the child's consent need to be given in addition to the mother's consent. This is the case if the child is of age. If the child is a minor, then it applies if the mother has died, been declared dead or has been deprived of custody and the child has been given a guardian in accordance with § 1773 BGB or a custodian in accordance with § 1909 BGB. In these cases, the consent of the child is necessary in addition to the consent of the mother, if living, otherwise the guardian (Verfahrenspfleger a so called "advocate for the best interest of the child".

2. Effect of the recognition

§ 1594 I BGB stipulates that the legal effects of recognition can in principle only be asserted from the time at which the recognition becomes effective. The effective recognition does have retroactive effect to the time of birth. This follows from the principle that the child, if it has a father, should have this father for its entire lifetime. An existing other assignment of paternity qua marriage or recognition (by another man) is initially protected procedurally, but in turn is eliminated with retroactive effect in the event of a successful challenge (or if the requirements of § 1599 II BGB are met).

a) Revocation. Until all requirements for the recognition are fulfilled, the declared recognition is pending ineffective (§ 1594 I BGB). If it has not yet become effective one year after notarization, the man can revoke the recognition pursuant to § 1597 III BGB. This revocation option is intended to prevent an unreasonably long state of suspense. Pursuant to § 1597 III 2 BGB, the provisions of the recognition apply to the revocation, in particular those concerning the personality of the act, public certification and legal capacity.

3. Paternity by virtue of establishment

According to § 1592 No. 3 BGB, paternity can also be established by judicial determination pursuant to § 1600d BGB. This is only admissible if there is no paternity under § 1592 nos. 1 and 2 BGB or § 1593 BGB.

4. Entitlement to sue for paternity

According to § 1600e I BGB, the man who wishes to have his paternity established, the child and the mother of the child are entitled to bring an action. The man sues the child, the child and the mother sue the man to establish paternity.

The mother's own right of action is not actually necessary, because of the granting of unrestricted legal custody to the mother in accordance with § 1629 II BGB, the mother can already take the initiative for the declaratory action as the child's legal representative. Once the previous official guardianship has ceased, only the mother with sole custody can regularly pursue the establishment of paternity for the child. However, if the mother is not prepared to disclose the father of the child, it is irrelevant whether she does not comply with her duty to the state official guardian (so under previous law) or to the adult child. The child is dependent on the mother's information about the biological father or the man who was with her at the time of conception to establish paternity. Otherwise, it cannot initiate a declaratory action for lack of a defendant.

5. Genetic testing for establishing parenthood and refusal

§ 17 GenDiagnoseGesetz establishes the legal framework for Genetic examinations to clarify parentage:

"(7) A genetic examination to clarify parentage may only be carried out if the person whose genetic sample is to be examined has previously been informed about the examination and has consented to the examination and to the collection of the genetic sample required for this purpose; § 8 applies accordingly to the consent. Only the examinations necessary to clarify the parentage may be carried out on the genetic sample. Determinations of other facts may not be made.

(2) Paragraph 1 shall apply mutatis mutandis to persons who have a genetic examination carried out to clarify their parentage".

There is no presumption by refusing a DNA Test. It must be ordered by the Family court and is only then admissible. Since 2008 this is regulated in § 1598a BGB[18]:

[18] For detailed literature on German law: Anslinger, Rolf, Eisenmenger, *Möglichkeiten und Grenzen der DNA-Analyse*, in *DRiZ*, 2005, 165; Aust, *Das Kuckuckskind und seine drei Eltern*, 2015; *Arbeitsgemeinschaft der Sachverständigen für Abstammungsbegutachtung in der Bundesrepublik Deutschland e.V., Leitlinien für die Erstattung von Abstammungsgutachten*, in *FamRZ*, 2002, 81; Balthasar, *Anmerkung*, in *JZ*, 2007, 635; Balthasar, *Anmerkung zu BVerfG FamRZ 2007*, 441, in *FamRZ*, 2007, 448; Bellis Hughes, Hughes, Ashton, *Measuring parental discrepancies and its public health consequences*, in *Journal of Epidemial Community Health*, 59 (2005), 749; Bertschi, *Leihmutterschaft*, 2014; Binschus, *Mutterschaft und Vaterschaft – ein Nachtrag*, in *ZFF*, 2002, 12; Blauwhoff, *Foundational Facts, Relative Truths – A Comparative Law Study on Children's Rights To Know Their Genetic Origins*, 2009; Borth, *Das Verfahren zum Entwurf eines Gesetzes zur Klärung der Abstammung unabhängig vom Anfechtungsverfahren gemäß § 1598a BGB-E und dessen Verhältnis zum Abstammungsverfahren nach dem FamFG*, in *FPR*, 2007, 381; Braun, *Die Regelungen des Gendiagnostikgesetzes zu „heimlichen Vaterschaftstests"*, in *MDR*, 2010, 482; Brosius, Gersdorf, *Vaterschaftstests – Verfassungsrechtliche und verfassungspolitische Direktiven für eine Reform der Vaterschaftsuntersuchung*, 2006; Brosius, Gersdorf, *Das Kuckucksei im Familiennest – Erfordernis einer Neuregelung der Vaterschaftsuntersuchung*, in *NJW*, 2007, 806; Brosius-Gersdorf, *Vaterschaftsfeststellung und Vaterschaftsanfechtung – Grundrechtliche Konfliktlagen in der Familie*, in *FÜR*, 2007, 398; Bundesärztekammer/Robert-Koch-Institut, *Richtlinien für die Erstattung von Abstammungsgutachten*, in *FamRZ*, 2002, 1159; Bundesgesundheitsamt, *Richtlinien zur Erstattung von Blutgruppengutachten*, in *Bundesgesundheitsblatt* 1990, 264; Bundesgesundheitsamt, *Richtlinien zur Erstattung von DNA-Abstammungsgutachten*, in *Bundesgesundheitsblatt* 1992, 592; Bundesrechtsanwaltskammer, *Stellungnahme zum Regierungsentwurf eines Gesetzes zur Klärung der Vaterschaft unabhängig vom Anfechtungsverfahren – erarbeitet vom Ausschuss Familienrecht der Bundesrechtsanwaltskammer –*, FPR 2007, 414; Coester, *Reform des Kindschaftsrechts*, in *JZ*, 1992, 809; Coester, Waltjen, *Überlegungen zur Notwendigkeit einer Reform des Abstammungsrechts*, in ZfPW 2021, 129; Coester, Waltjen, *Die Herausforderungen der Reproduktionsmedizin für das deutsche Abstammungsrecht*, in *FF*, 2022, 279; Coester, Waltjen, *Gutachten B in Ständige Deputation des Deutschen Juristentages*, Verhandlungen des 56. Deutschen Juristentages, I. Bd. (Gutachten), 1986, B 9; Coester, Waltjen, *Ausländische Leihmütter – Deutsche Wunscheltern*, in *FF*, 2015, 186; Deutscher Anwaltverein, *Stellungnahme durch den Familienausschuss zum Entwurf des Bundesministeriums der Justiz für ein „Gesetz zur Klärung der Vaterschaft unabhängig vom Anfechtungsverfahren"*, in *FPR*, 2007, 415; Deutscher Richterbund, *Stellungnahme zum Entwurf eines Gesetzes zur Klärung der Vaterschaft unabhängig vom Anfechtungsverfahren*, in *FPR*, 2007, 418; Diederichsen, *Thesen in Ständige Deputation des Deutschen Juristentages*, Verhandlungen des 59. Deutschen Juristentages, II. Bd. (Sitzungsberichte), 1992, M 87; Diel, *Leihmutterschaft und Reproduktionstourismus*, 2013; Duden, *Leihmutterschaft im Internationalen Privat- und Verfahrensrecht*, 2015; Dürbeck, *Die Kostenentscheidung in Abstammungssachen*, in *NZFam*, 2019, 524; Eckebrecht, *Das vertauschte Kind*, in *FPR*, 2011, 394; Eckebrecht, *Die geänderte Stellung des Vaters*, in *NZFam*, 2016, 673; Edenfeld, *Das neue Abstammungsrecht der Bundesrepublik Deutschland im nationalen und internationalen Vergleich*, in *FuR*, 1996, 190; Ernst, *Abstammungsrecht – Die Reform ist vorbereitet!*, in *NZFam*, 2018, 443; Fabricius, *Die humangenetische Abstammungsbegutachtung*, in *FPR*, 2002, 376; Frank, *Recht auf Kenntnis der genetischen Abstammung?*, in *FamRZ*, 1988, 113; Frank, *Gedanken zu einer isolierten Abstammungsfeststellungsklage* in Leipold, Lüke, Yoshino, *Gedächtnisschrift Ahrens*, 1993, 65; Frank, *Die zwangsweise körperliche Untersuchung zur Feststellung der Abstammung*, in *FamRZ*, 1995, 975; Frank, Helms, *Kritische Bemerkungen zum Regierungsentwurf eines "Gesetzes zur Klärung der Vaterschaft unabhängig vom Anfechtungsverfahren"*, in *FamRZ*, 2007, 1277; Frank, *Vertauschte Kinder*, in *FamRZ*, 2015, 1149; Frank, *Personenstands-*

"§ 1598a BGB Claim to consent to a genetic examination to clarify natural parentage

(1) To clarify the natural parentage of the child,

1. the father may require mother and child,

2. the mother may require father and child, and

3. the child may require both parents

to consent to a genetic paternity test and to acquiesce in the taking of a genetic sample appropriate for the test. The sample must be taken in compliance with the recognized principles of science.

(2) On the application of a person entitled to clarify, the family court is to substitute consent that has not been given and order acquiescence in the taking of a sample.

(3) The court suspends the proceedings if and as long as the clarification of the natural parentage would result in a considerable adverse effect on the best interests of the minor child which would be unreasonable for the child even taking into account the concerns of the person entitled to clarify.

(4) A person who has consented to a genetic paternity test and has given a genetic sample may require the person entitled to clarify who has had a paternity test made to permit inspection of the genetic paternity test report or to provide a copy. The family court decides disputes arising from the claim under sentence 1".

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rechtliche Fragen bei der Vertauschung von Kindern, in *StAZ*, 2015, 225; FRITSCHE, *Die Novellierung des Abstammungsrechts*, in *NJOZ*, 2008, 193; FRÖSCHLE, *Der Auskunftsanspruch des Scheinvaters nach dem Beschluss des BVerfG v. 24.2.2015*, in *FamRZ*, 2015, 1858; GAUL, *Die Neuregelung des Abstammungsrechts durch das Kindschaftsrechtsreformgesetz*, in *FamRZ*, 1997, 1441; GAUL, *Ausgewählte Probleme des materiellen Rechts und des Verfahrensrechts im neuen Abstammungsrecht*, in *FamRZ*, 2000, 1461; GEKO, Richtlinie der Gendiagnostik-Kommission (GEKO) zu den Anforderungen an die Inhalte der Aufklärung gemäß § 23 Abs. 2 Nr. 3 GenDG bei genetischen Untersuchungen zur Klärung der Abstammung, Bundesgesundheitsblatt 2011, 1242; GEKO, Richtlinie der Gendiagnostik-Kommission (GEKO) für die Anforderungen an die Durchführung genetischer Analysen zur Klärung der Abstammung und an die Qualifikation von ärztlichen und nichtärztlichen Sachverständigen gemäß § 23 Abs. 2 Nr. 4 und Nr. 2b GenDG, Bundesgesundheitsblatt 2013, 169; GENENGER, *Erleichterte Abstammungsklärung ohne Berücksichtigung der biologischen Väter*, in *JZ*, 2008, 1031; GESERICK, *Richtlinien für die Erstattung von Abstammungsgutachten*, in *FPR* 2002, 380; GRUBER, *Das Recht des „Spenderkindes" auf Kenntnis seines biologischen Vaters*, in *ZfPW*, 2016, 68; HAMMERMANN, *Das Gesetz zur Klärung der Vaterschaft unabhängig vom Anfechtungsverfahren*, in *FamRB*, 2008, 150; HEIDERHOFF, *Die Vaterschaftsklärung und ihre Folgen – von der Vaterschaftsanfechtung zur Vaterschaftsbeendigung*, in *FamRZ*, 2010, 8; HELMS, *Rechtliche, biologische und soziale Elternschaft – Herausforderungen durch neue Familienformen*, Gutachten F zum 71. Deutschen Juristentag, 2016.

Hence, there is no establishment of parenthood over an adult by operation of law refusing a DNA test. Such test can only be ordered according to § 1598a BGB.

IV. General principles of Adoption and the Right of Same-Sex Couples to Adopt

A. Evolution of adoption in German law

The legal institution of adoption as a child (adoption, formerly: adoption in lieu of a child) is one of the oldest historically documented legal institutions. With Roman law, it reached the German-speaking world between the 15th and 16th centuries and finally, via Prussian law, into the BGB. At the time the BGB came into force on 01.01.1900, the focus was on adult adoption. Adoption of minors is regulated in §§ 1741 ff. BGB, adoption of adults is regulated in §§ 1767 ff BGB.

The background of adoption was to ensure the family succession of couples or individuals without children. The interests of the adopters were primarily in the foreground, since the adopter received an heir with the help of an elective relative who took over the real estate and the assets and continued the family name. The adoption at that time, however, only created kinship relations to the adopter, but not to his relatives. Relationships to the previous, natural relatives were not affected.

A strong adoption is understood to be a full adoption, as provided for minors under German law (§§ 1741 ff. BGB): The child's relationship to his or her natural family is extinguished (§ 1755 BGB) and the child is given the legal status of a natural child of the adopter (§ 1754 BGB). In the case of a "weak" adoption, its effects are limited: The adopted person only becomes the child of the adopter and is therefore not related or related by marriage to the relatives or in-laws of his or her adoptive parents Section 1770 (1) BGB), although his or her relatives by descent remain related to his or her natural relatives (Section 1770 (2) BGB).

1. The historic development in BGB

Social change in recent decades has led to numerous changes in adoption law. With the introduction of the Family Law Reform Act of 1976, which came into force on 01.01.1977, adoption law was realigned. In addition to the previous adoption, with only weak legal effects, the adoption of minors was now designed as full adoption, §§ 1741 ff. BGB.

The focus here was not on the interests of the adopter, but on the best interests of the child. This is particularly evident in the introductory provision of the adoption law that adoption as a child is only permissible if it serves the best interests of the child and it is to be expected that a parent-child relationship will develop between the adopter and the child, § 1741 (1) sentence 1 BGB. The positive prognosis of an emerging parent-child relationship was declared to be the basic prerequisite for minor adoptions. This is also made clear in the change in the wording of the law, since 1977 the law has spoken of "adoption as a child" instead of "adoption in place of a child". Adoption now requires a court decision on adoption by the guardianship court (a section of the family court). Before 1977, it was merely a matter of an adoption contract with court approval.

2. The effect of full adoption

The legal effects of full adoption are particularly significant. The adoptee acquires the legal status of a child of the adopter and, in the case of joint adoption, of a child of the adopter. The child has the status of a joint child in the case of a joint adoption, § 1754 (1) BGB. This means that the child is fully integrated into the adopter's family.

The change in the function of German adoption law is particularly evident in the fact that it has since been primarily oriented toward the best interests of the child. The legal institution of adoption has developed from a legal institution for the private acquisition of heirs to a recognized measure of state welfare.

In recent years, social change and the diversity of family forms have led to an increasing public focus on the concerns of same-sex couples. The general creation of a legal framework for same-sex relationships was initially the subject of political and constitutional controversy. The first step toward eliminating discrimination was the introduction of the new family law institution of civil partnership. However, the public also became interested in other aspects of same-sex couples. It is increasingly recognized that children also grow up in same-sex relationships. It is often misunderstood that the desire to start a family is a fundamental human need and does not depend on sexual orientation.

3. Legal historical development

The Civil Partnership Act came into force on August 1, 2001. The political discussion that had been going on for several years with regard to the creation of a legal institution for same-sex couples thus reached its goal for the time being. Since the law came into force, rights and obligations have been constantly changing and there has been a gradual alignment with marriage under civil law.

The original bill to introduce registered civil partnerships was divided into two parts – a part not requiring approval in Bundesrat, LpartDisBG: Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften, and a part requiring approval in Bundesrat, LpartGErgG: Entwurf eines Gesetzes zur Ergänzung des Lebenspartnerschaftsgesetzes und anderer Gesetze (Lebenspartnerschaftsergänzungsgesetz). Only the part not requiring consent was initially passed and enacted.

The introduction of the Civil Partnership act was the subject of controversial political and constitutional debate:

Constitutionality

The constitutional concerns related to both formal and substantive compatibility with the Basic Law (Grundgesetz). Criticism with regard to formal compatibility existed insofar as the original draft law was divided into two parts. The substantive dispute centered on the accusation that the legal institution of civil partnership was too closely approximated to marriage under civil law and that, as a result, the special protection of marriage and the family guaranteed by Article 6 (1) of the Basic Law was not safeguarded. In addition to Art. 6 GG, the discussion also focused on Art. 3 GG and Art. 14 GG. However, the First Senate of the Federal Constitutional Court clarified in its decision of July 17, 2002[19] that Article 6 (1) of the Basic Law is not violated with the introduction of the legal institution of registered civil partnership for same-sex couples and that this law is compatible with the Basic Law. "The special protection of marriage does not prevent the legislature from providing rights and obligations for same-sex civil partnerships that are equal or close to those of marriage. The institution of marriage is not threatened by an institution that addresses persons who Are married to one another.

[19] BVerfG, judgment of July 17, 2002, 1 BvF 1/01.

It does not violate Article 3 (1) of the Basic Law that non-marital partnerships of persons of different sexes and related unions are denied access to the legal form of a registered civil partnership"[20]. In particular, the Federal Constitutional Court ruled out any disadvantage to the institution of marriage through the introduction of civil partnership. "It is also not constitutionally justifiable to derive from the special protection of marriage that such other life partnerships are to be structured at a distance from marriage and provided with lesser rights".

The Federal Constitutional Court of Germany also considered the LPartDisBG to be constitutional from a formal point of view. In particular, the Bundestag was not prevented from regulating the legislative procedure in several laws, since the regulations themselves were sufficiently definite, comprehensible and enforceable.

No provisions for adoption initially

In its original form, the LpartG in Art. 1 of the Act to End Discrimination against Same-Sex Communities: Civil Partnerships (Life Partnerships Act – LpartG)[21] did not provide for an explicit regulation on the adoption rights of same-sex couples[22]. The individual civil partner could therefore only adopt a child individually, § 1741 (2) sentence 1 BGB. With the individual adoption, the legal relationship of the adopted child to its previous legal parents ended, §§ 1754 (2), (3), 1755 (1) sentence 1, 1757 (1) sentence 1 BGB. Adoption by the civil partner was therefore not excluded. However, it had the undesirable consequence in this context that all existing legal relationships with the previous parents were dissolved[23]. The establishment of a legal relationship with the second partner was denied and the child was only ever related to one partner. The background to this was, among other things, the expert opinion commissioned by the Federal Ministry of Justice, in which the scholars Dopffel, Kötz and Scherpe suggested to the legislature that it should dispense with child-legal regulations for the time being.[24] First of all, familiarity and experience with the new legal institution had to be gained, and people in Germany had to get used to the new family forms. The aim was to achieve acceptance among the

[20] BVerfG, judgment of July 17, 2002, 1 BvF 1/01 (lead sentence).

[21] BGBl. 2001 I, p. 266.

[22] The only exception was § 1757 (1) sentence 2 BGB regulating the birth name of the child adopted alone, cf. Weber, ZFE 2002, p. 369.

[23] Maurer, FamRZ 2013, p. 752.

[24] P. Dopffel, Kötz, J.M. Scherpe in J. Basedow, K.J. Hopt, Kötz, P. Dopffel, cit., 391; see also Krings, ZRP 2000, 409; Schomburg, Kind-Prax 2001, 103.

general public. Consequently, there were initially no regulations on adoption law for civil partners.

B. Legal situation with entry into force of the law for the revision of the life partnership right on 1 January 2005

A further reduction in discrimination against same-sex couples was to take place with the amendment of the civil partnership law. One of the most important issues was adoption law. However, joint adoption rights were rejected by the German Bundestag for the time being and are still rejected by conservative members of Bundestag as of 2024[25].

1. Adoption with consent of the partner

Due to Art. 1 (Amendment of the Civil Partnership Act) of the Act on the Revision of the Civil Partnership Law16 , Sec. 9 (6), (7) LpartG was now given the following wording with effect from 1 January 2005 (Art. 7 (1))17:

"(6) If a civil partner adopts a child alone, the consent of the other civil partner is required for this. § 1749 (1) sentences 2 and 3 and (3) BGB shall apply mutatis mutandis.

(7) A civil partner may adopt a child of his civil partner alone. In this case, § 1743 S. 1, § 1751 subs. 2 and 4 second sentence, § 1754 subs. 1 and 3, § 1755 subs. 2,

§ 1756 (2), § 1757 (2), first sentence, and § 1772 (1), first sentence, letter c, BGB, mutatis mutandis".

The explanatory memorandum to the law further states, "In terms of child law, stepchild adoption is made possible", Furthermore:

"The new paragraph 6 clarifies that a life partner needs the consent of his or her life partner for the sole adoption of a child. As in the case of marriage, the consensus of the life partners required by law corresponds to the nature of a comprehensive life partnership".

Par. 7 allows for stepchild adoption.

[25] BT-Drucks. 15/2477, Feb. 11, 2004, pp. 1, 17; see also Resolution Recommendation and Report of the Legal Affairs Committee, BT-Drucks. 15/4052, Oct. 27, 2004, 3.

2. Stepchild adoption

1) If the parent of a child with whom he or she lives has formed a civil partnership, there is usually a joint family. Even the civil partner who is not the parent assumes responsibility for the child. If the partnership is dissolved due to the annulment or death of a partner, an uncertain situation may arise for the child. Although appropriate contracts can help, these are not always sufficient. Through stepchild adoption, the legal position of the child vis-à-vis the non-parent is considerably improved: the responsibility for the child of his or her life partner, which is assumed by a life partner, can be continued as joint parental responsibility through adoption. The proposed regulation eliminates the special rules otherwise required for stepchild adoption, including those relating to the continuation of family relationships, § 1756 BGB, are declared applicable. The other provisions of adoption law not relating to stepchild adoption, such as the best interests of the child requirement of § 1741(1) BGB and the necessity of a resolution on adoption, § 1752 BGB, shall remain applicable without a separate statutory order.
2) The introduction of stepchild adoption has considerably improved the legal position of the child vis-à-vis the other partner. The aim of the regulation was not to grant new rights to civil partners. Rather, it was intended to improve the legal position of the child who grows up in a civil partnership. The stepchild adoption now exists independently of the civil partnership. The child receives another parent through the adopting civil partner, who is legally obligated to support him or her, § 1601 BGB. In the event of an inheritance, the child is also protected accordingly by its own statutory right of inheritance, § 1924 Para. 1 BGB. However, the adopting person is not to be entered in the birth certificate as “co- mother” or “co-father”, but merely as “other parent”. The original bioparent is not visible on the certificate.
3) Stepchild adoption is possible if the following conditions are met. The consent of the previous opposite-sex parent is required, unless he or she is permanently unable or his or her whereabouts are permanently unknown, § 1747 paras. 1, 4 BGB. Likewise, the civil partner, who is already the child’s legal parent, must consent. Furthermore, as in every case of adoption granted by the court, the provision of § 1741 Para. 1 Sentence 1 BGB must be observed. Accordingly, it must be examined in each individual case whether the adoption serves the child’s best

interests and whether it is to be expected that a parent-child relationship exists or will develop between the adopter and the child.

4) The gender and sexual orientation of the adopter are irrelevant. This results from the principle of equality pursuant to Article 3 (3) sentence 1 of the Basic Law and the prohibition of discrimination pursuant to Article 14 of the European Convention on Human Rights in conjunction with Article 8 of the European Convention on Human Rights. With the pronouncement of the adoption by the court, the adopted child becomes the joint child of the life partners, § 9 para. 7 p. 2 LPartG in conjunction with § 1754 para. 1 BGB.
5) The possibility of stepchild adoption helped women in registered partnerships in particular to realize their wish for an "own" child. In this context, the procreation of a child with the help of sperm donation has practical significance. The non-birth parent then has the option of stepchild adoption in order to become the legal parent of the child alongside the birth parent.
6) However, the law of adoption was affected by the legislature's failure to refer to §§ 1742 BGB. Successive adoptions, in which first one person adopts a child in accordance with § 1741(2) sentence 1 BGB and then another person, were initially reserved for spouses only. The legislature met such adoptions with criticism, since a "passing on of the child" from one family to another was feared. Therefore, for the time being, only spouses were granted this right of successive adoption. The background to this was the idea that the child usually lives with the adoptive parent and his or her spouse in the same household and that the successive adoption adds another legal parent. The child is thus not "passed on". It merely receives two legally equal parents within the family. Civil partners were not initially granted the right to successive adoption. Under the law previously in force, a civil partner could adopt a biological child of his or her civil partner in accordance with § 9 (7) sentence 1 LPartG. However, in the event that the child was not a natural child but an adopted child of the partner, adoption was excluded. Multiple adoptions were to be avoided in this way. Consequently, the provision of § 1742 BGB only opened up the possibility of a supplementary adoption for the spouse of the adopter, but not for his or her civil partner. The reason for not referring to § 1742 BGB is that the legislator did not want to open up a way for civil partners to circumvent the joint adoption which was not possible at that time. On the one hand, it was not yet politically justifiable for the legislator to grant joint adop-

tion rights to registered civil partners. On the other hand, the European Convention of 24 April 1967 on the Adoption of Children stood in the way of this project. This agreement stipulates that the adoption of a child may be granted under national law either to two persons married to each other or to one person alone. This ultimately led to unequal treatment of children who lived in a registered civil partnership compared to children who grew up in a marriage with divorced parents.

C. Judgment of the Federal Constitutional Court of 19 February 2013

The Federal Constitutional Court ultimately had to decide whether the exclusion of civil partners from successive adoption was constitutional. Under previously applicable law, successive adoption was only permitted to married couples.

The most 'spectacular' decision was made by the Federal Constitutional Court on 19 February 2013 on the adoption of the adopted child of a registered partner by the other partner (successive adoption)[26]. The BVerfG ruled that the prohibition of successive adoption by life partners, *i.e.* the prohibition of the adoption of an already adopted child by the life partner of the person who initially adopting, was contrary to fundamental rights and gave up on the legislature, to adopt a constitutional provision by June 30, 2014. Art. 2 para. 1 in conjunction with Article 6 (2) sentence 1 of the Basic Law conferred on the child a right to state guarantee of parental care and upbringing. An obligation on the part of the legislature to allow the adoption of the adopted child of a registered partner by the other person in each case (successive adoption). (successive adoption) cannot be derived from this. Two persons of the same sex who are legally recognized as the parents of a child would also be parents in the constitutional sense (Art. 6 par. 2 sentence 1 of the Basic Law). A person who has hitherto had neither a biological nor a simple relationship to a child under simple law is not in principle to be regarded as a parent under Article parent in the constitutional sense under the first sentence of Article 6.2 of the Basic Law because solely because she lives in a socio-familial relationship with the child. If registered civil partners live with the natural or adopted child of a civil partner in a socio-familial relationship, they form a family with the child protected by Article 6(1) of the Basic Law. In the legal structuring of the family, the legislature is not constitutionally obliged without fur-

[26] BVerfG NJW 2013, 847.

ther ado to grant those who actually perform the social parental function, to create an adoption option for this reason alone. to create. By allowing § 9.7 of the Civil Partnership Act the possibility of adoption of an adopted child of the registered civil partner by the civil partner by the respective other (successive adoption), whereas the possibility of the adoption of an adopted child of the registered partner by the other person (successive adoption) is denied. When adopting a natural child of the registered partner (stepchild adoption), both the children concerned and the civil partners concerned would be the affected civil partners in their right to equal treatment violated, Art. 3 para. 1 GG. The law that came into force on 27.07.2014 reflects the decision of the Federal Constitutional Court on successive adoptions by civil partners and now provides that a child may be adopted by the life partner of the initial adopter. To this end, the relevant provisions of substantive adoption law and procedural law have been amended[27]. The joint adoption of a child by homosexual partners, however, was not yet introduced. However, the legislator did not yet want to regulate the parallel adoption in homosexual families[28].

D. Adoptionshilfe-Gesetz, Judgment of BVerfG of 26 March 2019

The Adoption Assistance Act (Adoptionshilfe-Gesetz) entered into force on April 1, 2021, predominantly to regulate the recognition and effectiveness determination of foreign adoption decisions[29]. The Federal Constitutional Court ruled on 26.3.2019 that the exclusion without exception of stepchild adoption in the case of unmarried persons that § 1754 I and II as well as § 1755 I 1 and II of the German Civil Code (BGB) are incompatible with Article 3 I of the German Basic Law (GG) to the extent that according to this, a child cannot be adopted by its stepparent living with a legal parent in a non-marital cohabitation under any circumstances without the kinship relationship with the legal parent being extinguished. This led to the new statutory provision in 2020, which is now codified in Section 1766a.

§ 1766a of the BGB declares the provisions of Sections 1741 et seq. BGB, including those relating to stepchild adoption in the case of married persons, are applicable mutatis mutandis. The legislature thus enables

[27] (BGBl I 2014: 786).

[28] A very good outline of the legislative discussion after 2013 can be found at: M. Antokolskaia, *Rechtliche Regulierung geplanter Elternschaft lesbischer Frauen. Recht der Jugend und des Bildungswesens (RdJB)*, 64(2), 2016, 241–255.

[29] See below, section on recognition of foreign judgments for details.

stepchild adoption in an illegitimate family via § 1741.2 sentence 3 BGB. Here, too, the focus is on the best interests of the child in accordance with § 1741 (1) BGB. The adopting partner must be 21 years old, § 1743 S. 1, § 1741 exp. 2 p. 3 BGB. The other partner must consent to the adoption, §§ 1747 Para. 1 S. 1, 1749 Para. 1 BGB. § Section 1749(2) of the BGB is meaningless because the concept of a stable partnership requires cohabitation. The partner whose child was adopted retains parental care, section 1751(2) BGB. The adoption triggers maintenance obligations under section 1751(4) sentence 2 BGB. The adopted child becomes a joint child and loses its relationship to the other parent and his or her relatives, §§ 1754 Para. 1 Alt. 2, 1755 Paragraph 2 BGB. The relationship to the relatives of the other parent remains if the other parent had parental care and has died, § 1756 Para. 2 BGB. The partners must determine the maiden's name, section 1757 (2) sentence 1 BGB. The provisions on the adoption of stepchildren of full age apply mutatis mutandis, section 1767 (2) sentence 1 in conjunction with section 1766a BGB. A recent change (December 2023) in the law adoption now allows for retaining the original name even after adoption.

Pursuant to Section 1766a (2) sentence 1 BGB, a stable cohabitation generally exists if the partners have lived together in a marriage-like manner for at least four years or as parents of a (further) joint child. Pursuant to section 1766a (2) sentence 2 BGB, this does not generally exist if one partner is (still) married to a third party. These standard examples leave room for exceptional constellations. For example, according to the legal justification, a solidified cohabitation does not exist if the relationship is not exclusive. On the other hand, solidification can be assumed despite marriage to a third party, insofar as the best interests of the child do not suffer as a result. If the adopter is married to a third party, the adopter can only adopt the child alone in accordance with § 1766a (3) BGB and requires the consent of the spouse for this, since the spouse's position under inheritance law is diminished. Section 1749 of the BGB is applicable with regard to consent.

It is true that the relevant new provision of § 1766 a BGB cannot be applied to the facts of a stepchild adoption in a marriage. However, the systematic interpretation of the reformed adoption law makes it clear that the duration of a couple's relationship continues to function as an empirical and standard value in the prognosis of stability. Marriage no longer has exclusive significance as an indicator of stability for the assumption of a "stable partnership". Yet, the adoption law did not and does not know

any minimum stability periods related to marriage or non-marital solidified cohabitation. The decisive factor is still an examination to be carried out in each individual case, which must be based on the best interests of the child and the expectation of a parent-child relationship.

1. Consent of the natural father

In principle, adoption also requires the consent of the natural father of the child to be adopted in accordance with section 1747 I 1 BGB. For this reason, the father of the child must also be involved in the adoption proceedings as a general rule. Exceptions are regulated by § 1748 IV 1 BGB for cases in which the parent is permanently unable to do so or his or her whereabouts are unknown. As a rule, the basis for the rights of participation and involvement is legal paternity. However, if no other man is to be regarded as the father in accordance with § 1592 BGB, the father is deemed to be the man who substantiates the requirement of § 1600 d II 1 BGB, i.e.: to have been present with the mother during the period of conception.

After enabling stepchild adoption for same-sex couples through the introduction of Section 9 VII LPartG in 2004, the Federal Constitutional Court expressed in its decision on successive adoption as early as 2013 that same-sex parenthood is not opposed because it does not require different sexes. This is now finding its way into the case law of the higher courts. The Nuremberg Higher Regional Court has held that paternal consent pursuant to § 1747 I 2 BGB and thus also the participation of the sperm donor in the proceedings is not necessary if the mother and her wife declare unequivocally that they have informed the sperm donor of the birth of the child and that the sperm donor does not wish to enter into any legal obligations towards the child.[30] The occupation of both parental positions by same-sex spouses does not meet with any overriding objections and is not contrary to the best interests of the child.

[30] OLG Nürnberg NZFam 2019, 742.

2. Right to information despite adoption

The basis of a child's claim to information against the mother under section 1618a BGB is the relationship. The subsequent adoption does not prevent the right to information. Therefore, even after the termination of the legal parent-child relationship ordered by § 1755 I 1 BGB as a consequence of adoption, the child may base its claim for information on the identity of its natural father against its natural mother on § 1618 a BGB. The Federal Court of Justice justifies this on the basis of the *ex nunc* effect of the adoption under § 1754 BGB. The separation of the child from the previous relationship and the establishment of the new parent-child relationship has legal effects only for the future. Pursuant to § 1755 I 1 BGB, the child's relationship to the previous relatives expires with the adoption, and with it the rights and obligations arising from it. However, under § 1755 II 2 BGB, claims of the child that have arisen up to the adoption, in particular to pensions, orphan's allowance and other corresponding recurring benefits, are not affected by the adoption. However, this does not apply to maintenance claims for the period from the adoption.

3. International Private Law on Adoption

Art. 22 EGBGB determines the law applicable to adoptions. Art. 22 (1) sentence 1 of the old version of the Introductory Act to the German Civil Code (EGBGB) distinguished between different constellations of adoption. Thus, in principle, the adoption was subject to the law of the state to which the adopter belonged at the time of adoption. Under the new version, adoption in Germany is now subject only to German law (lex fori), irrespective of certain constellations. With regard to adoption abroad, the determination of the legal status is based on the child's habitual residence in accordance with Article 22 (1) sentence 2 of the Introductory Act to the German Civil Code.

Article 23 of the Introductory Act to the German Civil Code (EGBGB) no longer additionally applies to the consents of the child and the persons with whom the child has a family law relationship. Pursuant to Art. 22 (2) of the Introductory Act to the German Civil Code, the legal consequences of adoption with regard to the relationship between the child and the adopter and the persons with whom the child has a family-law relationship are governed by the law applicable under Art. 22 (1) of the Introductory Act to the German Civil Code.

V. Medically assisted reproduction technologies

The following section gives an overview of regulation of medically assisted reproduction from a practical point of view as a notary. Drafting of contract texts on the occasion of artificial insemination for the legal safeguarding/clarification of the parties may be part of the day-to-day business for very few notaries. And yet, or precisely for this reason, from a notarial point of view there are a large number of special legal issues to be considered which, depending on the individual case, require concrete implementation within the framework of the drafting of the contract.

To this end, the general, and in particular medical, terms relevant to this topic will first be defined. Subsequently, the different types of artificial insemination will be briefly described, taking into account the respective medical characteristics.

A. Definition of Artificial insemination

Artificial insemination is any fertilization that is not achieved through sexual intercourse but with the use of technical aids[31]. Accordingly, the "Guideline on the Collection and Transfer of Human Germ Cells or Germ Cell Tissue in the Context of Assisted Reproduction" defines assisted reproduction as "medical assistance to fulfil the desire for a child through medical treatments and methods […] that involve the handling of human germ cells (eggs and sperm), germ cell tissue or embryos for the purpose of inducing pregnancy"[32].

Legally permissible forms of artificial insemination are: In-vivo-Fertilisation and In-vitro-Fertilisation („IVF") and Intracytoplasmic sperm injection ("ICSI"). Legally prohibited forms are Egg donation or surrogacy, § 1 EmbryonenschutzG, § 1 para. 1 no. 2 ESCHG, § 1 para. 1 no.

B. Notary involvement

There is no general obligation to notarize and thus no mandatory notarial action in connection with insemination agreements. In particular, this does not follow from Section 4 of the Act on the Establishment of a Sperm Donor Register and on the Regulation of the Provision of Information

[31] Embryonenschutzgesetz (EschG) BT-Drs. 11/5460, 8; im Rahmen des BGB MüKoBGB/Wellenhofer, 8. Aufl. 2020, § 1600 Rn. 52.

[32] Richtlinie zur Entnahme und Übertragung von menschlichen Keimzellen oder Keimzellgewebe im Rahmen der assistierten Reproduktion, umschriebene Fortschreibung 2022 v. 14.1.2022 Ziff. 1.4.

on the Donor after Heterologous Use of Sperm (SaRegG), according to which the medical institution carrying out the artificial insemination must ensure that the recipient of the sperm donation is informed.

In the cases of medically assisted artificial insemination dealt with here (intracorporeal medical insemination and all cases of extracorporeal insemination), however, the need for notarial agreements generally follows, at least in fact, from the treatment requirements of the clinics or doctors involved. According to section 2.2.3 of the aforementioned guideline on the removal and transfer of human germ cells or germ cell tissue in the context of assisted reproduction of 14 January 2022, in the case of heterologous artificial insemination, it is recommended to refer to the possibility of legal advice from a lawyer or notary due to the complex legal situation and the far-reaching consequences. The professional code of conduct for physicians in the North Rhine region also requires notarial documentation of legal counseling for the couple in the case of heterologous procedures and for couples who are not married[33].

The general purposes of the notarization procedure, in particular the instruction of the parties involved and the related preservation of evidence that accompanies the notarization, will also be decisive here for the request of the physicians involved for notarial agreements. The contents of such an agreement which require further regulation or which can at least be regulated will be dealt with in more detail below.

In order to be able to deal in more detail in the further course of this essay with the contents of notarial insemination agreements on the occasion of medical artificial insemination that require regulation, it is advisable to take a look at the development of the relevant legal regulations.

1. Law on the Regulation of the Right to Know the Parentage in the Case of Heterologous Use of Semen (SaAbstG)

The background to the Act to Regulate the Right to Know Parentage in the Case of Heterologous Use of Semen of 17.6.2017 is that, according to previous practice in the context of so-called semen donation and the form of data storage that took place in this context, the constitutional right of the child produced by artificial insemination to know his or her parentage was not ensured. Before the new regulations came into force, donor data were collected at most by sperm banks or reproductive physicians. Simi-

[33] § BO § 13 Abs. BO § 13 Absatz 3 S. 4 der Berufsordnung der nordrheinischen Ärztinnen und Ärzte in der Fassung v. 16.11.2019.

larly, under the old legal situation, sperm donors were exposed to the risk of being established as the legal father in addition to their biological paternity and thus also being exposed to the consequences of (legal) paternity under maintenance law, for example. To counteract this, the following changes were created with the entry into force of the SaAbstG.

2. Law on the establishment of a sperm donor register and on the regulation of the provision of information about the donor after heterologous use of semen - Samenspenderregistergesetz (SaRegG) (semen donor register law).

In Germany, prior to the introduction of the Act on the Establishment of a Sperm Donor Registry and on the Regulation of the Provision of Information on the Donor after Heterologous Use of Semen (in short, the Semen Donor Registry Act or SaRegG) of 17 June 2017, last amended on 28 April 2020, documentation in connection with the heterologous use of semen for medically assisted artificial insemination was carried out in a decentralized manner in facilities where the semen is collected for heterologous use of such medically assisted artificial insemination (collection facility). The information provided at that time was not suitable for ensuring the right of a person conceived through heterologous use of semen to know his or her parentage. The aim of the sperm donor register is therefore to enable persons conceived through physician-assisted heterologous artificial insemination to obtain knowledge of their parentage by creating a central office - now maintained by the Federal Institute for Drugs and Medical Devices .

The following in particular are to be mentioned as authoritative regulations of the SaRegG:

- § 4 SaRegG, according to which a health care facility must ensure, prior to heterologous use of semen for physician-assisted artificial fertilization, must ensure that the recipient of the sperm donation has been informed about the legal framework conditions mentioned therein, in particular about the right to information of the person conceived by sperm donation, the collection, storage and use of personal data and the exclusion of the determination of paternity pursuant to § 1600 d (4) BGB,
- § 6 SaRegG, according to which the medical care facility must transmit in particular the name, birthday and address of the recipient of the sperm donation as well as the number and birthday of the conceived children to the Federal Institute for Drugs and Medical Devices,

- § 8 SaRegG, according to which the relevant data are stored in the sperm donor registry for 110 years,
- § 10 SaRegG, which is the central provision of the SaRegG and standardizes the right to information of persons who suspect that they have been conceived through heterologous use of semen in medically assisted artificial insemination.

It is important to note that the provisions of the SaRegG, in particular the right to information under § 10 SaRegG, do not cover so-called old cases, *i.e.* cases in which artificial insemination took place before the SaRegG came into force.

3. Introduction of § 1600 d (4) BGB

A further consequence of the SaAbstG was the introduction of § 1600 d para. 4 BGB. Since then, this has excluded the judicial determination of the paternity of the sperm donor in the case of children conceived using heterologous sperm according to the rules of the SaRegG. The aim is to strengthen the assignment of the child to the intended father. In addition, the protection of the sperm donor against recourse is intended to preserve the willingness of the potential sperm donor to donate despite the introduction of the sperm donor register and to promote his willingness to establish contact with the child conceived through sperm donation. The provision can be understood as a counterpart to the regulations of the SaRegG. However, the provision only applies under the narrow conditions specified there, not in the case of non-medically assisted artificial insemination or donations outside a collection facility. If irregularities were to occur in the clarification of the sperm donor and his registration in the sperm donor register, this would have no influence on the applicability of §1600 d (4) of the BGB.

C. Medical professional law

Medical professional law in the field of artificial reproductive medicine has undergone a change in recent years, at least in some sub-areas.

According to the professional guidelines for physicians at the time, medically assisted artificial insemination was to be open only to women who were married to a man or at least only to women who were living in a stable partnership with a man. In the latter cases, however, great restraint was required in the use of artificial reproductive technology. And even in the former cases, the heterologous use of a donor sperm was problematic under professional law.

According to the more recent regulations of the medical code of ethics, no position is taken on the eligible group of persons for physician-assisted artificial insemination (at least at the federal level) Nor are there any other legal regulations on the eligible group of persons. From this, it is predominantly concluded that medically assisted artificial insemination is permissible for non-married couples and (married and non-married) lesbian couples. The question of the permissibility of (heterologous) artificial insemination for single women continues to be the subject of the most discussion in this area.

1. Consent to insemination

The legal relationship between the "intended parents" covers the relationship between the natural mother (other constellations with the consequence of a separation of the natural mother and the "intended mother" are not conceivable in the context of the (permissible) sperm donation dealt with here) and the other intended parent, as the partner living with the mother.

Consent

The decisive content of every notarial insemination agreement should be the consent of the intended parents (who are parties to the document) to the performance of medically assisted artificial insemination - irrespective of whether this is performed homologously or heterologously. According to general principles, consent is the prior agreement to the artificial insemination. If a heterologous donor sperm is used, the necessity of consent already follows from the legal consequences of § 1600 Para. 4 BGB. Even if the sperm is used homologously, however, the joint consent of the intended parents to the fertilization procedure makes clear their joint will to assume responsibility for the child conceived in this way. Ultimately, the consent of the intended parents to the artificial insemination is also of central importance for the reproductive physician due to the otherwise ordered penalty.

The declaration of consent is not legally linked to a specific form, but should - even if already given orally - be repeated again in the notarial deed, at any rate in order to preserve evidence[34].

[34] A.F. Schwarz, *Aktuelle Rechtsfragen zur künstlichen Befruchtung in der notariellen Gestaltungspraxis*, *RNotZ*, 2022, 42.

The legal nature of declarations of consent has not yet been fully clarified. Some see the declaration of consent as a volitional real act to which the provisions on declarations of intent apply accordingly. The prevailing opinion qualifies consent as a declaration of intent. The dispute is mainly of a dogmatic nature and should not be of decisive importance for the drafting of notarial insemination agreements in practice. In any case, the consent must be received by the other intended parent (at least by analogous application); on the other hand, it does not seem necessary for the physician performing the artificial insemination or the third donor to receive it.

Withdraw the consent to medically assisted reproduction?

As the declaration of consent by the intended parents must be included in the notarial deed as a matter of urgency - if not as a matter of obligation - the question arises as to whether and how consent declared in the deed by the parties involved can be subsequently revoked by them.

There is no statutory regulation on this. According to general principles, under § 130 Paragraph 1 BGB, a declaration of intent that needs to be received can only be revoked until it has been received by the recipient of the declaration. In the present constellations of consent to artificial insemination, however, revocation is considered permissible even after receipt of the consent by the recipient of the declaration - which will be effected at the latest when it is notarized by the respective intended parent - because of the participants' freedom to reproduce, which is protected by fundamental rights. However, the permissibility of such revocation appears to end at the latest when, in addition to the intended parents' right to freedom to reproduce, the legal status of the child conceived by artificial insemination is affected. In the case of "in vivo fertilization", this is likely to be affirmed if the artificial insemination process has been carried out in the mother's womb, without the union of egg and sperm being relevant. In the case of extracorporeal fertilization, this is predominantly assumed to be the case if the eggs have left the pronuclear stage, i.e. if ovular fusion has taken place. At any rate, after these aforementioned points in time, the revoking intended parent will no longer be able to unilaterally withdraw from the fertilization project and consequently will also not be able to demand termination of the fertilization process, although it remains doubtful whether the latter can also apply to the intended parent giving birth in cases of heterologous insemination. The notary will prob-

ably not be able to make a binding statement on the relevant time of revocation because the legal situation has not yet been conclusively clarified.

D. Co-motherhood for child born in lesbian marriage not constitutional

The Berlin supreme court *Kammergericht* considers it incompatible with the German constitution that a child born to a mother living in a same-sex marriage after medically assisted artificial insemination within the meaning of § 1600 d IV of the BGB has only one legal parent by operation of law[35]. The case focuses on §§ 1592 No. 1, 1600 d IV, 1741 II 3, 1795 I No. 3, 1796 BGB.

The case is one of the "standard" cases leading to Verfassungsbeschwerde:

The Wife (German national) and Wife (Luxembourg national) entered into marriage with each other 2018 before the registrar of the registry office of Berlin. In order to fulfil their wish to have children, they decided to undergo reproductive medical treatment in a Kinderwunschzentrum in such a way that the person of the sperm donor remains unknown to them and the sperm donor waives all rights arising from parenthood. In September 2019, they concluded a treatment contract for medically assisted artificial insemination with Dr. K at the Kinderwunschzentrum "…" The practice cooperates with the European Sperm Bank in Copenhagen. The spouses involved obtained the sperm donation from there.

2020, the second wife (hereinafter: mother) gave birth to twins, namely the child L concerned here (wife 1) and the child J. The appeals in the proceedings for determination of parenthood concerning the child J are pending before the Senate under file number 3 UF 1123/20. Child 1 lives in the spouses' household and is looked after by them jointly in equal shares. In the child's birth certificate, Ms. 2 is entered as the child's mother. The Friedrichshain-Kreuzberg registry office of Berlin refused to register the third person (hereinafter referred to as the wife) as co-mother of the child.

The child, the mother and the wife applied to the FamG for a declaration that a parent-child relationship exists between the child and the wife. By order of 26 October 2020, the Berlin-Tempelhof-Kreuzberg Local Court (FamG) dismissed the applications. The applications were not admissible. § Section 169 no. 1 FamFG only covers parentage cases

[35] KG, Beschl. v. 24.3.2021 – 3 UF 1122/20.

which are directed "towards establishing the existence or non-existence of a parent-child relationship, in particular the validity or invalidity of an acknowledgement of paternity".

Kammergericht of Berlin considers this unconstitutional and presented the case (pending) to Bundesverfassungsgericht by ruling:

The Senate considers it incompatible with Article 3 I of the Basic Law that a child born to a mother living in a same-sex marriage after medically assisted artificial insemination within the meaning of § 1600 d IV of the BGB has only one legal parent by operation of law. A mother married to a woman and entitled to sole custody is not prevented from representing the child in proceedings to establish parenthood between her child born in marriage and her wife either under § 1795 I no. 3 BGB or under § 1796 BGB.

§ 1592 No. 1 BGB is not amenable to analogous application to women who are married to each other for lack of an unplanned loophole, since the legislature deliberately refrained from regulating the second parent in the absence of a final report when it created § 1600 d IV BGB (non-ascertainability of the sperm donor as father).

The restriction of the mother's wife to what is known as minor custody (§ 1687 b BGB) violates the child's fundamental right under Article 3 I of the Basic Law by depriving it of a second legal parent who could fully assume the care for the development of the child that the constitution assigns first to the parents and leaves it solely to the wife's decision-making power to obtain a full parental position by adoption under § 1741 II 3 BGB.

It serves the welfare of a child best if it can be assigned two responsible legal parents with corresponding duties from birth. The legal position of the child would be considerably improved - e.g. on the level of maintenance and inheritance law. Furthermore, in the event of exclusion from the scope of § 1592 No. 1 BGB, there are considerable risks for the child in the event of separation or death of the mother before the adoption proceedings have been completed.

The provision of § 1592 No. 1 of the BGB violates Article 3 I of the Basic Law to the extent that it discriminates against the spouse of the mother of a same-sex marriage compared with the spouse of the mother of an opposite-sex marriage. The justification of the unequal treatment is subject to high constitutional requirements here because the unequal

treatment concerns sexual identity[36]. Justifiable differences no longer exist after the legislature no longer pursues the principle of “status truth” in the case constellation of § 1600 d IV BGB.

E. Pending Verfassungsbeschwerde before Bundesverfassungsgericht

There are several *VERFASSUNGSBESCHWERDEN* pending, filed by a Berlin based law firm. In 2018, the BGH ruled that Section 1592 No. 1 of the BGB was neither directly nor analogously applicable to the mother's wife and that this did not give rise to any fundamental rights concerns. The law of parentage refers to both marriage and the gender of the second parent in Section 1592 No. 1 of the BGB. However, the parent-child assignment has not yet been adapted to the fundamental legal changes from 2017 and 2018, namely the possibility of marriage for persons of the same gender and the creation of the third gender category “diverse”. If a child is born into a marriage of two women, the second parent position remains vacant until the family has successfully gone through judicial and administrative adoption proceedings. At least the question of unconstitutionality was judged differently by several family courts in 2021: four courts suspended corresponding declaratory proceedings of two-mother families and submitted concrete norm control petitions to the BVerfG on the unconstitutionality of § 1592 BGB. Most cases are from Berlin, as the Berlin local has a rather strict view in a very liberal and progressive city.[37] They all concern marital two-mother families who had a child by way of reproductive medical fertility treatment and anonymous sperm donation. Since September 2022, a fifth case on the law of parentage in two-mother families has been before the BVerfG, which concerns a child conceived by means of private sperm donation. If one focuses on the child's perspective, it becomes clear that essential fundamental rights of the child might be violated here[38].

The German legislator has so far not created an allocation regulation that gives a child of two wives the primary Assignment to the second mother directly. The state has thus failed to enable whether and the how of parental duties for children of queer parents. From the child's perspec-

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[36] Connection to BVerfGE 133, 59 = StAZ 2013, 184 = NJW 2013, 847 marginal no. 104 = NVwZ 2013, 1207 Ls.

[37] The author is professionally connected as a notary with one case that was upheld by AG Kreuzberg and Kammergericht and is now at BVerfG.

[38] https://www.nodoption.de/_files/ugd/9eb76e_e080b3eaa7f24f299cab3c7b-96b03e5.

tive, an assignment option to a parent willing to assume parental responsibility is completely absent because the child has no way to force an adoption by the second mother. If the second parent is unnamed and the child was conceived by means of private sperm donation, the child could theoretically have the sperm donor established as the legal father. However, it is already questionable whether the considerations of § 1600d IV BGB do not also apply to the private sperm donor. With the judicial determination of the sperm donor, however, the child would in any case not receive a parent within the meaning of Art. 6 II GG, because as a rule a sperm donor does not want to provide parental care and upbringing to the child, but merely to help the recipients of the donation to assume parental responsibility.

The current legal situation thus provides a child conceived by means of a sperm donation from a third party and born into the marriage of two women with no de facto permanent possibility of being legally secured by two responsible parents[39]. As a result, the child not only has an incomplete birth certificate, but is also denied all consequential rights linked to the parent-child relationship.

The situation under the law of parentage violates the child's fundamental right to a state guarantee of parental care and upbringing. He is denied opportunities for development and shaping his life that are open to children from marriages between a man and a woman. The BVerfG has already stated in the decisions on successive adoption and stepchild adoption that the denial of the legally full parental position goes hand in hand with restrictions on parental powers, which can also have an effect on the development of the child. In particular, the stabilizing function of the family, which is important for the child's development and is protected by Article 6 I of the Basic Law, is impaired because the denial of legal recognition can give the child the impression that his or her family relationship is less valuable than the family relationship of children in the comparison group. This poses a considerable threat to the child's personality development. This personality endangerment is also not diminished by the reference to the possibility of adoption by the second mother. The necessity of having to be adopted by the second mother first, even though both mothers are married to each other and the child is a common desired child, confirms all the more the impression that the queer family is less valuable

[39] L. Chebout, A. Sanders, D.-S. Valentiner, *Nicht von schlechten Eltern - verfassungswidriges Abstammungsrecht aus Sicht des Kindes* (NJW 2022, 3694) 3696.

and trustworthy and must therefore first be subjected to judicial and official control[40].

Results of Verfassungsbeschwerden are not expected before 2025.

VI. Surrogacy

A. The prohibition of surrogacy

All forms of surrogacy are expressly prohibited in Germany. Surrogacy isn't only illegal in Germany, but it's a criminal offence for doctors or medical professionals who help someone. This also includes egg donation from one woman to another for any reason. The word for a surrogate in German is Leihmutter, and it comes from the verb leihen or to lend and Mutter or mother, so it's essentially a loaned mother. While the adoptive parents and the children of a surrogate mother aren't persecuted under the law, they are still not recognized as the parents of the child outside of legal adoption[41].

Parents who want a child but are having fertility issues or are not capable of conceiving a child are said to have a Kinderwunsch, which literally translates to "children wish" or a desire for children. This can normally be fulfilled through a fertility clinic where a woman will go through hormone treatments, IVF, or purchase donor sperm (which falls into a legal category that egg donation does not).

Women in relationships and single women have the ability to pay for this service. For gay men who are not biologically female, this possibility becomes impossible and often leaves them searching for a surrogate mother or a way to adopt children. For heterosexual partners, if the mother makes use of a sperm bank, her partner is automatically considered the father with her consent. For lesbians going through the same process, this isn't possible. The second mother will have to go through to adopt the child as their "stepchild." Cis homosexual men are limited to the former adoption process because surrogacy isn't legal.

B. Foreign surrogacy

If a couple (regardless if they are same-sex or not) were to hire a surrogate mother in a foreign country to give birth to a baby for them and bring that baby back to Germany, the surrogate mother would have rights as a

[40] Chebout et al.. ut supra.

[41] https://feather-insurance.com/blog/surrogates-and-adoption-in-germany/.

mother and no other mother would have legal rights as a mother. For gay men, this means that there will only be one legal parent while the other will have to adopt the child as a stepchild (which is already the case for adoption for same-sex couples and for the second mother of a lesbian couple who have children together) [42].

As for sperm donations, the only law in place is that the sperm of a dead person is not allowed to be used. The reason for this different treatment between gestational mothers and genetic fathers is that it is assumed that the loss of a gestation (whether or not the genetic) mother could cause psychological problems while the loss of a genetic father will apparently not.

VII. Other forms of parenthood

There are no provisions in German law for parenthood other than biological links or de facto parenthood.

VIII. Recognition and enforcement of foreign documents related to parenthood

The provision in Section 2 AdoptionswirkungsGesetz created a separate formal procedure for determining the recognition and validity of foreign adoptions or adoptions based on foreign substantive provisions - the latter, however, only insofar as they were decided before March 31, 2020, since from that date only German law will apply to all domestic adoptions, Art. 22 (1) sentence 1 EGBGB.[43] This procedure primarily serves legal certainty, especially for the adoptive family and the adopted child. The introduction of such a procedure was intended to avoid the repeat adoptions common in previous practice, with their inherent burdensome child hearings, and to eliminate uncertainties regarding the legal status of the child. Ultimately, this is intended to serve the best interests of the child. Since in the case of foreign adoptions the uncertainty about recognition and the effects on the child's legal status were particularly strong both for the person applying the law and for the adoptive family, there was a need for the introduction of a generally binding decision on recognition, despite the ex lege recognition under Art. 23 HAdoptÜ, both for adoptions carried out in Contracting States and, in particular, for adoptions carried out in

[42] See *infra* B), VIII.

[43] *GROSSKOMMENTAR* GesamtHrsg: Gsell/Krüger/Lorenz/Reymann, Hrsg: Budzikiewicz/Weller/Wurmnest Stand: 01.09.2023, AdoptWirkG § 2 Rn 2.

non-Contracting States. The determination also offers greater legal certainty for adoptions from contracting states due to the *ordre public* reservation in Art. 24 HAdoptÜ. The determination procedure therefore takes its place alongside recognition by operation of law and alongside the incidence determination of the capacity for recognition.

Until the new Adoption Assistance Act[44] came into force on 1.4.2021, this was the only way for the parties to the adoption proceedings to obtain a binding decision on the recognition of a foreign adoption and its effects in Germany for the sake of legal certainty. Through the introduction of Section 1 (2) AdWirkG by Art. 3 No. 1 Adoption Assistance Act, the initiation of a recognition determination procedure for foreign adoption decisions issued in the context of international adoption proceedings is no longer dependent on the decision of the persons entitled to file an application, but this procedure is now made obligatory and therefore such a decision must be requested.

A. Recognition of foreign adoption

1. Recognition or effectiveness

The act of adoption may consist of a court or official decision (decree adoption) or be based solely on a contractual agreement (contract adoption). The determination of "effectiveness" as defined in para. 1 refers to the contract adoption, while the determination of its recognition refers to the decree adoption. Furthermore, the adoption may be strong or weak or may be transformed from weak to strong.

A strong adoption is understood to be a full adoption, as provided for minors under German law (§§ 1741 ff. BGB): The child's relationship to his or her natural family is extinguished (§ 1755 BGB) and the child is given the legal status of a natural child of the adopter (§ 1754 BGB). In the case of a weak adoption, its effects are limited: The adopted person only becomes the child of the adopter and is therefore not related or related by marriage to the relatives or in-laws of his or her adoptive parents Section 1770 (1) BGB), although his or her relatives by descent remain related to his or her natural relatives (Section 1770 (2) BGB).

However, the subject matter of the proceedings is always the determination that the adoption relationship carried out in accordance with foreign law is equivalent to an adoption relationship established in accordance with German substantive provisions. This may also concern the question

[44] Law of 12 February 2021, BGBl. 2021 I 226.

of whether a legitimation carried out in an Islamic state is to be equated with an adoption relationship established in accordance with German substantive provisions.

However, the AdWirkG only provides the procedural framework for this and does not lay down its own standard of review. Rather, this results from the rules of the HAdoptÜ in the case of an adoption from a contracting state to the HAdoptÜ and from the autonomous law (sections 108, 109 FamFG) in the case of one from a non-contracting state

Contractual adoptions from non-contracting states are subject to a comprehensive effectiveness review by the courts/authorities because they lack a guarantee comparable to the certificate of the Central Authority. Therefore, in this respect, the full substantive review is opened up on the basis of the foreign adoption law, whereby Article 22 EGBGB is to be used as a basis for this under conflict of laws.

2. Contracting state

An adoption from a state party to the HAdoptÜ is to be recognized without further examination - ex lege - if the competent authority of the state implementing the adoption has certified that it has come about in accordance with the rules of the Convention, Art. 23 HAdoptÜ. This applies to both decree and treaty adoptions. It then remains only to review with regard to the violation of domestic *ordre public*, Art. 24 HAdoptÜ taking into account Section 109 (1) no. 4 FamFG; because Art. 24 HAdoptÜ only opens up the examination of the compatibility of the foreign adoption with domestic *ordre public* under section 109, para. 1, no. 4 FamFG

The FamG does not need to examine the prerequisites of section 109, paras. 1-3 FamFG here. For Convention adoptions, the possibility of review is therefore narrowly limited under Article 24 of the HAdoptÜ and Section 109 of the FamFG, since German courts are in principle bound by the adoption decree and the findings confirmed in the certificate. A breach of public policy can therefore only be assumed in exceptional cases, for example, if there is an obvious lack of an examination of the best interests of the child and the suitability for adoption, and it is difficult to make up for this. The relevant point in time for a breach of public policy is that of the recognition decision in the last instance.

3. *Ordre public*

The concept of "*ordre public*" is, however, ambiguous, and the terminology used in case law and literature is extremely inconsistent and complex. Thus, the terms "*ordre public* interne", "*ordre public* national" vs. "*ordre public* international" "*ordre public* substantive" vs. "*ordre public* procedural", "*ordre public* recognition" and "*ordre public* conflict of laws" are by no means used uniformly. This diversity of terms is based on two different forms of *ordre public*, which must be distinguished in the examination of the clause to be carried out ex oficio. Systematically, a distinction must first be made between two groups of cases: Either the application of foreign law by German courts or the recognition of a foreign decision. The standard of review for the two groups of cases varies considerably. In the first case, in which an application result is reached by a court for the first time, the standard must be stricter than in the second case, in which a foreign, effective decision has already been rendered that is merely to be accepted by recognition. While in the first case the clause applies to substantive violations of the application of the law, including the incompatibility of fundamental principles of conflict of laws, in the second case the clause focuses on violations of essential substantive and procedural principles. In both cases, the subject of review is not the foreign law per se, but exclusively the result of the application of the law in the specific case. While in the first case it is a matter of examining the compatibility of the result of the application of the law of the foreign norm with essential principles of domestic law, in the second case it is decisive whether the result of the application of foreign law in the concrete case is in such strong contradiction to the basic ideas of the German regulations and the concepts of justice contained in them that it appears unacceptable according to the German conception, or cannot be regarded as having been issued in an orderly procedure based on the rule of law.

If recognition of the foreign decision is even subject to a prohibition of substantive review ("revision au fond"), this is to be refused only in the case of particularly serious violations of *ordre public*. Terminologically, the terms substantive public policy (first group of cases) and procedural public policy (second group of cases) have become established for these cases. The terms "public policy under conflict of laws" for the first group of cases and "public policy under recognition law" for the second group of cases are also used synonymously. The terms "national public policy" and "international public policy" are also commonly used for the first and second groups of cases, especially in the case law. Here, however, there is a risk of mixing and confusion with the concepts of *ordre public* interna-

tional private law - for substantive law - and "*ordre public* interne", which merely designates mandatory law in the sense of substantive contract law, but which is not protected by Art. 6 EGBGB. The use of these terms is therefore rejected here. In addition, a special, further weakened reservation clause of an "*ordre public* under service law" is still used in some cases, which is only supposed to intervene in the case of "indispensable principles of a free state governed by the rule of law. A "European *ordre public*" does not - yet - exist. Nevertheless, it should not be overlooked that the domestic canon of values is also enriched by supranational fundamental values (→ Rome I Regulation, Art. 21, para. 24); these include, in particular, the ECHR, Art. 8, and the fundamental freedoms of Community law.

The national public policy is always supplemented and limited by European law at least if the relevant conflict rule only recognizes a public policy of the forum state; then the European public policy "slips" into the garb of the national public policy. In this respect, the public policy is also gradually "Europeanized" (→ Rome I Regulation Art. 21 para. 20, → Rome I Regulation Art. 21 para. 24).

If the adoption is a treaty adoption from a state party to the HAdoptÜ, as with a decree adoption from these states, there is no room for a review of its effectiveness, provided that a certificate pursuant to Art. 23 HAdoptÜ is available; because this also contains the confirmation of the Central Authority of the home state that a review of the best interests of the child and of a parent-child relationship has taken place (Art. 23 HAdoptÜ in conjunction with Art. 4 HAdoptÜ). All that remains is the examination of compatibility with domestic public policy in accordance with Art. 6 EGBGB, which is opened up by Art. 24 HAdoptÜ.

B. Registration of a foreign act of birth issued out of surrogacy

In the following, a few recent case examples are explained:

Recognition of a Ukrainian judgment, AG Düsseldorf

Anyone who has their child carried by a surrogate mother in Ukraine will also be registered as parents in Germany if this has been determined by a court in Kiev. Since the surrogate mother herself did not want to be registered, she did not have to be involved, according to the Düsseldorf court.[45]

A German couple had their baby carried by a Ukrainian surrogate mother. Genetically, the ordering father was also the biological father; the

[45] Decision of 30 June 2023 - 98 III 8/23.

mothers were not related to the child. The surrogate mother delivered the baby in Kiev. There he was registered in the birth register with the Germans as parents. A local court in the city of birth expressly established their parenthood. Later, the parents applied for subsequent certification of the foreign birth at the (German) registry office. After the registry office had registered the surrogate mother as the child's mother, the father and his partner turned to the Düsseldorf Local Court. The judge who initially dealt with the case upheld the registry office. The father then successfully objected to her on the grounds of bias. Now the AG (decision of 30.06.2023 - 98 III 8/23) corrected this decision and confirmed the maternity of the German.

According to the AG Düsseldorf, the prerequisites for correcting the entry are met: Section 48 (1) sentence 1 PStG provides that the court may correct the entry at the request of a party. Since the surrogate mother does not claim any parental rights, she is not a party to the proceedings. According to its reasons, the Kiev judgment had dealt in detail with the factual and legal situation and had affirmed the existence of parenthood of the German couple.

In the view of the AG, this result also did not violate fundamental principles of the German legal system under § 109.1 No. 4 FamFG. According to prevailing case law, the registration of intended parents when the child is carried to term by a surrogate mother is compatible with public policy if the child is descended from at least one intended parent - such as the father in this case. The Düsseldorf judge also based his decision on the best interests of the child: with the intended parents, those persons would be registered who would care for the child anyway.

Surrogate parents and best interest of the child

In the event that none of the persons to be registered should be genetically related to the child, the AG Sinsheim had recently also considered it possible to register the surrogate parents, but required a more intensive examination of the best interests of the child[46].

The rights of the surrogate mother, on the other hand, were not affected, since she had waived any rights. Accordingly, the registration was to be carried out as a subsequent certification. According to foreign law, the Germans had acquired parenthood and this was also certified accordingly in Germany.

[46] AG Sinsheim, decision of 15 May 2023 - 20 F 278/22.

SWEDISH CHAPTER*

Statutory codes and laws cited

1. The Swedish Parents Code 1949 (*Föräldrabalken* (1949:381));
2. The Swedish Social Insurance Code 2010 (*Socialförsäkringsbalken* (2010:110));
3. The Swedish Cohabitation Act 2003 (*Sambolagen* (2003:376));
4. The Swedish Institute of Government 1974 (*Regeringsformen* (1974:152));
5. The Swedish Inheritance Code 1958 (*Ärvdabalk* (1958:637));
6. The Swedish Law on the Population Register 1991 (*Folkbokföringslag* (1991:481));
7. The Swedish Procedural Code 1942 (*Rättegångsbalken* (1942:740));
8. The European Convention on Human Rights (as incorporated into Swedish law) 1994 (*Europakonventionen* (1994:1219));
9. Directive (EU) 2004/38/EC of the European Parliament and of the Council 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (The EU Citizens Rights Directive);
10. The Charter of Fundamental Rights of the European Union 2012;
11. Law on Genetic Integrity [informational privacy] Etc. 2006 (*Lag* (2006:351) *om genetisk integritet m.m.*);
12. Law on Parenthood in International Situations 1979 (*Lag* (1985:367) *om föräldraskap i internationella situationer*);
13. Law on Recognition of Nordic Parenthood Determinations 1979 (*Lag* (1979:1001) *om erkännande av nordiska föräldraskaps-avgöranden*)
14. The Swedish Marriage Code 1987 (*Äktenskapsbalken* (1987:230))

Abbreviations

EU European Union
FB The Swedish Parents Code
FBL The Law on Population Register
HD The Swedish Supreme Court
HFD The Swedish Supreme Admin. Ct.
IPL International private law
NJA Swedish Supreme Court decisions (publication *Nytt Juridiskt Arkiv*)
RH Selected Swedish appeals court decisions (*Rättsfall från Hovrätterna*)

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* Prof. E.S. Perry.

SOU Swedish Government Official Reports by government-appointed expert committees (*Statens offentliga utredningar*); an important source of legislative history when an SOU leads to a *Proposition* that makes changes to statutory law.

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I. General principles and definitions in relevant Swedish law

A. A word on Swedish family law's history and legal sources

1. Sweden in the EU and its legal historical context

There are differences in Swedish law and culture relative to the rest of Europe that can best be understood historically. Modern Sweden is a relative newcomer to modern, supranational Europe, having joined the European Union (EU) on 1 January 1995, over forty years after some of today's EU Member States began the integration that developed into the EU[1]. Geographically on the northern edge of continental Europe, an even earlier Sweden left its Viking-era status of 'unreliable neighbour and onlooker' quite late, joining the post-Roman-era Europe as more of a full member in the century between 1050 and 1150 CE[2]. By that time, unique local traditions and identity had developed in Sweden, influenced by factors including the challenges of providing for a population sparsely dispersed over a relatively vast land area in a colder climate region[3].

Fast-forwarding to today – past the developments of Lutheran Protestantism and the development of today's strong social-democratic Swedish welfare state[4], among other influential developments – one can observe in Sweden growing Europeanisation, internationalisation and diversification generally. These influences, alongside a continuation of certain proud, progressive and individualistic (yet internally somewhat conservative and conformist) traditions, shape the nation's policies and law generally, and more specifically its family law[5].

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[1] The European Coal and Steel Community, a predecessor to the EU commonly cited as its initial stage of development, was formed in 1951 between France, Germany, Italy, Belgium, the Netherlands, and Luxembourg.

[2] S. Strömholm, *General Features of Swedish Law*, in M. Bogdan (ed.), *Swedish Legal System,* Norstedts Juridik, 2010, 2.

[3] See *ivi* 3–18.

[4] See e.g. E. Perry, *Child Support in Sweden and California: A Comparison Across Welfare State Models* (dissertation, Umeå University, 2019, 77–81, https://umu.diva-portal.org/smash/get/diva2:1362618/FULLTEXT01.pdf> accessed 1 November 2023. See also A. Blome et al., *Family and the Welfare State in Europe*, Edward Elgar Publishing, 2009, 38-68 (defining the concept of welfare regime as "the manner in which welfare – seen as an interaction between state, market and family or private household – is produced or organized in a particular country", attributing this definition to Danish sociologist Gøsta Esping-Anderson but updating his term "welfare state regimes" to "welfare regimes" to better include the role of the private family in the term).

[5] For one general comparative legal and sociological description of Sweden's families and regulation over time as of 35 year ago see D. Popenoe, *Disturbing the Nest,* De Gruyter, 1988. Popenoe's seeming assumptions that the weakening of the traditional nuclear family he observed in Sweden could be problematic have been criticized in Sweden, which has, most Swedes believe,

The past 100 years of Swedish family law are often characterized as "progressive" in comparison to the family law of other nations. Comparative family policy scholars provide some examples that justify this reputation[6]:

> "Historically, Sweden has led the way for many countries regarding family policy issues. Sweden has a history of passing reforms that were radical in their day, such as the abortion law of the mid-1970s that granted pregnant women the right to abortion up to the 18th week, the divorce law of 1974 that permitted divorce without a particular reason and without mutual consent, changing parental leave insurance in 1974, granting fathers the same rights as mothers to remuneration for leave from work to care for a child, and completely banning any person from using corporal punishment (1979).
> More recently, laws allowing homosexuals to adopt and receive insemination were passed as well as legalizing same-sex marriage".

Some of the history as well as the current state of this forward-looking family law and policy are described further in the following sections of this chapter.

2. Swedish legal sources

The Swedish legal system can be described as a "mixed system", both continental-like, with its civil law tradition, but also including features more familiar to common law legal professionals. For example, court decisions, especially of the Swedish Supreme Court and the Swedish Supreme Administrative Court, are of such importance that they cannot be called merely persuasive, even if many scholars continue to distinguish this from the formally-binding *stare decisis* tradition in many common law jurisdictions[7].

One notable focus in the Swedish legal system that truly does differ from for example EU legal sources' hierarchy is on legislative preparatory materials, also known in English as legislative history materials, especially

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equally strong nuclear families headed by non-married partners as well as a relatively successful policy to promote and create gender equality.

[6] M.B. WELLS, D. BERGNEHR, *Families and Family Policies in Sweden,* in M. ROBILA (ed.), *Handbook of Family Policies Across the Globe,* Springer, 2014, 91-107, 93.

[7] As a lawyer trained in the United States and subsequently in Sweden, I find this distinction outdated and unhelpful beyond certain pedagogical purposes, as even in common law jurisdictions each new case is unique and thus most often can be distinguished if the court is inclined to rule against earlier-established precedent; see E. PERRY (2019), *op. cit.*, 264-265 (and, on the Swedish hierarchy of sources, 51-53).

the propositions (government bills) for new statutory law and the expert reports from government-commissioned investigations. Such preparatory works are of great importance for courts and others establishing "what the law is" on a given question.

The Swedish legal system is also a "dual system", meaning that international conventions and other treatises are not directly legally binding upon national actors unless they have been adopted as national legal acts. Instead, Swedish national legal acts are supposed to be written and interpreted in harmony with ratified international conventions. Some international instruments have direct applicability in Sweden however, such as the primary EU sources of law and also the conventions that have been incorporated into Swedish law word-for-word, such as the UN Children's Rights Convention (which Sweden had also considered binding while enacting and enforcing national law for the many decades since Sweden's ratification of the Convention, even before its incorporation).

B. The Swedish legal concept of parenthood (*föräldraskap*)

Swedish law today seeks to satisfy a child's fundamental right to be assigned legal parents[8]. This includes a right, to the extent possible, to learn the identity of and to be cared for by one's parents, as set forth in the United Nations Convention on the Rights of the Child (UN CRC) at Article 7, the text of which has bound Sweden since its 1990 ratification of the Convention[9]. The Convention subsequently has been incorporated fully into Swedish national law, to further underscore to all state decision-

[8] A. Singer, *Barns rätt* [English: 'Child Law' or 'Children's Rights'] (3rd ed.), Iustus, 2022, 36.

[9] SOU 2022:38 *Alla tiders föräldraskap – ett stärkt skydd för barns familjeliv* [Parenting for All – a Strengthened Protection for Children's Family Life] 271. The convention entered into force in Sweden on 2 September 1990. Its Article 4 obliges Sweden to take all appropriate legislative measures, administrative measures and other measures needed to implement the rights recognized in the Convention. No legislative measures were considered necessary in order for Sweden to ratify the Convention because Swedish law was considered compatible with the provisions of the Convention. The same conclusion was reached in November 2020 during the legislative process that led to the incorporation: The Convention on the Rights of the Child investigative group submitted its report, The Convention on the Rights of the Child and Swedish law. According to the report, Swedish legislation and practice for the most part was already in accordance with the Convention's requirements, and yet in certain areas the provisions of the Convention did not (and still do not) receive sufficient weight or have optimal impact on decision-making in practice. See SOU 2020:63 *Barnkonventionen och svensk rätt* [The UN CRC and Swedish Law]. This justified incorporation, to bring increased awareness among those actors at national and local levels who apply law affecting children in Sweden.

makers that all creation and application of the law must honor children's rights[10].

1. Parenthood in Swedish national law

The right to legal parents (*rättsliga föräldrar*) is, as one might expect, also protected by the Swedish state in its purely national family law. Questions of parentage are regulated within the Swedish Parents Code [*Föräldrabalken*, FB, sometimes translated as Swedish Children and Parents Code but here I use the literal translation]. There is no explicit starting point in any notion of family bloodlines or broader kinship groups[11]. The law does not explicitly contain a principle akin to for example Italy's *favor veritatis*, although the law as a main rule does seek to confirm especially legal paternity (*faderskap*) in accordance with genetic truth[12]. The legal focus on establishing paternity is in recent times often tied to children's rights to know their genetic origins[13], but historically was primarily motivated by lawmakers' desire to ensure the financial contributions from children's fathers that were necessary for the children of unwed mothers to avoid growing up in poverty[14]. Swedish parental regulation's almost exclusive focus on fatherhood (establishing paternity)[15] can be understood from this perspective.

Swedish law today continues to contain, as this chapter describes, some contradictions that make it difficult confidently to conclude that legislative intent is clear as to the definition of "parent" or "parenthood". Legislative intent today is not clearly to equate the concept of "parent" with identifying and legally registering the genetic father and birth mother of every

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[10] The Swedish Act on the UN CRC [*Lag* (2018:1197) *om barnkonventionen*] came into effect on 1 January 2020. It provides that the original (English and French) text of the Convention is applicable as Swedish law.

[11] One could also argue however that certain Swedish laws, for example those governing names and family surnames, represent a small ember remaining from past traditions when family clans were more centralized in Swedish culture and law. See the Swedish Act on Personal Names (*Lag* (2016:1013) *om personnamn*) (e.g. enumerating which last names a child may receive and requiring a change of a child's name at the time of most adoptions but allowing a court to permit instead the adoptee to retain his or her existing last name or a hyphenate name consisting in part of that name). Factors including a decline in prominence of select noble family names and increasing internationalization in recent years have in any case reduced the uniformity of Swedish names.

[12] SOU 2022:38, ibid n 9, 236.

[13] Swedish lawmakers have described the right to know one's genetic origins as an aspect of the right to private and family life protected under Article 8 of the European Convention on Human Rights. SOU 2022:38 at 283.

[14] *Id.* Women were rarely self- and family-supporting income earners at that time.

[15] *Id.* at 235 (describing the history of statutes on legal paternity in Sweden since 1917).

child, although the lawmakers' stated aims often at least allude to correctly establishing the genetic father, and the woman who gave birth, as the main rules. It is no clearer that the concept of "parent" is to be based, instead of on genetics, on an intention to parent the child within a family unit with another parent, or otherwise socially to parent the child, although lawmakers' aims also often express a willingness to facilitate such parenting of individuals' non-genetic, non-biological children.

For example, on the one hand, recent legal changes have expanded the paternity presumption so that a woman married to a birth mother will be presumed to be – and thus will be registered automatically as – the child's other parent, regardless of genetic link to the child (which in most cases is known to be lacking, though in exceptional cases she might have donated her egg to her wife)[16]. Men married to birth mothers are also presumed to be the children's (genetic) fathers and are routinely registered automatically as their legal fathers, even in situations where it is unlikely that there is an actual genetic parent relationship. Here, however, the legislative intent is that the "correct" genetic father should be identified and the presumption overcome in situations where the husband is suspected not to be the genetic father[17]. Female and male presumed parents may have their parental status removed if they have not used assisted reproductive technology as it is regulated in Swedish law, that is to say in such a way (specifically through the Swedish healthcare system or through a regulated clinic abroad also requiring information availability) that the resulting child will have access to information on the identity of any gamete donors[18]. Those gamete donors do not need to be recorded as the genetic parents of the child, however.

2. Priorities in tension?

In other words, and as is true in perhaps every family law system in the world, as these rules have developed over time, a consistent theoretical choice has not consistently been made and articulated. This is despite

[16] This welcome reform means that female spouses (same-sex partners) are, after a long period of discrimination, now treated more similarly to men married to a birth mother, and that their children are secured two legal parents in a more immediate and simple way. Still, however, genetic parenthood for a woman is legally irrelevant under Swedish law, even analogously for a female parent who did not give birth but is the genetic mother.

[17] See FB 1:2 and, for female spouses, 1:9. These are detailed further in this chapter's Section III.

[18] See FB 1:15 and the subsequent section of this chapter on the right to know one's origins.

detailed and comprehensive efforts by family law expert academics, lawmakers and judges (among others) to keep the Swedish law relating to parenthood in line with legislative intents for it and respectful of the human rights and interests of individuals involved, with a starting point being the best interests of the child.

Many inconsistencies within Swedish parenthood law stem, in my view, from several self-imposed limitations on those drafting legislative reform proposals, most clearly the retention of two specific underlying priorities. These are justified with arguments that many family law scholars, even among Swedish scholars, do not find fully convincing.

One is a long-held *desire among lawmakers to protect automatic legal parenthood for a person giving birth to the child born*[19], regardless of known lack of genetic link or intention to become a legal or social parent to the child. This may partially serve to protect existing legal aspects of biological (gestating) parents' unique position in comparison to other parents, but can easily be argued to cause more legal uncertainty, confusion and weakly-justified sex-based discrimination than a mere (surmountable) birth parent presumption would cause[20].

The other self-imposed limitation on the Swedish lawmaker in this field is a *desire to pursue reforms that lead to greater equality of treatment* for a wider group of the diverse kinds of families with children living in Sweden today, *without expanding* legal parentage (filiation), legal guardianship (parental responsibility) or the kinds of parental roles designated in the population register *beyond their traditional two-parent limits*. Where the spouse to a person giving birth is presumed to be a legal parent, and is socially fulfilling that role, why else would lawmakers not let that continue and separately record genetic parentage to satisfy the child's right to know their genetic origins, as is done within the relatively new legal provisions on medically-assisted reproduction?

[19] See on this point SOU 2022:38 at 397 (noting that no explicit reason is given in earlier preparatory works to Swedish law on parentage regarding why different legal importance was made to follow from genetic ties through human egg versus sperm cells; "From the importance the lawmaker has given to the unwritten maternity principle, we can however conclude that the position taken likely has its basis in the legislator's strong interest in protecting parenthood for the one who gave birth to the child. The one who has given birth to the child always becomes its parent, even if it is someone else who has contributed the egg that has led to the child's birth" per FB 1:7, added when egg donation was first permitted in Sweden)). Is this not circular reasoning, that "we do not find any stated reasons that this was important to the lawmakers of years past, but it seems it was really important to them and thus that is our reason"?

[20] This argument will be expanded upon in a separate upcoming publication.

The result is a Swedish concept of “parent” (and “parenthood”) that is at once progressive and increasingly inclusive, in the best interests of Swedish children, but also imprecisely defined and understood, perhaps because it is pigeonholed into a two-parent norm, leading to negative results in individual children’s lives more often than otherwise could be the case[21].

3. The legal terms “mother”, “father”, “parent per FB 1:9”

Swedish family law presently provides for three possible legal parent designations: “mother”, “father” and “parent according to FB chapter 1, section 9”.

The main rule for assigning motherhood is not defined in statutory law. Its meaning instead follows from the unwritten principle, common throughout Europe, of “*mater semper certa est*” (“it is always clear who is the mother”)[22].

Rules assigning legal paternity are explicitly set forth, based on the historically main rule of paternity presumption for a man married to a birth mother along with several other rules governing acknowledgement of and consent to paternity in other situations, as well as a rule introduced in 2019 governing whether a legal man giving birth to a child will be termed “father” or “mother”: he will be a “father”, per FB 1:11, but also various provisions originally addressing mothers giving birth will be applicable to him.

The term given in Swedish statutory law for the third legal parent designation, “parent” – the commonly-used gender-neutral term for a parent of any type – actually applies only to the non-birth-mother parent within a same-sex female parenting couple, as regulated in FB 1:9. This has been recognized by many scholars (and by a recent legislative reform-proposing

[21] For example, courts (seeking to serve children’s best interests) are required to choose between a stepfather and a biological father rather than permitted to award some type of legal parenthood (filiation) to both, if all relevant parties desire and separately from any determination of parental responsibility. Also, a child and the child’s social parent, with whom the child has lived since birth, may or may not be denied a simple path to legal parent-child status through presumption or acknowledgement of parenthood, based on how likely the parent is to be a genetic parent to the child, even though in other situations genetic and legal parentage need not coincide for legal parentage to be registered. A legal parent may also lose that status in certain instances where the genetic or biological circumstances of a child’s birth are revealed at a later time. Such tensions are described in this chapter, with the aim of informing future lawmaking in Sweden, in other EU Member States and, to the extent appropriate, at the EU level.

[22] See e.g. SOU 2022:38 at 378.

government-appointed expert group[23]) as unnecessarily confusing and difficult to summarize succinctly.

For this and other reasons, the expert group recommended in 2022 that the terms for the existing three categories of legal parent be removed and replaced with the term "parent" in a reformed version of the Swedish Parents Code ("FB").

4. Proposed reforms for potential adoption effective 2024

The Swedish Government decided in December 2020 to appoint an expert to prepare the above-mentioned investigative report and proposal. The expert group subsequently named its investigation "The investigation into a parentage law for all" and described its purpose in the resulting report's English summary[24]:

> [T]o draft – with the best interests of the child as the starting point – a more cohesive, gender-neutral and equal parenthood regime and also rules about parental responsibility that are adapted to differing family constellations.

Per new statutory language drafted by the above-mentioned appointed expert investigative group (and originally proposed to go into effect on 1 January 2024, although this has not occurred), a distinction would be made between the "parent that gave birth to the child" and "the child's other parent", in the relatively few statutory provisions where such distinction is necessary[25]. Many other changes to the Parents Code and to other statutory law related to many of the topics addressed in this chapter were also suggested.

Because the Swedish government has not to date introduced a specific bill ("*proposition*") to the Swedish Parliament to adopt the proposed new version of the Parents Code, current law is described herein. This is done with the caveat that formal reception of the experts' recommendation, as reflected by opinions submitted by stakeholders and independent experts to which the proposal was referred as part of the law-making process[26], has

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[23] See SOU 2022:38 at 413.

[24] SOU 2022:38 at 57.

[25] See SOU 2022:38 at 30. The reform proposals have been subjected to a public and stakeholder comment process, the period for which ended on 29 August 2023. No bill has yet been proposed based on the recommendations.

[26] See The Swedish Ministry of Justice [*Justitiedepartementet*], Referral of SOU 2022:38 [*Remiss av SOU 2022:38*], diary number Ju2022/02331 (updated 6 March 2023) https://www.

seemed largely positive, as has its informal reception[27]. It would therefore not be surprising for such reform to be adopted into law in the near future.

5. Distinguishing other legal aspects of parenthood from legal parentage

Legal parenthood (or more precisely "legal parentage" or "parental status"), as a relational, civil status, does not expire when the child becomes an adult, but may at any time under Swedish law be lost or signed away, for example by court-ordered or voluntary adoption of the child by another parent or parents.

One's status as a child's legal parent does not always coincide with the right or responsibility (1) to give physical care to and to live with, (2) to visit with or (3) to participate in decision-making concerning a child. These aspects of "parenthood" as it might be more broadly defined could be termed (1) (physical and residential) "parental responsibility", formerly more widely and in some jurisdictions still today known as "physical custody"; (2) rights of the child to "visitation" with a parent (also known as "rights of access" for the parent and child to each other); and (3) "joint" or "sole parental responsibility" (in some jurisdictions known as "legal custody" or decision-making authority). These rights are, in contrast to parenthood, all temporary, expiring when the child reaches the age of majority[28].

As introduced above, a proven *genetic* parental relationship to a child is controlling under Swedish law when state actors such as courts and social agencies seek to confirm whom will be recognized as a legal *father*, yet a biological relationship (specifically a *gestational* relationship) is controlling over genetic veracity when confirming who will be recognized as a legal *mother*[29]. Once confirmed, these parent-child legal relationship cre-

regeringen.se/remisser/2022/08/remiss-av-sou-202238-alla-tiders-foraldraskap--ett-starkt-skydd-for-barns-familjeliv/ accessed 1 September 2023.

[27] This was a topic of informal discussion among Swedish academics in attendance at the two Uppsala University workshops on the topic of social parenthood in law and practice hosted by the author in November 2022 and May 2023. These and other discussions with Swedish academics and other experts form the basis for this conclusion.

[28] See FB 7:1 paragraph 2.

[29] The reasons for and tensions caused within Swedish family law by this distinction are further discussed below, but can be summarized as relating to the Roman Law-derived European legal maxim of *mater est* as well as practical considerations such as wishing to secure a child's right to financial support (traditionally from fathers) and also to resist the use of international surrogate-mother arrangements. Regarding the historic emphasis in Swedish parenthood regulation on

ates *inter alia* inheritance rights between the parent and child, as well as a right for the child, while a minor, to be supported by this parent financially, per FB Chapter 7.

Rights to child support (child maintenance) are, from a comparative law perspective, somewhat weak, reflecting the modern Swedish welfare state's design as one freeing the individual from dependence on the private family. Under modern Swedish law, for example, a minor child cared for 50% of the time by each of two parents in two separate households has in most cases no right to receive child support in the household of the lower-income-earning parent[30]. Also, an adult "child" in need of support is entitled to aid from the national and local governments; no legal support duty can be imposed on a family member, as it is in some countries, such obligation having been removed from law during the development of the strong Swedish welfare state[31]. In adulthood, then, significant legal consequences can be felt by a social parent and a child who are not designated as a legal parent and child to each other, but mainly in Swedish inheritance and migration law contexts, not in the care or financial support contexts that are strongly relevant for minor children. A sense of belonging to each other in a family legally recognized as such does nonetheless lead some adult children and their social parents to seek to become legal parent and child to each other, generally through Swedish adoption law[32].

C. The Swedish legal concept of family

The legal community uses the term "parentage" or "parenthood" (*föräldraskap*) as a catch-all term for the three types of legal parentage described above (maternity, paternity and parenthood per FB 1:9) the latter two defined in the Swedish Parents Code. In contrast, the term "family" is not

establishing paternity for children born out of wedlock and its evolution, see e.g. SOU 2002:38 at 235–237.

[30] See NJA 2013 s 955 (finding a duty for a higher-earning parent to provide support for children even during their time at a lower-earning parent's home in a relatively extreme situation where the lower earner could not meet the children's basic needs during their time with her).

[31] E. Perry (2019), nt. 4, 117–119. The private economic duty to support one's minor children has also become relatively weak in modern Swedish law, also largely due to the (often deliberate) easing of private dependencies in favour of a social-democratic welfare-state responsibility to provide financial supports in a more equal and guaranteed fashion to individuals unable to support themselves, including due to their minority (temporary status as children growing up and required to attend school). Perry (2019) 87–92. There have been recent attempts to better inform parents about their duty to contribute to the support of children not living with them, knowledge about which has declined due to the success of a public child support guaranteed benefit regulated within SFB Chapters 17–19.

[32] See FB Chapter 4 and the recent Swedish Supreme Court case NJA 2022 s 66.

directly defined in Swedish national law[33]. As Swedish family law scholars describe, there is no uniform concept of the family in Swedish family law more broadly defined either; married and unmarried couples can constitute a family, with and without children, although "household" is instead sometimes in focus. More broadly within Swedish social policy and law, the concepts "family policy" and "families with children" are often discussed, referring to groups within which individuals have legal relationships with each other[34].

The lack of a clear definition of "family" is seen in Sweden as preferable, in that it affords more flexibility and avoids possible undue discrimination in law that could disadvantage diverse types of families that might not fit within any chosen definition, as developed more fully below.

The lack of a definition also reflects the deliberate lack of centrality of the family as the basic unit of society in Sweden. Family policy has for many decades instead considered individuals, each in an independent relationship to the state, as the basic unit of society. It has explicitly and coherently aimed to minimize individuals' reliance on the family through "de-familialisation" of social benefits and social responsibilities[35].

One can however triangulate the meaning of "family" within Swedish law in a number of ways, and legal scholars (among others) regularly do so. This section briefly does this in two contexts not otherwise discussed

[33] This chapter generally is limited to Swedish national legal sources, to serve this project phase's aim of comparing current national law on topics related to social parenthood in support of later phases. Worth noting is that EU law (defining for example which family members are afforded rights to free movement within the EU along with an EU citizen) is also directly binding on and even has primacy before all Swedish courts, administrative agencies and other state bodies. See the Treaty on European Union Art. 4(3) (regarding the duty of sincere cooperation) and relevant case law of the Court of Justice of the EU (regarding the supremacy of EU law in cases of direct conflict with national law). Swedish political actors have a part in negotiating and drafting EU law, thus the Swedish perspective on the family and on parenthood is to some extent also discernible within EU legal sources, negotiations and proposals for new EU legislation.

[34] See e.g. A. Agell, M. Brattström, *Äktenskap & Samboende* [Marriage and Cohabitation] (7 ed.), Iustus 2022, 18.

[35] See K. Nygren, R. Naujanienė, L. Nygren, *The Notion of Family in Lithuanian and Swedish Social Legislation*, in 17(4) *Social Policy and Society*, 2018, 651–663, 654 (noting further: "State involvement is legitimised [in Sweden], and many services are universal, tax-funded and based on residence, which means that individuals, to a large extent, are able to uphold a reasonable living standard independent of family. Lithuania, on the other hand, has been described as a re-familialised welfare state that has undergone a political shift, moving from high state involvement during the socialist era, towards a minimalist state and increased market orientation. What were state responsibilities have shifted to being familial responsibilities, and state support for families is more rhetorical than a reality […]; welfare systems are partial, underfunded and underdeveloped." One internal citation omitted.).

within the remainder of this chapter: the inheritance law and social (specifically parental leave) benefit law contexts.

1. The family within Swedish private law on inheritance

By examining the scope of the group of individuals protected by Swedish private family law, for example in the law of succession following an individual's death, one can ascertain what types of relationships constitute close and less close family connections, and which rights and privileges current law provides.

The Swedish Inheritance Code 1958 (Ärvdabalk (1958:637)) controls in this legal area, as modified over the years since its enactment. At Chapter 2 § 1, the Code defines the closest heirs by consanguinity as the deceased's descendants for inheritance purposes (*bröstarvingar* or "breast heirs"). A deceased person's legal-recognized children or, in the event that the children predecease their parent, the deceased person's grandchildren are thus considered the closest "family" members from the inheritance perspective. Children take in equal lots, with none favored on the basis of age or sex. If a child is dead, the child's descendants shall take his place, and each branch shall take an equal lot.

Social children, including and step-, "bonus" children or foster children, do not inherit. Instead, the next closest family members to an individual from the inheritance perspective are the deceased individual's parents, who take in the event that no legal descendants are living; the individual's siblings and half-siblings are next, and take to the extent that one or both parents are deceased[36].

Grandparents to the deceased are in the third class of relatives that inherit in the absence of any living legal descendants, parents or siblings, but more distant relatives, such as cousins, as a main rule do *not* inherit[37]. A special national fund supporting the founding of organizations working to advance children's, disabled people's and elderly people's interests instead receives the net estate of the deceased[38].

There is one interesting statutorily-defined exception, clarified further in recent case law: if, at the time of a surviving spouse's death, only one of

[36] The Swedish Inheritance Code [*Ärvdabalken*, ÄB] 2:2.

[37] ÄB 2:3–2:4. These grandparents, called "father's parents and mother's parents" in the statute, also explicitly include the parents of an individual's second female legal parent, who under the Swedish Parental Code (FB) 1:9 is known as a "parent" (compared to a "mother" or a "father" as also defined in the Parental Code).

[38] ÄB 5:1.

the spouses has any "living heirs with a concrete right to inherit still unsatisfied" [*arvsberättigade*], then those heirs inherit "everything"[39]. In other words, if only a first-deceased spouse's descendants (stepchildren to the more recently deceased spouse, generally) are living *and did not previously take their inheritance at the time of the first spouse's death but rather waited until the second spouse's death like a joint child would be required to*, then the stepchildren will inherit everything the second-deceased spouse leaves behind, rather than the state fund[40].

Property will stay in the more-loosely-defined family of individuals who were socially close to the decedent and whom the decedent might have wished to care for financially after death, instead of having the net estate escheat to the state, but – the Swedish Supreme Court's textual interpretation of ÄB 3:8 has clarified – only if they retained a concrete right to delayed inheritance, meaning in practice only if they behaved like a joint legal child.

From the Swedish family and inheritance law's perspective, then[41], both legal and exclusively social relationships created by marriage, cohabitation or social parenthood have less recognition as close family relationships than the legal relationships described above, between biological or adoptive descendants and ascendants. The most-favored family relationships are thus most often blood (genetic) relationships. Social children but also marital partners (spouses) and legally-recognized cohabitants who have entered one's family but lack a bloodline or adoptive connection can be said to have a lesser status.

This was even more strongly reflected in Swedish law historically, in that surviving spouses under Swedish inheritance law in force until 1987 had no right to inherit from a deceased spouse before their joint children; the adult children of a surviving spouse had a legal duty to support their parent if necessary until 1979, when it was removed from law[42],

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[39] ÄB 3:8. The Swedish term's translation, a very functional one for clarification purposes, is my own.

[40] M. Brattström, A. Singer, *Rätt arv* [English: *Inheritance Law*] (6th ed.), Iustus, 2023, 155–157 (critically discussing recent case decisions on this rule as disfavoring stepchildren).

[41] Inheritance law is considered a central part of 'family law' in Sweden, although this categorization varies within the EU. See E. Perry, *Harmonising Family Law Across Borders in Europe,* in R. Fretwell Wilson, J. Carbone (eds), *International Survey of Family Law 2022,* Intersentia, 2023, 379.

[42] M. Brattström, A. Singer (2023), ivi nt. 40, 24 (citing preparatory works that proposed these changes).

Though Swedish spouses inherit from their deceased spouses today, this is limited by the deceased's heirs right to an immediate share, for non-joint children, and to a delayed share, for joint children.

Legal cohabitants, not married to the deceased partner, have no right to inheritance, not even if they have joint legal children together and were living as a family at the time of one partner's death. The legal children in such a case inherit their deceased parent's entire net estate, and the surviving parent may be allowed to manage the assets only under state supervision, to protect the heirs' interests[43].

On the whole, then, Swedish inheritance law sets legal children first and marital partners second, but protects both as family to a deceased person. Swedish surviving spouse's right to keep and to use the first-deceased spouse's property, along with the survivor's own, is significant in a national legal system where the main rule regarding property owned by spouses is that every item of property is owned and solely controlled by the individual who legally has ownership of it[44]. Nonetheless, social children and non-marital partners, although extremely common in today's Swedish nuclear family, have no inheritance rights[45].

This implicates the discussions of whether Swedish family law is sufficiently responsive to changing societal values and realities regarding what "family" entails, whether gender equality and independence are threatened by the current law, and whether it is sufficiently neutral as between individual's choice of family type. It also incites discussions of whether there

[43] K. Walleng, *Att leva som sambo – En civilrättslig studie om det rättsliga skyddet för sambor och om det är i takt med sin tid* [English: *To live as cohabitants – A civil law study of the legal protection for cohabitants and if it is keeping pace with its time*], Iustus, 2015, 335–347 (describing the difficulties that may arise when a parent's children inherit before their living parent because the deceased and the living parent were cohabitants and ways that valid wills as well as life insurances can alleviate but not prevent the difficulties).

[44] This per the Swedish Marriage Code (ÄktB) 1:3 ('Each spouse controls his property and is responsible for his debts').

[45] There is a cohabitant's forced share for protective purposes, similar to but set at a level one half that of the level set for spouses. The Swedish Cohabitation Act 2003 (*Sambolagen* (2003:376) § 18 para 2. There are also differences favorable to a surviving cohabitant partner between property division of the cohabitant home and its contents after one cohabitant's death vs. after a separation. See the Swedish Cohabitation Act 2003 (*Sambolagen* (2003:376) § 18. Under Sweden's regulation of cohabiting couples, the home and the personal property it contains are as a general rule subject to division upon separation or death. If the relationship ends due to a cohabitant's death, the surviving cohabitant may choose whether a property division will take place (per the Act's § 18), meaning that a surviving cohabitant owning more than 50% of the divisible property (the home and housewares if acquired for joint use) need never transfer value to the estate of the other cohabitant, but the cohabitant with less than 50% of the divisible property does have a right to receive value from the estate, albeit limited to the defined divisible property, if any exists, but not as a recognized heir or spouse.

by design should remain a difference between cohabitant and marital partnership regulations, to allow for knowing choice by couples, and on the other hand whether the public is aware of how much weaker the protections for cohabitants are today, potentially compromising the rights and interests of children born to cohabiting parents[46].

2. The family as defined and conceptualized in public benefits law

The family as defined in Swedish public law, for example in the laws defining which individuals are entitled to various payments called “family benefits” (social insurances regulated within the Swedish Social Insurance Code or *Socialförsäkringsbalk* (SCB)), is also largely focused on the relationships between legal parents and children, but in contrast to the (older, yet still in force) inheritance law usually equates a cohabitant partner with a spouse, not treating a marital relationship as more qualifying for family benefits than a cohabitant one[47].

For example, the ‘family benefits’ section of the SFB clarifies that it is comprised of ‘provisions on social insurance benefits to parents and chil-

[46] EU law, it should be noted, defines as a ‘family member’ to a Union citizen the registered partner of the Union citizen for free movement purposes, ‘if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State’. Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, art 2(2)(b). Sweden considers cohabitants from other Member State moving to Sweden as ‘family members’ in the same category as registered partners, although no registration is required to become a legally-protected cohabitant in Sweden beyond administrative registration at the same home address. English translations by Swedish state actors sometimes refer to such a cohabitant as a ‘common law spouse’. (see, e.g., Embassy of Sweden, Sweden Abroad ‘Family members of EU citizens’ <https://www.swedenabroad.se/en/about-sweden-non-swedish-citizens/india/going-to-sweden/visiting-sweden/family-members-of-eu-citizens/> accessed 10 April 2023) or list three categories of partners qualifying for free movement to Sweden: ‘cohabitating partner, spouse or registered partner’ (see, e.g. The Swedish Migration Authority (*Migrationsverket*), ‘Residence cards for an EU/EEA citizen’s family who are non-EU/EEA citizens’ <https://www.migrationsverket.se/English/Private-individuals/EU-EEA-citizens-and-long-term-residents/Work-study-or-live-in-Sweden-for-EU-EEA-citizens/Residence-cards-for-family-who-are-non-EU-EEA-citizens.html> accessed 10 April 2023). Under the relevant national legislation in Sweden, the Cohabitation Act, cohabitation is thus considered treated as a legal form akin to marriage, according to Sweden’s application of EU free movement law, specifically to its interpretation of Article 2(2) of Directive 2004/38 which defines the ‘family members’ relevant for the purposes of the protection provided by the Directive to include a ‘spouse’ (art 2(2)(a)), the ‘registered partner’ (art 2(2)(b)) but only as qualified above, as well as descending and ascending relatives.

[47] Note that previously in Swedish statutory law, cohabitants having at least one joint child were treated differently than other cohabitants, but this was recently removed from law.

dren'[48]. Those five benefits include 'pregnancy allowance for those who, due to pregnancy, have reduced ability to work or are prohibited from performing their gainful employment'; 'parental allowance benefits in connection with the birth of a child, upon adoption of a child or in other situations when a parent is caring for a child'; 'child allowance as a general allowance for children'; 'maintenance support for children whose parents do not live together', and 'special family benefits in certain cases of adoption or when a child suffers from an illness or disability'[49].

The term "parenthood" (*föräldraskap*) is defined for SFB purposes, according to SFB 2:14, as it is regulated within the Swedish Parents Code (FB)'s first and fourth chapters. Those chapters in turn currently define, as introduced in the previous section, "father" and "parent" (the female partner to a mother's designation if they both have legal parentage of a child) under Swedish law, in addition to how adoption affects such statuses. FB provisions leave largely unwritten the definition of a "mother".

Notably, some social parents are included in the Swedish Social Insurance Code's provisions on "family benefits" in ways not included in the Parents Code. Defined within the SFB are a 'soon-to-be adoptive parent' (a social agency approved person who has taken in a child for continuous care with the aim of adopting the child, per SFB 2:15) as well as a 'foster parent' (called a 'family home parent', meaning a person 'who has received a child for permanent care and upbringing in a private home that does not belong to either of the child's parents or someone else who has legal custody of the child', per SFB 2:16).

Further, for the purpose of applying the law on parental allowance benefits (social insurance payments while an adult is on 'parental leave'), the following persons are 'equated with' a parent[50]:

the parent's spouse who permanently lives with the parent;

the parent's cohabitant (as legally defined and protected by the Cohabitation Act);

the specially-appointed guardian caring for the child (a temporary guardian), and

the prospective adoptive parent.

There is thus a category of persons who, while not defined using the word 'parent' (even in qualified form) generally, are considered for the public benefit regulatory purposes to be equal in their caregiving function

[48] SFB 8:1.

[49] SFB 8:2.

[50] SFB 11:4 (this researcher's translation from the original Swedish).

to a legal parent for social benefit purposes, specifically while they take time off from work to care for a child in a legal parent's stead. This status is conferred on such persons only so long as they live with one of the child's parents, and (not or) they are married to or in a marriage-like (cohabitant) relationship with that parent.

Before the current wording of these rules went into effect on January 1, 2019, only cohabitants who had previously been married to or had a child together with the parent were eligible to be equated with the parent, while spouses to the parent did not face the same requirement of joint children with the parent. By 2019, these limitations and the discrimination between different partnership forms that they relied upon were considered unnecessarily to deny a desirable flexibility to different types of families who use parental benefits and were, for those reasons, removed[51].

In the same proposal for statutory reform, the appointed expert group reviewing the law proposed that each legal custodian to a child (usually each parent) get a broader right to transfer some of their parental leave "to a person that is not the child's parent or equated with a parent"[52]. The expert investigators concluded that this legal change would give lone legal guardians a better opportunity to get help and to share the burden of the childcare performed during parental leave with someone close to them, and also would have the effect of giving "families in which more than two parents exercise a parental roll" a similar opportunity to have more than two persons "combine parenthood and work life" while "the child gets to benefit from more parents' care and supervision"[53]. The wording of the preparatory works seems to suggest that he or she who cares for a child – even if not the spouse or cohabitant partner of a legal guardian parent – is engaging in "parenting", whether as a grandparent helping a single legal custodian, a relatively traditional situation, or as one of three or four functional or intentional "parents" in the type of multi-parent family that has been becoming more common in multiple family law jurisdictions.

Swedish lawmakers have, in certain statutory law (notably, public law), thus have already acknowledged that "parenting" of a child may be performed by multiple individuals, even if some of them (most often one or

[51] SOU 2017:101 *Jämställt föräldraskap och goda uppväxtvillkor för barn – en ny modell för föräldraförsäkringen* [Equal parenting and good upbringing conditions for children – a new model for parental insurance] 28.

[52] *Id.*

[53] *Id.* at 29. The person to whom the right to take leave is delegated must themselves qualify for Swedish social insurance in order to take a share of parental leave for the child. In other words, they must have earned income, thus have a right to this form of social insurance.

two) do not have a kinship (parentage) relationship with, legal responsibility for, or decisionmaking authority and a right to information regarding the child (as parentage and parental responsibility statuses remain limited to two persons under Swedish law, as is still the case in most jurisdictions)[54].

It is unclear from the parental leave provisions' current wording, but clearer from the preparatory works, that lawmakers' focus when proposing the reform to the Swedish Legislature for adoption into law was not particularly on strengthening such a social or *de facto* parent's relationship to the child. The focus was more on encouraging more than one parent – particularly from a gender equality perspective – to take significant shares of the guaranteed, paid parental leave available for a child, in line with one of the Swedish parental leave law's purposes. As summarized by the investigators who proposed the 2019 changes[55],

> "The starting point of the investigation has consistently been that children benefit from an early and close attachment to their parents. The proposals made are intended to bring about a more even distribution of parental leave and parental allowance between the child's parents and is expected also lead to a more even distribution of care for the child, which promotes good contact between the child and more than one parent".

Based on the provision's wording, legislative focus could have been instead on the adult legal parent that wishes to choose, within the private family in one of its common forms, to delegate to his or her life partner some or nearly all (up to the limit reserved for each parent) of the *de facto* caregiving during a particular paid parental leave period. From a Swedish family policy perspective, however, strengthening the ability for a parent to allow a cohabitant to take some of one's share of the parental leave for a child from another relationship could work against gender equality goals, if it were to mean in practice that men allow or pressure their current female partners (stepmothers or bonus mothers) to take leave from work to do the hands-on parenting in their place. This is especially true given many years of Swedish statistical reports confirming that women (albeit usually mothers rather than social parent mothers) continue to take more than half of the parental leave available for a given child.

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[54] See, for discussion of jurisdictions that have permitted more than two legal parents or responsibility-holders, J.M. Scherpe, *Breaking the Existing Paradigms of Parent-Child Relationships,* in G. Douglas, M. Murch, V. Stephens (eds.), *International and National Perspectives on Child and Family Law: Essays in Honour of Nigel Lowe*, Intersentia, 2018, 343–359.

[55] See e.g. SOU 2017:101 at 36.

Instead, the investigators emphasized 'a more even distribution… between the child's parents', meaning that, as these experts proposing reformed legislation viewed the situation regulated, it would benefit children and parents and social parents to spread the leave used to more adults in many instances, and for more children to form 'early and close attachments' with more adults. Flexibility for the parent entitled most directly to the leave and access to the leave for additional social parents not before legally entitled to it (if a legal parent agreed to delegate it to them) was deemed more important than protecting against it being used to re-establish traditional gender roles.

This focus and resulting reform to the parental leave benefit laws indicates a social parent's belonging to the 'family' defined by Swedish law, specifically to the set of adults seen as appropriate and sufficiently desirable to care full-time for a child soon after its birth or adoption, and thus to be eligible for social benefit income related to the child's need for parental care. This is true, however only to the extent to which a person with a superior legal protection, a person (usually one of two biological and legal parents) with legal parental responsibility for the child, chooses to delegate this parental leave opportunity and responsibility. The law will not require live-in partners or spouses to legal guardians of children to contribute equally to the child's care, or even overtly encourage it, but it will facilitate it for parents who wish to conduct their households in this way.

Having a romantic life partner thus does not make parenting one's children automatically a joint endeavour with that partner in the Swedish national legal system, but the system promotes removing obstacles for the many children whose legal parents have allowed them to be parented by one or more additional adults in a parental role, most often by their partner. Social parenthood in Sweden remains, then, a kind of delegated parenthood, a situation even recent law reform investigators have declined to recommend should change[56]. Thus the relationship between a social parent and a child remains relatively fragile, the potential for interference with it against a child's best interests a well-recognized problem.

Returning to the question of the meaning of 'family' in Swedish law, such legislative intent does not seem to confirm a state interest or a child-welfare interest in protecting and strengthening 'the family' as a unit in society *per se*, or the potential parent-child-like relationship between the social parent and the child in its own unique right. Few distinctions are made on the basis of the social parent's marriage to the legal parent, thus the child's

[56] See e.g. SOU 2022:38.

'stepparent' due to formal marriage and 'bonus' parent due to marriage-like cohabitation will be treated similarly, now after the latest reforms to the public law on social insurances for children and parents. The marital distinction has nearly been eliminated in Swedish law, where most children are born to cohabitating, not wed, mothers[57]. Swedish public laws such as those described most often instead focus on the household "family" unit, of whatever type, which can be seen as another indication that the individual is the main unit of interest in legal regulation in Sweden.

3. The family conceptualized for general family policy purposes

The scope of a private individual's legal duties to support certain other private individuals, and conversely of legal privileges like citizenship, inheritance and decisionmaking rights which follow from certain legally-recognized family relationships, further help to define the Swedish concept of family, including more specifically the concept of parenthood. Moral versus legal duties can be distinguished, of course, and the society's (or the state's) focus on reducing private individuals' need to rely on "family" (that they may or may not have) is associated with achieving various types of equality in Sweden, more than it is any expression of a lack of personal social bonds between Swedish family members.

Comparatively, of course, some individuals socialized in other societies where for example the elderly are cared for largely by their adult children, grandchildren or clan might experience Swedes' relative comfort with state care for family members (such as the elderly, or preschoolers, or school-aged children) as unwise, undesirable for their personal family or even morally questionable. Such differences in world culture become particularly relevant during a time of increased human migration, including and in some ways especially to Sweden. There has also been some criticism of Swedish family policy among Swedes, questioning whether the notion of love among individualists is plausible[58].

On the other hand, high trust in government and high expectations for quality care provided by institutions outside of the family tend to be associated with relatively good outcomes, for the cared-for that oth-

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[57] See e.g. M.B. Wells, D. Bergnehr, *Families and Family Policies in Sweden*, in M. Robila (ed), *Handbook of Family Policies Across the Globe,* Springer, 2014, 94 ("Of those who live together, Sweden is about evenly split between those who marry and those who cohabit, making it the country with the highest percentage of cohabiting unions. Many Swedish couples will cohabit, have their first child, and then marry, in that order". Internal citations omitted.)

[58] One example is the popular book *Är svenskar människor?* [English: *Are Swedes People?*].

erwise would have highly inconsistent access to quality care (depending on having family members available and able to provide such care), and for the 'carer' family members themselves. Investment in state care capacity results in care responsibilities more evenly distributed among a society's members, particularly to the benefit of women who traditionally bear more of the unpaid care work responsibilities where non-family institutions are relatively weak[59]. Swedish notions of the family and family policy thus aim to reduce obligation but not social and emotional support and respect between individuals with family ties to each other.

To what extent can the larger society be one's 'family', or to what extent can needed services and goods be provided justly to as large a share of the population as possible? What is affordable, what is the ideal level of taxation and oversight, and what should be state-run vs. privatized to provide a robust and high-quality welfare state? Constantly evolving social and political views affect these determinations, in Sweden as in other social democracies.

4. Some history of Sweden's "dual-earner, dual-carer" model of the family

Perhaps the most highly relevant evidence useful to defining the concept of family in Swedish law are the past and present family policy objectives and principles outlined over the last century within Swedish law and governmental publications. In 1969, as one example, a family expert committee was asked by Sweden's governing political leadership to recommend family law reforms that not only reflected public sentiments about what rules would be desirable but also proactively encouraged positive change, specifically towards more equality between men and women[60].

As prominent Swedish family law scholar Anders Agell described it in 1998, 'the famous 1969 directive' deemed legislation to be one of the most important instruments at society's disposal for meeting encouraging societal development in new directions and emphasized that there was no

[59] Women's achievement of equal economic and social power and opportunity is an express aim not only of Swedish equality policy, but also of the United Nations.

[60] Government directive of 15 August 1969 to appoint experts to investigate and propose reforms to the then-current Swedish family law, cited within SOU 1972:41 (Family and marriage: a national investigative report submitted by the family law experts) p 58. The 1969 directive meant that the legislator very clearly chose a new course, moving further from a focus on family unity that characterized older legislation and more towards strengthening of each individual's direct relationship with the state.

reason, according to the government's view as expressed in the directive, 'to refrain from using the legislation on marriage and the family as one of several instruments in the reform efforts towards a society where every adult individual can take responsibility for himself without being financially dependent on relatives and where equality between men and women is a reality'[61].

A government-appointed expert committee report that resulted, SOU 1972:41, reviewed the various central and more peripheral functions of the family, as generally agreed upon in published sociological research. The experts discussed both the importance of the family and the risks it can involve for children's development, for example when it cannot fulfil its functions[62], The 1972 report discussed growing debate at that time on the family's roll in childrearing, specifically a "serious disadvantage of the conventional roll division within today's small families that the father takes part in the children's upbringing to too minor of an extent", resulting in children being deprived of a more "harmonious and comprehensive development" of their personalities that could be achieved if parents of both sexes had extensive interaction with them.[63] The mother's constant presence with the child throughout childhood was argued to have an unduly dominant influence, and to perpetuate the traditional, gendered roles of mothers as unemployed caregivers and fathers as employed financial providers, hindering the achievement of true gender equality.

It was thus considered important for society to support as family policy and for individuals personally to contribute to achieving a model of the family in which not only woman adapted to the traditionally male life pattern as an income-earner but also men adapted to the traditionally female by incrementally taking on more childcare and child development responsibilities so that women could maintain employment during the period in her life in which the family had small children[64], This 'dual-earner, dual-carer model' (including its assumption of a two-parent norm for most families) has remained by far the dominant family model in Sweden to this

[61] A. Agell, *Familjeformer och lagstiftningsideologi,* in *SvJT* 1998:518, 520. Although using family law to encourage positive societal change was presented to the expert committee as desirable, Agell notes further, the family law experts proposing new legislative changes chose a different approach to ethical or ideological matters. Family law experts elaborated in their report in 1972 that the legislation on marriage should not contain rules of a specific ethical nature, since ethical perceptions can change and spouses' personal relationships should develop guided by their individual circumstances and own values.

[62] SOU 1972:41 *Familj och äktenskap I* [Family and Marriage I] 63–82.

[63] SOU 1972:41, 68.

[64] *Id.*

day, which the law now protects to a greater extent regardless of the sex or genders of the parents[65].

5. The principle of neutrality towards common forms of cohabitation

Swedish family law is explicitly intended "to the greatest extent possible to be neutral in relation to different forms of cohabitation," per the 1969 government directive to the family law reform expert committee it was appointing; new legislation was to avoid favouring any one family form over another, mostly with respect to whether couples were raising children as a married or as an unmarried, cohabitating family[66].

Critiques of the law continue to be made, however, within Swedish academic, policymaking and public debates, often based on research evidence that legal provisions nonetheless remain based upon, assume or tend to reinforce a traditional heteronormative, married, two-parent nuclear family norm[67]. This can discriminate against individuals living within family forms that differ from such a norm, causing them harm in various ways[68]. The final sections of this chapter return to this topic, describing instances of discrimination and potential discrimination with respect particularly to children's access to and relationships with social parents.

6. Types of Swedish legally-protected family or household forms

Types of legally-protected family or household forms including children in Sweden are largely based on various forms of legally-protected adult cohabitation. The forms of cohabitation have to some extent have been regulated, among other reasons, in order to protect the interests of children living with the adults as a family or household. These types include the following:

1) The family in which the two adults have married, as regulated by the Swedish Marriage Code (ÄktB);

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[65] See e.g. Perry 2019 *passim*.

[66] See above, footnote 11.

[67] See e.g. E. Jonsson, *Konstruktioner av den sexuella familjen: styrning av föräldrablivande i rättslig reglering av assisterad befruktning och juridiskt föräldraskap* [Eng.: Constructions of the sexual family: the regulation of becoming a parent under Swedish statutory law on assisted reproduction and parental status] (dissertation, Umeå University, 2023).

[68] See E. Mägi, L.-L. Zimmerman, *Stjärnfamiljejuridik: Svensk familjelagstiftning ur ett normkritiskt perspektiv* [Eng.: *Legal regulation of diverse families: Swedish Family Law from a norm-critical perspective*] (Gleerups 2015).

2) The family in which a "registered partnership" exists between the two adults, who are persons of the same sex who entered this type of partnership (identical to marriage but in name) between its creation in 1994 and its abolishment in 2009 when same-sex marriage simultaneously became legally available in Sweden[69]; and
3) The family founded on de facto cohabitation, regulated in the Swedish Cohabitation Law 2003 (*Sambolagen* (2003:376), under which any two persons (over the age of consent) who habitually reside together in a "marriage-like relationship" are protected under the law without any registration as cohabitants but solely with respect to their joint home and its contents if these things were acquired by one of the cohabitants for their joint use[70]; and
4) The family comprising a single adult parent or guardian, who may be targeted by legal changes in both private law (example: child support from the other parent) and public law aimed at easing such families' remaining economic disadvantages compared with two-worker (two-carer) households that serve as the family model lawmakers seek to promote, while simultaneously not discriminating against adults' choices of family form.

D. The Swedish concept of social parenthood

Social parenthood is the relationship between someone serving in a parental capacity without holding legal parentage or parental responsibility for the child[71]. The most often-discussed examples in Sweden today are the following three:

[69] The Swedish Law on Registered Partnership (Lag (1994:1117) was abolished on 1 May 2009 and registered partners given the opportunity to convert their relationship to a "marriage".

[70] See the Swedish Cohabitation Act [*Samboloagen*] § 1 (defining who is considered in a cohabitant relationship within the law's meaning). Over 50% of children born in Sweden are born to unmarried mothers; see e.g. SOU 2022:38 at 414. The large majority are born to their two biological parents living as a family in these de facto, "marriage-like" relationships, in which a mutual residence and household-related property, if and to the extent that each was acquired for joint use as cohabitants, are divided upon the couple's separation (or when one dies), if one cohabitant requests it. This compares to a similar property division that more mandatorily occurs when legal spouses divorce (or one dies), except that the scope of "*samboegendom*" (cohabitant property subject to division) is confined to the joint main home and its contents. While in divorce all of the property held by either spouse, whether acquired before or during the marriage, is as a main rule (subject to a few exceptions) divisible between them in equal shares (ÄktB).

[71] This definition is from the Swedish perspective and differs from the perspective in some legal systems and their societies where persons with legal parentage, parental responsibility and related rights and duties with respect to a child are defined to have social parenthood, if they are persons other than the child's genetic father and genetic plus gestational mother. Topics such as Swedish adoption and assisted reproduction laws are nonetheless described. They are relevant in a

1) The step- or "bonus parent", living with a legal parent and the child and *acting as*, functionally, one of the child's parents, whether to an equal, greater or lesser extent day-to-day than the legal parent(s). This could include the legal parent who has later had his paternity terminated because he was proven not to be the genetic father.
2) The third or fourth parent in an arrangement among several adults to have and raise a child together, whether living with one of the legal parents and the child or living separately but having regular contact with the child and seen by the child and the family as one of the child's parents. The two-parent and two-guardian rules frustrate these social parents' efforts to secure a more equal and less fragile parenthood.
3) The intended parent who was not able under Swedish law regulated the situation to be confirmed as a legal parent or potentially even to legally share in parental responsibility for the child, for example a mother, genetic or not, who has engaged a surrogate for the child's gestational period. The single man who has used a surrogate and his own genetic material is also in this category, although (perhaps surprisingly) the single man who has used a surrogate and donor sperm is not, due to the interactions of the laws on who are considered the legal parents and how adoption to re-assign parenthood to the intended parent or parents works in such situations.

As Swedish legal scholar Eva Ryrstedt confirmed in 2023, "Swedish legislation lags behind this development, and thus in many regards there is a lack of legislation to safeguard the relationship between different types of parents and children. In particular, Swedish law does not yet recognize – with one minor exception – social parenthood"[72].

E. The Swedish concept of *de facto* parenthood

In Sweden, the term "social parent" is somewhat synonymous with "*de facto* parent", but "*de facto* parent" can seem in my view to imply that this person is doing significantly more or exclusively parenting a child, relative to a legal parent or parents.

Swedish context to the regulation of social parenthood because they allow intentional and social parents in many instances to become legal parents.

[72] E. Ryrstedt, *Social Parenthood in Sweden*, in C. Huntington, C.G. Joslin, C. von Bary (eds.), *Social Parenthood in Comparative Perspective,* NYU Press, 2023, 213 (giving as the exception certain foster parents who are given legal parental responsibility and also noting the governmental inquiry regarding more social parenthood protection, which led to SOU 2022:38 expert proposals, discussed elsewhere herein).

Legal parents with decision-making authority (legal custody) of a child in Sweden can generally, informally (without family service agency involvement) delegate actual caregiving of the child to one or more persons away from the child's registered home address, as in when a child goes to live with a grandparent or at a boarding school[73].

If this is done, or if the social service authorities formally place a child in another home with a non-legal parent with or without the legal guardian parents' consent[74], such a person in a parental role could be called a *de facto* parent or a foster parent. Grandparents are sometimes put in this position, for example, if a parent has difficulty caring for the child due to the demands of the parent's employment or struggles with addiction as well as for more benign reasons such as not wanting to move away from a current school when a parent needs to move. There are also significant numbers of what can be called *de facto* foster parents appointed by the state, including among a child's close non-parental relatives. The state is expected to play a relatively active role relative to the private family in guaranteeing that child care in the best interests of the child is provided, and teens may request that social services place them in another home than with their parents, for example.

A *de facto* parent in Sweden might also be an intended parent, for example who has gone abroad to enter a surrogacy contract and has brought a baby home to Sweden who has been denied or is awaiting a legal decision on whether they can be confirmed as the child's legal parent and guardian, perhaps after going through an adoption process. This *de facto* building up of a "family relationship" with the child, which then is deemed entitled to protection under Article 8 of the European Convention on Human Rights, usually occurs while the *de facto* parent is living with and thus has permission to care for the child from one of the legal parents or guardians.

Because this parent could have been an "intentional parent" from before the child's birth and might even be, for example, the child's genetic (but not biological/gestational) mother, the term "social parent" seems to fit them less well. Also, the basis of their and the child's rights to a future legal relationship often hinge on the fact that they are, in fact (*de facto*), from day to day, building the only mother-child or father-child bond the child has. The European Convention's Article 8 right to respect for private

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[73] See e.g. FB 6:11 (the guardian has the right and obligation to decide in the child's personal affairs).

[74] This can occur as set forth in the Swedish Act on Social Services (*Socialtjänstlagen* (2001:453)) and the Swedish Act (1990:52) with Special Provisions on the Care of Youths. These Acts regulate voluntary and involuntary placements of children under 18.

and family life at some point becomes implicated, requiring Swedish state actors to provide a workable path to legal parent or guardian status for the *de facto* parent.

Those typically thought of as "social parents" by Swedes, in contrast, are also typically living with an already-established legal parent and the child, at least during the legal parent's parenting time with the child, but may have no reasonable expectation of becoming a legal parent, due to lack of desire in some cases but often due to the child already having two legal parents (and the law capping the number of legal parents at two). "Social parents" are more likely to be third or fourth parents for a child in Sweden, as a result, "extras" in the role of one of the two adults of the household raising children but not allowed by the law to also become legal parents or guardians on an equal basis as their partners. It would require displacement legally of one of the two existing legal parents, or legal guardians, to attain a legally-protected roll for the social parent, while "*de facto* parents" might be the two primary parental figures (or one of them), but lacking legal recognition as such.

I find it interesting that few scholars problematize the plight of social parents that are third or fourth parental figures to a child; summaries of the law of stepparent adoption, for example, rarely point out that this "upgrade" of legal status is only available if the parent not partnered with the stepparent has died or consented to the adoption, otherwise is removed by a court granting the stepparent adoption request.

II. Public documents related to legal and social parenthood

A. The Swedish Population Register and civil status records

The Swedish Law on the Population Register (*Folkbokföringslag* (1991:481)) at § 2 provides that a child born alive in Sweden shall be fully registered in Sweden's population registry as habitually resident at a given address in the country "if the mother is registered as legally resident in Sweden or if the father is registered as legally resident in Sweden and holds [sole or joint] legal custody"[75]. Children and adults who, after moving to Sweden, can be considered legally resident in Sweden, defined as expecting regularly to spend their sleeping hours in the country for at least one year, also shall be fully registered[76]. All marriages, births and deaths in the

[75] This researcher's translation from the original Swedish.

[76] The Swedish Law on the Population Register 1991 (*Folkbokföringslag* (1991:481) § 3. Regular time spent out of Sweden is acceptable so long as the person is in Sweden at least one

country are to be registered as well; this is done without the full habitual residency registry, confirmation and entry of their basic personal demographic information that is done when a person meets the criteria introduced above[77].

It is within the Population Register that the identity of a person's parents and children are recorded. Certificates evidencing various subsets of information from the Register are available to individuals when necessary. For example, when individuals need to prove to officials outside of Sweden their legal status relationships, they can log into the Swedish Tax Agency's website and order a digital or printed copy of the type of certificate they need[78]. Within Sweden, state and local agencies as well as private companies such as banks generally can access the Population Register directly, thus for example no birth or marriage certificates are necessary to establish parenthood status domestically.

Sweden therefore does not issue birth certificates (evidence of birth or *födelsebevis*) at the time of birth or later. Sweden does not issue international birth certificates either; the document corresponding to the birth certificate is the population registration certificate called in English "Extract from the Population Register." It can be ordered online from Skatteverket by a person whose identity is authenticated by their possession of a digital identification (BankID), including by request with the authenticating marks (such as stamps) that may be required by some foreign jurisdictions[79].

Such extracts, also known as "population registration certificates," can be downloaded instantaneously from the tax authority's website, to the extent that only the requesting individual's personal information will appear on the certificate[80]. If family members' information will also

24-hour period per week or its equivalent, even if the timing is distributed differently.

[77] The Swedish Law on the Population Register 1991 (*Folkbokföringslag* (1991:481) § 1 para 2.

[78] See the Swedish Tax Authority (*Skatteverket*), Information to foreign authorities: explanation of the document population registration certificate https://www.skatteverket.se/servicelankar/otherlanguages /inenglishengelska/individualsandemployees/livinginsweden/populationregistrationcertificate/commonrequestsfromforeignauthorities/informationtoforeignauthorities.4.361dc8c15312eff6fd13b6c.html (accessed 1 September 2023).

[79] *Ivi.*

[80] The Swedish Tax Authority (*Skatteverket*), Order a population registration certificate https://www.skatteverket.se/servicelankar/otherlanguages/inenglishengelska/individualsandemployees/livinginsweden/populationregistrationcertificate.4.361dc8c15312eff6fd117b6.html (accessed 1 September 2023).

appear on the certificate (specifically if an individual is ordering a certificate regarding a minor child's information), it will instead be mailed to the child's registered address, normally within two working days. Individuals 16 years of age and older can access or order home a certificate online containing their own personal information as recorded in the Population Register[81].

B. The contents of population registration certificates

The various excerpts from the Swedish Population Register available to individuals needing them from the Swedish Tax Authority suit different purposes, but together make available relevant information recorded in the Register. A "family certificate" (*familjebevis*) is available, listing one's legal spouse and any children, for example. One might instead request a certificate needed by another authority, usually outside of Sweden, to engage in studies, to begin a divorce, or to prove a death.

The personal information recorded and that may be used for various enumerated public purposes[82] without violation of EU data protection laws include, per Chapter 2, Section 3 (in its latest wording effective 2023-09-01) of the Act on the Processing of Personal Information in the Tax Authority's Population Registration Work[83] the following:

15. personal or coordination number,
16. name,
17. date of birth,
18. place of birth,
19. place of birth,
20. address,
21. civil registration property, apartment number, civil registration place, district and civil registration under a special heading,
22. citizenship,
23. marital status,
24. spouse, children, parents, guardian and other person with whom the registered person has a connection within the population register,
25. relationship according to 10 which is based on adoption,
26. moving in from abroad,

[81] *Ivi.*

[82] These are listed at Lag (2001:182) *om behandling av personuppgifter i Skatteverkets folkbokföringsverksamhet* 1:4–4a.

[83] *Ivi.* at 2:3.

27. deregistration in accordance with §§ 19-22 of the National Registration Act (1991:481),
28. notification according to ch. 5 Section 2 of the Electoral Act (2005:837),
29. burial,
30. social security number that the person has been assigned in another Nordic country,
31. right of residence for a person registered in the national register,
32. time for when declaration of suspension may take place according to ch. 3. 2 § 1 of the Act (2022:1697) on coordination numbers,
33. declaration of suspension according to ch. 3 Section 2 of the Act on coordination numbers with an indication of whether the declaration was made with the support of paragraph 1 or 2 of that section,
34. time when a person with a coordination number or a person with a social security number who is not nor has been registered in the national register has died, and
35. fingerprints, facial images and biometric data derived from them.

C. Public documents related to social parenthood and *de facto* parenthood

In Sweden's Population Register, no information is given on the procreation technique (natural or assisted) or on the nature of the link (biological, genetic, gestational, adoptive) between a parent and a child. At this time, in other words, no information is recorded as to the manner in which a child was conceived or the specific basis for the establishment of a parent-child civil status recorded in the Register, thus social parents who are currently legal parents are most often indistinguishable from biological, genetic parents. It is social parents that are merely *de facto* parents who cannot easily prove any important family relationship with a child via Swedish public documents at this time.

The Swedish Tax Authority also records information on which (one or two) persons have legal custody (*vårdnad)* of a child at any given time. This legal parental responsibility usually follows automatically (as the parentage civil status of "mother" does) for the parent who gives birth[84], as

[84] Recently an intended mother after a surrogacy arrangement abroad whose parenthood the Swedish Supreme Court had recognized in order to protect the child's ECHR rights was granted leave to bring an action for a declaration that she has legal custody of her child against her local social welfare board (*socialnämnden*). 'The California surrogacy arrangement II' ('*Det kaliforniska surrogatarrangemanget II*') NJA 2021 s 437. The Swedish Supreme Court found that the FB did not answer the question of whether state authorities must grant her legal custody of the child as well, based on the argument that the foreign judgment that she was the child's legal parent had

well as for the legal spouse of the mother, including automatically if the parents of a child marry after the child's birth[85].

A share in parental responsibility with the mother must be actively sought for her cohabitant partner who is a parent to the child, after or concurrently with that person becoming a legal parent. This is usually done via an acknowledgement of paternity (or "parenthood per FB 1:9"), through an application, made in person or now digitally, to the Tax Authority; 80% of parents who can acknowledge their parentage digitally use that option, as of January-April 2022[86].

As is described in the section of this chapter on children's right to know their genetic origins after assisted reproduction, information on the identity of gamete donors is recorded separately from in the main population register, in a database accessible by the children when they are deemed of sufficient maturity, as regulated in the Law on Genetic Integrity.

Proof of adoption also is considered sensitive information which is not publicly listed but which can be obtained by relevant parties from legal documents concerning the adoption (such as a court decision, an adoption contract, a social services investigation into the appropriateness of the adoption, or in principle from before-and-after indications of the child's legal parent(s) if information from the population register has been obtained on different dates, before and after adoption, although parentage can have changed for another reason (such as determination or termination of paternity, maternity or parenthood). Most reliable is likely a confirmation from Swedish social services officials (*socialtjänsten*).

Which parent or parents have legal guardianship of a child, sole or joint, is identifiable in the Population Register in a manner in most cases tightly coupled to the civil status of parenthood, as mentioned above. The Swedish Tax Authority, given a child's personal identification number, also can confirm which adult or adults have legal custody to public actors needing this information.

The availability of this information to state actors meeting children and parents has an important practical function. When a municipality, for

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been found to apply in Sweden. The woman was allowed to bring a declaratory action according to the Swedish Procedural Code [*Rättegångsbalken*, RB]'s general rule on status declaratory actions, RB 13:2.

[85] FB 6:3. The argument that these rules are outdated and discriminate today against certain types of parenting pairs and their children without due justification has been made by a number of scholars, and is discussed towards the end of this chapter.

[86] See SOU 2022:38 at 414 and Section IV of this chapter (on parenthood established by consent).

example, is asked to change a child's school of enrolment based on information provided by one parent, it is encouraged to check who has legal custody over the child and thus the authorization to decide upon such a change. Some social, *de facto* parents will lack parentage or custody, and then will not be recognized as authorized to make decisions that a parent or, more often, legal guardian (person with a share in legal custody) would. A power of attorney delegating decisional authority to such a social parent may help alleviate problems that can arise in the daily lives of such social parents and the children they parent.

How or that a parental (kinship) status arose for the parents of a given child can be evidenced using other official documents, if necessary in combination with excerpts from the Population Register. Court judgments determining parentage or medical records of insemination (themselves protected by regulation as medical records) are some examples of documents that may be useful in proving the origin of a particular parent's status with respect to a child, if these facts become legally relevant at a later date, for example in connection with a family move abroad. A current excerpt from the population register should in most cases be the form of public document needed.

Because "social parenthood" is commonly understood in Sweden as the absence of a legal parenthood, the presence of a *de facto* close relationship with a child, similar to a typical parent's, has often arisen just before and during the child and social parent living together as a household family with a legal parent. This connection between the child and the "bonus parent" arguably is not entirely clear from simple family information excerpts. Personal information excerpts showing that the social parent and the child are and have been registered to the same physical address are one means by which to infer, however, that they most likely have a (social, legally-informal) family relationship. Seeking the child's input, given the child's right to express opinions and to receive information in personal matters, could also be of help.

If a *de facto* relationship has continued for a period of time, a private family life protected by the ECHR may have arisen, but even this must be inferred or proven without any official Swedish public document intended to prove it. This is not primarily a matter of documentation; no legally-protected role for a social parent arises automatically or is intended under current law to arise automatically, even if it can be shown that the child

and social parent have lived together for many years[87]. The current or past marriage of the child's legal parent to the social parent, also discernible from register data, might also provide relevant but arguably not sufficient evidence of a social parent's *de facto* relationship as a parent in a child's life[88].

The social parent perhaps enjoys a private family life with the child, which per the European Court of Human Rights is a right of the child deserving of protection from unjustifiable state interference. Evidencing that, however, is – due to a lack of public documents acknowledging the bonus parent as in some sort of relationship to the child – extremely difficult, especially when the child's legal parent, the bonus parent's former partner, has become averse (and legally adverse) to the bonus parent and is not interested in being a witness to the child and bonus parent's close personal relationship.

One document that can confirm that certain decisionmaking authority has been delegated or shared by a legal parent with a social parent is the power of attorney. These can be used to prevent times when confusion arises, at for example a doctor's office or a school, about the role of a bonus parent in the child's life. These are however rarely used, according to the investigation done by the expert group evaluating families in which more than two adults take care of a child and the day-to-day hurdles they can face[89].

Parenting powers of attorney for social parents, a new legal instrument proposed by the Swedish expert group issuing the report SOU 2022:38 (discussed further below), would enter into state agency records a legal confirmation that a given social parent has authority at a given time to

[87] This is found to be problematic enough to warrant some legal reform, however, by the expert investigation published as SOU 2022:38, both in access to visitation orders for children with *de facto* social parents and in the availability of a standardized social (non-legal) parent power of attorney.

[88] A case could be made that a legal stepparent to a child may have a stronger case in proving a *de facto* parent-like relationship with a child, including because of legal provisions remaining in Swedish family law that for example hold a stepparent potentially liable to provide financial support for a child, if the legal parents do not do so to a sufficient degree. See FB Chapter 7. This duty in practice virtually never is enforced, however, since the adequacy of child support payments, *underhållsbidrag*, owing for a child living with just one legal parent are guaranteed by a social benefit, *underhållsstöd*. The state is in the secondary position, not a stepparent, in assuring a child's welfare, but the stepparent is (in some instances, such as in this example) acknowledged to have a tertiary role. In some instances this is also extended to the nonmarital cohabitant partner of the legal parent when they are both living with the child, such as in the parental leave public law legislation discussed elsewhere in this chapter.

[89] See SOU 2022:38 at 80–81 (providing a short summary in English of this "parental power of attorney" proposal).

act with the day-to-day decision-making authority of a legal parent, such authority having been delegated to the social parent by a legal parent (the social parent's spouse or cohabitant partner). Because such a power of attorney would, if adopted as proposed, be revocable at any time, any excerpt available to evidence the social parent's status would need to be current to have usefulness outside of Sweden (and there may be risk of abuse if this was not clear to authorities abroad); the power of attorney would not be evidence of a durable or lifelong kinship status in the way that parent-child status records or proof of adoption documentation generally are.

D. Access to public documents

Civil status records are not openly available in Sweden, except to the extent required by rules guaranteeing freedom of information and of the press. Only the managing authority, the Swedish Tax Authority (*Skatteverket)*, can enter information into the Population Register, and the ability to access its content depends on the purpose of the access and the identity of the requestor.

III. Parenthood established through operation of Swedish law

A. Overview

In Sweden an individual can become one of three types of legal parent (with parentage/status as a parent) under current law, and each of these ways can be established by automatic operation of law, as follows:

1) "Mother" is the person who gives birth, per an unwritten (non-statutory) *mater est*[90] principle widespread within European family law from various nations and deliberately retained as unwritten by the Swedish Parliament[91]. No legal decision is needed to secure a child's legal relationship with its mother, meaning the person giving birth to the child

[90] "*Mater seper certa est"* because "*mater est quam gestatio demonstrate"* are the longer versions of the Latin phrase describing the principle, often mentioned in Swedish preparatory works. See, e.g. Prop. 2017/18:155 p 42 (citing this lack of doubt in Sweden and other counties as to who legally should be considered the mother as an explanation as to why Sweden had no law on legal motherhood in cases with international elements).

[91] Whether to codify the presumption was discussed but lawmakers ultimately introduced into law only a clarification, FB 1:7, that a mother who gives birth to the child (the biological mother) and not an egg donor (the genetic mother) is the legal mother. See Prop. 2001/02:89 at 84.

is the legal mother without any further action being taken by her or by the state[92].

2) "Father" is the person, if male, who is legally married to the mother at the time of the birth, per written statutory law at FB 1:1. Such a spouse is entered into the Population Register as a child's father automatically, although under certain circumstances (where there are grounds for termination of the automatically-presumed paternity) a court shall clarify that the husband to the mother at the time of birth is not the father, as discussed in Section C, below. Acknowledgement of paternity for an unmarried father and consent to medically assisted reproduction leading to a birth are additional ways, in addition to by court judgement, as expanded upon below.
3) "Parent" is the female person married to the mother to the mother as a spouse or registered partner (but not merely a cohabitant) at the time of the birth, who is presumed the "parent" per FB 1:9 paragraph 1 and thus needs to take no further active steps to become a parent. Per paragraph 2, "parent" status will be confirmed by court judgment or acknowledgement for a woman who was the mother's spouse, registered partner or cohabitant in cases where the mother underwent assisted reproductive treatment in Sweden (or abroad, if the clinic was licensed and donor information is available to the child) and that treatment likely led to the child's birth.

This means that status as a "father" or "parent per FB 1:9" can arise from a legal ***presumption***: the traditional "paternity" presumption, per FB 1:1, or its extension as an explicit "parental" presumption to a female spouse of the mother per FB 1:9 paragraph 1. There are also paternity and parentage presumptions in international situations in Swedish law; the parentage presumption for female spouses was added to law as of 1 August 2022 and means in many cases that a woman established as a second parent to a child by operation of law or court judgment abroad is usually automatically recognized as the child's parent also in Sweden[93].

Paternity (or parenthood per FB 1:9 paragraph 2) alternatively can arise via the mother's spouse's or partner's ***consent*** to e.g. adoption or to a med-

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[92] However, someone may also receive the civil status term of 'mother' to a child under current Swedish law *without* having given birth, for example if the person has changed legal gender identity (M-t-W) or if she adopts a child with her wife or who is her wife's child (via stepchild adoption). Prop. 2017/18:155 p 58. In those instances, it is not by presumption but rather a positive legal act that the person receives status as (a) 'mother'.

[93] See Prop. 2021/22:188 Equal rules on parenthood in international situations (*Jämlika regler om föräldraskap i internationella situationer*).

ically-assisted reproductive treatment likely, taking account of all circumstances, to have resulted in the child's conception, per FB 1:8 paragraph 1, which creates a presumption that the spouse or cohabitant is the father to the child born from the treatment (see the following section of this chapter), or by ***court judgment*** in various types of cases (also described in subsequent sections).

Functionally, these two analogous presumptions mean that a father (or parent) who has consented to assisted reproductive techniques of insemination or fertilization outside of their partner's body (that have then been used in accordance with law and resulted in a child) cannot avoid being legally held to that decision to become a parent by claiming facts that might be sufficient in the absence of the fertility treatments, such as regarding the mother's sexual intercourse with another or the lack of a genetic link to the child.

The following sections go further into detail regarding the ways that parenthood, mainly paternity, can arise automatically by operation of Swedish law based on presumptions and how these in certain cases can be overcome.

B. Parentage based on presumption of law (the paternity presumption)

Under Swedish law, the spouse of a person who gives birth to a child is presumed to be the child's other parent and is entered into the national civil records database (the Swedish Population Registry) as such. This follows from the statutory definitions of "father" at FB 1:1 and of "parent" at FB 1:9[94]. The presumptions thus function for different-sex parent pairs and for same-sex female pairs who have married.

Both presumptions also apply if the child is born after the mother's spouse's death, so long as the child is born within such time after the death that the child could have been conceived before the death[95]. In contrast, if

[94] Note also that FB 1:9 a, introduced by the bill SFS 2021:783 (More modern rules for confirmation of parentage, paternity investigations and to achieve gender-neutral presumption of parentage), which provides that the presumption for a female spouse will not apply (a court shall declare that the woman is *not* the second parent) if the regulations on insemination or fertilization have *not* been followed, or if the mother has not had an assistive reproductive treatment at all, thus the consented-to treatment did not lead to the child.

[95] This rule also is explicitly stated within FB 1:1 and FB 1:9 for husbands and wives of the mother, respectively. This does not apply however if the surviving spouse has remarried before the child's birth.

the couple is divorced on the child's date of birth, the presumptions do not apply, even if the child could have been conceived during the marriage[96].

Both presumptions can also be overcome in several ways that may soon be reorganized to be presented more clearly in Chapter 1 of the Swedish Parents Code.

C. Overcoming presumptions through actions for termination or establishment of parentage

Any of the above-described three ways to establish a second legal parent under Swedish law also can be set aside by a court of law issuing a final judgment, whether in an adoption or in another of several types of actions (such as, for cases of presumed paternity for the mother's husband, *actions for the establishment of paternity* – which are to be brought by the child concerned[97] – or *actions for the contestation/termination of parental status*[98] – brought by the presumed parent or the child). These are otherwise known as *positive* and *negative* paternity/parentage actions: one adds a desired legal father and one takes away and undesired one. Sometimes these goals are achieved simultaneously of course, with the presumed parent removed as the parent to be established as a legal parent is added.

The statutory rules to overcome the FB 1:1 paternity presumption that comes into play after a Swedish child's birth (and lead to automatic assignment of a second parent, a father, in addition to the birth mother) involve proving that the presumed father is likely not, to a sufficient degree of certainty, "the [genetic] father", in which case a court shall clarify that he is not the legal father, per FB 1:2 paragraph 1. There are parallel provisions for female spouses of a mother as well (presumed per FB 1:9 to be parents), as further discussed below.

The Swedish Parents Code (FB) 1:2 paragraph 1 lists various *grounds for termination* of paternity established via presumption, specifically paternity shall be terminated:

1) if it is established that the mother has had intercourse with someone other than the husband during the time when the child may have been

[96] The rule was changed in the 1970s because lawmakers considered it most likely that the husband was not the genetic father to a child conceived and born so close in time to a divorce. Prop. 1975/76:170. In 1968, lawmakers had removed from law a prohibition on women remarrying until nine months after they became divorced. See Prop. 1968:136.

[97] Regulated at FB 3:5–3:12.

[98] See FB 3:1 for termination actions by the presumed father and 3:2 for termination actions by the child.

born *and* it is likely, taking into account all the circumstances, that the child was born through such intercourse;

2) if it can be assumed "due to the child's inheritance or some other special circumstance" (today by genetic testing) that the husband is not the child's father;
3) if the child was born before the marriage or while the spouses lived apart *and* it is not likely that the spouses had intercourse with each other during the time when the child may have been conceived; or
4) if the husband consents to an acknowledgement of the parenthood by another person, also consented to by the mother in writing, then it will be considered legally established that the husband is not the father, per FB 1:2 paragraph 2[99].

A positive action for establishment of a claimant's paternity or parenthood (and simultaneous termination of a husband's presumed or a cohabitant's acknowledged paternity) may be brought by the presumed father or by the child (represented, if under 15 years old or deemed insufficiently mature to bring the case personally, by the child's financial guardian[100]. A child's financial guardian may be a different individual or pair of individuals than the child's legal guardian in terms of custody. Usually, however, this is the same person, namely the parent who already is established as a parent (the birth mother).

If the parent seeking to terminate the parental relationship is the child's financial guardian, a representative for the child will be appointed by the state, to avoid a conflict of interest; the child at age 15 and older probably also has the right to bring an action for termination personally, according to scholarly opinion (in the absence of clear statutory wording to that effect)[101].

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[99] Termination of legally-presumed versus consented-to fatherhood under Swedish law is discussed within SOU 2022:38 at 402–405 (concluding that the grounds are confusingly presented in the FB and should be revised, though retained in material substance, with genetic testing's importance today reflected by moving the naming of it up in the statutory text but also retaining traditional rules that reduce the burden of proof in some cases to allowed continuing correct decisions in certain types of cases, such as where a father is presumed because a woman gives birth after living in Sweden for many years but her legal husband has not ever migrated to Sweden with her.

[100] FB 3:4 for termination of a presumed paternity for the mother's husband and FB 3:17 for termination of a "parenthood according to FB 1:9" for the mother's wife.

[101] FB 3:1–3:2 for paternity termination, 3:14-3:15 for "parent according to FB 1:9" termination; see also A. Singer (2022), cit. note 8, 45-47. Dividing financial decision-making authority from caregiving-related, non-financial decision-making authority with respect to the child was done historically and today usually is held by the same two parent legal guardians, but there are situations in which they are treated separately, as here.

One ongoing area of Swedish parentage law development is the question of when, if ever, the filing of an action to remove a legal father who was presumed to be a child's father should be time-barred. Current law set *no time bar at all*, for the child's bringing of a termination action or for the legal father's, thus evidence of a "true" genetic father can lead to the severing of a legal parent-child civil status many years after the child's birth, if ever the man brings the case, even if he knew from the time of the child's birth[102].

The experts who have recently reviewed the Swedish Parents Code have recommended to lawmakers that a three-year time limit (for a father and also for a birth mother in her own right but not for the child) be introduced, with cases allowed later in time only in certain extraordinary circumstances[103].

D. The use of DNA evidence and its probative value

Today the most common basis used for disavowals of presumed paternity (termination actions) is genetic testing, which can exclude to a very high degree of probability the possibility that a presumed father is a child's genetic father. Genetic testing thus satisfies FB 1:2 paragraph 1(2), pursuant to which if the court can find that "due to the child's inheritance or some other special circumstance" the husband is not the child's father, the paternity presumption is overcome and the court shall declare the presumed father not the father.[104] In rare instances when a test is not able to determine who is the genetic father or the father needing to be tested is unreachable for testing, the other subparagraphs of FB 1:2 paragraph 1 can be invoked to overcome the presumed paternity[105].

In the case of a woman presumed to be a child's other parent, these grounds would not be useful as it is not a genetic link but truly her marriage to the birth mother and her consent to the medically assisted reproduction that are the basis of her legal parenthood. Her parenthood, presumed under FB 1:9 paragraph 1, can be terminated if the requirements under FB 1:9 paragraph 2 regarding such consent were not met, namely if the child was not conceived following the rules for assisted reproduction in the Swedish healthcare system or alternately in a state-run clinic

[102] A. Singer (2022), cit. note 8, 45–46 (citing critiques of the legal change in 1976 that removed a three-year time limit for the legal father to bring such an action; the child has never been time-limited).

[103] SOU 2022:38 at 33–36.

[104] See SOU 2022:38 at 403.

[105] SOU 2022:38 at 404.

abroad (which must be of the type permitting the child to access information on the gamete donor(s) in the future). Thus an informal sperm donation to the two female intended parent spouses would prevent the non-birth mother from being presumed to be a parent.

Under current Swedish law[106], a court can order a genetic test to establish parenthood for a second parent to a child only if the child was not conceived by medically assisted techniques; there is no statutory basis for testing based on a relevant genetic question but only if the child was conceived through intercourse. If paternity/parenthood for the second parent was established by acknowledgment, new facts must have arisen that give a reason to believe that the person who gave birth had intercourse with someone other than the acknowledged parent under the time period when the child could have been conceived. The expert group recommending reforms has recommended changing this to allow genetic testing be ordered or requested, on the rare occasions where it is not consented to, in additional situations where new circumstances arise or where there is uncertainty about who is the genetic father to a child or who gave birth to a child (a situation in which finding a genetic relationship make the biological relationship much more likely, according to the expert group)[107].

E. No parentage presumptions for children born to cohabitants

If a child in Sweden is born while the person who gives birth is a cohabitant (as defined in the Swedish Cohabitation Act § 1), the cohabitant partner is recognized as a legal parent if he or she subsequently *acknowledges paternity*, as described below. Lawmakers have declined to choose automatic presumption of parenthood for cohabitants, thus entry into the Population Register of that legal parenthood, without approval by each of the parent-cohabitants or an order of the court, despite the widespread choice in Sweden of the unmarried cohabitant family form, as previously discussed. Recently, however, lawmakers have simplified the establishment of parenthood for the parent who did not give birth and is a cohabitant but not a spouse to the person giving birth by making it digitally simple to do during the first two weeks of a child's life, as described further below.

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[106] See the Swedish Law on Forensic Genetic Testing in Paternity Determinations (Lag (1958:642) *om rättsgenetisk undersökning vid utredning av faderskap*) and summarized proposals to improve it and related laws in SOU 2022:38 at 36–39.

[107] *Id.* at 39.

IV. Parenthood established through consent or intention

A. Confirmation of parenthood is the most common method to establish it

For approximately 55% of the children born in Sweden in 2020, parenthood was established legally, not by presumption due to the marital status of the person giving birth but instead by an acknowledgement or confirmation of paternity (*faderskapsbekräftelse*), and to that percentage can be added the additional acknowledgements of "parenthood per FB 1:9" for female cohabiting partners of the birth mother[108]. Thus parenthood established through consent to take on the parenthood is common, where once it was much less common, and its regulation therefore is of importance as it touches the lives of most families having children in Sweden today.

Lawmakers have recently simplified the establishment of parenthood for the parent who did not give birth who is a cohabitant but not a spouse to the person giving birth, reducing barriers for many new parents and lessening the workload of the social services officials who otherwise have a duty actively to investigate and try to identify and register the second parent, as described below. The law has also been reviewed by an expert group tasked with proposing legislative changes, which in 2022 determined that presumption of parenthood for an unmarried partner is not appropriate at this time, compared to easy but secure digital acknowledgement of parenthood that requires both the mother and the second parent's written consent.

B. Recognition or acknowledgement (a.k.a. confirmation) of parentage

Where there is no automatically-presumed person to be assigned legal parenthood alongside the birth mother due to marriage, the second parenthood must be established, usually by formal acknowledgement by the mother's partner (most often a man cohabitating with her) of his actual (genetic) paternity.

Such an acknowledgement must be, per FB 1:4, written and witnessed by two persons. It must be approved by the local social services authority (*socialstyrelsen*) and also by the birth mother (or the person giving birth, who on rare occasion is a man who has changed legal gender but retained the biological capacity to bear children, and thus is the father, or one of two fathers).

[108] A. Singer (2022), cit. note 8, 48 (citing MFoF, *Statistik om familjerätt*, 2020).

In some cases, a specially-appointed legal guardian or a temporarily-appointed legal guardian for the child approves the acknowledgement in the place of the birth parent. Adult children give approval themselves to another person's written, witnessed acknowledgement of being their parent; their birth parent and social services do not need to approve the acknowledgement[109]. Indeed, social services has a duty to investigate pursuant to FB 2:1 when a child residing in Sweden does not have a second legal parent established. It does not, however, have a duty to investigate to find a second parent for persons over 18 years of age or for children with a second legal parent already in place (by presumption or acknowledgement), although the statutory wording does not currently make this clear[110].

Confirmation of parentage can since 1 January 2022 be accomplished digitally if done within 14 days of a child's birth, per FB 1:4 a, or in person at an office of the Swedish Tax Authority, per FB 1:4. It can be submitted before a child's birth, but not approved by the agency until after the birth. Digital confirmation is given using certified electronic personal identifications, usually installed on each person's mobile telephone and used today in Sweden for many interactions with public and private entities like government agencies, schools and banks[111]. The digital IDs can now be used by new parents to authenticate the second parent's and the mother's confirmations of the second parent's parenthood. Nothing about the parents' relationship affects this process, however the authors of the reform proposals in SOU 2022:38 have recommended changing these provisions substantively.

Currently the system can be used to confirm paternity, "parentage per Chapter 1, Paragraph 9 FB" and "maternity per Chapter 1, Paragraph 14 FB" (which regulates the parenting term to be used for a woman who contributed sperm cells to the conception of a child; she would have need to have changed her legally-recognized gender to female to be regulated under this provision)[112]. The authors of the reform proposals in SOU 2022:38 have recommended changing these provisions to ones using gender-neutral language.

[109] FB 1:4 paragraph 3.

[110] Compare FB 2:9, SOU 2022:38 at 454–455 (proposing the wording be clarified by legislative reform to the FB).

[111] BankID is the nearly-universal provider of the digital identification system used in Sweden.

[112] (förordningen (2021:1046) om digital bekräftelse av föräldraskap)

C. Adoption

Adoption is a path to parenthood under Swedish law based not on genetic (parent-child) relationship but instead on a consent to take on (in the case of non-stepparent adoption) a legal parenthood of a child available for adoption or a consent to change a *de facto* relationship (in the case of a stepparent adoption) into a legal parenthood, followed by application to the state for adoption and a resulting suitability evaluation. If granted, Swedish adoption entails the establishment of a full (strong) legal familial relationship between the adoptive parent and the adopted child that is today treated in law exactly as the legal parent-child relationship is treated for biological children, including for purposes of e.g. inheritance law[113]. Historically, Swedish adoption law had provided for a weaker form of adoption in which some legal ties to the former family were maintained and inheritance was denied to adopted children, but the current rules have been in place since 1970 when all "weak" adoptions (entered prior to 1959) were converted by law into "strong" adoptions[114].

This section briefly summarizes adoption's regulation under current law, then mentions reforms that have been officially recommended and therefore may be introduced by the Swedish Government and go into force soon.

The basic rules regarding adoption are outlined in Chapter 4 of the Swedish Parental Code (FB). Adoption can apply to both children and adult individuals. Through adoption, the adopted child is legally considered the adoptive parent's child, and not the child of their biological parents. However, if someone has adopted their spouse or cohabitant partner's child (via "stepchild adoption" regulated at FB 4:21–4:22), the adopted child is considered the couple's common child, meaning the original legal parent (most often also a biological parent) retains legal parenthood alongside the stepparent.

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[113] See FB 4:21 and SOU 2022:38, 251 (summarizing adoption's regulation under Swedish law, in Swedish). FB 4:21 provides that "Anyone who has been adopted must be considered the adoptive parent's child and not the child of their former parents. If a spouse or cohabitant partner has adopted the child of the other spouse or cohabitant partner, the one who has been adopted shall, however, be considered the common child of the spouses or partners. Laws or other statutes that add legal meaning to the relationship between child and parent shall apply to the person who has been adopted and his or her adoptive parent".

[114] See e.g. A. Singer (2022), cit. n. 8, 75.

Decisions on adoption are made by Swedish courts. The best interests of the child, not other parties', must be given the greatest weight in all matters relating to the adoption of a child[115].

Per FB 4:2, a child may be adopted if, considering all circumstances in the individual case, the adoption is deemed "suitable" (*lämplig*"). In this assessment, the child's "need for adoption" and the applicant's "suitability to adopt" are to be particularly key to the court's evaluation. The suitability assessment shall consider all relevant circumstances. The purpose of the adoption is to create or consolidate a personal relationship between the applicant and the person to be adopted that is substantially equivalent to that between parents and children. While the child's best interests (per Article 3 of the Child Rights Convention) must be given weight as "a primary consideration", consideration must also be given to the interests of other persons, e.g. the interests of the current parents and the intended adoptive parents[116]. Case law of the European Court of Human Rights confirmed that, to not violate individuals' Article 8 ECHR rights, the interests of both the child and the parent must be taken into account in the assessment of whether an adoption should take place[117].

The Swedish Supreme Court has recently applied Swedish adoption law to the facts of two cases, announced by the Court the same day, illustrating how the suitability of the adoption assessment should be applied. In the joined judgment NJA 2020 s. 980 (given by the Court the informal name "stepchild adoption I and II"), one stepfather adoption against a biological father's objection was allowed. In the other, the adoption was denied. The relationship with a parent who does not have custody of the child has also been important in the cases NJA 1977 s. 206, NJA 1987 s. 116 and NJA 1987 s. 628. In the assessment, emphasis has been placed on the value of contact with the parent for the child. On lame legal relationships that may arise from adoption, see NJA 1985 s. 651 and NJA 1991 s. 21 and also the referenced Court of Appeal decision RH 1989:86.

Per FB 4:4, an adult can be adopted under Swedish law if there is a special reason, based on the personal relationship between the applicant and the person they wish to adopt, and if the adoption is otherwise deemed appropriate. The assessment should especially consider whether the appli-

[115] FB 4:1.

[116] Such was intended by lawmakers, according to the relevant legislative preparatory works. See Prop. 2017/18:121, pp. 39 f. and 141 f.).

[117] See, e.g., ECtHR decisions in Söderbäck v Sweden (judgment of 28 October 1998 in case No 113/1997/897/1109) and in case AK and L v Croatia (judgment of 8 January 2013 in case No 37956/11).

cant has raised the person they want to adopt or if the adoption aims to confirm a relationship similar to that of a parent and (adult) child.

Children's rights to participation and information are protected in the regulation of adoption in Sweden. The potential adoptee child must be informed and given the opportunity to express their opinions on matters related to the adoption. The child's opinions must be considered and given due significance in relation to their age and maturity[118]. If the person potentially to be adopted is 12 years or older, their consent to the adoption is required, as a general rule[119].

Also as a general rule, a child cannot be adopted without the consent of any parent who has legal custodianship (a.k.a. legal custody otherwise known as parental decision-making responsibility with respect to the child). The consent of the parent who has given birth to the child can only be given after they have "sufficiently recovered from childbirth",[120] which precludes surrogacy or adoption contracts from being binding against the person bearing the child if she does not after the birth still wish to relinquish parenthood status so that another person can adopt the child.

No requirements exist under Swedish law for the child adoptee, other than, as mentioned, that their rights to be informed, give opinions, have those opinions influence the decision to an appropriate degree and (if 12 or older) consent themselves to the adoption being sought. An adoptive child often already lives with the adoptive parent or parents, if they were foster parents or a stepparent prior to becoming, through the adoption, legal parents.

1. The effects of adoption

The adopted child acquires full legal status as the adoptive parents' child, and even "shall" be given a new family name, although the court can grant an exception to this rule for the child to retain their birth name.

With respect to the child's former legal parent or parents, usually one or two birth (genetic) parents, no effect following from the former parent-child civil status remains, including e.g. rights to inherit from former grandparents, siblings or other relatives.

In contrast, the *de facto* close genetic relationship still exists, entirely separate from the legal parenthood and parental responsibility questions.

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[118] FB 4:3.

[119] FB 4:7.

[120] FB 4:9.

The Swedish Marriage Code's enumerated impediments to marriage apply both before the adoption, precluding any marriage between a genetic parent and child, and after the adoption, precluding marriage between an adoptive parent and child as well[121].

2. Adoptees' right to know their origins

Adopted persons in Sweden, like children born after assisted reproduction, have an express right under national law to know their origins. An adoption will be recorded in the Swedish Population Register entry, which the Swedish Tax Authority is tasked with maintaining and holding confidential[122], but an adopted person's right to know about the adoption is protected in that one is permitted access to the information when deemed by the Swedish Tax Authority to be of sufficient maturity to receive the information; administrative guidelines provide currently that "normally a 10-year-old is not sufficiently mature for this while a 17-year-old can handle receiving such sensitive information"[123]. The basis for this conclusion is unclear.

3. Prerequisites

To adopt, a potential adoptive parent must be 18 years or older (FB 4:5). While no upper age limit is specified in the Parents Code, there exist regulations that may limit potential adopters if they are not younger than 42. Sibling adoption of sibling just 9 to 12 years younger that the adopting sibling have been permitted in case decisions, and adoption of adults in some circumstances is permitted (FB 4:4), the latter only to confirm an existing close relationship, and only if the adoption is also otherwise appropriate. A cohabiting or married person generally only may adopt together with their partner, while a single person may adopt alone (FB 4:6).

Reforms have been recommended to current law which would allow certain partnered people to adopt without their partners, and former part-

[121] Section 3 of the Marriage Code (*ÄktB*) prohibits marriage between whole siblings (sharing two parents) as well as between direct descendants and ascendants (meaning a grandparent or parent may not marry a grandchild or child). Adoptive relationships are treated as genetic relationships.

[122] See the Swedish Act on Public Access to Information and Secrecy 22:1 (*Offentlighets- och secretesslag* [2009:400]).

[123] The Swedish Tax Authority, Population Registration and Related Duties, <https://www4.skatteverket.se/rattsligvagledning/edition/2023.14/329108.html#h-Rattsfall-uppgift-om-bord-och-adoption> (accessed 2023-10-25).

ners to share adoptive parentage, so that for example an ex-stepparent could adopt their ex-partner's legal child and become one of the child's two legal parents, or a former foster parent could adopt the child who grew up in their home without his or her current partner also becoming a legal parent to the foster child. These changes have not yet been enacted[124].

4. Necessity of consent

If married, in a registered partnership or cohabiting with a partner, both partners must adopt together or one of them must adopt the other's child, as with a stepparent adoption. A person with an unwilling partner, in other words, cannot become a parent (and thereafter guardian) through adoption. The only exceptions to the partner consent rule involve situations where the other partner's whereabouts are unknown or the partner is hindered from adopting "due to a mental illness or similar situation" (FB 4:6).

A person who is not married or cohabitating with a partner may adopt alone, and same-sex adoption is permitted, although the availability of children from international adoption is more limited to same-sex couples and individuals.

The child's consent to the adoption is necessary if the child is 12 years or older, but the child's best interests determination is always in focus as the standard by which appropriateness of all adoptions (of minors) are judged.

D. Medically-assisted procreation

Legal parenthood in Sweden is available to parents who have used certain statutorily-regulated medically-assisted reproductive technologies to conceive a child. The main medically-assisted reproductive techniques or technologies regulated in Swedish law to date include clinic-based insemination (permitted since the 1985 for different-sex couples, since 2005 for lesbian couples and since 1 April 2016 for single women),[125] fertilisation outside the body (*assisterad befruktning*) otherwise known as IVF, permitted since 1988 with a couple's own gametes and since 2003 with one or the other gamete donated), and egg donation (permitted since 2003)[126]. Only since 1 January 2019 has IVF with double gamete donation been

[124] See SOU 2022:38 at 40–43.

[125] Singer (2022) ibid note 8, 56 (citing the preparatory works to each legal reform).

[126] *Id.*

available (the intended parents no longer needing at least one of them to have a genetic link to the child, after reform to the Swedish Law on Genetic Integrity)[127]. Simultaneously, fertilized egg or embryo donation became possible in Sweden, as discussed in a separate section of this chapter, IV.D.6, below.

Recognition as the legal mother, father or (second female) parent is based, in these instances, either on the main rules mainly set forth in the Parents Code (FB),[128] to the extent they apply, or, for any intended parent not entitled to recognition per the main rules, on the relevant statutory provisions specific to assisted reproduction.

A person giving birth to a child will still automatically be considered the child's legal mother, for example, even when a donated egg was used in the child's conception[129]. Specifically, a parent not giving birth to the child and also not the genetic father or married to the parent giving birth will need to benefit from one of these provisions to secure their legal parentage with respect to the child. Required are the consent of the would-be (intended) parent to the conception of a child using the regulated technology and compliance with certain mandatory requirements in place to protect the rights of all concerned parties, including the child ultimately born.

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[127] Subsequently the ECtHR has held that Articles 8 and 14 of the ECHR can be violated when a State Party restricts access to this means by which two individuals affected by medical infertility issues may potentially give birth to a child. See the chapter on Italy's social parenting regulations elsewhere in this book.

[128] For maternity, this is an unwritten legal rule in Sweden, as in many European jurisdictions.

[129] FB 1:7 clarifies this; see also A. Singer (2022), cit. note 8, 38. Actions to terminate an (in Sweden) already-legally-established mother-child relationship, as well as actions to establish legal maternity in cases where none has yet been established or there is uncertainty as to whether the legal mother actually gave birth to the child, are possible under Swedish law, provided that the uncertainty is negative for the "child", whether a minor or adult child. This is a general test for whether the existence of a certain legal relationship is justiciable, per the Swedish Code of Civil and Criminal Procedure (RB) 13:2. In maternity cases, it is assumed that such uncertainty is negative for the child, and thus the child is given a cause of action (right to bring a case). *Id.* 38–40. As Singer points out, the developing case law of the European Court of Human Rights interpreting the European Convention of Human Rights at Article 8 (regarding the right to respect for one's private and family life) may preclude Swedish national law in any event, to the extent that such national law might be held to deny a person standing to establish or to terminate legal parentage in accordance with genetic parentage. The child's interest in retaining an existing place as a member of a family must also, however, per the same case law, also be considered, as is demonstrated by cases where State Parties have been held not to violate Article 8 when denying genetic fathers' confirmation as legal fathers under certain circumstances, particularly where such confirmation would terminate a previously-established (though non-genetic) legal father's parentage with respect to the child. A legal-historical perspective on the roles of fathers versus mothers in society and in family law remains useful here, in understanding (if not necessarily condoning) some of the differences in legal treatment of fathers versus mothers.

1. Paths to parenthood for the partner after medically-assisted procreation techniques

The above-described parenthood *presumptions*, parenthood *recognitions or acknowledgements* or automatic action of the section in the Swedish Parents Code specific to medically assisted reproduction (based on valid consent) lead to established parenthood for the parent not giving birth. Otherwise, an externally-imposed *court judgment* pathway to establishing a second parent can be used. These alternatives are regulated by FB 1:1 through 1:5 and can all be used to secure the reproductive-treatment-consenting other parent's (usually father's) paternity (legal parenthood), per FB 1:8 on rules for fatherhood establishment on the grounds of consent to assisted reproduction. However, there are certain limitations.

If sperm cells from another man were used in the treatment, the presumption of a spouse's paternity/parenthood only holds if the treatment was done in accordance with Swedish law (within Swedish healthcare) or at an "authorized foreign clinic" and the child has a right to information about the sperm donor[130].

2. Insufficient, withdrawn, invalid consent and termination of parenthood after medically assisted reproduction

Lack of valid consent can be an obstacle to the use of a presumption or the consent itself to establish legal parenthood (or an argument for a part-

[130] FB 1:8 paragraph 2 provides this exception to the presumption. (See also FB 1:3 paragraph 2 point 1, regarding when fatherhood determination shall not be pursued and including in this category cases of legally-used sperm donation.) FB 1:8 para 2 was introduced by Lag (2018:1279) after the preparatory work Prop 2017/18:155, More modern rules on assisted fertilization and parenthood (*Modernare regler om assisterad befruktning och föräldraskap*). This proposition led in 2018 to new law, which went into force on 1 January 2019. The new law also removed the requirement that at least one parent have a genetic tie to the resulting child, allowed clinics other than Swedish university hospitals to provide in-vitro fertilization services, and made parenthood for the parent not giving birth easier to establish, even if a foreign assisted reproductive services clinic was used, so long as the clinic used was an authorized (state-licensed) clinic and information about the donor was guaranteed to be available in the future to any child born. One additional legal change the same 2018 law made was that it established terminology changes so that a trans man (W-t-M) who gives birth in Sweden will be considered a child's legal 'father' and a trans woman (M-t-W) contributing sperm to a child's conception will be considered a child's legal 'mother'. Especially the introduction into law of these confusing gendered parenting terms was criticized by reviewers of the 2017 proposition, who in many cases recommended instead that Sweden introduce gender-neutral parenthood terms; Prop. 2017/18:155 at 55–56. The changes just described were nonetheless adopted, to reduce confusion among state workers registering parents and to try to avoid violating trans persons' rights to privacy. *Id.* at 56–58.

ner seeking to avoid legal parentage, depending on one's viewpoint). Lack of valid consent to the medically-assisted reproductive procedures leads under Swedish law to a spouse to a woman giving birth having a right to terminate automatically-arising parenthood. Notably, in theory even a person married to the mother *who has contributed sperm cells to the conception* by assisted reproduction (insemination) of their wife's newborn child actually can be seen as a sperm donator as well, and it is specified by FB 1:11(c) – this newer statutory section regarding only cases when one or the other or both in a couple have changed legal sex -- that a spouse's presumed legal parenthood *can be terminated* if a valid consent to the insemination was lacking, *even if the spouse's own sperm cells were those used in the insemination procedure to conceive the child.* This means that a genetic father and spouse to the person giving birth has a right to avoid parenthood if consent rules are not followed, a perhaps surprising result but one that also applies to presumed father-husbands in all other cases, per preparatory works to the statutory rules (despite the statutory language being less clear in these cases and in need of revision)[131]. This seems to suggest that lawmakers prioritized second parent rights to self-determination with respect to reproduction over a determination including weighing of the child's best interests, a result expert reviewers in 2022 question.

3. Objective and subjective requirements to receive medically-assisted reproductive services: Stockholm County

Medically-assisted procreation is permitted relatively broadly within the Swedish healthcare system today. Since 1 April 2016 in Sweden, not only couples of intended parents but also single women (and others with female reproductive capacity) may access assisted reproductive services, specifically insemination or egg fertilisation and implantation, as individuals, to conceive and thereafter become parents, as introduced above.

[131] SOU 2022: 38 at 383–385 (citing prop. 1984/85:2 s. 19–21 and prop. 1987/88:160 at 20–21)). The same logic, according to recent expert investigators, probably under current law applies to a genetic father cohabitant of the mother (in addition to a spouse), allowing him to avoid legal fatherhood of his genetic child just as another sperm donor whose sperm were used without his consent. SOU 2022:38 at 394 note 18 and 395 (taking a position against this result, pointing out how difficult in practice claiming not to have consented is for a man in a marital or cohabiting relationship with the mother whose sperm in fact led to the birth, even if he claims he withdrew consent or was deceived into consenting, and pointing out as well that a genetic father whose sperm led to a child after intercourse can have similar objections but has no legal way to avoid legal paternity). Compare NJA 2015 s 675 (on consent to one embryo's implantation when actually two were implanted and two babies born).

Not all persons with female reproductive capacity may access these services, however, which could be seen as discriminatory against potential social parents (and their unborn potential children) on several bases. The regional authorities responsible for the provision of Swedish healthcare may and do set up rules requiring, for example, that the person seeking to become pregnant must be between 25 and 40 years of age at the time of the assistive reproductive treatments. Attempts to become pregnant are also not unlimited, but instead often limited to three attempts.

There are other requirements that might seem onerous to an outside observer. Per Region Stockholm's rules, for example, the intended parent seeking to become pregnant must have a Body Mass Index over 18 and under 35, and both she and any partner must be over 25 years old, among other restrictions, among them the following[132]:

> "Basic requirements regarding publicly funded assisted reproduction:
> No joint children (applies to both biological and adopted children).
> Stable relationship, two years minimum at the time of referral (except single women).
> Cohabiting and registered in Stockholm County.
> At least one year of involuntary childlessness, unless there is a previously known factor (fallopian tube damage, lack of sperm, etc.).
> No one in the couple may be sterilized.
> The parents/single woman are expected to take care of the child throughout its growing up period.
> The childlessness investigation must not have demonstrated that any psychological and/or social contraindication to parenthood is deemed to exist.
> Treatment may not be given if it involves significant risks to the woman's health during treatment, pregnancy or childbirth, or danger to the health of the unborn child.
> The woman's age must be under 40 at each treatment, also applies to the second and third treatment. A treatment session means the start of medication. This applies to all types of treatment (including sperm donation, egg donation).
> Partner's age must be under 56 years.
> Any frozen embryos must be used before new fresh treatment is started.
> Frozen embryos may be used until the date on which the time for frozen storage expires.

[132] Karolinska Institute, Rules and Basic Requirements – Assisted Reproduction (IVF/ICSI) (rules notices for Swedish reproductive medicine care providers), https://www.karolinska.se/for-vardgivare/tema-kvinnohalsa/gynekologi-och-reproduktionsmedicin/reproduktionsmedicin/regler-och-grundkrav---ivf1/#:~:text=Behandling%20f%C3%A5r%20inte%20ges%20om,ska%20vara%20%C3%B6ver%2025%20%C3%A5r (accessed 2024-02-10).

> A single woman is defined as a woman who is not married, registered partner or cohabiting (SOSFS 2009:32). The definition also applies to female-to-male, KtM, who retain their reproductive capacity.
> Sibling treatment is provided to the extent of resources. As of February 2009, the couple themselves must cover the cost of sibling treatment. If you have frozen embryos from previous treatments, these can only be returned against self-financing. This applies regardless of when the embryos were frozen".

Mitochondrial donation (requiring the use of donated mitochondria or power-providing organelles from outside of the nucleus of a third person's human egg cell to substitute for an intended mother's faulty mitochondria) seems not to be permitted in Sweden at this time due to risks remaining with the procedure. There is no basis in current family law for recognition of the mitochondria donor either, with parentage limited to two legal parents, although if this type of donation becomes available it will likely lead to notations in the special journaling system developed so that children born as a result of donated cells can in the future obtain information on their genetic origins, as the following section details.

4. The right of children born after assisted reproduction to know their origins

There is no possibility of anonymity for donors of reproductive cells used within Swedish healthcare. Those who have been conceived through assisted fertilization with donated reproductive cells within Swedish healthcare, when they have "reached sufficient maturity", have the right to access information about donors (as the donor(s) remain the child's genetic parent(s)). Donors' identities are recorded in a hospital-kept special medical record pertaining to them, as required by the Law on Genetic Integrity[133].

Swedish law requires that children (of sufficient maturity) born after assisted reproductive services additionally are provided the opportunity to request that information about themselves be recorded in their gamete donor or donors' special medical record(s), which allows them to access information recorded in donor medical records regarding other individuals who have been conceived with reproductive cells from the same donor(s), in other words, genetic half or full siblings to the child seeking this information.

If someone in Sweden has reason to believe that they have been conceived through assisted fertilization with one or two donated reproductive

[133] Law on Genetic Integrity [2006:351] chapters 6:5 and 7:7.

cells, they can contact their local social services agency office. The social services are then obligated by law to assist the person in finding any information recorded in any special medical record[134].

According to the Parents Code, children also have the right to be informed by their parents that they have been conceived through assisted fertilization with one or two donated reproductive cells[135]. More specifically, this right is coupled to an obligation for the child's parent or parents to provide information to the child: "As soon as it is appropriate, the parents should inform the child that they have been conceived through assisted fertilization with donated reproductive cells"[136]. This obligation it would seem applies regardless of whether the assisted fertilization has been performed within Swedish healthcare, per the unqualified language of FB 1:15, and thus regardless of whether the child could find any information in the special medical records kept in Sweden for this purpose.

In practice, however, there is no enforcement mechanism holding parents accountable to do their duty of informing a child born with donor gametes, and it has been reported that for example opposite-sex legal parents are privileged by this, as children to same-sex parents will more obviously and at an earlier age face the question of the child's genetic origins.[137] Seen from the child's perspective, the right to know is better protected when it is evident that the legal parents could not have conceived a child genetically related to both of them, or likely could not have conceived this particular child.

5. On embryo donation in Sweden

Sweden allows IVF treatments with the patient's own gametes, donated gametes or donated embryos. Embryo donation has been legally permitted in Sweden since 1 January 2019,[138] and related revised administrative

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[134] See Law on Genetic Integrity [2006:351] chapters 6:5–5 b and 7:7–7 b.

[135] FB 1:15 sentence 1.

[136] FB 1:15 sentence 2.

[137] This can be seen as a disadvantage or as an advantage, according to comments by interest groups before finalization of the latest Swedish Board of Health and Welfare regulations in this area.

[138] The Genetic Integrity Act (Lag (2006:351) om genetisk integritet) was modified, effective on that date, to allow "double donation" in Swedish assisted reproductive services. See also The Swedish Act (2008:286) on quality and safety standards in the handling of human tissues and cells, and The National Board of Health and Welfare regulations (SOSFS 2009:30) on donation and procurement of human tissues. The National Board modified these two sets of administrative regulations in response to the Genetic Integrity Act modifications.

rules have been in force since 15 February 2022[139]. Per the current rules, single women or couples can begin a possible donation process by advising their IVF caregiver early so that testing requirements for donated sex cells can be met, yet the decision to donate and the legally-required evaluation as to the donors' suitability are not completed until after the potential donors have become parents themselves[140]. Written consent from the donating successfully-treated IVF patient and her partner, if applicable, is required before embryo donation, and donors have the right to revoke their consent until the embryo is transferred.

One woman in a same-sex couple is permitted to donate an egg cell or a fertilized egg cell (or embryo) to her partner, if the medical caregiver and the treating doctor determine the donation to be justified after the same type of individualized assessment required for other donations. The donor(s) are evaluated with blood tests, interviews, and questionnaires on their health.

Decision-makers who carry out potential donor evaluations must now have behavioural science competence, per changes to the agency regulations in this area that went into effect 15 February 2022. Clearer rules on identity checks and health declarations for couples treated with their own gametes as well as for single women who receive donated gametes have been implemented simultaneously.

The law now clarifies that fertilised eggs may be still used after a donor has died, and that the number of families to which a gamete donor may donate is limited to a maximum of six families in Sweden, which means that such a person could be the genetic parent to more than six resulting children (due to it being permissible for each family to use the donator's gametes again so that additional siblings share the same genetic donor parent).

A couple or a single woman may donate fertilized eggs to another family in addition to their own; the donors in this case of "double donation" (both gametes donated and by the same genetic parents) may donate to a maximum of one family. There are several ethical considerations for embryo donors to reflect upon, reasoned regulators as these rules were

[139] The National Board of Health and Welfare (*Socialstyrelsen*), National guidance report 'Assisted fertilization with embryo donation and double donation' (Nationellt kunskapsstöd '*Assisterad befruktning med embryodonation och dubbeldonation*') (published 2020-03-12; last updated 2022-02-15) https://www. socialstyrelsen.se/kunskapsstod-och-regler/omraden/organ-och-vavnadsdonation/assisterad-befruktning-med-embryodonation-och-dubbeldonation/ accessed 2023-05.10.

[140] *Id.*

developed[141]. Donors are required to be parents of at least one child before considering embryo donation, allowing them time to reflect on their decision and its potential consequences for their own family and another. Children born through embryo donation in Sweden have the right to access information about their genetic origins as they mature, as previously described for all children born after assisted reproduction or adopted and as further detailed below. Parents are obligated to disclose this information, per the Swedish Parental Code (FB), as discussed above, and social services is obligated to help anyone suspecting that they may have been born with the help of donated genetic material to answer that question. They may potentially, bit do not always, initiate contact with their donors[142], who may have themselves become parents to, in the case of embryo donation, genetic whole siblings to the child.

The best interests of the child are in focus within Swedish regulations of the embryo donation process, aimed to ensure that any child resulting from use of the donated embryos will grow up in a good environment.

From January 1, 2019, when changes to the Swedish Law on Genetic Integrity went into effect, children can also access information about others who were born through treatment using the same donor's or donors' gametes, in other words about their genetic half- or full siblings, provided that those individuals have chosen to have their information recorded in the special medical record medical providers of assisted reproductive services are required to keep. Social services will assist individuals who suspect they were conceived through donation in finding out if any information is documented in these special medical records, as detailed in the previous section.

The period during which frozen embryos can be stored was increased effective 1 January 2019 as well, from five years to the current general limit of ten years. Embryo preservation is permitted for medical or social reasons, such as preserving fertility before cancer treatment or delaying parenthood.

Embryo creation and cryo-preservation of embryos are considered in Sweden non-controversial consequences of Swedish law being changed to allow assisted reproductive services. When couples use only donated gametes, in other words where neither of the intended parents is a genetic par-

[141] *Id.* (summarizing these, and the changes to law and agency regulations that went into force 15 February 2022).

[142] PUB BY UME PERSON (describing how adults born using assisted reproduction reported using their access to information on their genetic origins).

ent to the resulting child, the resulting embryo could be said to be akin to an adopted embryo, although transfer of an embryo created during one person or couple's assisted reproductive procedure to another couple at a later time is in some ways distinguishable. This section briefly describes the "usual" creation of embryos, including ones formed from exclusively donated gametes, and then addresses the legal situation in Sweden today with respect to true donation of entire embryos, not created originally for implantation into the uterus of the intended parent who ultimately receives them.

In the usual case of in-vitro fertilization, when egg and sperm are combined – whether they have been obtained from the intended parents themselves or from donors – they are mixed or physically caused, via transfer of genetic material from the male gamete to the nucleus of the female gamete, to form early-stage human embryos. These may then be transferred into the intended mother's uterus, pursuant to the ordinary procedures for insemination and fertilization outside the body. In Sweden, it has been standard practice for 20 years that only one embryo (fertilized egg) is introduced into the uterus in vitro fertilization[143]. This is done partly to reduce the number of twin pregnancies, which pose risks to both mother and baby, and partly to reduce the cost of healthcare. Nonetheless, two embryos were implanted instead in approximately 10% of IVF treatments carried out in 2020, in part because some fertility doctors judge the risks worth the benefit of an increased chance of pregnancy in cases where the chance of pregnancy resulting from the treatment is already lower than average, and increased risks of transferring two versus one embryo seem from recent Swedish research on the question to exist but to be small[144].

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[143] This practice is recommended to clinicians, who follow national recommendations and are regulated by administrative regulations promulgated by the National Board of Health and Welfare ("*Socialstyrelsen*"). As previously mentioned, revised regulations entered into force on 15 February 2022. A description in English of such national guidance and regulations, a legal source of lower hierarchical weight than statutory law, is available at https://www.socialstyrelsen.se/en/clinical-practise-guidelines-and-regulations/regulations-and-guidelines/national-guidelines/ accessed 2023-07-31.

[144] A. Bratt, *Two embryos can be an alternative for childless couples*, in *Dagens nyheter*, 5 December 2022, https://www.dn.se/sverige/tva-embryon-kan-vara-alternativ-for-vissa-barnlosa-par/ accessed 23 May 2023 (reporting on the study Kenny A. Rodriguez-Wallberg Arturo Reyes Palomares, Hanna P. Nilsson et al. *Obstetric and Perinatal Outcomes of Singleton Births Following Single- vs Double-Embryo Transfer in Sweden* (2023) 177(2) JAMA Pediatric 149–159 <doi:10.1001/jamapediatrics.2022.4787> accessed 2 September 2023).

In the uterine wall, an embryo may then implant, in which case it may develop, over approximately 40 total weeks from egg release to birth, into a full-term, healthy infant. Any time the embryos so formed are not genetically the intended parents' own, one might say that the law is allowing "adoption" of the sperm donor and egg donor's biological child, but under such circumstances neither donor would be aware of this and neither would have intended to create any embryo for their own use in procreation. However, where these embryos, or some of them, are created per the intended parent or parents' request but then for whatever reason not implanted, a question of what is legally permissible to do with the embryos arises.

Under Swedish law, such embryos may be destroyed, donated or saved for potential future use in additional fertility treatments for the intended parent(s). These permissible outcomes do not seem controversial for the Swedish public. Objections to embryo formation or donation may be based, largely in other countries, on the position that the embryo is already a human being or in any case a unique individual, if a very vulnerable one, unable to survive on its own and even statistically unlikely to develop into a full-term infant after transfer to a uterus. The view that instead sex cells and also fertilized eggs and embryos are not yet individuals with rights to human life but later may become that is more widespread in Sweden. In line with this, the right to abortion has been secured in Sweden for many decades, and reproductive rights to decide whether to proceed with pregnancy or reproduction are highly valued and accepted.

One practice that may be seen to cause a greater number of embryos being created during IVF than those needed for treatment is thus Sweden's generally allowing only one embryo to be transferred to an intended parent's uterus in a single IVF cycle.

6. On surrogacy and questions of parental status recognition in Sweden

In Sweden, neither commercial nor altruistic surrogacy is permitted within the Swedish healthcare system[145]. The practice is not criminalized or otherwise made unlawful, yet it is stated Swedish public policy not to encourage surrogacy arrangements abroad. This has resulted in difficulties

[145] For a weighing of the advantages and disadvantages expert investigators in 2017 found when recommending that altruistic surrogacy continue not to be made available in Swedish healthcare, see Prop. 2017/18:155 p 97-104. Unknowns about effects on children and surrogate mothers were emphasized, surprisingly without any reference made to lawful third-party adoption and what might be inferable from it.

for intended parents who pursue surrogacy lawfully in another legal jurisdiction and for their children, especially in the realm of recognition of their foreign-established legal status identities and related rights.

The Swedish Supreme Court on recognition of intentional mothers after surrogacy

The question of establishing parentage after a surrogacy arrangement abroad was heard by the Swedish Supreme Court ("HD"); its decision was announced within the published judgment NJA 2019 s 504 ("The California Surrogacy Arrangement")[146]. In consideration of the concerned child's best interests and Sweden's international law obligations, the Court held that it was required to recognize a judgment issued in California which stated that a child who would be born to a surrogate mother would not be considered legally her child, but that of the Swedish intended mother. The High Court found that there must be a certain limited scope for Swedish courts to recognize foreign judgments concerning family civil status, even where no express provision in Swedish law supports such recognition, such as in the circumstances of the case.

The "California Surrogacy Arrangement" case concerned a cohabiting Swedish couple who in August 2015 had a child through surrogacy in California, after an embryo created from the man's sperm and a donated egg had been implanted into a surrogate mother's uterus. Two months before the birth, a Californian court had declared the Swedish woman to be the legal mother of the child to be born by the surrogate mother, as was intended by the Swedish couple and the surrogate gestational carrier.

The couple returned to Sweden with the child after the birth, and the intended mother cared for the child as its mother day to day for the following four years. On these facts, the Court found that during these four years in Sweden, "the child built a family life together with [the Swedish woman]" which "had become a practical reality". Because Swedish authorities had refused to recognize this family legal relationship, the child's identity and right to privacy were intruded upon. Given the harms the child suffered as a consequence, the Court considered the child to have the right to have a family law relationship with the *de facto* mother recognized in

[146] The judgment is available on the Swedish Supreme Court's website, www.domstol.se, as are all most HD judgments. This case is found at < https://www.domstol.se/hogsta-domstolen/avgoranden/2021/99084/>.

Sweden. Such recognition, the Court added, "is also required for the principle of the best interests of the child to be satisfied".

The Swedish Supreme Court referred in its judgment to a 2019 advisory opinion from the European Court of Human Rights, requested by the French Court of Cassation[147] where the issue of recognition in national law by a state party to the ECHR of legal relationships between a child born by a surrogate mother and the intended mother was addressed, in light of developments since the European Court's earlier judgment in *Mennesson v. France*[148].

In its advisory opinion, the European Court emphasizes that the child's right to respect for private life under Article 8 requires that national law provide an opportunity to legally establish a legal relationship between the child and the intended mother, even in cases where the child is not her genetic child.

Sweden was noted as one of 12 out of 24 countries prohibiting surrogacy that nonetheless had an adoption pathway to legal parenthood available to intended parents after surrogacy who could not otherwise be considered legal parents with respect to a child. The Swedish Supreme Court, in its judgment in this "Californian Surrogacy Arrangement" case, found however that no such possibility existed under Swedish law under the circumstances of the case, because stepchild adoption was not possible if the parent and intended adoptive parent are no longer living together, and a third-party adoption under Swedish law in these circumstances would mean that the child's legal relationship with the already-established legal father would end, contrary to the child's and the father's right to respect for private and family life according to Article 8 of the European Convention. The father had in any case withdrawn consent to adoption by the intended mother. As a result, the Court needed to recognize the Californian civil status judgment and thus the intended (and *de facto*) mother as the child's legal mother.

In a further decision issued soon after, the same Swedish Supreme Court declared that a judgment from a court in Arkansas, USA, which estab-

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[147] 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 (Request no. P16-2018-001) issued April 10, 2019, by the Court sitting as a Grand Chamber

[148] No. 65192/11, ECHR 2014. The Court of Cassation requested the Advisory Opinion because Mr. and Mrs. Mennesson from the previous case had now, on behalf of their children, asked for re-examination of France's 2010 decision to annul the parenthood details entry in France's birth registry taken from their children's US birth certificates.

lished a Swedish woman as the mother of a child born through a surrogacy arrangement there, also must be recognized in Sweden[149]. In that case, the woman had been able to apply to adopt the child (without the male parent's non-consent, as in the prior case), but it was uncertain how the required adoption suitability review (by social services, regarding whether she would be an appropriate adopting parent) would be decided. A considerable amount of time would pass before that determination would be made, to the detriment of the child who would be denied the intended and *de facto* mother as a legal mother in the interim. The Court concluded that the most appropriate way to satisfy the child's right to privacy and to fulfil the principle of the child's best interest was again to recognize the US judgment in Sweden, despite the existing – but less than efficient – adoption path to motherhood legally available.

Although recognition of intended mothers after surrogacy abroad is improving in Sweden, due to these precedents, the remaining difficulty of fully legally recognizing foreign maternity determinations within the framework of current regulations was further illustrated by the Swedish Supreme Court's decision in NJA 2021 s 437 (The California surrogacy arrangement II). This case was pursued by the same intended mother who, in the earlier Swedish Supreme Court decision NJA 2019 s 969, had had her Californian legal parentage recognized in Sweden upon order of the Court. Despite that judgment, she did not automatically receive custody of the child when she applied for it with administrative authorities, however. The main rule is that according to the Swedish Parents Code (FB) 6:3, a child is under its mother's custody from birth if the parents are not married, and there was confusion as to whether the birth mother in California (who had waived all claims to any parental rights) had, under Swedish custody law, custody nonetheless.

In the case, the child's father did not have custody responsibility either, which meant that the child lacked a legal guardian entirely when the case came to the Supreme Court. The Court found there to be no obstacle under the Parents Code for the woman to bring a declaratory action under the Swedish Judicial Procedure Code against her local social welfare board regarding the custody of the child and its decision not to award it to her. It was, in other words, a long road for the child to have a legal mother with legal custody established in Sweden.

Relatedly, sex discrimination in Swedish parentage law has recently been litigated also. Before 2019, "parentage according to 1:9 FB" for a

[149] See NJA 2019 s 969.

woman who consented to the assisted fertilization of her spouse could only be established by acknowledgement (or court judgment) if the fertilization took place in accordance with the Law on Genetic Integrity, mainly, in other words, within the Swedish health care system. Corresponding requirements did not exist for a man who consented to his spouse's medically assisted fertilization; as the genetic father, he faced no difficulty in being established as a legal parent.

The question of whether this could be considered unlawful discrimination was tested in RH2020:3. The Court of Appeal found that the differential treatment that resulted from the rules of the Parents Code was based on the spouses' sexual orientation, but did not contravene 2:12 RF, the European Convention for the Protection of Human Rights and Fundamental Freedoms or the Charter of the European Union on Fundamental Rights. The Court of Appeal held further that the specific provisions in the FB took precedence over the provisions of the Discrimination Act[150].

V. Additional "hard cases"

None have been identified at this time.

VI. Discrimination related to parenthood

A. Discrimination in access to parenthood

In Sweden, parenthood is increasingly available to more types of parents and families, but the two-parent norm, the *mater est* principle, and other aspects of current law continue to create barriers to legal protection for several additional types of parenthood that in fact exist among today's diverse Swedish families. Opinions differ as to whether certain legal rules discriminate in ways that are justified and proportionate given lawmakers' aims and the society's values weighed against parents' and children's rights, including to live free from unjust discrimination. Here, several aspects of current law that have been or could be criticized in light of existing legal human rights protections are summarized.

[150] S. Hellblom, *Surrogate motherhood forbidden in law – but not in practice?* (*'Surrogatmoderskap förbjudet i lag, men inte i praktiken?'*), Norstedts juridik JUNO nyheter 2021-06-09, https://www.nj.se/nyheter/ surrogatmoderskap-forbjudet-i-lag-men-inte-i-praktiken (accessed 2023-05-15). Note that the article's title is a bit misleading, as surrogacy is not forbidden in law in Sweden but rather not regulated or included as a means of assisted reproduction through the public healthcare system.

Adoption, as written earlier in this chapter, is now available to cohabitants, but not to platonic parenting partners openly not in a marriage-like relationship. It is available to ex-partners, but not to single persons. It is available to same-sex couples and to trans-persons, but not to step- or bonus parents if a child already has two legal parents. Somewhat relatedly, a share in parental responsibility is also largely unavailable for step- or bonus parents, which underscores the lack of existing legal protection for social parenthood, differently stated children's rights to continuity of their intimate family relationships with their functional parent figures who do not have legal parentage or parental responsibility rights. Adoption – including its review by state actors of the suitability of the intended parent and possible rejection of the application – must in some circumstances be used to create a parent-child relationship between an intentional, *de facto* and even genetic mother and her child, who is otherwise a legal stranger to her in Sweden[151]. The same is not true for a genetic father, who can be and often is easily established as a parent following a non-invasive genetic test, regardless of his intention to conceive or to parent the child, and regardless of whether he would be approved as suitable to adopt the child[152].

Other rules discriminating between persons in similar relation to children have been deemed not justifiable and removed from law in recent years, thus both opposite-sex and same-sex spouses can now become parents by relying on the parental presumption. Cohabiting partners to a birth mothers, whether of the same or opposite sex, both can relatively easily become a second legal parent to a child through acknowledgement of parenthood as well. Polyamorous or polygamous families, in contrast, cannot be recognized in law as parents to a child, where there are more than two persons seeking legal protections for their joint child's relationship with each of them.

Some *de facto* parents, such as foster parents, are not permitted to become legal parents to children with whom they would like to have such a relationship, due to the preservation of a legal parenthood for a parent not actually serving as a *de facto* parent to the child. Other natural parents are denied adequate legal protection for their and their children's important relationships when in practice the state fails to provide them with the parenting support and regular visitation to which they are legally entitled.

[151] This is discussed in other recent academic summaries regarding Swedish social parenthood as well. See e.g. E. RYRSTEDT, *Social Parenthood in Sweden,* in C. Huntington, C.G. Joslin, Christiane von Bary (eds.), *Social Parenthood in Comparative Perspective,* NYU Press, 2023, 216–217.

[152] The suitability review is required by the adoption law at FB chapter 4.

This can be due to social services working from the assumption that a permanent placement with foster parents will be the best or inevitable result in certain individual cases, perhaps due to biases and misunderstandings of a natural parent's mental or physical illness, disability, substance addiction or perhaps non-majority ethnic origin, culture or language.

Some discrimination in access to artificial procreation (assisted reproduction) occurs today in Sweden due to legal provisions limiting access to it but also due to some local-level soft-law rules imposing various specific requirements on couples or individuals seeking such services through the public healthcare system. Age limits and limits related to previous voluntary sterilization of one partner are examples[153].

1. Discrimination caused by economic condition

If only those with the economic means to pursue litigation or to seek private help to become parents, including by traveling abroad, might be able to overcome medical obstacles to become parents, there is a strong risk of discrimination on the basis of socioeconomic status. Sweden's law currently risks such discrimination. Some rules limiting access to publicly-funded assisted reproduction services, to adoption and to automatic recognition as a parent by denying it to some and not others must be analysed against that background: does this rule prevent all persons subject to it from accessing assistance in building a family, in a manner proportionate to any state interests it advances, or does it prevent access only for a subset of the population who cannot afford private or foreign alternatives? Another significant question is whether the fiscal impacts of a given rule on individuals and the state are being borne in a non-discriminatory way, and if budgetary constraints imposed on a given regulated activity (such as judicial establishment of parentage or medically-assisted reproduction) might be eased by certain reforms to reduce disproportionate economic and other burdens currently placed more on some types of families than on others.

2. Discrimination in the case of disabilities including genetically transmissible conditions

When those with certain inherited or acquired conditions are discriminated against, specifically as the Swedish state determines through current

[153] In contrast to other legal systems' age limits, for example those that vary between 46 and 50 years of age for access to heterologous assisted reproduction in different regions in Italy, Sweden's age discrimination.

law or the law's application in practice who may become or be legally protected as a child's parents, there is a risk that the parents' rights to equal treatment are violated. Persons with blindness, deafness, dwarfism, and many types of physical and mental illness for example, if denied in law or practice the opportunity to become parents without adequate, evidenced-based justification, have experienced discrimination with respect to an important area of personal, private life and self-determination.

B. Discrimination in legally protecting children's rights

1. Children born in wedlock and out of wedlock

Thanks to many years of incremental reforms to Swedish law with the aim of eliminating discrimination between children on the basis of their parents' marital status, most provisions discriminating in this way have been eliminated. An exception that could be argued to be unjustified is the marital presumption for establishing a legal parent: any spouse to a person who gives birth to a child is automatically registered as the child's other parent, while a cohabitant co-parent must acknowledge parenthood and receive the birth mother's consent. The group of experts who authored a recent reform proposal cited this presumption as an element of Swedish family law that they would recommend be further evaluated (as detailed above). On the other hand, the ease of completing the (now optionally digital, from home) acknowledgement of paternity or parenthood after a child's birth means that results of this difference likely rarely lead to outcomes in violation of a child's right to family or right to have its best interests taken into account as a main consideration.

An additional difficulty for children's equal treatment depending on whether their parents form a family as married or cohabitating adults arises if one cohabitating parent dies, especially while the children are minors. Cohabitants do not inherit from each other, per the law that governs in cases of intestacy. Cohabitants cannot even by a valid will overcome the 50% forced share of an estate that children of the deceased (even joint children) are entitled to inherit immediately after one parent's death, and minor children may not defer taking their shares so that the surviving cohabitant can use them until his or her own death, as adult joint children must and adult stepchildren may do. Therefore, when a cohabitant parent dies, children's best interests in many cases can be threatened or harmed, depending on which cohabitant parent owned various assets used by the

family.[154] This can be true despite the aims of the forced share inheritance law rule and rules on protection of minors who own significant assets or real estate[155] being to protect their best interests. Their surviving parent will not be able to have unsupervised control over the property that they have inherited from their deceased parent, which may include significant amounts of the cohabitating couple's assets.

Depending on the individual situation, and in contrast to how a similar situation is regulated if one married parent dies (and their spouse inherits his or her own forced share plus is allowed control of the joint children's inheritance), children with unmarried parents can have their rights compromised. They are treated the same way that two legal parents not in any relationship with each other would be treated under the law, as if the cohabitation did not have significance as to what the deceased parent would consider in the children's best interests – and regardless of a last well left specifically attempting to leave the assets to the other parent-cohabitant.

2. Adopted children

The extinguishing of one or both legal parents' parental status in all cases of Swedish adoption leads to difficulty legally protecting children's important familial relationships and to discrimination between for example stepchildren and shared children within blended families in questions of, for example, inheritance but also continuity of care and access to parental figures after certain adult relationships end or a legal parent dies.

3. Children born through medically-assisted procreation techniques permitted vs. prohibited in Sweden

Under current Swedish law, same-sex couples have different legal options for becoming parents depending on whether they are male or female[156]. Men's opportunities to form a family are more limited, including because surrogacy is not provided as an assisted reproductive option

[154] This state of affairs has been criticized in scholarship. Children's right in Swedish law to inherit from their unmarried mother was first introduced in 1905, and a right to inherit from their unmarried father was not passed into law until 1970. Also, before 1958, adopted children had only a weak inheritance right from their adoptive parents but retained a right to inherit from their birth parents; it was 1970 before all Swedish adoptions became "strong" adoptions, the result of which is full inheritance rights from adoptive parents and no remaining legal ties to birth parents. A. Singer, *Barns rätt* (3d. ed., Iustus, 2022) 86–87.

[155] See FB chapter 10.

[156] See e.g. SOU 2017:101 at 276.

in Sweden or particularly available as a path to becoming a parent.[157] In the absence of a national or an EU-wide legal mandate that international determinations of parentage must be recognized, couples who do use surrogacy abroad face recognition obstacles when returning to Sweden, particularly for a non-genetic parent and for women, that compromise, temporarily or permanently, children's legal status as a child to a *de facto* parent. International adoptions have decreased overall and have been in practice rarely an option for same-sex couples. This means that male same-sex couples wishing to become parents have very different conditions when starting a family than female same-sex couples, who may use techniques such as insemination.

4. Children with stepparents and bonus parents

Such additional parents may have a non-legal 'parentage' relationship, for example if one as a genetic parent has allowed a non-genetically-related one of the other co-parents to adopt their genetic child, in order to create some sort of meaningful position for each parent. Even where this has been done, most often the non-legal parents' close relationships to the children that they 'parent' are unprotected in situations where a legal parent no longer wishes to authorize contact[158].

VII. Recognition of foreign-issued parenthood-related public documents

A. General rules on recognition and enforcement of public documents

Documents issued by officials of other EU Member States, of other Nordic countries, and of "third party" countries are recognized and enforced in Sweden pursuant to different legal rules. Sweden's public international law in the family law context generally derives in large part from harmonizing EU legislation, as between (most) EU Member States, and from international agreements including certain Nordic cooperation agreements in other cases. Purely national law applies to cases where the above-named rules do not apply.

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[157] See e.g. E. RYRSTEDT, *Social Parenthood in Sweden*, C. HUNTINGTON, C.G. JOSLIN, CHRISTIANE VON BARY (eds.), *Social Parenthood in Comparative Perspective,* NYU Press, 2023, 216.

[158] SOU 2022:38 at 46.

A somewhat confusing array of instruments thus can apply to situations in which a foreign public document, administrative or judicial, is presented for recognition, meaning someone seeks for the document to create legal effects in Sweden, such as when a document is accepted by the Swedish Tax Authority and the information recorded on the document is simultaneously entered into the Swedish Population Register.

Recognition of foreign-issued family law status documents in particular remains a rapidly-evolving area[159]. Beyond purely national law, there are new rules to consider arising regularly in recent years from EU secondary law, from EU case law (decided by the Court of Justice of the European Union), and from regional human rights case law (decided by the European Court of Human Rights as it interprets the European Convention on Human Rights). Rules and recommendations also can arise from elsewhere, including from the Council of Europe and the United Nations Committee on the Rights of the Child.

In Sweden, legal and political debate is ongoing regarding when Swedish law and courts may and should recognize foreign-issued family law status documents, primarily with respect to marriages and parental status[160]. The newest national legal sources include the 2022 reformed version of the Swedish Act on Parenthood in International Situations[161], the 2019 Swedish Supreme Court decision allowing recognition of a mother-child relationship after surrogacy abroad (where a family relationship had arisen, implicating Article 8 of the ECHR) and the latest modifications and proposed modifications to the Swedish Parents Code, each summarized above in this chapter, reflect the often-conflicting public policy aims and priorities in focus at the national level.

The Swedish Tax Authority itself describes its procedures in practice for establishment of parenthood and custody for children moving to Sweden as follows[162]:

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[159] See, for detailed description of the Swedish international private law concerning parenthood (in Swedish), M. Bogdan, M. Hellner, *Swedish international private and procedural law*, (9th ed.), Norstedts, 2020, 214-233.

[160] See, e.g., L. Vaige, *Recognition of a status acquired abroad*, in *Cuadernos de Derecho Transnacional*, Marzo 2023, Vol. 15, No. 1, 1108-1120, 1109 (pre-print).

[161] Lag (1985:367) om föräldraskap i internationella situationer (modified recently by Lag (2022:1322)).

[162] The Swedish Tax Authority (*Skatteverket*), 'Registering of Child Custody https://www.mfof.se/faderskap-och-foraldraskap/kunskapsstod-till-surrogat-arrangemang-i-utlandet/vardnadshavare/registrering-av-vardnad-vid-inflyttning-fran-utlandet.html (accessed 27 September 2023).

> “The Swedish Tax Agency registers custody of a child when the child moves to Sweden. Custody is registered in the population register on the day the child is registered. This applies even if custody is valid in Sweden from an earlier date. When a notification of custody is received by the Swedish Tax Agency for a child who is not to be registered in Sweden, the Swedish Tax Agency rejects the notification.
> If the notification of custody for a child who is not registered in the population register is received by the Tax Agency together with a paternity confirmation, the Tax Agency can register the relationship between the father and the child without registering custody.
> If a child moves to Sweden from abroad and there is no custody decision that applies in Sweden, the Swedish Tax Agency normally registers custody of the child according to Swedish principles. In surrogacy arrangements, this means that the Swedish Tax Agency registers the woman who gave birth as a mother and guardian in the population register. If the woman is married, her husband is registered as a guardian if he is the presumptive father of the child in accordance with Section 2 of the Act (1985:367) on International Paternity Issues. If the presumption of paternity has been revoked by a foreign paternity decision that is valid in Sweden pursuant to Section 7 of the Act (1985:367) on International Paternity Issues or by a Swedish court, the surrogate mother’s spouse shall not be registered as a legal father and guardian in the population register.
> Foreign judgments or decisions on custody may apply in Sweden according to the Brussels II Regulation, the Ordinance (1931:429) on certain international legal relations concerning marriage, adoption and guardianship, the Act (1989:14) on the recognition and enforcement of foreign custody decisions etc. and the transfer of children or the Act (2012:318) on the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children. When the custody issue has been decided in a foreign custody decision that can be recognised in Sweden, custody of the child is registered accordingly. However, a foreign surrogacy agreement that regulates custody of the child has no legal effects in Sweden because there is no legal support for recognizing this type of custody agreement”.

The legal underpinnings of the above-described practice are further detailed below.

1. Parenthood in international situations arising immediately per statutory law.

In international situations, including in the Nordic context[163], parentage of children is currently regulated within the 2022 reformed version of the Swedish Act on Parenthood in International Situations, previously mentioned. The Act regulates this area using gendered parenthood terms, distinguishing between the establishment of legal paternity, maternity and other parenthood, though this could be reformed to be gender-neutral and simplified in the near future[164].

Choice-of-law rules generally defer to non-Swedish law, and do not discriminate against for example same-sex co-parenthood, but they also require the use of Swedish law, rather than foreign law, in certain situations. Per § 2 of the Act, for example, a man who is or has been married to the mother of a child shall be deemed to be the child's father, when it follows from the law of the state in which the child was domiciled at birth or, if no one is to be considered the child's father under that law, when it follows from the law of a state of which the child became a citizen at birth. If the child was domiciled in Sweden at birth, however, the matter must always be assessed according to Swedish law.

Per § 2 a of the Act, in a parallel fashion, a woman who is or has been married to the mother of a child shall be considered the child's parent, when it follows from the law of the state where the child was domiciled at the time of birth or, unless any woman other than the mother shall be considered the child's parent under that law, as follows from the law of a state where the child became a citizen at birth. If the child was domiciled in Sweden at birth, however, the matter must always be assessed according to Swedish law. Now that Swedish law includes a parenthood presumption for the female spouse of the person giving birth (who is always deemed the legal mother), such a spouse in an international case can be a legal parent without further legal steps, even in Sweden, if the foreign law provided that or if the child was domiciled in Sweden at birth and thus Swedish law is applicable.

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[163] A separate act regulates Swedish recognitions of decisions on parenthood from Denmark, Finland, Iceland and Norway, but it takes precedence over only sections 7-10a and 12 (para 2) of Lag (1985:367). See the Swedish Law on the Recognition of Nordic Parental Decisions (Lag (1979:1001) *om erkännande av nordiska föräldraskapsavgöranden*) (that was renamed with respect to parental instead of paternity decisions effective 1 August 2022).

[164] The reform proposed by SOU 2022:38 would modify even this 2022 law to replace the gendered terms and otherwise to simplify and improve current statutory wording.

In order to take advantage of such automatic status recognitions, based upon already-established status relationships from abroad, reliable documentation regarding the relevant foreign statuses must be presented to Sweden officials.

2. Recognition of public certificates relating to parenthood, such as birth certificates.

Per § 3 and 3 a of the Swedish Act on Parenthood in International Situations, a parent relationship can be established by confirmation (acknowledgment) of that relationship with the involvement of a Swedish municipality's social services agency, if that agency is required to investigate paternity or parenthood for a woman (per FB §§ 2:1, 2:8 a or 2:9) with respect to the child concerned.

Swedish law will be applied here as well. If the confirmation (acknowledgement) has been given outside of Sweden, it will be considered valid as to form if it was valid as to form according to the law where it was given[165]. Foreign public documents confirming or creating legally-protected family relationships may be registered at the state authority tasked with registering family status relationships, which in Sweden is the Swedish Tax Authority (*Skatteverket*).

Here the public policy reservation to usual international private law rules becomes relevant. A Swedish official may decline recognition of a foreign legal act when recognition would be "so contrary to public policy as to offend the foundations of Swedish law"[166]. Where, under Swedish law, a public document recognizing a certain civil status is considered contrary to public policy to such a degree, a Tax Authority registrar will refuse to register it in the civil status register. The negative decision may then be challenged before the ordinary courts (*allmänna domstolar*, in contrast to in the administrative law courts).

In at least one instance, described subsequently by lawmakers, however, a prominent Swedish appeals court (specifically the *Svea hovrätt*) concluded that it does not violate Swedish *ordre public* for Swedish authorities to recognize an American court judgment that establishes both a genetic father and a social father as a child's legal "fathers"[167].

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[165] Lag (1985:367) om föräldraskap i internationella situationer § 3 para 3.

[166] See e.g. SOU 2022:38 at 504.

[167] This is described at Prop. 2017/18:155 p 101, and refers to a then-newly-decided case that was not appealed further; the Swedish Supreme Court has not itself had opportunity to address the issue.

In a more recent case, HFD 2020 ref 13, also concerning two parents of the same sex, the Swedish Supreme Administrative Court decided whether parentage established in Iceland, a fellow Nordic country, could be the basis for a registration of parentage in the Swedish Population Register for the non-birth-mother parent, where two women were listed (in accordance with Icelandic law) on a child's birth certificate as the child's parents and there was no provision of Swedish law applicable to the situation.

The Icelandic couple concerned had moved to Sweden and reported the move to the Swedish Tax Authority, which registered them but decided not to register any relationship between the child and the woman who did not give birth to the child, citing the lack of legal support to recognize a woman's parentage established in another country. Where the first-level Administrative Court and the second-level Court of Appeal had overturned the Tax Authority's decision and called for registration of the non-childbearing woman as a parent, the Supreme Administrative Court (HFD) reinstated the Tax Authority's decision not to register the second parent. It held that the refusal to register the non-childbearing woman's parentage was a restriction on the private and family life of the parties concerned, but that the restriction was legally founded, had taken place for a legitimate purpose and was proportionate in relation to the purposes of the legislation, therefore did not amount to a violation of Article 8 or 14 of the ECHR.

Nonetheless, similar situations of nonrecognition of foreign birth certificates listing same-sex female parents will no longer occur in Sweden, thanks to the new legal provision, in force from 1 August 2022 and introduced earlier, which states that a woman who is or has been married to a child's mother shall be considered the child's parent, when it follows from the law of the state in which the child was domiciled at birth or, if no woman other than the mother is to be considered the child's parent according to that law, when it follows from the law of a state where the child became a citizen at birth[168].

3. Recognition of court decisions or orders relating to parenthood, such as final judgments on family relationships

The first legal issues relevant to resolve for any case with international elements in Sweden, including those regarding parenthood, are which

[168] Law (1985:367) on parentage in international situations (formerly law [1985:367] on international paternity issues) § 2 a.

court or courts have jurisdiction to decide the case, and what substantive law such court should apply. Here, the question in focus is how Swedish authorities, including courts, respond to requests to recognize or enforce rulings from courts and tribunals outside of Sweden, therefore the question of jurisdiction is, we can assume, resolved.

A main rule in Swedish international civil and procedural law is that recognition of foreign judgments requires support in (statutory) law. There exists an abundance of Swedish law concerning civil status in various border-crossing situations, unfortunately fragmented across legal instruments, including depending on which legal means by which paternity, maternity or parenthood was established in a given case[169].

Civil status-conveying documents issued by a foreign court can be reviewed by the general courts in Sweden. Separately, foreign rulings also may be granted some effects in certain prejudicial contexts, even when not fully recognized for all purposes.

Jurisdiction in cases of determination or termination of legal parenthood

An action to establish paternity (or parenthood for a woman) with respect to a person that is or has been married to or a legal cohabitant with a child's mother may be taken up by a Swedish court if the child is habitually resident in Sweden (has *hemvist* in Sweden), the case is brought against someone (a man, woman or multiple men or women that all are) habitually resident in Sweden, or if there are otherwise special reasons to allow the case to proceed in Sweden, with consideration of the child's mother's, or the man's (mens') or woman's connections to Sweden[170].

Applicable law in cases of determination and termination of paternity

Applicable law for a case regarding determination of or termination of a legal parenthood relationship will be, per § 5 of the same Act, that of the child's place of habitual residence when the case is filed in the first instance court.

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[169] M. Bogdan, M. Hellner, *Swedish international private and procedural law* (*Svensk internationell privat- och processrätt*), (9th ed.), 2020, 214–233 (explaining in detail the various regulations and their interactions as the law is applied). Improving the law applicable to establishing parenthood in international situations by organizing it together was one recommendation of SOU 2022:38.

[170] Lag (1985:367) om föräldraskap i internationella situationer (modified by Lag (2022:1322)) § 4.

However, per § 5, paragraph 2, Swedish law instead shall always be applied in a determination of paternity case for a child habitually resident abroad where the man concerned has his habitual residence in Sweden, is claimed to be the genetic father of the child, and where the child does not have another legal parent except for the man and his spouse, registered partner or cohabitant partner[171].

This last-named provision is used in situations where a court confirms paternity for a child who has been born as a result of a surrogate arrangement outside of Sweden involving a genetic father from Sweden.

4. Sweden's *ordre public* exception to the main rule of recognition of family relationships established elsewhere

Swedish international private law includes an *ordre public* or public policy exception, under which recognition can be refused. Today, this often is discussed in connection with legal recognition in Sweden of parenthood and related family law legal conclusions reached abroad under foreign law.

Surrogacy arrangements are not expressly prohibited by Swedish law, but the legal system has expressed declined to facilitate the practice, on public policy grounds. When egg donation was first allowed in Sweden in 2003, the provision FB 1:7 was introduced, to clarify in law that the woman who gives birth to a child after egg donation shall be considered the child's mother, and not (impliedly) any genetic or intentional mother. The regulation is compatible with the *mater est* principle and by continuing to follow that principle, lawmakers have in practice rejected surrogate motherhood[172]. The notion that surrogacy should not be allowed is based on moral grounds and issues of human trafficking and exploitation of women. Not long ago, in an investigation from 2016, it was argued that the *mater est* rule should be considered an internationally binding rule[173]. Perhaps relatedly, uniformly thus far the Swedish lawmaker and experts groups appointed to investigate surrogacy and related matters have declined to allow surrogacy in any form, or to promote easy paths to legal

[171] Lag (1985:367) om föräldraskap i internationella situationer (modified recently by Lag (2022:1322)) § 5 para 2. This exception to the main rule was introduced by Prop 2017/18:155 (More modern rules on assisted reproduction and parenthood (*Modernare regler om assisterad befruktning och föräldraskap*)) 77.

[172] S. Hellblom, *Surrogate motherhood forbidden in law – but not in practice?* (*"Surrogatmoderskap förbjudet i lag, men inte i praktiken?"*, Norstedts juridic, JUNO nyheter, 2021-06-09 https://www.nj.se/nyheter/ surrogatmoderskap-forbjudet-i-lag-men-inte-i-praktiken (accessed 2023-05-15).

[173] See SOU 2016:11.

parenthood for intended parents who have used a surrogate arrangement abroad[174].

Because surrogate arrangements do not occur in Sweden and their consequences when intended parents return home to Sweden have not explicitly been regulated, Swedish authorities and courts have been required to make difficult determinations based on their own interpretations of the law and of when the public policy exception to recognition of foreign-established civil status relationships should be invoked. The starting point in Swedish law is that a foreign judgment cannot be enforced in Sweden without explicit support in law, so a court must determine which legal provision regulates a given request for recognition, and then whether the result triggers a need for the Swedish official to refuse recognition nonetheless.

The consequence of this in surrogacy cases can be an inconsistent ("limping") legal parentage for a child, where the intended parents are recognized as legal parents in the child's country of birth, where often a legal surrogacy agreement had been performed in full, but the legal parenthood will not apply in Sweden, the country where the child will live and in which it needs legal parents. In Sweden, the surrogate mother (and her husband, is she is married) may be recognized instead as a child's legal parents, though they live abroad and may be protected from having such parenthood imposed on them in their legal system. These complexities and realities are understood by Swedish lawmakers, who have devised ways new ways that parenthood can be established in Sweden recently, while retaining the stance that surrogacy is against Swedish public policy.

5. Consideration of the child's best interest (*barnets bästa*) and other fundamental human rights

As in other EU Member States, when Swedish public agency officials and judicial officers decide whether a foreign public document such as a public record of a legal parent-child relationship should be recognized in Sweden, not only the directly applicable law and case precedent but also an overarching "best interest of the child" determination must be made. This is so because the consequences of their actions will affect the life of a child, and the affected child's best interests must be a primary consider-

[174] See SOU 2022:38 (declining again to turn away from the *mater est* principle or public policy disfavoring surrogacy).

ation under such circumstances[175]. Children's views and interests should be weighed into any decision affecting them, as was underscored by the Swedish government and legislature when they passed law to incorporate, effective 1 January 2020, the United Nations Convention on the Rights of the Child directly into Swedish national law[176].

Other fundamental human rights also must be considered, such as the rights protected in Europe by, among other international and other instruments, the ECHR. The manner in which such consideration occurs during recognition-related adjudication by Swedish courts is illustrated in the case decisions described in this section of this chapter.

B. Instances in which parenthood-related public documents have not been recognized, enforced or registered in the civil status registry

Sweden has declined to recognize legal pronouncements of a parent-child relationship most notably with respect to intended Swedish mothers after surrogacy abroad[177]. Even in that category, however, the Swedish Supreme Court made clear in 2019 that the legal motherhood of such an intended mother would in exceptional cases need to be recognized, despite the lack of law supporting the recognition, and has subsequently confirmed for Swedish state officials that even child custody (parental responsibility or *vårdnad*) aspects of the recognized foreign judgment must be given legal effect.

Under the particular circumstances of that case, the "Californian Surrogacy Arrangement" case, which precluded adoption of the child by the intended mother and even precluded the mother's continuing relationship

[175] This per (among other legal sources) the United Nations Convention on the Rights of the Child (UN CRC) Article 3, itself incorporated into Swedish national law. Per the Committee on the Rights of the Child, this right must be honoured in all circumstances where children individually or as a specific or general group may be affected by state action, broadly defined. See General Comment Nr. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3 para. 1) paras 17-24 (on the meanings of "in all actions" "concerning" and "children").

[176] See Prop. 2017/18:186 (Incorporation of the UNs Convention on the Rights of the Child) 1 (summarizing the Government's reasoning that incorporation should help the Convention be used more frequently in interpretation and application of Swedish national law). The bill led to the incorporating act, *Lag* (2018:1197) *om Förenta nationernas konvention om barnets rättigheter*. The Convention had already largely applied to Sweden, which ratified the Convention in 1990, for three decades before the incorporation.

[177] In many cases, the intended mother would then need to pursue legal Swedish adoption of the child from the woman considered the child's birth mother per Swedish law, but not the law where the surrogate resides, as discussed elsewhere in this chapter.

with the child, because she and the child's father had separated and were in conflict, the child's rights to private life would be violated and Sweden in possible violation of Article 8 of the ECHR if the Swedish courts had declined to provide a legal path to establish parenthood for the intended mother, therefore the Supreme Court recognized the judgment of parenthood from a Californian court[178]. Subsequently, leading the Swedish Supreme Court in its judgment referred to as "The Californian Surrogacy Arrangement II"[179], to clarify that

1. Sweden's non-recognition of child and plural marriages

There is a possibility that non-recognition of the validity of certain marriages in Sweden could lead to non-recognition of legal effects that such marriages would otherwise create, such as fatherhood for a man under the paternity presumption. The current state of Swedish law regarding recognition (or, more to the point, increasing non-recognition) of marriages celebrated abroad therefore merits mention here.

In general, in Sweden, the rights to marry and to equal treatment when creating parent-child relationships have been increasingly respected within family law in recent years. A notable exception however, meant to be in line with Sweden's approaches to gender equality and children's rights, is a new statutory prohibition preventing judges from granting recognition of foreign child marriages, even for marriages legally conducted elsewhere in the EU: since 2019, no marriage of a minor child may be recognized as valid in Sweden, although in very limited circumstances when there are not just "special" but "especially weighty reasons", its effects might be recognized[180].

The previous general rule was that a foreign marriage would be recognized when the parties to it had no connection to Sweden at the time of the marriage, and thus were not marrying abroad to circumvent Swedish law, so long as the marriage was legal where it occurred. Now the rule (at

[178] NJA 2019 s 504 ("The Californian Surrogacy Arrangement"). In that case, the intended mother was also the child's *de facto* mother, although not genetic mother (because a donated egg had been used to create the embryo then gestated by the surrogate mother). The intended mother had been declared the child's legal mother in California pursuant to California law, in uncontested legal proceedings in which the surrogate was a participant.

[179] NJA.

[180] Lawmakers mentioned as an example the recognition of the validity of a marriage entered into when one party was under 18 years old as an incidental question in an inheritance dispute. L. Vaige, cit., 1115 (citing Prop 2018(18) 288 *Förbud mot erkännande av utländska barnäkterskap* [Prohibition of recognition of foreign marriages] 30.

IÄL 1:8 a paragraph 1) provides that "[a] marriage that has been entered into according to foreign law is not recognized in Sweden if at the time of the conclusion of the marriage there would have been obstacles to the marriage according to Swedish law, if it is likely that the marriage was entered into under duress, or if the parties were not present at the same time at the conclusion of the marriage and at least one of them was then a Swedish citizen or had domicile in Sweden" but then, as paragraph 2, provides that paragraph 1 does not apply if both parties are (now) over 18 years old and there exist special reasons to recognize the marriage.[181]

This has now been curtailed for persons who married when one of the parties was under 18 years of age, as it is now deemed to be so against Swedish public policy (fundamentally incompatible with the foundations of the Swedish legal system) as to deserve not only *ordre public* protection but also "codified *ordre public*" protection, removing judicial discretion as to when recognition should be refused on the basis of *ordre public* by legislating that decisionmakers have no discretion in certain factual circumstances[182]. The general rule to be applied is that no marriage entered into when one of the parties was under 18 years of age at its inception will be recognized in Sweden[183].

The new provision has been criticized by several Swedish law academics, as it does remove rights from young people, substituting adult judgment about what will be best for them, in general a disfavored direction for family law to go in Sweden. The rule never recognizing marriage where one or both parties was under 18 can be contextualized, however, in that parties who have subsequently reached 18 can re-marry in Sweden if relocating to Sweden. On the other hand, it is often in the context of a subsequent legal dispute that recognition of the existence of a marriage is requested; the potential to disadvantage the person who was a child when married is not always lower than the potential to advantage or protect that individual[184]. There is, however, IÄL 1:8 a paragraph 2, allowing a court to find that special circumstances exist in a given case for nonetheless recognizing the foreign marriage.

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[181] Law (1904:26 p 1) on Certain International Legal Relationships Relating to Marriage and Economic Guardianship) 1:8 a, as modified by the Swedish parliamentary bills SFS 2018:1973 and 2021:465.

[182] L. Vaige, cit., 1115, 1118.

[183] Law (1904:26 p 1) on Certain International Legal Relationships Relating to Marriage and Economic Guardianship) 1:8 a, as modified by the Swedish parliamentary bills SFS 2018:1973 and 2021:465.

[184] Multiple academics have criticized the new stringency of the non-recognition rule on this basis. See, e.g., L. Vaige , cit., 1118.

Recent changes to Swedish international private law have also more generally restrained decisionmakers from recognizing as valid foreign marriages which are problematic as a matter of Swedish public policy. Not only child marriages but polygamous marriages, proxy marriages, marriages "likely to be forced" and all others which could not have been concluded in Sweden when they were concluded abroad are now – as a general rule subject to exceptions for "special reasons" – not to be recognized, as described below. This is a legal change affecting, most notably, immigrants to Sweden who entered into polygamous marriages abroad before they had any connection to Sweden.

2. Plural marriages (such as polygamy)

Since July 1, 2021, the national law rule in Sweden on recognition of foreign marriages has been one less based on comity, bounded by the *ordre public* exception, and more based on explicit legislative clarity, intended to increase legal certainty, including for the state officials tasked with making decisions on whether to recognize for Swedish purposes certain foreign marriages. The general rule has become that any marriage that could not have been entered into in Sweden will not be recognized by Sweden, regardless of whether the parties had ties to Sweden when married[185]. This new baseline rule is subject to exceptions in "special circumstances", but only so long as both parties were legal adults.

The new rule was enacted specifically to prevent general recognition of plural, specifically polygamous, marriages[186]. Lawmakers enacted this rule based on an expert investigation's conclusions that Swedish law in many areas is not written in a way compatible with legal recognition of polygamous marriages among immigrants to Sweden (or the native population), and also that polygamy generally is harmful to the achievement of a central aim of Swedish law: equality between men and women in society[187]. Investigators had been appointed due to an increase in such marriages among immigrants to Sweden. They recommended the new

[185] SFS 2021:465, a bill amending Law (1904:26 p 1).

[186] See SOU 2020:2, *Skärpta reglar om utländska månggiften* [Eng: Stricter rules on foreign polygamous marriages] (reviewing the growing number of plural marriages already recognized in Sweden and the problems associated with applying Swedish law with regards to them).

[187] SOU 2020:2. In practice, families with three or more persons who are legal spouses elsewhere can live together in Sweden, since Swedish law does not regulate with whom adults may live, but the protections of legal marriage – of relatively low importance in Sweden due to the strong welfare state available to all individually – will not be extended to more than two legal spouses. One cannot be a legal cohabitant if married, either, per *Sambolagen* § 1(3).

national stance against general recognition of such marriages, despite academic concern that it would contribute to the problems of "limping" family statuses, including within the EU[188].

It is worth noting that the new rule was adopted over the objection of Sweden's Council on Legislation (*Lagrådet*), a body functionally providing a sort of advisory judicial review before legislative enactments, but with no power to stop such enactments if its advice is not taken[189].

Academics specializing in Swedish international private law have also been highly critical. Non-recognition of marriage can have consequences for establishment of parentage, such as when the marital presumption would establish legal paternity of a child. It can also affect rights to inheritance and spousal or child support.

C. Consequences of non-recognition of legal parenthood established outside of Sweden

The consequence of non-recognition of a foreign-established personal status relationship, such as a child's with a parent, is that the two individuals are legal strangers to each other in Sweden, and can only establish legal kinship in Sweden (and therefore benefit from its effects) if another means, such as adoption, is available to them under Swedish law. They may in some circumstances be able to move to, or back to, another legal jurisdiction that does recognize their relationship, but this would frustrate both the child's and the parent's ability to become or remain residents of Sweden.

Another consequence of non-recognition of legal parenthood established outside of Sweden is, as often seen in the prominent Swedish Supreme Court cases on this issue, that one parent to a child may have legal parentage in Sweden and thus related rights such as parental responsibility and the right to object to the child's adoption, while the other parent, a genetic but not biological mother to the child for example, may be placed in a relatively powerless position. That this continues to occur

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[188] L. Vaige, cit., 1109–1110 (concluding that even where Sweden has been making changes to comply with the requirements of EU law and the European Convention, it tends to do so conservatively, "slightly endorsing a *lex fori* approach, especially where the underlying ideology of Swedish law differs from other European law. Note that Regulation 2016/1191 on the circulation of public documents affects the acceptance but not recognition of public documents from other EU Member States. L. Vaige, cit., 1113.

[189] Concerns about the weakness of the judicial power in Sweden have been raised often in recent years, including by another recent expert investigative report, this one on behalf of the Swedish Parliament.

under Swedish law particularly to intended mothers but not generally to intended fathers is an equal treatment question raised by many, including the expert group proposing legal reforms to the Swedish Parents Code and related existing laws.

If a Swedish court has actually taken up the issue and decided formally that a given personal status relationship does not exist, the results for one or both individuals claiming that status relationship can be worse for those wishing to rely on the relationship (which might otherwise be assumed or recognized as an incidental question); not requesting a formal decision can thus sometimes be practically advantageous[190].

1. Violation of the rights of the child

Non-recognition under Swedish law has been held by Sweden's civil law court of precedent to undermine certain of a child's fundamental rights, in cases where the non-recognition could deprive the child of an important personal family relationship already established or otherwise not serve the child's best interests[191]. Several potential violations have been acknowledged within Swedish legal sources and scholarship.

Violation of the child's right to private and family life under Article 8 ECHR (absence of inheritance rights, legal representation, work leave, etc.)

Without being entered into the Swedish Population Registry as parent and child to each other, no rights and obligations that would otherwise exist under Swedish national and international sources of law for parent-child relationships will exist for the parent or the child, in terms of being enforceable in Sweden. The non-parent may not have any path to a share in legal parentage or in legal custody of the child, no child support will be due if the non-parent lives separately from the child, and no inheritance rights between the two will arise, as some examples. State failures to act by recognizing such an important civil status relationship – despite the relationship having arisen because the child's parents entered a disfavoured surrogacy arrangement abroad – have been held by the European Court of Human Rights to violate the state's obligations to protect individual children's rights to private life guaranteed by Article 8 ECHR, at least where

[190] L. VAIGE, cit., 1112; see also See E. MÄGI, L.-L. ZIMMERMAN, *Stjärnfamiljejuridik: Svensk familjelagstiftning ur ett normkritiskt perspektiv,* cit.

[191] See NJA 2019 s 504 ("The Californian Surrogacy Arrangement").

alternate legal means by which the legal parenthood could be established also were denied[192].

Swedish law limits the legal recognition of such relationships after surrogacy, but does not deny all pathways to parenthood for the intended parents. In situations where no other pathway is available, Sweden has recognized such a parent-child relationship[193]. Sweden thus considers itself in compliance with its obligations under Article 8 ECHR.

However, there may be ways in which current Swedish law or practice with respect to recognition of foreign-established parenthood violates Article 8 rights. The Court in Mennesson v. France stated that its analysis "takes on a special dimension where, as in the present case, one of the intended parents is also the child's biological parent", citing biological parentage as an important component of one's identity, as previously established by the Court.[194] This can be an important point in Swedish cases today where one of two intended parents, specifically the mother, is a genetic parent to the child, and this is given no legal consequence due to the *mater est* principle (even in cases where we know that the woman giving birth was not the child's genetic mother).

Also, if Sweden were to deny a third parent's legal status as parent of a child, given Swedish family law's maximum number of legal parents a child may have (two), consider how much of the ECtHRts reasoning would still be applicable. The child's needs for a legal parent would likely be met by the first two legal parents, assuming they were recognized in Sweden. The child's expectations in the individual case with respect to the third parent would not be met, however, for example in an inheritance situation, or to secure identity with a particular people for citizenship purposes. Perhaps there are circumstances where a state party to the ECHR would violate a child's rights by denying legal recognition to their third (or fourth) legal parent, lawfully declared a parent in another jurisdiction, because it too would be held an unjustified violation of the child's rights to private life and to have his or her best interests weighed in as a primary consideration. We easily accept that legal limits on the number of legal

[192] See e.g. *Mennesson v France* (2014, ECLI:CE:ECHR:2014:0626JUD006519211). France's refusal to allow US birth certificates to be registered in France and its failure to allow establishment of at least the biological father's paternity in France violated the children's Article 8 rights to private life, especially considering the best interests of the children, though not the parents' or children's rights to family life.

[193] NJA 2019 s 504 ("The Californian Surrogacy Arrangement").

[194] *Mennesson* para 100 (citing *Jäggi v. Switzerland*, no. 58757/00 (ECHR 2006-X)) at § 37).

children a parent may request to have registered in a given legal jurisdiction would violate an excluded child's and perhaps the parent's fundamental rights. Might there not be a parallel situation for children seeking to register the identities of (all of) their parents? Such a case has not yet arisen in Sweden, but conceivably could be, as several jurisdictions worldwide have begun allowing registration of more than two legal custodians or parents, and more have begun recognizing such relationships established elsewhere[195]. Multiparent situations are not themselves new phenomena[196], but their time to be established and recognized more universally in law may have arrived.

Violation of the child's right to personal identity under Article 8 of the Convention on the Rights of the Child

Lack of legal recognition by Swedish state actors could be argued to violate Sweden's obligation under Article 8 of the UN CRC "to respect the right of the child to preserve his or her identity, including his or her nationality, name and family relations, as recognised by law, without unlawful interference." This might depend upon the definitions of "unlawful interference" and "identity…as recognized by law" according to a Swedish court or the Committee on the Rights of the Child tasked with ensuring full respect for the rights described in the CRC.

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[195] For comparison, consider the United States, where six states of 50 had introduced laws expressly allowing their courts to recognize more than two parents for a child in 2022, and a number of others were considering similar proposals. C.G. Joslin, D. NeJaime, *The next normal: States will recognize multiparent families*, The Washington Post, January 28, 2022 < https://www.washingtonpost.com/outlook/2022/01/28/next-normal-family-law/> (accessed 2023-09-23) (arguing on the basis of the authors' family law research at UC Davis and Yale Schools of Law that multiparent recognition has made children's lives steadier and more secure, not less).

[196] *See id.* ("We are working on the first nationwide empirical study of case law from 1980 to the present on 'functional parent doctrines' – laws that allow courts to treat a person as a parent, even if that person is not the child's biological or adoptive parent. Our preliminary findings show that multiparent families have long existed and that they take a wide variety of forms. Examples include children who develop parent-child relationships with one or more stepparents, as well as children who have living biological parents but are raised primarily or exclusively by other relatives or friends. Long before statutes expressly permitted it, courts extended parental rights to people besides a child's biological parents. Such decisions reflected the understanding that these relationships can be vital to children and that protecting them is often critical to children's well-being")

2. Violation of the rights of the second parent (non-recognized parent)

When a parent, legally recognized as such in a foreign jurisdiction, is denied equivalent recognition in Sweden, there are not only serious social and practical but even legal consequences to the detriment of that parent. Parents can be denied their own rights to private family life and to form a family. Parents can be denied the right to participate that they would otherwise have, if the status relationship was recognized, for example in medical decisionmaking on behalf of the child, or in legal disputes where a legal parent or guardian has standing to bring a case but a legal stranger does not. They can be denied inheritance from their (according to foreign law) child, if the child should pre-decease the parent, leaving no descendants. Their ability to take over parental responsibility and day-to-day care of the child can be compromised, in the event that the parent legally recognized in Sweden dies or becomes incapacitated, for example, or unilaterally decides to move away with the child.

In my view, one rights violation arises from the power imbalance that occurs if the parent not recognized in Sweden is co-parenting with a parent who is recognized in Sweden; sobering instances of such facts have led to several recent Swedish Supreme Court decisions, as discussed above with respect to non-recognition of foreign-established legal parenthood for intended mothers after use of a surrogacy arrangement abroad. The non-recognized parent, when declined recognition as a consequence of sex-differentiated family law leading to seemingly arbitrary protection for one of two intended parents, both of whom equally circumvented for example the unavailability of surrogacy or anonymous sperm donation in Sweden, also could make a case that sex or other unjustifiable discrimination has occurred.

At the EU and Nordic levels, the second parent's, as well as the legal parent's, ability in practice to effectively enjoy their rights and freedoms of free movement over borders within these regions can be compromised.

DIRECTIVE PROPOSAL

European Commission

Brussels, 28.2.2024
COM(2024) ___ final

2024/___ (CNS)

Proposal for a

COUNCIL DIRECTIVE

on Social Parenthood

EXPLANATORY MEMORANDUM

I. CONTEXT OF THE PROPOSAL

• Reasons for the proposal

a) The rise of social parenthood among Member States

"Social parenthood" is an umbrella term used to describe the relationship between a person assuming parental responsibility and a child without genetic, biological, or gestational contribution between the former and the latter. The category includes all forms of filiation resulting from the various types of adoption, including stepchild adoption, as well as filiation resulting from donor-gamete-based medically assisted reproduction (MAP), surrogacy, *post-mortem* procreation (use of gamete after a natural parent's death), adoption or sharing of embryos, heterologous MAP by mistake (switched gametes at the lab resulting in a child not biologically related to the intended parents), and ROPA procreation method (receiving oocytes from one's partner).

From a broad definition of social parenthood, it is possible to isolate two constituent components relevant to the category. The first, referred to here as the positive prerequisite, relates to the potential social parent's assumption of responsibility for the procreation resulting in the child's birth, followed by the assumption of the parental responsibility as a conscious and responsible choice by the adult as a single parent, as a part of a couple or as a part of a different social formation, for example a multi-adult parenting group. The second component, the negative prerequisite, relates to the lack of relevance of genetic or biological heritage between both parents and the child born or of a lack of a gestation carried out by one of the intended parents prior to the child's birth.

Social parenthood includes functional/de facto parenthood and parenthood founded on informed consent. Furthermore, it includes cases in which certain countries provide legal status to a parent-child relationship while in other states the parent and child are treated as "legal strangers".

By including the concept of social parenthood in the legal regulation of the family, such legal harms can be avoided and more emphasis can be placed on what is central for the child: enduring care for the development of the identity of the child, in coordination with the Commission's

2021"EU strategy on the rights of the child". The approach is supported by research findings from the studied jurisdictions that document existing rules of domestic law aimed at the preservation of a social parent-child relationship, that is to say, a non-biologically-based status filiationis for the protection of the best interest of the child. The term is highly relevant to EU legal development because it includes both the above-described non-biologically-based forms of parenthood/filiation based on national law and the filiation status that circulates between EU Member States and in cross-border cases between EU and non-EU countries.

Social parenting is on the rise in Europe, as some statistics show, and research has shown that more and more individuals and couples are seeking and using medically assisted reproductive techniques and adoption to become parents.

b) Problems caused by legislative differences on social parenthood among Member States

The differences in family law disciplines between the Member States of the European Union emerge very clearly when examining the phenomenon of social parenthood. Each Member State has adopted its legislation on adoption and artificial procreation and each regulation is the outcome of its own ethical and legal sensitivity. On the one hand, legislative competence for the legal recognition of parental ties formed in the absence of gestational, genetic or biological ties is reserved to the Member States; on the other hand, however, the phenomenon of social parenting has several strong transnational components, which might be summarised as follows:

- firstly, citizens of the European Union today move from one state to another to have access to social parenting (e.g. to have access to assisted procreation techniques that are not permitted in their home state, such as donor-gamete-based medically-assisted procreation, ROPA, surrogacy, adoption, etc.);
- secondly, Union citizens move from one state to another to obtain legal recognition of the filiation bond that they cannot obtain in their home country (e.g. the issuance of a birth certificate on which a child has two mothers);
- thirdly, Union citizens may move to a country where social parenthood is not recognised or is recognised differently than in their home country such that the legal relationship between parents and children suddenly "disappears" when they move from one country to another or is negatively affected by a "downgrading" process (i.e., the legal

status becomes different: qualitatively inferior legal treatment compared to that of the country of origin results); this might hinder the children's fundamental rights and the result might be denial of the rights they derive from parenthood under national law.

This phenomenon is accentuated and is bound to increase in light of the increasing movement of families within the European Union. Differences between Member States in the recognition of parenthood may discourage the free movement of persons and workers whose social parenthood is not recognised in the destination state. In other words, families in which there is no biological, gestational or genetic link between their members may be deterred from exercising their rights to free movement for fear that their legally-established parenthood will not be recognised in another Member State for all purposes.

To address these problems with the recognition of social parenthood for all purposes and to close an existing gap in Union law, the Commission is proposing the adoption of Union rules on social parenthood.

- **Objective of the proposal**

a) General objective

The general objective of this proposal is to strengthen the protection of the fundamental rights and other rights of social families in cross-border situations (including the children's right to equality, personal identity, non-discrimination, private and family life), and to maintain their rights in another Member State, taking the best interests of the child as a primary consideration.

b) Specific objectives

Specific objectives of the proposal are:

- to avoid discrimination in access to social parenthood (e.g.: adoptions, medically assisted reproduction, etc.) determined by age, economic conditions, nationality, health, gender, sexual orientation, and civil status;
- to avoid discrimination between children who have gestational, biological, and genetic links with their parent/parents and children who do not;
- to avoid discrimination between legal parents and social parents by assuring all of them equal treatment in employment, occupation and cross-border health care;

- to reduce the costs and burdens for social or de facto families when they find themselves in cross-border situations (such as costs for legal recognition or authentication of public documents on social parenthood);
- to prevent the cross-border downgrading of a child's legal status;
- to improve the use of IMI (Internal Market Information System), the IT application that connects national, regional and local authorities across the EU (and EEA), so that local authorities might share information about public documents on social parenthood issued in another Member State when receiving them;
- to equally balance and fully protect the rights of those who are involved in the phenomenon of social parenthood (e.g., biological parents versus social parents in adoption, donors and recipients in MAP practices, pregnant women and intended parents in surrogacy, surviving and deceased parents in posthumous practices, caregivers in cases arising from Islamic law, vulnerable women, etc.);
- to eliminate the negotiation and the indirect effects of negotiation in assisted reproduction procedures and to strengthen the value of informed consent to treatments (via a unilateral, non-negotiated, free-from-contract-rules act);
- to introduce harmonised rules related to the governance and the management of genetic heritage material and information; and
- to balance the right to know one's origins for medical or therapeutic reasons and the principle of anonymity of donors of body parts (such as gametes), bringing into equilibrium the interests of parents, donors and children.

- **Consistency with Union provisions in the policy area**

Member States have and will maintain the competence to regulate family law, including the phenomenon of social parenthood, the establishment of parenthood in domestic situations, and the recognition of foreign public documents on filiation. At the same time, the Union aims to create, maintain and develop an area of freedom and justice in which the free movement of persons with their families and the full respect of fundamental rights are ensured. Many existing instruments of European legislation already deal with social parenthood, although indirectly and as a result of different objectives (e.g. the tissue directive). Such existing instruments have become insufficient to deal with the increasing phenomenon of social parenthood, which over the years has become a supranational issue, and thus such instruments need to be improved and amended.

1) Directives 2004/23/EC[1] and 2002/98/EC[2] (the so-called tissue and blood directives) are not up-to-date with recent scientific techniques and do not currently target, even indirectly, the increasing phenomenon of social parenthood. Modern techniques, for instance, easily allow the safe storage of genetic patrimony and heritage (gamete cells), giving the possibility to access *post mortem* procreation: consequently, it is necessary to introduce harmonised provisions among Member States for determining the destiny of genetic cells and governing the methods of tissue retrieval and transfer, in accordance to the general principle of informed consent to treatment. This objective might be reached through an amendment of the above-mentioned directives, to include harmonised rules for governing, managing and determining permissible use of one's genetic material (such as cells, tissues and especially gametes), even after death. Consent, understood as authorisation for interference with the body, should be constructed as a unilateral, non-negotiable act, not subject to commercial or contract rules. Harmonized requirements for governance and management of genetic material in the transport and transfer of bodily organs and tissues must also be established through a common legal instrument creating a common legal basis among Member States.

2) Regulation (EU) 2016/679[3] lays down general rules on the protection of personal data, especially those related to health status. The processing of special categories of data related to health status without consent of the data subject may however be necessary, not only for reasons of public interest in the areas of public health, but also to protect the fundamental right to health of children born from techniques involving, in any capacity, assisted procreation and the use of donor cells. Thus, Member States should enforce this right through the provision of rules guaranteeing access to information on a gamete's donor for therapeutic (treatment) purposes. With such rules it will be possible to pre-

[1] Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells.

[2] Directive 2002/98/EC of the European Parliament and of the Council of 27 January 2003 setting standards of quality and safety for the collection, testing, processing, storage and distribution of human blood and blood componentsand amending Directive 2001/83/EC.

[3] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance).

vent and treat genetically-transmissible diseases more easily in children born after gamete donation. Member States should also be encouraged to introduce a specific proceeding that guarantees anyone born after assisted reproduction access to the donor's or donors' health information when needed for therapeutic reasons. The interpellation procedure must guarantee and protect both the rights of the applicant and the rights of the donor.

3) Regulation (EU) 2016/1191[4], which promotes the free movement of citizens by simplifying the requirements for the submission of certain public documents in the European Union, allows citizens of the European Union to move from one Member State to another without the need for legalization or other similar formalities (e.g., apostille) with respect to certain public documents; the regulation also simplifies the formalities related to the translation of public documents and certified copies. The catalogue and type of public documents to which the Regulation applies are circumscribed by its Article 2: in family matters, in particular, the Regulation applies to public documents attesting to birth, filiation, and adoption. Member States have been asked to notify the European Commission of the list of public documents to which the Regulation applies, which is published on the European Justice Portal. However, the catalogue of existing public documents on parenting–and particularly social parenting–is known to be much larger than that included by the Regulation and those submitted to the European Commission by Member States. The non-application of the benefits of the Regulation to public documents on certain types of social parenting is an obstacle to the movement of families within the European Union. It would therefore be appropriate that, as Article 26 of the Regulation provides, the objective scope be expanded in the future, to include further categories of public documents on social parenting[5].

[4] Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012.

[5] Such as those on: 1) representation and guardianship of the child (including acts of appointment of guardian by the parent and orders of appointment of guardians); 2) custody of the child (including agreements regarding custody of the child and financial obligations to the child, including out-of-court agreements); 3) informed consents to medically assisted artificial procreation and withdrawal of such informed consents; 4) placement orders concerning custody of a child (into or out of "foster care" placement or "private placement"; 5) acts of acknowledgement of a child including acts of recognition of a child before birth; 6) acts made in conjunction with adoption proceedings (for example declarations of consent of one parent to the adoption of the child by the other parent in the case of stepchild adoption); 7) acts confirming adult cohabitation or cohabi-

4) Directive 2011/24/EU[6] on the application of patients' rights in cross-border healthcare stipulates that Member States shall ensure that the costs incurred for the health care of a person insured in another Member State shall be reimbursed by his or her Member State of affiliation, provided that the health care in question is among the benefits to which he or she is entitled in the Member State of affiliation. Consequently, couples or individuals who need to travel to another Member State of the union to accessmedically assisted procreation are not always entitled to reimbursement of health care costs incurred, but only in cases where the technique performed is permitted by the legislation of their State. Therefore, it seems appropriate to provide for an amendment to Directive 2011/24/EU that expands the possibilities of obtaining reimbursement for healthcare costs incurred abroad: today the requirement is that the healthcare in question is among the benefits to which the insured person is entitled in the Member State of affiliation. It could be provided that the condition for reimbursement is that the healthcare in question is not against the fundamental constitutional principles, values, or identity of the Member State of affiliation, or not against its public policy. This solution would prevent only wealthy people from having access to artificial procreation, as opposed to poor people; in other words, it would prevent discrimination in access to parenthood based on wealth.

5) Directive 2004/38/EC8[7] on the right of the citizens of the Union and their family members to move and reside freely within the territory of the Member States entails the right to equal treatment and the prohibition of obstacles in matters such as the recognition of names and the recognition of court decisions. As recently ruled by the Court of Justice of the European Union, the directive already requires the Member States to recognise the parenthood of a child as established in anoth-

tation between a social parent and a child (such as Italian registry family certificates, act of cohabitation, etc.); 8) acts with which legal custodians to a child (usually the parents) transfer some of their right to a parental leave to a person that is not the child's parent or equated with a parent (with reference to the Swedish legal system); and 9) parenting powers of attorney (documents with which a legal parent delegates or shares a certain decision making authority).

[6] Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare.

[7] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

er Member State for the rights that the child derives from Union law. To make sure that this right is fully respected, it is necessary to establish a European filiation certificate with entailed effects limited to the rights guaranteed by the European Union, allowing the full exercise of the right to free movement between Member States. The legal basis for such a certificate would be not only the aforementioned directive but also Articles 20-21 TFEU and the case law of the Court of Justice of the European Union, which obliged a Member State (Bulgaria) to register a birth certificate recognizing two mothers for the sole purpose of applying European Union law (C-490/20: VMA case, "Pancharevo").

Any citizen of the European Union would have both a filiation certificate issued by his or her Member State (valid and effective in the state that issued it and in states that register or recognize it) and a European filiation certificate that is automatically valid and effective throughout the European Union.

6) Directive 2000/78/EC[8] lays down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation. It enforces the principle of equal treatment in the Member States. In many States, the lack of legal recognition of a family tie produces discrimination of various kinds:,among them discrimination in employment and welfare. For example, a social parent might not have access to work leave to be able to care for his or her child in cases where the child is ill, or has a disabling illness or disability, etc. As a consequence, national authorities should therefore interpret domestic law in light of and in accordance with directive 2000/78/EC and thus disapply domestic law that produces any discrimination against social parents in employment and welfare.

7) Regulation (EU) No 1024/2012[9] introduces The Internal Market Information System ('IMI'), a software application accessible via the internet, developed by the Commission in cooperation with the Member States, in order to assist Member States authorities with the practical implementation of information exchange requirements laid down in Union acts by providing a centralised communication mechanism to facilitate cross-border exchange of information and mutual assistance.

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[8] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

[9] Regulation (EU) No 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC ('the IMI Regulation').

Member State should be encouraged to use IMI to exchange (share) information on public documents related to social parenthood also, e.g. to verify their authenticity.

8) Regulation (EU) No 2201/2003 of 27 November 2003 ("Bruxelles IIbis) and its recast, Regulation (EU) No 1111/2019 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction ("Brussels IIter); although these instruments define matters of parental responsibility extremily brodly, including public law (foster care) type orders, they apply only in civil matters of divorce, legal separation or marriage annulment and of the attribution, exercise, delegation, restriction or termination of parental responsibility; they do not address thoroughly and explicitly, however, the phenomenon of social parenthood as affecting matters within its scope. The directive would complement these regulations on issues of social parenthood.

- **Consistency with international conventions**

Many international law provisions, as well as Union law and Member States' laws, rule that all children have the same rights without discrimination, irrespective of how the child was conceived or born (for example through MAP), regardless of the existence of a genetic, biological or gestational link between the child and the parent (as in the adoption case).

As the proposal aims to protect the rights of children in cross-border situations, it is consistent with:

1) the European Convention on Human Rights, which provides for the right to respect for private and family life (art. 8), for the prohibition of discrimination on any ground such as birth or other status (art. 14 and 1 of protocol no. 1) and with the related case law of the European Court of Human Rights;

2) the United Nations Convention on the Rights of the Child of 20 November 1989 ('UN Convention on the Rights of the Child'), which provides that States Parties must ensure that the child is protected against all forms of discrimination or punishment based on the status or activities of the child's parents (art. 2); that, in all actions concerning children, whether undertaken by courts or legislative bodies, the best interests of the child must be a primary consideration (art. 3); and that children have the right to an identity and to be cared for by their

parents (articles 7 and 8); that a child shall not be separate from his or her parents against their will (art. 9); that no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family (art. 16); and that both parents have common responsibilities for the upbringing and development of the child (art. 18).

3) the Treaty on European Union, which promotes the rights of the child (Article 3(3) and the protection of the human rights of the children, Article 3(5) TEU);
4) the Charter of Fundamental Rights of the European Union ('the Charter'). The Charter guarantees, in the application and implementation of Union law, the protection of the fundamental rights of children and their families. These rights include the right to respect for private and family life (Article 7), the right to equality before the law (Article 20), the right to non-discrimination (Article 21), and the right of children to maintain regularly a personal relationship and direct contact with both parents if it is according to their best interests (Article 24); the duty to consider the child's best interests must be a primary consideration in all actions relating to children (Article 24(2)).
5) the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, which all Member States ratified. The Convention stipulates that recognition of intercountry adoptions is automatic in all signatory states, without the need for any specific procedure for recognition to be effective, and that recognition may be refused only if the adoption is manifestly contrary to the public policy of the state concerned, taking into account the best interests of the child. However, the Hague Convention does not cover the situation of a family with a child adopted under a purely national procedure which then moves to another Member State. This can lead to significant legal difficulties if the legal relationship between the parent(s) and the adopted child is not automatically recognised. Additional administrative or judicial procedures may be required, and in extreme cases recognition may be refused altogether.

- **Consistency with other Union policies**

The proposal draws on several policy initiatives. These include:

1) The Council of the European Union's proposal for a Regulation on standards of quality and safety for substances of human origin intended for human application and repealing Directives 2002/98/EC and

2004/23/EC, which establishes measures setting high standards of quality and safety for all substances of human origin ('SoHOs') intended for human application and for activities related to those substances in order to ensure a high level of human health protection, in particular for SoHO donors, SoHO recipients and offspring from medically assisted reproduction. This Regulation is without prejudice to national legislation which establishes rules relating to aspects of SoHOs other than their quality and safety and the safety of SoHO donors.

2) The Council of the European Union's proposal for a Regulation on filiation no. 2022/0402 (CNS), which lays down common rules on jurisdiction and applicable law for the establishment of parenthood in a Member State in cross-border situations; common rules for the recognition or, as the case may be, acceptance in a Member State of court decisions on parenthood issued, and authentic instruments on parenthood drawn up or registered, in another Member State; and creates a European Certificate of Parenthood.

3) The European Parliament resolution of 2 February 2017 with recommendations to the Commission on cross-border aspects of adoptions and a Regulation proposal to the Council of the European Union. The resolution states that the absence of provisions for the recognition of domestic adoption orders, i.e. concerning adoptions that are carried out within a single Member State, causes not only significant problems for European families who move to another Member State as the adoption may not be recognised (meaning that the parents may have trouble legally exercising their parental authority); it puts at risk the rights of children to a stable and permanent family; obliges the family to go through specific national recognition procedures or even re-adopt the child; and thus prevents families from freely and fully exercising free movement rights. For this reason, the proposal provides for the automatic recognition of adoption orders made in a Member State, on the condition that recognition must not be manifestly contrary to the public policy of the recognising Member State. The proposal also provide for a European Certificate of Adoption whose model is to be adopted as a Commission delegate act.

4) The 2010 "European Council Stockholm Programme – An open and secure Europe serving and protecting citizens" and the following "Commission Action Plan Implementing the Stockholm Programme".

5) The 2010 Green Paper entitled "Less Bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records".

6) The 2021 ”EU Strategy on the rights of the child”, which followed the 2020 Commission’s announcement to ensure that parenthood established in a Member State would be recognised in all other Member States, and the 2020 EU LGBTIQ Equality Strategy.
7) The 2022 European Parliament Resolution on the protection of the rights of the child in civil, administrative and family law proceedings.
8) The jurisprudence of the European Court of Justice, which recently stated that European Law must be interpreted as meaning that, in the case of a child, being a minor, who is a Union citizen and whose birth certificate, issued by the competent authorities of the host Member State, designates as that child’s parents two persons of the same sex, the Member State of which that child is a national is obliged (i) to issue to that child an identity card or a passport without requiring a birth certificate to be drawn up beforehand by its national authorities, and (ii) to recognise, as should any other Member State, the document from the host Member State that permits that child to exercise, with each of those two persons, the child’s right to move and reside freely within the territory of the Member States (Case C-490/20). Member States are already obliged by existing Union law to recognise the parenthood of a child as established in another Member State for the purpose of the exercise of the rights that the child derives from Union law, in particular on free movement.
9) The European Parliement legislative Resolution of 14 december 2023 on the proposal for a Council regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood COM(2022)0695.

II. LEGAL BASIS, SUBSIDIARITY, PROPORTIONALITY, CHOICE OF THE INSTRUMENT

- **Legal basis**

The proper legal basis for this proposal is Article 81(3) of the Treaty on the Functioning of the European Union, which provides that the Union can adopt measures concerning family law with cross-border implications.

Moreover, this proposal for a directive is also consistent with the provisions of the Treaty, and in particular with: Article 4(2)(j), which provides that shared competence between the Union and the Member States

applies in the area of freedom, security and justice; Article 19 that allows the Council take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation; Article 20(2) point (a) which concerns the right of every European citizens to move freely within the territory of Member states; Article 21(2), 45, 49 and 56 which concern measures in the field of the right to move and reside freely within the territory of the Member States; Article 67(4), which concerns the mutual recognition of judgments and decisions; Article 168(4), point (a), which concerns measures setting high standards of quality and safety of organs and substances of human origin, blood and blood derivatives (measures that shall not prevent any Member State from maintaining or introducing more stringent protective measures).

- **Subsidiarity (for non-exclusive competence) and proportionality**

This proposal complies with the requirements of subsidiarity and proportionality. Since the objective of this Directive cannot be sufficiently achieved by the Member States and can be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity and proportionality as set out in Article 5 of the Treaty on European Union (TEU). In accordance with these principles, European Union actions should be undertaken only if their objective cannot be sufficiently achieved by the Member States and can therefore, by reason of their scale and effects, be better achieved by the EU. Member States cannot act alone to set up a legal framework for:

- the governance and management of genetic material. As a matter of fact, article 152 specifies in (4)(a) that measures should be adopted setting high standards of quality and safety of organs and substances of human origin, blood and blood derivatives. In light of this, the article provides that actions should address issues that have a trans-national dimension, where common approaches are required, or where there is a need for effective co-operation and coordination. The measures set out in this proposed Directive, which amends Directive 2004/23/CE, incorporate provisions on indemnity for cell donation, informed consent, anonymity of gamete donors' data, management of cells in the event of death of the donor, processing of genetic data and data concerning the health. They do not prevent Member States from maintaining or introducing more stringent protective measures, in conformity with the Treaty, and do not

affect national provisions on the donation or medical use of embryos, tissues and cells of human origin, nor do they change the requisites to access MAP provided by national legislation; this Directive does not interfere with decisions made by Member States concerning the use or non-use of any specific type of human cells, including germ cells and embryonic stem cells.

- the cross-border recognition of filiation orders, the exemption from legalisation of public documents on social parenthood, the institution of a birth certificate for the purposes of rights derived from Union law. The proposal goes no further than absolutely necessary to ensure the stability of the legal situation of children. It does not affect the family law of the Member States nor the competence of the Member States to adopt substantive rules of family law such as rules on the definition of family or rules on the establishment of parenthood in domestic situations. It does not affect the competence of the authorities of Member States to deal with parenthood matters, and the European Certificate that this Direction creates is created only to produce the effects that are already provided by Union law (such as the freedoms of movement and establishment within the European Union). The directive simply sets a minimum standard for the circulation of families within the European Union to be free of any kind of discrimination based on the presence or the absence of genetic, gestational or biological relationship between parents and children. The directive is in compliance with art. 81(3) of the TFEU, which allows the Council to establish measures concerning family law with cross-border implications, to favour their right to free movement. The proposal does not try to harmonise family law and does not impose the recognition of public documents on Member States.
- equal treatment of parents in employment. The prohibition of discrimination in the field of employment and occupation exists in the Member States, but its scope, contents and enforceability vary significantly. Such a divergence might put at risk, within the scope of European Union competence, the effectiveness of the fundamental principle of equality in employment, provided by art. 19 of the Treaty. In view of article 5 of the Treaty, the goal to avoid any kind of discrimination in the field of social parenthood might be better achieved with a supranational instrument that forbids any kind of discrimination in employment, taking account of the different national situations. The rise of the phenomenon of social parenthood determines the need to

amend the European directive on employment discrimination so that its scope might include the prohibition of discrimination based on the type of family of the workers.

- cross border healthcare within the EU, which might be facilitated only through European cooperation (since cross border healthcare has, as the name already explicits, many European-wide trans-national aspects, which are already governed by Directive 2011/24/EU); the existing instrument need to be implemented and coordinated to the new phenomenon of social parenthood and to the achievements of new MAP techniques. The proposal fully respects the right of Member States to define the requisites to access MAP and regulate artificial procreation techniques and does not oblige any Member State to extend the scope of their national law on MAP.

Therefore, the objectives of this proposal, by reasons of its scope and effects, would be best achieved at the Union level in accordance with the principles of subsidiarity and proportionality.

• Choice of the instrument

1) Choice of the directive instead of Regulation

Although the adoption of specific uniform rules on social parenthood in cross-border situations would be desirable within the EU, the preferred legal instrument is a Directive: only a Directive would respect the specificities of each jurisdiction on matters such as MAP, adoption, public documents and filiation more generally. Member States would be able to identify the appropriate tools to achieve the goals of the Directive, without any kind of intrusion into their competence and jurisdiction. It must also be considered that recent legislative proposals of the Council such as the Proposal for a Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (COM (2022) 695 final) were rejected by many national Parliaments of the view that they violate the competence of Member States and the principle of subsidiarity.

This proposal does not intend to amend the text of the Council of the European Union's proposal for a Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of

Parenthood (no. 2022/0402 CNS) and constitutes an autonomous and independent proposal for a directive.

2) Choice to amend the existing instruments

Abstractly, the most effective choice would be to have a unique specific instrument on social parenthood, governing all the profiles of this phenomenon. This complete and wide legal source would balance the best interests of the child and the need to respect the dignity of all stakeholders involved (e.g., the pregnant woman in surrogacy) in the "new" procreative processes (MAP), during the adoption process, or during the establishment of parenthood without gestational, biological or genetic link. The wide single source would allow the European Union to meet the needs of systematic order and intelligibility of the system, which would benefit Member State legislators and the stakeholders in the application of the discipline.

Nonetheless, many EU instruments already deal with the phenomenon of social parenthood and might be amended as such: the Tissue Directive (2004/23/EC) and Blood Directive (2002/98/EC), the cross border healthcare directive (Directive 2011/24/EU), the Directive on equal treatment in employment and occupation (2000/78/EC). Thus, on one hand, this directive includes amendments to some pre-existing European instruments, and on the other hand introduces new specific and autonomous rules which are governed for the first-time at a European level (such as those on circulation of public documents or the institution of a European certificate of birth).

3) Choice to regulate the matter with a single instrument

As outlined in the project proposal, the topic of social parenthood affect several policies, it is transversal for different fields of the science, and concerns numerous profiles, such as governance and management of genetic heritage; recognition and applicable law; formalities related to the cross-border acceptance of public documents on parenthood; cross-border healthcare and equal treatment in employment and occupation, and more. These are very different topics that could be regulated in different and autonomous directives: indeed, the following directive proposal can be divided into different directive proposals, taking into account the different chapter, if it is considered the most effective strategy. However, as outlined in the project proposal, a single comprehensive legal instrument

is preferable, by regulating therapeutic self-determination in artificial procreation as the constitutive element of the legal phenomenon, on the one hand, and all its consequences, i.e. the protection of parenthood, on the other. A unique and comprehensive proposal can show the complexity of the studied phenomenon and the different implications involved.

III. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Stakeholder consultations**

In preparing this proposal, an extensive consultation was conducted. On 19 and 20 October 2023, a civic assembly on social parenthood was held in Milan, attended by 152 citizens drawn by lot. The assembly aimed to ask questions on social parenthood (especially on adoption, surrogacy, MAP, institution of a European birth certificate, etc.). The assembly was conducted by the as[10]sociation "Eumans" and funded by the European Union within the EU-funded project "Transnational European Assembly".

Most of the participants were Italian, but there were also people from Spain, Belgium, Germany, Romania, France and Poland. During the first day of the assembly, there were four panels held by experts on the topics of adoption, assisted reproduction, gestation for others and the recognition of the legal status of children. Subsequently, the organisers identified 50 participants by lot with the help of the association Prossima Democrazia and the open source software Panelot. The causal selection aimed at inclusiveness. The statistical element applied to the draw ensured that the sample was as representative of society as possible.

During the second day of the assembly, the selected 50 citizens took part in five debates on specific topics where they drew up recommendations on the topic of social parenting. The recommendations were first voted on by a plenary and then also by participants at home via a digital platform.

The assembly approved recommendations which were aimed at regulating the phenomenon of social parenthood also in cross borders situations, establishing a European Birth Certificate and creating a European Civil Status Registry of births.

[10] https://www.eumans.eu/index.php/assemblea-civica-estratta-sorte-sulla-genitorialita-sociale

- **Collection and use of expertise**

Besides the above-mentioned stakeholder consultations, expertise from other sources were used and collected. In particular:

- the policy brief to the Commission drawn by the "Just Parent European Project", which, among others, includes those recommendations to the Commission: to eliminate all negotiation and indirect effects of negotiation in biolaw; to prioritize women's dignity throughout any kind of artificial procreation procedure; to promote equality in access to parenting (without discrimination for age, economic status, nationality, health, gender, sexual orientation, civil status; to armonise rules among EU on governance and management of genetic heritage, knowledge of own origins, decisionmaking over human reproductive cells and embryos after a genetic parent's death, cell management in case of donor's death without provisions for it, mutual recognition of public documents on parenthood, exemption from legalisation and other formalities for public documents, use of IMI ("internal market information system"), cross border health care, discrimination in employment and occupation;
- the policy recommendations to the Commission drawn by the "Identities on the move, documents cross borders European Project", which, among others, suggests that the Union should extend the scope of the Regulation by including more public documents (such as those that will be included in this Directive).
- the Final Report "The feasibility of one or more private international law instrument on legal parentage" drawn by the Experts' Group on the Parentage / Surrogacy project of the Hague Conference on Private International Law, which stressed the need of a instrument to provide greater predictability, certainty and continuity of legal parentage in international situations for all persons concerned, taking into account their human rights, including, for children, those enshrined in the *United Nations Convention on the Rights of the Child (UNCRC)* and in particular their right that their best interests be a primary consideration in all actions taken concerning them. Although the report was on legal parentage (defined as "the parent-child relationship established in law", this notion might also included social parentage, when countries provide legal status to parent-child relationships in absence of genetic, biological o gestational lins (e.g. through adoption, decision of an authority, etc.)

- **Impact on Fundamental Rights**

As explained above, the current problems with the recognition of social parenthood lead to situations that might infringe the fundamental rights and other rights of those who are involved in the establishment of parenthood in absence of gestational, biological or genetic link: children born out of MAP, adoptees, gamete' donors, intentional parents, etc. In accordance with the Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, the Commission has ensured that the proposal complies with the rights set out in the Charter and more importantly, that it further promotes their application. In particular, by establishing a general legal framework of social parenthood, this Directive aims at protecting:

- The fundamental right to health of all the stakeholders involved (art. 35 of the Charter of fundamental rights of the European Union). In this case, this directive specifically protects the right to health of the donors of gamete, to whom this directive intends to guarentee the maximum level of protection, by promoting free screening or medical examinations to ascertain the their state of health, or by encouraging Member States to give them reimbursement of expenses, and by imposing to Member States a periodical up-to date adjournments of their national provisions on donations of tissues and cells. The directive also protects the rights to health of the child born through MAP, who needs to a rapid and effective access to the genetic and health data of the gamete donor's, for therapeutic reasons.
- The fundamental right to informed consent (art. 3 of the Charter), which imposes a full and complete informed consent in the fields of medicine and biology and explicitly forbids anyone from making the human body and its parts as such a source of financial gain. Thus, this right must be reinforced for all of those who are involved in the artificial procreation procedure.
- The fundamental right to identity, non discrimination, respect for a private and family life, free movement, best interests of children (art. 7, 21, 24, 45 of the Charter). These rights might be infringed when adopted children or children born through MAP are deprived of their legal status and of the parenthood established in another Member State. By facilitating the recognition of parenthood between Member States, the proposal aims to protect the fundamental rights of chil-

dren in cross-border situations and to ensure the continuity of parenthood status within the Union, regardless of the method through which they were conceived or the existence of any type of adoption. Also, this directive aims at guaranteeing non discrimination between families in the area of work.

- The fundamental right of protection of personal data (art. 8 of the Charter); personal data of the gamete's donor might be processed only in strict exceptional cases, when necessary to protect the right to health of a subject born through filiation resulting from donor-gamete-based medically-assisted procreation. Also, only strictly needed data might be accessible in case of lack of the donor's consent.

IV. BUDGETARY IMPLICATION

Member states may incur in the costs needed to conduct periodic popular consultations or referenda and to give an indemnity to the gamete's donor provided by article 4 of this Directive. New costs might arise for Member states from the mandatory procedure provided by article 7 (access to data and information of donor's), as well as for the required new harmonised rules on management of cells and tissues in the event of the death of their donor. Member states should also pay the expenses of introducing and implementing the new European Certificate of parenthood for the purposes of rights derived from union law and for the new types of administrative cooperation introduced by this Directive. Some more costs might derive from the implementation of the right to reimbursement of health care costs in cross borders situations, since this directive broadens the cases in which a Member States should reimburse medical costs paid by their citizens in another Member state. Member states might also incur in one-off costs arising from the need to train judges, lawyers, civil registrars. Also the provisions in the proposal concerning the use and extension of the IMI system would have an impact on the Union budget, but this impact is rather small since the IMI system already exists and would only need to be implemented. None of these costs are significant and each of them would be in any case outweighed by the advantages and cost savings brought about by the Directive.

V. OTHER ELEMENTS

• Explanation of the provisions of the proposals

The proposal consists of nine Chapters:

Chapter I - Subject matter, scope and definitions. This chapter sets out the subject matter of the directive, its objectives, and there are definitions of relevant expressions such as 'social parenthood', 'de facto parenthood', 'medically assisted procreation', 'adoption', 'informed consent', 'filiation' and 'public documents'.

Chapter II - Governance and management of genetic heritage. This chapter includes provisions amending some articles of Directive 2004/23/EC: in particular, under this Directive, Member States will have to conduct popular consultations or referenda on the governance and management of genetic heritage and will have to periodically update national regulations on the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells. This directive also better specifies the nature and type of compensation for donors of tissues and cells and introduces the principle that under no circumstances should reimbursement be commensurate with the amount of tissues and cells donated. It also introduces specific and detailed rules on informed consent to donation and on the management of donated cells or tissues in the event of the donor's death (both in cases where the donor has established the fate of the cells by deed and in cases where he has not done so). Furthermore, the principle of anonymity of the donor of cells and tissues is stressed, unless he/she expressly consents otherwise, and it is provided that information and data on the donor's health may be accessible for the protection of the fundamental right to health of the recipient of his/her tissues or cells or of those born through the donor's gametes. The directive also introduces specific rules on the protection of personal data in the case of gamete donation, thus complementing the GDPR.

Chapter III - Recognition and applicable law. This chapter introduces rules on the recognition of public documents relating to parenthood, providing what are the requirements for automatic recognition; it also provides that the recognition of a public document may be full or partial and expressly provides for the 'downgrading' of the child's legal status when moving from one Member State to another within the European Union.

In addition, certain rules are introduced on the adaptation of public documents when brought in another Member State and on the applicable law to the establishment of parenthood.

Chapter IV - Simplification of formalities related to the cross-border acceptance of public documents. This chapter introduces rules under which public documents relating to parental responsibility can be copied between member states without the need for legalisation or similar formalities such as Apostille. Similar simplification rules concerning certified copies of public documents in family matters are also provided for.

Chapter V - European certificate of parenthood for the purposes of tights derived from union law. This chapter introduces a European Certificate of Parenthood. This certificate shall produce throughout the Union only the effects deriving from European law. The chapter includes rules on the establishment of the certificate, the content of the certificate, its effects, the procedure for issuing it and the competence of the national authorities that are to issue it.

Chapter VI - Adminstrative cooperation. This chapter introduces some rules concerning administrative cooperation between Member States via IMI in the areas covered by this directive.

Chapter VII - Cross border healthcare and equal treatment in employment and occupation. This chapter extends the scope of the cross-border healthcare directive and introduces a ban on employment discrimination due to the type of family the worker belongs to (regardless of the existence of a biological, genetic or gestational link between the worker and his or her children).

Chapter VIII - Relationship with other provisions. This chapter regulates the relationship between this directive and other European Union instruments and international conventions.

Chapter IX - General and final provisions. This chapter introduces some general and final rules concerning the information to be communicated by the Member States to the European Commission, transposition by Member states and the entry into force.

2024/____ (CNS)

Proposal for a

COUNCIL DIRECTIVE

on social parenthood

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 67(4) and 81(3) and 168(4), point (a), thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the European Economic and Social Committee,

Acting in accordance with a special legislative procedure,

Whereas:

(1) The Union has set itself the objective of creating, maintaining and developing an area of freedom, security and justice in full respect of fundamental rights in which the free movement of persons and access to justice are ensured, in accordance with the Treaties and Charter of Fundamental Rights of the European Union (the 'Charter'). For the gradual establishment of such an area, it is necessary that the Union adopt measures relating to judicial cooperation in civil matters having cross-border implications, including in the area of family law.

(2) This Directive establishes a general framework for the protection of social parenthood in cross borders situations. Furthermore, this Directive promotes cooperation between the Member States of the European Union in matters of social parenthood, while fully respecting national competences in family law.

(3) For the purposes of this Directive, social parenthood means any kind of relationship between a person assuming parental status or parental responsibility and a child, in the absence of a genetic, biological, and gestational contribution between the former and the latter.

(4) Social parenthood includes all forms of filiation resulting from the various types of adoption, including full, mild, simple and stepchild adoption. In particular, adoption should be considered as a permanent, legal parent-child relationship, constituted or recognised by a judgment or an administrative decision, between a child who has not yet reached the age of majority and a new parent or parents who are not biological parents of that child, regardless of how that legal relationship is named in their national law. This Directive only applies to domestic adoptions, in which the child and the adoptive parent or parents have their habitual residence in the same Member State and where the adoption creates a permanent parent-child relationship. This Directive does not apply to intercountry adoptions, where the child and the adoptive parent or parents have their habitual residence in different States, irrespective of whether it involves two Member States or a Member State and a third State, and irrespective of whether or not an intercountry adoption is covered by the Hague Convention.

(5) Social parenthood also includes filiation resulting from donor-gamete-based medically-assisted reproduction, such as medically-assisted procreation (MAP) using a couple's own gametes, surrogacy, ROPA (receiving oocytes from the partner), post-mortem procreation (use of gametes after a natural parent's death), adoption of embryos, heterologous MAP by mistake (switched gametes at the lab resulting in a child not biologically related to the intended parents), embryo sharing or embryo adoption.

(6) Social parenthood further includes functional/de facto parenthood by adults in actual parenting roles with a child and parenthood founded on informed consent more generally.

(7) This Directive addresses several strong transnational components of social parenting. Citizens of the European Union today move from one state to another to have access to social parenting, to have access to adoption or to assisted procreation techniques that are not permitted in their home state; union citizens also move from one Member State to another to obtain legal recognition of the filiation bond that they cannot obtain in their home country; furthermore, union citizens may move to a country where social parenthood is not recognised or is recognised differently from their home country so that the legal relationship between parents and children suddenly is mined by a 'downgrading' process when they move from one country to another (i.e., the legal status becomes different: qualitatively inferior legal treatment compared to that of the country of origin).

This phenomenon might hinder the children's fundamental rights and the result might be the denial of the rights that they derive from parenthood under their national law.

(8) For the aforementioned reasons, differences between Member states in the government and recognition of social parenthood may discourage the free movement of persons and workers where social parenthood is not recognised in the destination Member State. Families, where there is no biological, gestational or genetic link between their members, may be deterred from exercising their right to free movement for fear that the parenthood will not be recognised in another Member State for all purposes. This might hinder the application of articles 21, 45, 49 and 56 of the Treaty on the Functioning of the European Union (TFEU) which confer on Union citizens the right to move and reside freely within the territory of the Member States, compromising the right of Union citizens not to face any obstacles and the right to equal treatment with nationals in the exercise of free movement.

(9) Under the Treaties, the competence to adopt substantive rules on family law, such as rules on the definition of family and rules on the establishment of the parenthood of a child, lies with the Member States. However, pursuant to Article 81(3) TFEU, the Union can adopt measures concerning family law with cross-border implications. Moreover, pursuant to Article 19 of the Treaty, the Council take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation; pursuant to Article 20(2) point (a) of the Treaty, union citizens have the right of every European to move freely within the territory of Member states; pursuant to Article 21(2), 45, 49 and 56 of the Treaty, citizens have the right to move and reside freely within the territory of the Member States; pursuant to Article 67(4) of the Treaty, the Union shall facilitate access to justice, in particular through the principle of mutual recognition of judgments and decisions; pursuant to Article 168(4), point (a) of the Treaty, the Union can adopt measures setting high standards of quality and safety of organs and substances of human origin, blood and blood derivatives (measures that shall not prevent any Member State from maintaining or introducing more stringent protective measures).

(10) This Directive aims at strengthening the protection of the fundamental rights and other rights of children who do not have a genetic, biological and gestational link with their parents in cross-border situations (the chil-

dren's right to equality, personal identity, non-discrimination, private and family life), at maintaining their rights in another Member State, at taking the best interests of the child as a primary consideration.

(11) While the Union has competence to adopt measures on family law with cross-border implications, the Union has not adopted general and common provisions in the area of social parenthood. In fact, many existing instruments of the European legislation already deal with social parenthood, although indirectly and as a result of different objectives. Such existing instruments (Directives 2004/23/EC; Regulation (EU) 2016/679; Regulation (EU) 2016/1191; Directive 2011/24/EU; Directive 2004/38/EC8; Directive 2000/78/EC; Regulation (EU) No 1024/2012; Regulation (EU) No 2201/2003) are fragmentary, disconnected, are only partially related to social parenthood. More generally, these instruments have become insufficient to deal with the increasing phenomenon of social parenthood, which over the years have become a supranational issue, and thus need to be improved and amended.

(12) Many international law provisions, as well as Union law and Member States' laws, rule that all children have the same rights without discrimination, irrespective of how the child was conceived or born (even through MAP), regardless of the existence of a genetic, biological or gestational link between the child and the parent (as in the adoption case or the artificial procreation case). The United Nations Convention on the Rights of the Child of 20 November 1989 ('UN Convention on the Rights of the Child'), provides that States Parties must ensure that the child is protected against all forms of discrimination or punishment based on the status or activities of the child's parents (Article 2); that, in all actions concerning children, whether undertaken by courts or legislative bodies, the best interests of the child must be a primary consideration (Article 3); that children have the right to an identity and to be cared for by their parents (Articles 7 and 8); that a child shall not be separate from his or her parents against their will (art. 9); that no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family (art. 16); that both parents have common responsibilities for the upbringing and development of the child (art. 18).

(13) The European Convention on Human Rights provides for the right to respect for private and family life (art. 8), for the prohibition of discrimination on any ground such as birth or other status (art. 14 and 1 of protocol no. 1). The Court has interpreted Article 8 of the Convention

as requiring all States within its jurisdiction to recognise the legal parent-child relationship established abroad between a child born out of surrogacy and the biological intended parent, and to provide for a mechanism for the recognition in law of the parent-child relationship with the non-biological intended parent (for example through the registration of the foreign act of birth or with adoption of the child, which should produce the same effects of the registration of the foreign act of birth) .

(14) The Treaty on European Union promotes the rights of the child pursuant to Article 3(3) and the protection of the human rights of the children pursuant to Articole 3(5).

(15) The Charter of Fundamental Rights of the European Union guarantees, in the application and implementation of Union law, the protection of the fundamental rights of children and their families. These rights include the right to respect for private and family life (Article 7), the right to equality before the law (Article 20), the right to non-discrimination (Article 21), and the right of children to maintain regularly a personal relationship and direct contact with both parents if it is according to their best interests (Article 24); the duty to consider the child's best interests must be a primary consideration in all actions relating to children (Article 24(2)).

(16) The adaptations of the aforementioned measures are encouraged by several acts, proposals, recommendations, resolutions of European institutions and more generally by union policies, such as the Council of the European Union's proposal for a Regulation on standards of quality and safety for substances of human origin intended for human application and repealing Directives 2002/98/EC and 2004/23/EC, the Council of the European Union's proposal for a Regulation on filiation no. 2022/0402 (CNS), the European Parliament resolution of 2 February 2017 with recommendations to the Commission on cross-border aspects of adoptions and a Regulation proposal to the Council of the European Union, the 2010 "European Council Stockholm Programme – An open and secure Europe serving and protecting citizens" and the following "Commission Action Plan Implementing the Stockholm Programme", the 2010 Green Paper entitled "Less Bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records", the 2021 "EU Strategy on the rights of the child", the 2022 European Parliament Resolution on the protection of the rights of the child in civil, administrative and family law proceedings, the European Parliement legislative Resolution of 14 december 2023 on the on the proposal for a Coun-

cil regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood COM(2022)0695.

(17) In accordance with the principles of subsidiarity and proportionality set out in Article 5 of the Treaty on European Union (TEU), European Union actions should be undertaken only if their objective cannot be sufficiently achieved by the Member States and can therefore, by reason of their scale and effects, be better achieved by the UE. Member States cannot act alone to set up a legal framework for the governance and management of genetic heritage, the cross-border recognition of filiation orders, the exemption from legalisation of public documents on social parenthood, the institution of a birth certificate for the purposes of rights derived from Union law, equal treatment of social parents in employment, cross border healthcare within the EU, especially related to all forms of MAP.

(18) Since many EU instruments already deal with the phenomenon of social parenthoodthis, this Directive includes amendments to some pre-existing European instruments, and on the other hand introduce new specific and autonomous rules which are governed for the first-time at a European level.

(19) This Directive amends Directives 2004/23/EC in order to introduce techniques for controlling the shipment of human genetic material and governing the methods of tissue retrieval and transfer, all in accordance with the general principle of informed consent to medical treatment. Consent, understood as authorization for interference with the body, is a unilateral, non-negotiable act, not subject to commercial or contract rules.

(20) This Directive requires that Member State update national-level regulation on governance and management of the use of one's genetic material that is not now in accordance with science by adding positive obligations on Member States to consult the people, specifically through (i) implementation of direct democracy mechanisms (e.g., popular consultations and referendums), and (ii) periodic updating of all national rules in this subject area to ensure high-quality and research-proven contents (e.g., contingency management clauses).

(21) This Directive establishes the principle of consent as a constitutive element of any transfer of body parts and to etablish the principle of gratuitousness for all forms of super-ethic or supererogatory services, except for reimbursement of expenses and inconvenience (VUD, voluntary unpaid donation). Since these services are characterised by a high social and moral

value, and they have an impact on the body, they should not be susceptible to contractualization and negotiation to an extent that would commercialize them. These services should be characterized by solidaristic purposes, while not unreasonably denying donors reasonable expenses and appreciative compensation.

(22) This Directive guarantees the right to reconsideration (ius poenitendi) of the donor and allows only and exclusively indirect forms of incentive to withdrawal and disposal (e.g., so-called social gratitude in the forms of the free offer of screening and medical examinations to ascertain the donor's health status or compensation for expenses and inconveniences by the center in the form of indirect remuneration or with reimbursements tout court that do not consider the quantity of donated samples but rather the activity performed by the donor in verifying suitability for donation, performing the retrieval and giving after-care post-surgery, if any).

(23) This Directive identifies the effects of the general rule of consent: if the treatment, whatever it may be, is based on consent or on a series of unilateral, non-negotiated, revocable, gratuitous, solidaristic consents, there is no room for negotiation, for contracts contrary to mandatory rules, public order and morality, or for forms of commodification of the body and violation of human dignity.

(24) This Directive precludes udifferentiated and generalized access to information concerning one's origins, i.e., the personal identity of possible cell donors and pregnant women, in order to protect the confidentiality of the latter, unless consent is given to the display of the aforementioned information. Thus, the general principle of anonymity in body part harvesting and donation procedures is affirmed in this Directive. Since the need to protect the fundamental right to health has emerged, this Directive provides that Member States introduce rules of interpellation and access to information with therapeutic purposes, suitable for the prevention and treatment of genetically transmissible diseases.

(25) This Directive provides common principles on governance and management of the use of one's genetic material after death (such as the use of gametes, cells and tissues). There is a need for any legal instrument regulating this area to specify rules for decisionmaking over human reproductive cells and embryos after a genetic parent's death, in view of the possible occurrence of death during the MAP and cryopreservation cycle. Pursuant to his Directive, Member States should provide that the instrument of control is always informed consent, accompanied, however, by formal

safeguards, such as a requirement for the consent to be given in writing and in the presence of witnesses for purposes of validit. In the absence of an express determination, since cells cannot be abandoned to prescriptive acquisition by biobanks, this Directive prescribes the application of domestic inheritance law, insofar as it relates to dispositions with non-patrimonial content. This Directive respects the competence of the Member States in matters relating to civil law and allows the predictability and intelligibility of the system to be protected.

(26) Member States should bring national rules into line with the indications of the scientific community and provide for a harmonious system, for the protection of safety, individual and public health, and legal certainty (to prevent a high rate of litigation of individual cases). Therefore, this Directive obliges the Member States to adopt regulations on the duration of storage of human reproductive cells and embryos, destinations, and interpellation procedures. As a result, reproductive cells can be safety obtained and the overproduction of new cells for storage can be avoided, while subjects also can be allowed to determine, through the granting of their informed consent, how their cells will be used and to whom they will be released, including with respect to the posthumous use of their already collected cells capable of transmitting their genetic heritage to a future generation. This allows for the determination of control over the cell, without the loss of the power to govern the cell, precluding the acquisition of property rights by biobanks.

(27) The fundamental right to health of children born from techniques involving, in any capacity, artificial procreation and the use of cells allogeneically, should be protected. Having recognized the right to health, the enforcement of this right must be made effective through the provision of rules for donor questioning and access to information for therapeutic purposes. In this way, a twofold objective is pursued: the first is the prevention and treatment of genetically transmissible diseases; the second is traced to the prevention of reproduction between blood relatives. For these reasons, this Directive integrates the existing instrument GDPR in the part on health status information, without, however, providing for a modification of the discipline on access to GDPR data in the part on personal information related to the donor's identity, unless the donor expressly consents. Member States should guarentee that interpellation procedure must guarantee and protect both the rights of the applicant and the rights of the donor.

(28) Children derive a number of rights from parenthood, including the right to an identity, a name, nationality (where governed by ius sanguinis), custody and access rights by their parents, maintenance rights, succession rights and the right to be legally represented by their parents. The non-recognition in a Member State of the parenthood established in another Member State can have serious adverse consequences on children's fundamental rights and on the rights that they derive from national law. This may prompt families to start litigation to have the parenthood of their child recognised in another Member State, although those proceedings have uncertain results and involve significant time and costs for both families and the Member States' judicial systems. Ultimately, families may be deterred from exercising their right to free movement for fear that the parenthood of their child will not be recognised in another Member State for the purposes of rights derived from national law.

(29) Pursuant to Articles 67 and 81 of the Treaty on the Functioning of the European Union (TFEU), the Union can adopt measures concerning family law with cross-border implications, including measures aimed at ensuring the mutual recognition of decisions in judicial and extrajudicial cases.

(39) In conformity with the provisions of international conventions and Union law, this Directive should ensure that children enjoy their rights and maintain their legal status in cross-border situations without discrimination. To that effect, and in the light of the case law of the Court of Justice, including on mutual trust between Member States, and of the European Court on Human Rights, this Directive should cover the recognition in a Member State of the parenthood established in another Member State irrespective of how the child was conceived or born and irrespective of the child's type of family. The refusal to recognise a public document related to parenthood should be therefore admitted in exceptional and restricted cases, such as when the recognition is manifestly contrary to the public policy of the Member State in which the recognition is invoked.

(31) Member States should not use public policy as a synonym for national identity: if national identity is to be opposed as a limitation, counter-limits must be opposed. Likewise, the scope of national identity must be distinguished from the general Best Interests of the Child clause. Moreover, the courts or other competent authorities should not be able to apply the public policy exception in order to set aside the law of another State when doing so would be contrary to the fundamental rights and principles enshrined in the Charter .

(32) Member State should not preclude that civil registrarts, public notaries or officials make a partial registration of a public document attestinc or certificating parenthood, such as a birth certificate. Through the partial registratio of the public document, only the biological, genetic, gestational parent (who, conversely, must always have the link to the genetic, biological, gestational parent recognized) is recognised when the legal relationship with the other parent cannot be registered. The partial registration is necessary to guarantee the best interest of the child: the European Court of Human Rights established that the refusal to recognise the legal bond between the biological parent and the child affect child's right to respect for private and family life pursuant to Article 8 of the Charter, which implied that everyone should be able to establish the essence of his or her identity, including his or her parentage, and is not c compatible with the children's best interests, which must guide any decision concerning them.

(33) This Directive should not apply to and does not interfere with domestic rules related to the establishment of parenthood in a Member State in a domestic situation with no cross-border elements.

(34) This Directive should not cover the recognition of court decisions on social parenthood given in a third State or the recognition or, as the case may be, acceptance of authentic instruments on parenthood drawn up or registered in a third State. The recognition or acceptance of such documents should remain subject to the national law of each Member State.

(35) The phenomenon of downgrading of a child status occurs when the quality of a child's status is compromised in cross borders situations. Children suddenly is mined by a 'downgrading' process when they move from one country to another (i.e., the legal status becomes different: qualitatively inferior legal treatment compared to that of the country of origin). This might be a serious obstacle to the movement of persons, families and statuses. Member State should therefore introduce measures to ensure that a child status should circulate within European Union effectively and fully, which means that the public documents concerning a status shall produce the same legal effects in the Member State of destination as it did in the Member State that issued it.

(36) It might occur that a public document on filiation issued in a Member State is not known in the law of another Member State, or that some rights and duties provided by a public document on filiation issued in a Member State are not applicable in another Member State. In that case, the legal relationship between a child and his or her parent(s), including

any ensuing right or obligation, should, to the extent possible, be adapted to one which, under the law of that Member State, has equivalent effects attached to it and pursues similar aims. How, and by whom, the adaptation is to be carried out should be determined by each Member State.

(37) This Directive provides a rule on applicable law in cases of cross-border artificial procreation (MAP), which occurs when a couple or an individual citizen of a Member State of the European Union need to travel to another Member State to access artificial procreation. In that case, the law applicable to the establishment of filiation should be the law governing informed consent to artificial procreation, which is the primary public document that constitutes the filiation status, regardless of the Member State where the parent(s) or child live and or reside and regardless of their national citizenship.

(38) Regulation (EU) 2016/1191, which promotes the free movement of citizens by simplifying the requirements for the submission of certain public documents in the European Union, allows citizens of the European Union to move from one Member State to another without the need for legalization or other similar formalities (e.g., apostille) of certain public documents, such as those attesting to birth, filiation, and adoption. However, the catalog of existing public documents on parenting – and particularly social parenting – is much larger than that included by the Regulation and those submitted to the European Commission by Member States. The non-application of the benefits of the Regulation to public documents on social parenting is an obstacle to the movement of families within the European Union.

(39) This Directive therefore broaden the scope of the Regulation in order to include public documents on social parenting. A complete list documents on social parenting and their sample form should be communicated to the Commission by Member States, so that they might be published in the European E-Justice Portal. Public documents on social parenthood might be those on: 1) representation and guardianship of the child (act of appointment of guardian by the parent; order of appointment of guardian); 2) custody of the child (agreements regarding custody of the child, financial obligations to the child, including out-of-court agreements); 3) informed consent to medically assisted artificial procreation; withdrawal of informed consent; 4) custody of the child ("fostercare") or "private placement"; 5) act of acknowledgement of the child; act of recognition of child before his birth; 6) acts from adoption proceedings (for example: decla-

ration of consent of one parent to the adoption of the child by the other parent in the case of stepchild adoption); 7) cohabitation or cohabitation between the social parent and the child (such as: registry family certificates; act of cohabitation, etc.); 8) act with which legal custodians to a child (usually the parents) transfer some of their right to a parental leave to a person that is not the child's parent or equated with a parent.

(40) To speedily, smoothly and efficiently settle the effects that arise from the application of the law of the European Union to filiation in any Member State of the European Union, children or their parent(s) should be able to demonstrate easily the children's status in another Member State. To enable them to do so, this Directive provides that Member States shall issue a European Certificate of Parenthood for use in another Member State.

(41) In order to respect the principle of subsidiarity, the certificate shall produce in the Member States only those effects that arise from the application of the law of the European Union to filiation, such as the right to free movement. Member States should be free to identify the contents of the certificate (except for the mandatory information listed on this Directive), the competent authority which shall issue the certificate, the issuance proceeding.

(42) The European Certificate of Parenthood should not take the place of internal documents which may exist for similar purposes in the Member States. Therefore, each citizen of the European Union would have both a filiation certificate issued by his or her Member State (valid and effective in the state that issued it and in states that register or recognize it) and a certificate relating to European filiation that is automatically valid and effective throughout the European Union.

(43) The European Certificate of Parenthood is issued pursuant to Articles 20-21 TFEU and Directive 2004/38/EC, and in addition the case law of the Court of Justice of the European Union, which obliged a Member State (Bulgaria) to register a birth certificate with two mothers for the sole purpose of applying European Union law (C-490/20: VMA case, "Pancharevo"). The Court ruled that European Law must be interpreted as meaning that, in the case of a child, being a minor, who is a Union citizen and whose birth certificate, issued by the competent authorities of the host Member State, designates as that child's parents two persons of the same sex, the Member State of which that child is a national is obliged (i) to issue to that child an identity card or a passport without requiring a birth

certificate to be drawn up beforehand by its national authorities, and (ii) to recognise, as is any other Member State, the document from the host Member State that permits that child to exercise, with each of those two persons, the child's right to move and reside freely within the territory of the Member States (Case C-490/20). The European Certificate of Parenthood would only facilitate the mutual recognition of parenthood of a child as established in another Member State for the purpose of the exercise of the rights that the child derives from Union law, in particular on free movement, to which Member States are already obliged.

(44) The use of the European Certificate of Parenthood should not be mandatory. This means that persons entitled to apply for a European Certificate of Parenthood, namely the child or a legal representative, should be under no obligation to do so and should be free to present the other instruments when requesting recognition in another Member State.

(45) Whilst the contents and the effects of national authentic instrument providing evidence of parenthood (such as a birth certificate or a parenthood certificate) vary depending on the Member State of origin, the European Certificate of Parenthood should have the information enlisted in this Directive and produce the same effects in all Member States specified by this Directive. It should have evidentiary effects and should be presumed to demonstrate accurately elements which have been established under the law applicable to the establishment of parenthood. The evidentiary effects of the European Certificate of Parenthood should not extend to elements which are not governed by this Directive, such as the civil status of the parents of the child whose parenthood is concerned. Whilst the language of a national authentic instrument providing evidence of parenthood is issued in the language of the Member State of origin, the European Certificate of Parenthood form should be available in all Union languages.

(46) This Directive should not affect the application of Conventions No 16, No 33 and No 34 of the International Commission on Civil Status ('ICCS') in respect of the plurilingual extracts and certificates of birth as between Member States or between a Member State and a third State.

(47) The IMI (Internal market information system) interchange system should be implemented in order to guarantee that the Authorities of Member States (e.g.: civil status offices, Courts, public administrations…) have complete access IMI to get in touch with the authority of another Member State that issued the public document on filiation to verify not

only its authenticity, but also its compliance with domestic law. The use of IMI for the exchange of information between authorities in different Member States on legal and social parenthood should be encouraged. Local authorities should be able to access IMI (e.g.: local civil status office; local court…) without necessarily seeking the intermediation of a central authority. IMI should be available in case an authority needs to dispel doubts where the authorities of a Member State where a public document or its certified copy is presented have reasonable doubts as to the authenticity of a public document or its certified copy, or if they need to inquirer about the effects of the public document in thre issuing Member State.

(48) Directive 2011/24/EU on the application of patients' rights in cross-border healthcare stipulates that the Member State shall ensure that the costs incurred for the health care of a person insured in another Member State shall be reimbursed by his or her Member State of affiliation, provided that the health care in question is among the benefits to which he or she is entitled in the Member State of affiliation. Consequently, couples or individuals travel to another Member State of the union to access artificial procreation are not always entitled to reimbursement of health care costs incurred, but only in cases where the technique performed is permitted by the legislation of their state.

(49) To prevent discrimination in access to parenthood on the basis of income, this Directive amends Directive 2011/24/EU tin order to expand the possibilities of obtaining reimbursement for healthcare costs incurred abroad: the condition for reimbursement should be that the healthcare in question is not against the fundamental constitutional principles, values, identity of the Member State of affiliation.

(50) Directive 2000/78/EC lays down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment. In many States, the lack of legal recognition of a family produces discrimination of various kinds: among them, discrimination in employment, welfare, acces to leave or work leave to be able to care for his or her child in cases where the child is ill, or has a disabling illness, or disability, etc. To prevent discrimination on any ground such as birth or other status, this Directive amends Directive 2000/78/EC in order to include the prohibition of any discrimination basd on the existence of any kind of relationship between a child and his or her parent(s), including social parenthood.

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I
SUBJECT MATTER, SCOPE AND DEFINITIONS

Article 1
Subject matter

1. This Directive establishes a general framework for the protection of social parenthood in order to give effect in the Member States to the principle of equal treatment of families, irrespective of the existence of a biological, gestational or genetic link between parent and child.
2. The Directive promotes cooperation between the Member States of the European Union in matters of social parenthood, while fully respecting national competences in family law.

Article 2
Scope

1. This Directive shall apply to citizens of the Member States of the European Union and to public documents issued in a Member State of the European Union.
2. This Directive shall not apply to citizens of third States and to the recognition of public documents issued in a third State, even if subsequently registered in a Member State.

Article 3
Definitions

1. For the purposes of this Directive, the following definitions apply:
1) "social parenthood", any kind of relationship between a person assuming parental status or parental responsibility and a child, in the absence of a genetic, biological, and gestational contribution between the former and the latter, including filiation resulting from medically assisted procreation, intercounty adoption and domestic adoption.
2) "de facto parenthood", any kind of relationship between a person assuming the social role of a parent and a child, without legal recognition between them;
3) "medically assisted procreation" (MAP), any kind of procreation resulting from donor-gamete-based medically-assisted reproduction;
4) "adoption", a permanent, legal parent-child relationship, constituted or recognised by a judgment or an administrative decision, between a child

who has not yet reached the age of majority and a new parent or parents who are not biological parents of that child, howsoever that legal relationship is named in national law;
5) "informed consent", personal, free, voluntary, unconditional, unilateral, and unpaid authorization or withdrawal or abandonment of health treatment affecting the patient's body or body parts, including the explantation and transplantation of organs, tissues and cells, preceded by free, complete and appropriate information at the level of the patient or donor;
6) "filiation", the legal, social or de facto relationship between a child and their legal, social or the facto parent;
7) "public documents", documents defined by art. 3 of Reg. (UE) 2016/1191.

CHAPTER II
GOVERNANCE AND MANAGEMENT OF GENETIC HERITAGE

Article 4
Amendment to art. 4 of Directive 2004/23/CE

Article 4 of Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 is amended as follows:
Article 4 - Implementation
1. Member States shall designate the competent authority or authorities responsible for implementing the requirements of this Directive.
2. This Directive shall not prevent a Member State from maintaining or introducing more stringent protective measures, provided that they comply with the provisions of the Treaty.
In particular, a Member State may introduce requirements for voluntary unpaid donation, which include the prohibition or restriction of imports of human tissues and cells, to ensure a high level of health protection, provided that the conditions of the Treaty are met.
Member States shall conduct periodic popular consultations, by means of instruments of direct democracy such as citizens' consultations and referenda, on the donation, procurement, testing, processing, preservation, storage, distribution or use of specific types of human tissues and cells or cells of particular origin.
Member States shall ensure regular updating of the domestic regulations concerning quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells.

3. This Directive does not affect the decisions of the Member States prohibiting the donation, procurement, testing, processing, preservation, storage, distribution or use of any specific type of human tissues or cells or cells from any specified source, including where those decisions also concern imports of the same type of human tissues or cells.
4. In carrying out the activities covered by this Directive, the Commission may have recourse to technical and/or administrative assistance to the mutual benefit of the Commission and of the beneficiaries, relating to identification, preparation, management, monitoring, audit and control, as well as to support expenditure.

Article 5
Amendment to art. 12 of Directive 2004/23/CE

Article 12 of Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 is amended as follows:

Article 12 - Principles governing tissue and cell donation
1. Member States shall endeavor to ensure voluntary and unpaid donations of tissues and cells.
Donors may receive compensation, which is strictly limited to making good the expenses and inconveniences related to the donation. In that case, Member States define the conditions under which compensation may be granted.
The indemnity may consist, for example, of free screening or medical examinations to ascertain the donor's state of health, or reimbursement of expenses. In no case shall the allowance or reimbursement be commensurate with the quantity of donated tissue or cell samples.
Member States shall report to the Commission on these measures before 7 April 2006 and thereafter every three years. On the basis of these reports the Commission shall inform the European Parliament and the Council of any necessary further measures it intends to take at Community level.
2. Member States shall take all necessary measures to ensure that any promotion and publicity activities in support of the donation of human tissues and cells comply with guidelines or legislative provisions laid down by the Member States. Such guidelines or legislative provisions shall include appropriate restrictions or prohibitions on advertising the need for, or availability of, human tissues and cells with a view to offering or seeking financial gain or comparable advantage.
Member States shall endeavour to ensure that the procurement of tissues and cells as such is carried out on a non-profit basis.

Article 6

Amendment to art. 13 of Directive 2004/23/CE

Article 13 of Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 is amended as follows:
Article 13 - Consent
1. The procurement of human tissues or cells shall be authorised only after all mandatory consent or authorisation requirements in force in the Member State concerned have been met. Free consent is a constitutive element of any tissue or cell transfer.
2. Member States shall, in keeping with their national legislation, take all necessary measures to ensure that donors, their relatives or any persons granting authorisation on behalf of the donors are provided with all appropriate information as referred to in the Annex.

3. Member States shall take the necessary measures to ensure that donors sign an informed consent to the interference with their bodies and to the transfer of human tissues or cells free of charge. Informed consent, which is governed by national law, must in all cases be a unilateral, non-negotiated, free, supportive, voluntary act, in writing, not subject to the rules of private law on contracts. Consent must be revocable up to the time the tissue or cells are harvested.

Article 7

Amendment to art. 14 of Directive 2004/23/CE

Article 14 of Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 is amended as follows:
Article 14 - Data protection and confidentiality
1. Member States shall take all necessary measures to ensure that all data, including genetic information, collated within the scope of this Directive and to which third parties have access, have been rendered anonymous so that neither donors nor recipients remain identifiable.
2. For that purpose, they shall ensure that:
(a) data security measures are in place, as well as safeguards against any unauthorised data additions, deletions or modifications to donor files or deferral records, and transfer of information;
(b) procedures are in place to resolve data discrepancies; and
(c) no unauthorised disclosure of information occurs, whilst guaranteeing the traceability of donations.

3. Member States shall take all necessary measures to ensure that the identity of the recipient(s) is not disclosed to the donor or his family and vice versa, without prejudice to legislation in force in Member States on the conditions for disclosure, notably in the case of gametes donation.
4. Member States shall ensure that, in the case of gamete transfer, all the donor's data and genetic information are rendered anonymous and inaccessible, except with the express consent of the recipient and the person born through the use of gametes to the disclosure of such information.
5. By way of derogation from the previous paragraph, Member States shall ensure that genetic data and information concerning the gamete donor is accessible to the recipient or the person born through the use of gametes in order to protect their fundamental right to health.
6. To this end, Member States shall ensure a rapid and efficient procedure for requesting genetic data and information, for therapeutic purposes, suitable for the prevention and treatment of genetically transmitted diseases.

Article 8

Amendment to art. 21 of Directive 2004/23/CE

Article 21 of Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 is amended as follows:
Article 21 - Tissue and cell storage conditions
1. Tissue establishments shall ensure that all procedures associated with the storage of tissues and cells are documented in the standard operating procedures and that the storage conditions comply with the requirements referred to in Article 28(h).
2. Tissue establishments shall ensure that all storage processes are carried out under controlled conditions.
3. Tissue establishments shall establish and apply procedures for the control of packaging and storage areas, in order to prevent any situation arising that might adversely affect the functioning or integrity of tissues and cells.
4. Processed tissues or cells shall not be distributed until all the requirements laid down in this Directive have been met.
5. Member States shall ensure that tissue establishments have agreements and procedures in place to ensure that, in the event of termination of activities for whatever reason, stored tissues and cells shall be transferred to other tissue establishment or establishments accredited, designated, authorised or licensed in accordance with Article 6, without prejudice to Member States' legislation concerning the disposal of donated tissues or cells, according to the consent pertaining to them.

6. Member States shall identify means for the management of cells or tissues in the event of the death of the donor. To this end, the relevant provisions expressly stated in the written informed consent of the donor as referred to in Article 13 of this Directive shall apply. In the absence of informed consent or express provision within the informed consent, the law of succession of the Member State where the cells and tissues were collected shall apply.
7. Member States shall regulate the destination of donor cells and tissues in the event that the donor dies without having signed an informed consent stipulating the destination of the cells and tissues after his death.

Article 9

Processing of genetic data and data concerning the health

1. The prohibition on the processing of genetic data and data concerning the health of a subject provided for in Article 9(1) of Reg. (EU) 2016/679 shall not apply in cases where it is necessary to protect the right to health of a subject born through filiation resulting from donor-gamete-based medically-assisted procreation.
2. Member States shall regulate a rapid and effective appeals procedure aimed at ensuring that the child or his/her legal representative has access to the donor's genetic and health data, where the donor does not consent to the processing of the data for the protection of the data subject's right to health.
3. For the purposes of this provision, only the donor's genetic and health data shall be accessible and processed. Data concerning the donor's personal identity shall be accessible, only when the donor gives express consent in accordance with Article 13 of this Directive.

CHAPTER III
RECOGNITION AND APPLICABLE LAW

Article 10

Grounds for refusal of recognition of public documents

1. The recognition of a public document related to social parenthood shall be refused when, taking into account the child's interest:
(i) such recognition is manifestly contrary to the public policy of the Member Staste in which recognition is invoked;
(ii) a party did not have proper notice of the proceedings and an opportunity to be heard;

(iii) fraud was conducted in connection with a matter of procedure;
(iv) there are inconsistent judicial decisions or parallel proceedings;
(v) the child has not been given an opportunity to express their views, unless this is against the interest of the child; when a child is below the age of 14 years, this provision shall apply when the children are capable of forming their views.
2. Member States applies the public policy clause observing the fundamental rights and principle laid down in the Charter of Fundamental Riights of the European Union.
3.The verification of conformity with public policy does not apply to the certificate referred to in Article 16 of the this Directive.

Article 11

Partial recognition of public documents

1. The authorities of the Member States may not refuse to recognise public documents on filiation and social parenthood in the part that certifies the relationship between the child and the biological parent.

Article 12

Prohibition of downgrading

1. Member States shall introduce appropriate measures to ensure that if the public document is recognised, it shall produce the same legal effects in the Member State of destination as it did in the Member State that issued it.

Article 13

Adaptation of public documents

1. Member States provide that if a public document on filiation contains a measure or an order which is not known in the law of the Member State addressed, that measure or order shall, to the extent possible, be adapted to a measure or an order known in the law of that Member State which has equivalent effects attached to it and which pursues similar aims and interests. Such adaptation shall not result in effects going beyond those provided for in the law of the Member State of origin.

Article 14

Applicable law

1. The law applicable to the establishment of parenthood shall be the law of the State of the habitual residence of the person giving birth at the time

of birth or, where the habitual residence of the person giving birth at the time of birth cannot be determined, the law of the State of birth of the child.

CHAPTER IV
SIMPLIFICATION OF FORMALITIES RELATED TO THE CROSS-BORDER ACCEPTANCE OF PUBLIC DOCUMENTS

Article 15
Exemption from legalisation and similar formalities

1. Public documents on social parenting are exempt from legalisation and similar formalities, pursuant to Article 4 of Regulation (EU) 2016/1191.

Article 16
Simplification of formalities on authentic copies

1. Where a Member State requires the production of the original of a public document on social parenting issued by the authorities of another Member State, the authorities of the Member State where the public document is presented shall not also require the production of a certified copy.
2. Where a Member State allows the production of a certified copy, the authorities of that Member State shall accept a certified copy produced in another Member State.

CHAPTER V
EUROPEAN CERTIFICATE OF PARENTHOOD FOR THE PURPOSES OF RIGHTS DERIVED FROM UNION LAW

Article 16
Creation of a European Certificate of Parenthood

1. Member States shall issue a filiation certificate (“Certificate”) which shall produce within the European Union the effects laid down in Article 18 of this Directive.
2. The use of the certificate shall not be compulsory.
3. The certificate shall not replace public documents released by the national authorities pursuant to the domestic law of the Member States.

Article 17
Contents of the Certificate

1. Member States shall identify the content of the certificate, which must in each case contain the following information:
(a) name, address and contact details of the issuing authority of the Member State;
(b) date and place of issue;
(c) particulars of the applicant of the Certificate;
(d) particulars of the parent(s) of the applicant of the Certificate;
(e) particulars of the legal representative of the applicant, if any, and the source of the power of representation;
(f) express statement that the certificate shall produce only the effects provided by the law of the European Union in application of Article 18 of this Directive.
(g) signature and/or stamp of the issuing authority.
2. For the purposes of the preceding paragraph, "particulars" shall mean: surname(s) (if applicable, surname(s) at birth), given name(s), address, sex, date and place of birth, nationality (if known), identification number (if applicable), address.

Article 18
Effects of the Certificate

1. The certificate shall produce in the Member States only those effects that arise from the application of the law of the European Union to filiation.
2. The Certificate is intended for use by a person or legal representative who needs to applicate rights under European Union law in a Member State.
3. The certificate shall produce its effects in all Member States without the need for any recognition procedure.
4. The certificate shall be exempt from legalization or any similar formality.
5. Member States may adopt internal rules enabling the certificate to produce further effects under their national law.

Article 19
Competence to issue the Certificate and issuance proceeding

1. Member States shall identify the authority competent to issue the filiation certificate and shall regulate the procedure for its issue.
2. Member States shall determine: the persons entitled to apply for the certificate; the contents of the application form; the costs of the certifi-

cate; the time limits for examining the application and for issuing the certificate and its certified copies; the procedures for rectifying, amending or withdrawing the certificate in cases of material error or falsity; the procedures for appealing against and contesting decisions taken by the issuing authority.

Article 20

Registry of Certificate

1. Member States shall establish a special register of filiation certificates with effect limited to the application of the law of the European Union.

CHAPTER VI
ADMINISTRATIVE COOPERATION

Article 21

Request of information

The competent authorities designated by each Member State shall use the Internal Market Information System ("IMI") established by Regulation (EU) No 1024/2012:
(1) dispel doubts where the authorities of a Member State where a public document or its certified copy is presented have reasonable doubts as to the authenticity of a public document or its certified copy;
(3) inquire about the effects of the public document in the issuing Member State in order to apply Article 12 of this Directive.

CHAPTER VII
CROSS BORDER HEALTHCARE AND EQUAL TREATMENT IN EMPLOYMENT AND OCCUPATION

Article 22

Amendment to art. 7 of Directive 2011/24/UE

Article 7 of Directive 2011/24/EU is amended as follows:

Article 7 - General principles for reimbursement of costs
1. Without prejudice to Regulation (EC) No 883/2004 and subject to the provisions of Articles 8 and 9, the Member State of affiliation shall ensure the costs incurred by an insured person who receives cross-border health-

care are reimbursed, if the healthcare in question is among the benefits to which the insured person is entitled in the Member State of affiliation.
2. In cases where the healthcare in question is not among the benefits to which the insured person is entitled in the Member State of affiliation, costs incurred by an insured person who has received cross-border healthcare shall be reimbursed provided that the healthcare provided is not contrary to the principles of the legal system of the Member State of affiliation.
3. By way of derogation from paragraph 1:
(a) if a Member State is listed in Annex IV to Regulation (EC) No 883/2004 and in compliance with that Regulation has recognised the rights to sickness benefits for pensioners and the members of their families, being resident in a different Member State, it shall provide them healthcare under this Directive at its own expense when they stay on its territory, in accordance with its legislation, as though the persons concerned were residents in the Member State listed in that Annex;
(b) if the healthcare provided in accordance with this Directive is not subject to prior authorisation, is not provided in accordance with Chapter 1 of Title III of the Regulation (EC) No 883/2004, and is provided in the territory of the Member State that according to that Regulation and Regulation (EC) No 987/2009 is, in the end, responsible for reimbursement of the costs, the costs shall be assumed by that Member State. That Member State may assume the costs of the healthcare in accordance with the terms, conditions, criteria for eligibility and regulatory and administrative formalities that it has established, provided that these are compatible with the TFEU.
4. It is for the Member State of affiliation to determine, whether at a local, regional or national level, the healthcare for which an insured person is entitled to assumption of costs and the level of assumption of those costs, regardless of where the healthcare is provided.
5. The costs of cross-border healthcare shall be reimbursed or paid directly by the Member State of affiliation up to the level of costs that would have been assumed by the Member State of affiliation, had this healthcare been provided in its territory without exceeding the actual costs of healthcare received.
Where the full cost of cross-border healthcare exceeds the level of costs that would have been assumed had the healthcare been provided in its territory the Member State of affiliation may nevertheless decide to reimburse the full cost.
The Member State of affiliation may decide to reimburse other related costs, such as accommodation and travel costs, or extra costs which per-

sons with disabilities might incur due to one or more disabilities when receiving cross-border healthcare, in accordance with national legislation and on the condition that there be sufficient documentation setting out these costs.

6. Member States may adopt provisions in accordance with the TFEU aimed at ensuring that patients enjoy the same rights when receiving cross-border healthcare as they would have enjoyed if they had received healthcare in a comparable situation in the Member State of affiliation.

7. For the purposes of paragraph 4, Member States shall have a transparent mechanism for calculation of costs of cross-border healthcare that are to be reimbursed to the insured person by the Member State of affiliation. This mechanism shall be based on objective, non-discriminatory criteria known in advance and applied at the relevant (local, regional or national) administrative level.

8. The Member State of affiliation may impose on an insured person seeking reimbursement of the costs of cross-border healthcare, including healthcare received through means of telemedicine, the same conditions, criteria of eligibility and regulatory and administrative formalities, whether set at a local, regional or national level, as it would impose if this healthcare were provided in its territory. This may include an assessment by a health professional or healthcare administrator providing services for the statutory social security system or national health system of the Member State of affiliation, such as the general practitioner or primary care practitioner with whom the patient is registered, if this is necessary for determining the individual patient's entitlement to healthcare. However, no conditions, criteria of eligibility and regulatory and administrative formalities imposed according to this paragraph may be discriminatory or constitute an obstacle to the free movement of patients, services or goods, unless it is objectively justified by planning requirements relating to the object of ensuring sufficient and permanent access to a balanced range of high-quality treatment in the Member State concerned or to the wish to control costs and avoid, as far as possible, any waste of financial, technical and human resources.

9. The Member State of affiliation shall not make the reimbursement of costs of cross-border healthcare subject to prior authorisation except in the cases set out in Article 8.

10. The Member State of affiliation may limit the application of the rules on reimbursement for cross-border healthcare based on overriding reasons of general interest, such as planning requirements relating to the aim of ensuring sufficient and permanent access to a balanced range of high-

quality treatment in the Member State concerned or to the wish to control costs and avoid, as far as possible, any waste of financial, technical and human resources.
11. Notwithstanding paragraph 9, Member States shall ensure that the cross-border healthcare for which a prior authorisation has been granted is reimbursed in accordance with the authorisation.
12. The decision to limit the application of this Article pursuant to paragraph 9 shall be restricted to what is necessary and proportionate, and may not constitute a means of arbitrary discrimination or an unjustified obstacle to the free movement of goods, persons or services. Member States shall notify the Commission of any decisions to limit reimbursement on the grounds stated in paragraph 9.

Article 23

Amendment to art. 1 of Directive 2000/78/CE

Article 1 of Directive 2000/78/CE is amended as follows

Article 1 - Purpose
The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age, sexual orientation, or the existence of a filial link, including a social one, as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

Article 24

Amendment to art. 2 of Directive 2000/78/CE

Article 2 of Directive 2000/78/CE is amended as follows

Article 2 - Concept of discrimination
1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.
2. For the purposes of paragraph 1:
(a) direct discrimination shall be taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;
(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, a particu-

lar sexual orientation, or persons bound by a parental and filial relationship, including a social one, at a particular disadvantage compared with other persons unless:
(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or
(ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.
3. Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.
4. An instruction to discriminate against persons on any of the grounds referred to in Article 1 shall be deemed to be discrimination within the meaning of paragraph 1.
5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

CHAPTER VIII
RELATIONSHIP WITH OTHER PROVISIONS

Article 25

Relationship with other provisions of Union law

1. This Directive applies without prejudice to:
   a) Directive 2004/23/ec of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells;
   b) Directive 2002/98/ec of the European Parliament and of the Council of 27 January 2003 setting standards of quality and safety for the collection, testing, processing, storage and distribution

of human blood and blood components and amending Directive 2001/83/EC;

c) Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation);

d) Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012;

e) Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare;

f) Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC;

g) Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation;

h) Regulation (EU) No 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC ('the IMI Regulation');

i) Regulation (EU) 2019/1111 of the Council of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction.

Article 25

Relationship with other existing international conventions

1. This Directive shall apply without prejudice to international conventions to which one or more Member States are party at the time of adoption of this Directive and which lay down provisions on matters governed by this Directive.

2. Nevertheless, this Directive shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Directive.
3. This Directive shall be without prejudice to the Hague Convention of 29 May 1993 on Protection of Children and Cooperation in respect of Intercountry Adoption.
4. This Directive shall apply without prejudice to Conventions Nos 16, 33 and 34 of the International Commission on Civil Status.

CHAPTER IX
GENERAL AND FINAL PROVISIONS

Article 26

Information to be communicated to the Commission and publication of information

1. By 31 December 2026, Member States shall communicate to the Commission the following information:
(a) the national authorities competent to issue the European Certificate of filiation;
(b) the model of the certificate of filiation;
(c) information concerning the national register of filiation certificates;
(d) a list of public documents falling within the scope of this Directive, as referred to in Article 24(1)(b) of Regulation (EU) 2016/1191.
2. The Commission shall ensure by any appropriate means, including the European e-Justice Portal, that the information referred to in paragraph 1 is accessible to all.

Article 27

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by … [one year after its entry into force].
They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.
2. When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occa-

sion of their official publication. Member States shall determine how such reference is to be made.

Article 28
Entry into force

1. This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

Done at Bruxelles, ____

Four the Council
The President

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The project *"JUST-PARENT. Legal Protection for Social Parenthood"*, funded by the European Union, involves five research units: the University of Modena and Reggio Emilia, the University of Milano-Bicocca, the University of Granada, the University of Uppsala and the notary firm Krause-Tiefenbacher.

The project dealt with the issues arising from the progressive expansion of cases of parenthood that is not biological but based on self-determination. More specifically, the project analyzed the recent and controversial phenomenon of functional and intentional parenthood, that can be traced in the stable and affective relationship between the person assuming parental responsibility and the child, in the absence of a biological bond between the two. Sometimes these phenomena are regulated by policy makers, as in the case of adoptions and artificial insemination, sometimes arise in the case law. In certain cases, however, the phenomena are banned in some countries and allowed in other. The most challenging issue of this phenomenon is the admissibility in a general way of achieving recognition of the relationship between the parents and the child in order to ensure a full protection of the child beyond the way in which they were procreated.

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