

# **CIVIL STATUS AND THE FREEDOM OF MOVEMENT OF CHILDREN IN THE EU / STATO CIVILE E LA LIBERA CIRCOLAZIONE DEI MINORI NELL'UE**

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# Topics to be discussed

- **Children and surrogacy**
- **Children and intersex**
- Pressure points on domestic and EU law
  - Cross-border EU context as it relates to civil status
  - The role of public policy / ordre public
  - Regulation EU 2016/1191 of 6 July 2016 (applicable as from 16 February 2019)
- Status quo
  - Legal vacuum and uncertainty for children
  - Challenges
- Way forward (domestic, EU and international)

# Intersex

- Intersex is a collective term for many natural variations in sex characteristics. It is not a medical condition
- The Allgemeine Preussische Landrecht of 1794 and the Saxonian Code of 1865
- In most Member States it is required to assign a sex to intersex new-borns. In some Member States, unknown or unclear sex
- Public policy considerations:
  - Interplay of legal, social, and medical expectations
  - Child's choice
  - Certainty in binary sex demarcation

# Surrogacy

- Parentage and parent-child relationship status
  - Who are the (legal) parents?
- Ethically (un)acceptable
- Response to infertility? Exploitative?
- Public policy considerations
  - Potential for exploitation of all parties
  - Free and informed consent of surrogate, donors
  - Nationality and prevention of statelessness
  - **Parent-child relationship** and continuity in status
  - Best interests of the child
  - **Identity rights (origins) and the “truth”**





# Differing national approaches to surrogacy

Comparative research on laws and policies in States concerning surrogacy led to four broad 'groupings' of States being identified:

1. States which **prohibit** surrogacy
2. States in which surrogacy is largely **unregulated**
3. States which expressly permit and **regulate** (usually *altruistic*) surrogacy
4. States with a **permissive** approach to surrogacy, including *permissive* for commercial surrogacy



# Impact on birth registration and civil status/public documents

- **Birth certificates / civil status document**
- **Acknowledgements** of legal parentage (in some States, pre birth) and varying forms (before a civil register, in a protocol before a court or administrative authority, by written agreement between parents or by joint signature of birth registration, in a Will or notarial act)
- Important implications for **filiation**, names, immigration and citizenship, **Will drafting/testamentary dispositions**, tax

# Public documents and parentage

- A key distinction:
  - Recognition of the (formal) **validity of a foreign public document** vs. Recognition of the **legal (parent-child) status** recorded in that document
- Currently it appears that **only a minority** of States **recognise the legal status**
- Most States give foreign birth certificates and acknowledgments **only evidential (if any) weight**

# Cross-border EU context

- Identified migration of people within Europe. In particular within EU Member States due to the right to free movement
- Right to free movement is also applicable to third country spouses and long term residents (limited)
- Migrants take their civil status certificates of State of origin with them
- National authorities are therefore confronted with EU and non-EU civil status certificates



# Grounds for non-recognition

- Fait accompli for States?
- Possible grounds for non-recognition? E.g.:
  - Fraude à la loi
  - Manifest incompatibility with public policy
  - NB Dignity and (Potential for) exploitation



# Public Policy and Evasion of Law

- Courts should have the authority to take counter-measures against flagrant abuses of PIL, although they should take such measures only when:
  - they find that it is appropriate to do so
  - having regard to the circumstances in the individual case and
  - the potential circumstances in refusing to give effect to the artificially created connection
- Private international as a **good governance tool**

# Cross-border EU context

- Are the national authorities of an EU Member State under an obligation to recognise a foreign public document with:
  - i. an intersex marker? or
  - ii. a parental status established abroad and recorded?
- What if public document is recognised in a MS and person concerned subsequently moves to other MS? Is there in the light of the free movement of persons a duty to recognise the recognition granted in another MS?
- Only in exceptional cases related to *ordre public* non-recognition? Constitutional values?

# Pressure points on EU Member States irrespective of national positions

- Impact of **cross-border (reproductive) travel**
- Continuing, steady stream of (influential) **case law (surrogacy)**:
  - **national** (e.g. senior courts of Germany, NL, FR, Spain, the UK)
  - **CJEU** + Charter of Fundamental Rights (*CD v. ST* [2013] No C-157/12 and *Z v. A Government Department* [2013] No C-363/12 - maternity or adoption leave for intending mothers)
  - **ECtHR** (*Mennesson v. France* App. No. 65192/11 and *Labassée v. France* App. No. 65941/11 etc)
- **No CJEU case law on intersex**
- **Problems** and **need for awareness** are not specific or limited to the EU but **global**

# EU Case Law, Recognition and Public Policy

- *Dafeki* 2-12-1997
- In proceedings for determining the entitlements to social security benefits of a migrant worker who is a Community national, the competent social security institutions and the courts of a Member State ***must accept certificates*** and analogous documents ***relative to personal status issued by the competent authorities of the other Member States, UNLESS their accuracy is SERIOUSLY UNDERMINED BY CONCRETE EVIDENCE relating to the individual case in question.*** (also approach of Regulation 2016/1191)



# EU Case Law, Recognition and Public Policy

- CJEU has decided that the exercise of the **right to move and reside freely** within the EU (**Article 21(1) TFEU**) is **hampered if a child is obliged to use a surname in a Member State (Germany), of which he and his parents are nationals, that is different** from the double-barrelled surname conferred and registered in another Member State (Denmark), where he was born and always lived (***Grunkin-Paul C-353/06***)
- Is it allowed to recognise the content of a public document only if the law applied to determine sex or parentage in the public document was the law according to PIL of the host state? ***Grunkin-Paul*: NO**

# Tentative conclusions on CJEU case law

- *Grunkin-Paul, Sayn-Wittgenstein* and *Bogdendorff von Wolffersdorff* read together suggest that the CJEU will not allow MSs to label rules of national law with a public policy label as they see fit if there is an unjustified restriction of the right to free movement guaranteed by Article 21 TFEU, which causes **serious inconveniences and thus obstacle to free movement**
- **MS's national policy must be justified based on objective considerations, must be proportionate to the legitimate aim pursued and respecting EU Charter**

# Tentative conclusions on CJEU case law

- Apply EU case law to **other elements of a person's civil status in intra EU cases** (e.g. sex determination, parentage)?
- **NB** cases only on names and titles
- Boderlines of case law:
  - Only if parties want to have recognition?
  - What if only weak link with other country?
  - What if conflict with public policy/ constitutional values?
  - Also for civil status established in third country, but recognised in another EU MS?
- Recognition should be the rule, non-recognition permitted under exceptional circumstances (unconditional obligation to recognise nationality other MS)

# Public Documents Reg. 2016/1191 of 6 July 2016

- Does not deal with harmonisation/ unification of PIL
- Nor with recognition of the effects of a document
- Regulation does not apply on civil status documents issued outside EU, if not converted in document MS EU
- Does the Regulation apply to cases of intersex and surrogacy?

# How to manage the diversity?

- Recognition of **content of public documents**
- Second proposal at same time as proposal for Public Documents Regulations
- The EU Parliament's Committee on Legal Affairs has asked the European Commission to confirm whether the Commission still intends to make such a proposal on the recognition of the content of civil status documents and if so, when will the outcome of the study and/or impact assessment be available?



# How to manage this diversity?

- Need for domestic responses
- Need to identify national policy and contours of public policy
- Private international law as a good governance tool
  - Which jurisdiction may decide on sex determination / parentage?
  - Which law has to be applied? → conflict rules
  - Which rules determine obligation to recognise?
  - Which jurisdiction may modify?

# International projects



- ISS Surrogacy Project
  - ISS developing "Principles for a better protection of children's rights in cross-border reproductive arrangements, in particular international surrogacy"
  - Expert group comprises ISS, CRC and CEDAW Committee Members, representatives of UNICEF, private practice, academia
  - Distinct human rights focus and multi-disciplinary approach
- HCCH Parentage/Surrogacy Project
  - Expert group

# Tentative conclusions (I)

- Children are children
- Human rights are multifaceted and multidimensional
- No (international) private law vacuum. Public policy of a Member State cannot be understood as being made exclusively of national principles and values
- An isolated (national) position does not necessarily imply that, for example, that aspect conflicts with EU law or the ECHR
- Lots of unknowns (ethically, socially, legally) – evolving subject matters but urgent responses needed

# Tentative conclusions (II)

- Other matters:
  - New reproductive technologies and collaborative family forms
  - Posthumous conception and civil status records
  - Changes to birth records once donor conception known
- Records:
  - Number of parents
  - Checking the facts
  - Guardianship elections
  - Care needs to taken over the definitions used
- Something more fundamental that society is grappling with



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