

Project UniPAR
JUST-JCOO-AG-2023
GA No. 101137859
WP2
Impact National Report on Italy
Deliverable D2.2
WP2 Leader: UJ



Project co-funded by the European Commission within the JUST Programme		
Dissemination Level:		
PU	Public	X
CO	Confidential, only for members of the consortium (including the Commission Services)	
EU-RES	Classified Information: RESTREINT UE (Commission Decision 2005/444/EC)	
EU-CON	Classified Information: CONFIDENTIEL UE (Commission Decision 2005/444/EC)	
EU-SEC	Classified Information: SECRET UE (Commission Decision 2005/444/EC)	
Document version control:		
	Name	Date
Version 1	Laura Carpaneto, Ilaria Queirolo, Francesco Pesce and Francesca Maoli	24/4/2025
Version 2		
Version 3		
Version 4		
Version 5		
Version 6		

Table of contents

Introduction	4
A) Parenthood.....	6
1) Relevant private international law rules on parenthood.....	6
2) Foreign birth certificates and their registration in national registries	11
CASES	14
B) Parenthood following an International surrogacy agreement (hereinafter ISA)	17
1) Attitude <i>vis-à-vis</i> surrogacy and relevant rules on (international) surrogacy in the national legal order	17
2) Relevant problems considered by the case-law in your legal order	17
CASES	19

Introduction

The present Impact National Report is part of the research undertaken under the EU co-funded project UniPAR – Towards Universal Parenthood in Europe,¹ which addresses the legal issues stemming from the circulation of family status – in particular, parent-child relationships – across borders, also in light of the current evolutions in the field of Assisted Reproductive Technologies (hereinafter ARTs).

The Impact National Reports represent the results of an analytical research conducted by the UniPAR consortium on Belgium, Italy, Spain, Croatia, Poland and Bulgaria, concerning domestic law - including private international law - rules, case law and current practices on parenthood.

Each Impact National Report finds its basis in the European Impact Report developed by the Consortium and aimed at identifying parenthood issues arising in connection to existing EU secondary law, also analysing the possible impact of the Parenthood Regulation at the EU level.² In order to obtain this result, the consortium has conducted an analytical research of the EU *acquis*, accompanied by an impact research in the light of the possible introduction of a Parenthood Regulation. At the same time, the research will be supported by consultations with professionals and stakeholders, in the form of six national seminars and a European stakeholder meeting in Brussels. At the end of the project, the Consortium will formulate Conclusions and Recommendations, which will be the natural development of the research outputs incorporating the inputs from the Stakeholder's meeting and national seminars.

In this context, the present Impact National Reports analyses how parenthood issues are dealt with in each of the six jurisdictions covered. Such information will be of value in order to deal with the increasingly frequent (cross-border) cases in which parenthood is an issue. A comparison between domestic legal systems will reveal convergences and divergences in the respective approaches. In addition, the research is supported by the analysis of a series of case-studies, identified by means of a preliminary analysis of case law and concerning specific disharmonies created by recent developments in ARTs as well as in the society and in the legal systems.

This factual approach is focused on results that would be reached in the specific situations at stake.

The Impact National Reports also deal with the possible introduction of an EU Parenthood Regulation, in the light of the fact that the introduction of the new PIL rules will determine substantial changes in the application of the already existing EU PIL instruments in family matters. The auspice is that the Impact National Reports would help stakeholders and professionals to be aware of problems and possible future developments, in order to accompany them through the transition.

Please note that in all the documents/deliverables of the UniPAR project, the term "parenthood" is used in order to make reference to the (legal) parent-child relationship,

¹ JUST-JCOO-AG-2023-101137859. More information about the project, its activities and resources are available on the official website: <https://www.pravos.unios.hr/unipar/>.

² The European Impact Report is accessible on the UniPAR website at <https://www.pravos.unios.hr/unipar/resources-305/>.

coherently with the title of the project itself (i.e. UniPAR – Towards Universal Parenthood in Europe).

However, the UniPAR consortium is aware of the fact that also “filiation” and (biological and legal) “parentage” are terms frequently use to make reference to relation existing between a child and his/her parent(s)³.

³ It appears that (i) the term “parenthood” refers to an ongoing status of the mother or father of a child, associated with the responsibility of raising a child, (ii) “parentage” traditionally refers to the genetic link between a child and another person (even if the expression “legal parentage” as opposed to “biological parentage” is frequently used as well and (iii) “filiation” focuses on the child’s perspective of the parent-child relation. On this topic, see BAINHAM A., *Parentage, Parenthood and Parental Responsibility: Subtle, Elusive Yet Important Distinctions*’ in GILMORE S. (ed), *Parental Rights and Responsibilities*, London-NewYork, 2017, p. 159; LECKEY R., *Filiation*, in *McGill Law Journal*, 2020, p. 73.

A) Parenthood

1) Relevant private international law rules on parenthood

Please provide an English translation of the relevant private international law rules on parenthood (jurisdiction, applicable law and recognition and enforcement).

Please provide a brief explanation of their functioning.

As far as the Italian legal system is concerned, the private international law (PIL) rules on parenthood are to be found in the Italian PIL Act (Law 31 May 1995, n. 218, *Riforma del sistema italiano di diritto internazionale privato*)⁴.

The Italian jurisdiction over parenthood matters with cross-border implications is established by Article 37, which attributes jurisdiction to Italian judges each time one of the parents or the child is an Italian citizen or resides in Italy: *"In addition to the cases where there is jurisdiction under Articles 3 and 9, Italian jurisdiction extends to matters of parentage and personal relations between parents and children where one of the parents or the child is an Italian citizen or resides in Italy."*

The provision saves the application of the grounds of jurisdiction established by Articles 3 and 9. In particular, relevance should be made to the following provisions:

Article 3, para. 1: *"There is Italian jurisdiction when the defendant is domiciled or resident in Italy or has in Italy an agent authorized to appear in court for him/her in accordance with Article 77 of the Code of Civil Procedure, as well as in other cases provided by the law."*

Article 9: *"There is jurisdiction in non-adversary proceedings when the relief sought concerns an Italian citizen or resident, or when such relief relates to situations or relations to which Italian law is applicable, as well as where the present law specifically so provides or where venue is proper before the Italian judge to whom the matter is brought."*

From the above, it can be inferred that there are many cases in which a parenthood matter may be considered connected with the Italian legal system from the point of view of jurisdiction. Moreover, Article 37 seems to be interpreted in the sense that jurisdiction exists even if the parent who is an Italian citizen or resident is not the one involved in the proceeding.

As concerns the applicable law, it should first be emphasised that the Italian legal system is based on the principle of the unicity of the status of a child and does not distinguish between legitimate and natural children. The establishment of parenthood

⁴ The English version of the Italian PIL Act is retrieved from *National statutes: Italy*, in Basedow J., Rühl G., Ferrari F., de Miguel Asensio P., *Encyclopedia of Private International Law*, Elgar, 2017, p. 3329. However, the term 'parentage' has been substituted with the term 'parenthood', in coherence with the approach described in the introduction.

with cross-border elements is determined by Article 33 of the Law 218/1995, according to which:

- "1. Parenthood of a child is determined by its national law at birth or, if more favourable, by the law of the State of which one of its parents is a citizen.*
- 2. The law applicable pursuant to par. 1 determines the requirements for and effects of establishing its parenthood as well as the grounds for contesting parenthood; if the applicable law does not permit establishing or contesting parenthood, Italian law applies.*
- 3. Parenthood acquired on the basis of the national law of one of the parents may be contested only under such law; if such law does not permit contesting parenthood, Italian law applies.*
- 4. The provisions of Italian law which confirm the abolition of any difference between legitimate and natural children must be applied, regardless of the provisions of any law otherwise applicable."*

Thus, Article 33 introduces alternative connecting factors and favours the establishment of parenthood (*favor filiationis*). In fact, the latter (or its contestation) is disciplined by the law of nationality of the child or, if more favourable, the law of nationality of one of the parents (or both parents) at the date of birth. Even in that case, if the applicable law does not allow for the establishment or contesting of parenthood, precedence is given to Italian law. Indeed, from the last mentioned provision, it should be noted that the favour towards the establishment of parenthood results to be balanced with the search for the "biological truth": in fact, the application of Italian law is permitted if the applicable law does not consent the establishment of parenthood, but also the contestation of the latter.

The last paragraph of Article 33 confirms the unity of the status of the child, qualifying any provision enshrining this principle as an overriding mandatory provision.

Article 35 of the Law 218/1995 refers to a specific modality of unilateral recognition of parenthood by a parent, contemplated by Italian law⁵:

- "1. The requirements for recognition of a son or daughter are determined by his/her national law at the time of birth or, if more favourable, by the national law at the time of recognition of the person recognizing the son or daughter; if such laws do not provide for recognition, Italian law applies.*
- 2. A parent's national law determines the capacity to recognise a son or daughter.*
- 3. The law of the State where recognition takes place or the law governing the merits determines the form of recognition."*

The applicable law regulates the conditions for the recognition. Even in this case, the inspiring principle is *favor filiationis*, expressed alternative connecting factors (among

⁵ Reference is made to Article 250 of the Italian Civil Code.

which the most "favourable" applies) and by the application of Italian law each time recognition is not possible according to the other legal systems. This, provided that the capacity of each parent to make a recognition is regulated by his or her national law.

As far as parenthood matters are concerned, it is relevant to recall that Italian PIL provides for the limit of public policy against the application of a foreign law (Article 16 of the Law 218/1995). This limit is to be applied *in concreto*, on the basis of the circumstances of the case concerned and on the effective impact over the national legal order.

The *renvoi* mechanism (Article 13) applies in parenthood matters, but is subject to a special rule (para. 3): "*In cases to which Articles 33 [...] and 35 apply, renvoi shall apply only if it results in applying a law which permits establishing filiation.*"

The recognition and enforcement of judgment on parenthood matters is disciplined by Articles 64 ff. of the Law 218/1995. Article 64 provides that foreign judgments are automatically recognized in Italy, provided that they respect the requirements stated in the same provisions:

"Foreign judgments shall be recognized in Italy without the need for resort to any proceedings when:

- a) The foreign judge rendering the judgment had jurisdiction according to Italian jurisdictional principles;*
- b) The defendant was given notice of the complaint in accordance with forum law and essential rights of defence were not violated;*
- c) The parties appeared in accordance with forum law or default was declared in accordance with that law;*
- d) The judgment is res judicata when pronounced;*
- e) The judgment is not in conflict with another judgment rendered by an Italian judge which is res judicata;*
- f) There is no proceeding pending before an Italian judge involving the same subject matter and between the same parties which began before the foreign proceeding;*
- g) The effects of the judgment are not in contrary to public order"*

At the same time, Article 65 e 66 provides for complementary rules on recognition, which apply respectively to foreign judgment and judicial order relating to capacity of persons or on the existence of family relations or personality rights, and to foreign judicial orders in non-adversary proceedings. If those judgments are adopted by the authorities of the State whose law is applicable under the connecting factors of the Law 218/1995, they are effective in Italy unless they are contrary to public policy or the essential rights of defence have been violated. Therefore, if the conditions are satisfied, only the above two conditions apply to those judgments in order to be recognized in Italy.

In case the decision is not complied with or there is a need to give execution to it, under Article 67 of the Law 218/1995, anyone having an interest is allowed to start a proceeding aimed at ascertaining the existence of the requirements for recognition.

As far as jurisdiction is concerned, please clarify whether a competent authority hearing a case on another matter:

- is able to determine parenthood or not;

- may recognise a judgment on parenthood for the purpose of taking its decision on the other matter.

According to Italian PIL rules, the seized judicial authority who holds jurisdiction over a cross-border dispute “*may decide, incidentally, issues not within Italian jurisdiction but whose resolution is necessary in order to decide the case before him/her*” (Article 6 Law 218/1995).

Similar provisions are to be found in EU PIL instruments which regulate jurisdiction over matter different from parenthood, but in the context of which parenthood issues may arise as incidental questions⁶.

This means that, in general terms, the Italian judge hearing a case on another matter, is able to determine parenthood, if the resolution of this issue is necessary in order to pronounce on the main application.

Please clarify which is the law applicable to:

- limitations;

- legal standing;

- evidence (including presumptions).

Under art. 12 Legge 218/1995, when the Italian courts have jurisdiction, the Italian law applies (*lex processualis fori*).

However, the **legal standing** (*legitimation ad causam*) shall be considered in light of the right/situation of the case and, therefore, in light of the *lex causae*.

The same reasoning applies to **limitations**.

With regard to **evidence**, it has been considered that it has to do both with the judicial procedure and with the substantial law applicable⁷. As a consequence, when the procedural aspects of the evidence are at stake, the *lex fori* applies and when the substantial ones are at stake, the *lex causae* will apply.

However, **presumptions** are regulated by the *lex causae* (as an example, the presumption of paternity, see for example the decision of the Tribunal of Bologna decision n° 415/2010).

⁶ For a detailed analysis, see the European Impact Report.

⁷ See BARATTA R., *Article 12*, in BARIATTI S. (ed), *Legge 31 Maggio 1995 n. 218 Riforma del sistema di diritto internazionale privato*, in *Le Nuove leggi civili commentate*, 1996, p. 1002.

It shall be also noted that under Italian law is open to use foreign instruments of proof, not envisaged by the *lex fori*. Under art. 69 of the Law 218/1995, Italian courts may take evidence following the decisions of foreign judges.

At EU level, uniform rules are provided by Regulation 2020/1783 on cooperation between courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence).

Please explain briefly how a foreign judgment on parenthood is recognised in your State

Italy is not bound by multilateral international conventions on parenthood matters. Therefore, leaving aside particular cases in which a bilateral convention may apply⁸, the general rules on recognition of foreign judgments apply (Article 64 ff. Law 218/1995).

Decisions on parenthood may fall within the scope of application of Article 65, which specifically regards judgments on the capacity of persons, the existence of family relations and the rights of persons. Here, recognition based on the foreign law designated by means of the conflict-of-law rules. If the judgment has been issued by a judicial authority of the State whose law is recalled by the connecting factors of Articles 33 and 35, the judgment is automatically recognized in Italy without the need of any judicial proceeding. This, provided that the two conditions stated by Article 65 are met, namely:

- a) the judgment is not contrary to public policy;
- b) the essential rights of defence have been respected.

Judicial proceedings are required only if the recognition is contested, or for the purposes of the implementation of the judgment in case of non-compliance by the competent authority, such as the refusal of the civil status registrar to entry the judgment in the civil status registers (reference is made to Article 67 of the Law 218/1995).

The same holds true for judgments that do not fall within Article 65, which will follow the general rule of Article 64: the main consequence is that more conditions need to be met (see above). Therefore, the two provisions operate on a complementary basis⁹. The foreign judgment on parenthood can be directly submitted to the civil status registrar of the interested municipality¹⁰, who shall verify whether the conditions provided in Article 65 (or Article 64) are met¹¹. The request shall be formulated through

⁸ The multilateral and bilateral convention to which Italy is party can be found on the "Atrio" portal at <https://itra.esteri.it/>.

⁹ See Corte di Cassazione, judgment no. 10378 of the 28th of May 2004 and judgment no. 17463 of the 17th of July 2013. On the topic MOSCONI F., CAMPIGLIO C., *Diritto internazionale privato e processuale*, Vol. I, *Parte generale e obbligazioni*, Milan, 2024, p. 409.

¹⁰ The civil status registrars may also receive the request from the Italian Consulate of the circumscription in which the judgment has been issued.

¹¹ Following the registration in the civil status registers, parenthood is registered as such also in the population registers (*registri anagrafici*).

a statutory declaration (*dichiarazione sostitutiva di atto notorio*, disciplined by Article 47 of the Presidential Decree 445/2000), certifying that the requirements are met, and should be accompanied by a duly legalized and translated copy of the full judgment. copia integrale della sentenza completa dei requisiti di cui all'art. 64, debitamente legalizzata e tradotta.

In origin, according to the circular of the Ministry of Justice of the 7th January of 1997¹², the civil status registrar had the possibility of appealing to the public prosecutor's office in the event of reasonable doubt as to whether the conditions for recognition existed. With the entry into force of the Presidential Decree of 3 November 2000, No. 396¹³ (which now governs the registration of civil status events), the competence to update civil status registers has shifted to the local Prefect (*Prefetto*), to which the civil status registrar may refer in case of doubts and who shall decide whether the conditions for recognition are met or not met. The civil status registrar is required to act accordingly. It is only at this stage that the judicial proceedings regulated under Article 67 of the Law 2018/1995 can be initiated.

The last mentioned provision provides for a declaratory proceeding, which can be initiated by any interested party (therefore, both the party seeking the recognition or the party seeking to establish that the judgment lacks the required conditions for recognition). These proceedings are governed by Article 30 of the Legislative Decree of 1st September 2011, No. 150 and they shall be initiated before the Court of Appeal of the place where the judgment must be implemented and conducted according to the simplified procedure regulated by Articles 218-*decies* ff. of the Italian Code of Civil Procedure.

The judicial decision ascertaining the conditions for recognition, together with the foreign judgment, constitutes title for implementation.

2) Foreign birth certificates and their registration in national registries

Please explain how the authorities of the Civil or Population Registry of your country proceed if the birth of a child occurred abroad and there is a foreign birth certificate.

If the birth of a child occurred abroad and a birth certificate concerning an Italian citizen is formed abroad, the foreign birth certificate – duly legalized and translated¹⁴

¹² Ministero di grazia e giustizia, Circolare del 7 gennaio 1997 prot. 1/50/FG/29(96)1227.

¹³ d.P.R. 3 November 2000, No. 396, *Regolamento per la revisione e la semplificazione dell'ordinamento dello stato civile*.

¹⁴ Special rules concerning legalization and translation of the birth certificate may be provided by international convention such as (i) the 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (available at <https://www.hcch.net/en/instruments/conventions/specialised-sections/apostille>) or (ii) the 1976 Vienna Convention on the issue of multilingual extracts from civil-status records (<https://ciecl.org/en/convention/convention-no-16-on-the-issue-of-multilingual-extracts-from-civil-status-records/>) or by Regulation 2016/1191 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation 1024/2012 (<https://eur-lex.europa.eu/eli/reg/2016/1191/oj/eng>). On this topic, see R. Calvigioni,

- shall be presented to the territorial competent Civil Registrar by (i) the Italian diplomatic/consular authorities of the State where the birth has taken place, or (ii) by the “persons registered” in the foreign birth certificates, or (iii) by any person interested in the registration of the birth certificate¹⁵.

Please clarify:

- **Whether they determine parenthood on the basis of choice-of-law rules**
- **Whether they transcribe the foreign birth certificate in the Civil or Population Registry or whether transcription is required only in some circumstances**
- **Whether the authorities in charge of the Civil or Population Registry are allowed to modify their records on the basis of a foreign judgment and, in the affirmative, whether a special procedure is required**

Under Italian law, the Civil Registrars do not have to determine parenthood and they do not have to determine it on the basis of choice-of-law rules.

In the Practice guide concerning the application of the rules on civil status, it is expressly clarified that Civil Registrars are not bound to apply foreign law (following the Italian private international law rules)¹⁶. Their role is to check:

1. whether the documents received are in compliance with the formal requirements of Italian law.
2. whether the child is born within or outside wedlock.
3. whether the child has been acknowledged by one or both parents.

Furthermore, the Civil Registrar does not have investigation powers. This fact has two consequences: on the one hand, the Civil Registrar cannot require any further document and, on the other hand, even if medical documents proving the existence of a genetic link with the child are provided, the Civil Registrar is not allowed to make use of them for the purposes of registration.

Despite this somehow “limited” role, the Civil Registrar is required by Italian law to refuse registration of an act when such act is contrary to Italian public policy¹⁷.

The problem of a foreign act contrary to Italian public policy is expressly considered, whilst a correspondent duty on the Civil Registrar to consider the problem of the applicable law to the parenthood is not.

Circulation of public documents in the EU, available at <https://aldricus.giustizia.it/circulation-of-public-documents-in-the-eu/?lang=en>. More generally on the transcription of foreign birth certificates, see R. Calvigioni, *La trascrizione dell'atto di nascita formato all'estero ed il ruolo dell'ufficiale di stato civile*, in (edited by) F. Pesce, *La surrogazione di maternità nel prisma del diritto*, 2022, pp. 35-60.

¹⁵ See Article 17 of the D.P.R. 396/2000.

¹⁶ See *Massimario per l'ufficiale dello stato civile*, 2014, at p. 159 available at <https://prefettura.interno.gov.it/sites/default/files/87/2024-07/massimario-ufficiale-stato-civile-2014-0.pdf>

¹⁷ See Article 18 of D.P.R. 396/2000.

In this regard, it shall be considered that (i) the Civil Registry is the registry where civil status documents concerning Italian citizens shall be registered¹⁸ and (ii) under Italian private international law, the law applicable to filiation is Italian law any time the parents are Italian.

The Civil Registrars are not allowed to modify the registry *ex motu proprio*, they need to be requested to do so by any person having an interest¹⁹.

¹⁸ As far as foreign citizens (having their residence in Italy) are concerned, the information concerning their status are collected in a different registry, called "anagrafe".

¹⁹ See Article 98 D.P.R. 396/2000.

CASES

Establishment of parenthood of a child born in the forum

A bi-national married couple, the mother (Maria) being a national of your State and the father (Jürgen) being a national of Germany, is habitually resident in Germany. One month before the child's (Leo) birth in your State, the couple divorces in Germany. Parenthood between the child Leo and Maria is established at birth by operation of law and Leo acquires the nationality of your State due to the legal relationship established with Maria or the birth in your State (as the case may be under nationality law). Leo's birth is registered in your State.

Please clarify

- **Whether the father, Jürgen, will be registered as the child's father (despite the divorce)**
- **Whether it is possible under your legal system for Maria to appear at the birth registry with the man she says is the father (Jan) and register him as Leo's legal father and, in the negative, whether there is a way in your legal system to establish parenthood between Jürgen and Leo**

Under Italian law, a presumption in favour of Jürgen exists to be Leo's father within 300 days from the date of divorce (as well as from separation as well as from annulment of marriage)²⁰.

Therefore, if Jürgen was not mentioned immediately in the birth registry, he will be easily registered within 300 days from the divorce.

Under Italian law, Maria is entitled to appear at the birth registry and to register Jan as Leo's father. Since this would be clearly a false statement, Maria is likely to be found guilty of a specific crime (called "alterazione di stato")²¹.

Under Italian law, the declaration that the parent provides to the Civil Registrar prevails over the facts and as well as over the registered divorce decision.

On the other hand, the Civil Registry's function is to collect the declaration and, eventually, to refuse it in case he/she believes that it is contrary to Italian law or Italian public policy.

As mentioned, there is a legal presumption that Jürgen is Leo's father, therefore he can start an action claiming paternity ("azione di riconoscimento di stato").

It is also possible that Jan can start an action ("azione di contestazione di riconoscimento").

²⁰ See Article 232 Italian civil code.

²¹ See Article 567 criminal code.

Establishment of parenthood of a child born abroad

A bi-national couple, the mother (Maria) being a national of your State and the father (Jürgen) being a national of Germany, are habitually resident in Germany. One month before the child's (Leo) birth in Germany, the couple divorces in Germany. The child's birth is registered in Germany and German authorities issue a birth certificate recording that Maria is the child's mother. Jürgen is not mentioned.

Please clarify

- **Whether Leo's birth may be registered in your State**
- **The value (if any) of the German birth certificate in your State**
- **Whether Jürgen may be registered as the child's father in your State**
- **Whether it is possible in your legal system for Maria to appear at the birth registry with the man she says is the father (Jan) and register him as Leo's legal father and, in the negative, whether there is a way in your legal system to establish parenthood between Jan and Leo**

Leo's birth should be registered in the Civil Registry, since he is an Italian citizen. There is a specific section of the Civil Registry where births happened abroad are registered. The request may come from the mother directly or through then Italian Consulate and the birth certificate will be registered in the Civil Registry of the place of residence (if any) or of the AIRE (i.e. the registry of the Italian citizens having residence abroad). Thanks to the existence of the Regulation 2016/1191, once the multilingual standard form is attached to it, the German birth certificate has the same value as an Italian birth certificate (i.e. it has the value of a public act, which is presumed to state the truth) Jürgen may be registered as Leo's father.

It is possible for Maria to appear at the birth registry and to declare that Jan is Leo's father.

However, it is also possible to start an action to have Jan recognized as Leo's father.

Co-motherhood

Valentina, a national of your State, and Jette, who is Dutch, are the legal mothers of a child (Tom) born in the Netherlands.

Please clarify

- **Whether Tom's birth can be registered in your State**
- **The value of the Dutch birth certificate be in your State**
- **Whether the two women (Valentina and Jette) may be considered to be the legal mothers of the child in your State and, in the affirmative, whether this happens to all effects**

Tom's birth – once duly legalized and translated - can be surely registered in Italian birth registry, having the same value of an Italian birth certificate.

As regard the registration of the birth certificate mentioning the two mothers, the Italian Supreme Court have clarified that it is possible to register it²². This is not contrary to public policy (as in the case of two men), since no surrogacy occurred.

²² See Cass. n° 14878/2017; Cass. SU n° 12193/2019; Cass. n° 23319/2021.

B) Parenthood following an International surrogacy agreement (hereinafter ISA)

1) Attitude vis-à-vis surrogacy and relevant rules on (international) surrogacy in the national legal order

Please provide a brief description of the attitude of your legal order vis-à-vis surrogacy.

In case your legal order regulates surrogacy, please provide an English translation of the relevant national rules on surrogacy and a brief description of their functioning.

In case your legal order does not expressly regulate surrogacy, please explain which rules may apply to children born abroad following a surrogacy agreement.

In case your legal order does expressly prohibit surrogacy, please provide a brief explanation in English of the legislation, the functioning thereof and a reference to the original text of the legislation.

The Italian legal order expressly prohibit surrogacy. Article 12, para. 6 of the Law 40/2004 (*Norme in materia di procreazione medicalmente assistita*) states that "Anyone who, in any form, carries out, organises or advertises the commercialisation of gametes or embryos or maternity surrogacy shall be punished by imprisonment of from three months to two years and a fine of from 600,000 to one million euro. If the facts referred to in the previous sentence, with reference to surrogacy, are committed abroad, the Italian citizen shall be punished according to Italian law". The last part of the provision, sanctioning surrogacy committed abroad by Italian citizens, has been recently introduced by the Law 169/2024 (in force since 3rd of December 2024).

2) Relevant problems considered by the case-law in your legal order

Please enlist and explain briefly the relevant problems considered by the case-law in your country concerning recognition of parenthood of children born following a surrogacy agreement.

Please explain briefly:

- the solutions adopted in your legal order with regard to the implementation of the indications provided by the ECtHR in its first Opinion rendered on Request No. P16-2018-001

- how (foreign) birth certificates of children born following a surrogacy agreements are considered by the Civil Registrars in your legal order

- how foreign adoption decisions (concerning adoption by the intentional parent) are considered by the Civil Registrars in your legal order

Being surrogacy a crime under Italian law, it generally takes place abroad and it comes to the attention of the Italian authorities mainly when the intended parents/parent require the registration of the foreign birth certificate in the Civil Registry.

In this situation, the Civil Registrar has the following alternatives:

1. To register the birth certificate (and to report a suspect situation to the General Prosecutor of the Italian Republic). This is in practice the most common

outcome, even if up to now the General Prosecutor does not generally start any further investigation/proceeding (but the situation may change, given the recent entrance into force of the Italian legislation qualifying surrogacy as a universal crime).

2. To register the birth certificate, mentioning just the biological parent (frequently the father), with the consequence that the other parent (frequently the mother) shall (i) start the adoption in special situations procedure (art. 44, lit. d) of the Italian law on adoption) or (ii) shall apply before the court against the refusal of the Civil Registry to register. In the proceeding before the court, the circumstances of the case (such as for example whether the intended parents have made fraudulent declarations before the Italian diplomatic/consular authorities abroad) will be assessed. Practice shows that in the majority of the cases the decision of the Civil Registrar not to accept and register the certificate in case of birth following a surrogacy has been considered lawful.

The ECtHR's first Opinion has been *de facto* implemented by the Civil Registrars and by the courts by (i) recognizing filiation of the genetic (intentional) parent, (ii) denying recognition of the filiation of the non-biological (intentional) parent, being against public policy, with the consequence that the latter, in order to be recognized as parent, shall follow the path of the so-called "*adoption in special situations*".

The Constitutional Court has confirmed the need for specific legal provisions on this matter, since the above *de facto* solution has been considered not adequate for the protection of the best interests of the child (decision n° 33/2021).

With regard to **adoption decisions**, a distinction shall be made:

- a) International adoption decisions shall be recognized through a procedure envisaged by the Italian law on adoption (Legge 184/1983, articles 35 and 36), which requires the intervention of the Tribunal of Minors, which may establish that the decision on international adoption shall be recognized in the Italian legal order and may also order the registration of the decision in the Civil Registry;
- b) Domestic adoption decisions coming from the judicial of a foreign State may be brought to the attention of the Civil Registrars anytime they concern Italian citizens, having their habitual residence abroad and wanting to register in the Italian Civil Registry their parenthood. Since these decisions are automatically recognized in the Italian legal order (following the rules under art. 64-65 of the Italian law of private international law), the Civil Register shall (and will) register them. Hypothetically, if the Civil Register understand that the situation at stake may be characterized by international elements and may therefore be considered as an international adoption falling within the scope of application of the rules mentioned above under a), he/she may ask the intervention of General Prosecutor. But, as mentioned by Civil Registrars during interviews, this situation does not happen frequently in Italy.

CASES

Recognition and transcription of a foreign birth certificate establishing parenthood following a surrogacy agreement

Marco (commissioning father) and Michela (commissioning mother) made a surrogacy agreement in a third State with Agnese.

Agnese gave birth to Maria and the foreign birth certificate from the third State recognizes Marco and Michela's legal parenthood of Maria.

Whilst Marco has a genetic link with Maria, Michela has not.

Please explain the effects (if any) your legal system would give to this foreign birth certificate and, in particular, please clarify

- Whether Marco's parenthood can be recognised

- whether Michela's parenthood can be recognised?

What procedure shall be followed (if any)

- **whether grounds for refusal exist and, in the affirmative, which one**
- **Whether differences would exist if two men were indicated as parents in the foreign birth certificate**
- **Whether difference would exist if only a father is indicated in the foreign birth certificate, while the mother is not**

The foreign birth certificate concerning an Italian citizen is to be registered in the Civil Registry.

A foreign birth certificate – duly legalized and translated – has the same value of the Italian birth certificate, which is a public document, the content of which is considered true, unless a specific complain of forgery is made²³.

Following the ECtHS's opinion, Marco's parenthood is surely recognized (due to the genetic link). Michela's parenthood may be recognized, unless the Civil Registrar believes that the child is born following a surrogacy agreement, which is against Italian public policy.

In case of refusal, Michela shall start a proceeding for "adoption in special situations" (art. 44 lit. d) Law 183/1984).

If two men are indicated as parents in the foreign birth certificate, the following situations may take place:

1. the Civil Registrar will deny registration, assuming the existence of a surrogacy agreement which is against Italian public policy and that the couple will make an application against the denial. Following the ECtHR's opinion, it is likely that the court will order registration of the genetic father, whilst the non-genetic father will have to start the adoption in special situations proceeding.
2. Given that birth certificates from some (foreign) States record the parenthood establishing a first and a second parent, the Civil Registrar may recognize the first parent as the genetic one and the second parent will have to start the adoption in special situations proceeding.

²³ See Article 2700 Italian civil code.

3. The Civil Registrar has not the power to take into consideration documents different from the birth certificate (such as a DNA test) neither he/she has investigative powers. However, the Civil Registrar has the power to ask to the parents requiring the registration to make a joint statement on the identity of the genetic father. In such case, the Civil Registrar shall register the genetic father as a parent (whilst the non-genetic father shall start the adoption in special situations proceeding).

In the case of a foreign birth certificate indicating the father of the child (and not the mother), the procedure does not change: the Civil Registrar will register the father and the (non-biological mother) shall start the adoption in special situations proceeding.

Adoption by the non-biological intentional parent

Giovanni is the biological father of Maria, who is born in Canada following a surrogacy agreement with Agnese.

Michele is the intentional father of Maria and wants to adopt her. Agnese agrees to the adoption, whilst Giovanni does not anymore.

Giovanni admits that he and Michele had a common parental project of having babies through a surrogacy agreement with Agnese, but he refuses to give his consent to adoption since, after Maria's birth, Michele has never had any affective relationship with her and abandoned both, his partner and the child.

Please clarify whether, in your legal order, Michele has a right to be recognize as a parent and, in the affirmative, what procedure can be followed in order to enforce that right (for example, establishment of parenthood, adoption)

Please clarify whether in your legal order differences may exist in the situation where the intentional parent asking for the recognition of parenthood is a man (as in the example) or is a woman

Please describe the requirements for the establishment of parenthood in favour of the non-biological (intentional) parent of a surrogacy agreement

Please clarify whether the biological parent's consent and/or the surrogate mother's one are a necessary element for the establishment of parenthood with regard to the intentional (non-biological) parent

Michele – lacking a genetic link with Maria – has not the right to be recognized automatically as the father of Maria, as it happened for Giovanni.

However, he has the possibility to start the adoption in special situation proceeding, which in principle allows him to be recognized as the adoptive father of Maria.

The above proceeding, however, is subject to Giovanni's consent.

In the Italian legal order, when the intentional parent is a man, he needs to go through the adoption in special situations procedure to be recognized as a father.

This is not a case when the international parent is a woman: in such a case, if the parenthood is registered in the birth certificate or recognized in a decision, it will be recognized in the Italian legal order.

The procedure for the establishment of parenthood in favour of the non-biological (intentional) parent of a surrogacy agreement is the adoption in special situation one, envisaged by art. 44 lit. d) of Law 184/1983²⁴.

The interested person shall make an application to the Tribunal of Minors, which shall evaluate the existence of the requirements envisaged by the law and shall also check

²⁴ See Cass n° 12193/2019. As for a confirmation that the adoption in special situation procedure is in compliance with the ECHR, see the ECtHR's decision in the case Bonzano and others v. Italy, application n° 10810/20, 22 June 2023.

whether the parent having parental responsibility gives his/her consent to the adoption.

In principle, the adoption in special situations is aimed at providing adequate moral and material assistance to the child which is deemed to be as abandoned or in a situation where he/she lacks adequate care from the parents. As a consequence, the adoption in special situations is not a full adoption.

The Italian Constitutional Court has recognized the existence of a discrimination vis-à-vis the children born after a surrogacy agreement and adopted by virtue of the procedure at stake and has requested an intervention of the Italian lawmaker (Constitutional Court decision n° 33/2021).

The Constitutional Court has further clarified that the solution of the adoption in special situations is not adequate for the children born after a surrogacy agreement also because it requires the necessary consent of the biological parent, which may not be given in the case of crisis of the couple, occurred after the surrogacy agreement.

Recognition of a foreign decision establishing parenthood

Clara (intending mother) and Peter (intending father), both resident in Italy, entered into a commercial gestational surrogacy agreement (i.e. the international parents provide their gametes and both have genetic links with the child) with Natasha who lives in the State X (which is not a EU country), allowing such agreements.

Under the law of the State X, parenthood is established by virtue of a court order and the birth certificate is amended accordingly.

Clara and Peter come back to Italy and require the recognition of the foreign judgment.

Please clarify the procedure to be followed for the (judicial) recognition of the foreign judgment of the State X

Please clarify also whether a different procedure is envisaged in your legal order in case of recognition of a (foreign) adoption decision

In principle, under Italian law (Law 218/1995), recognition of foreign decisions does not require any specific procedure, unless the decision does not respect some requirements, which in the case of parenthood relates to applicable law and public order.

Being surrogacy against public policy (and starting from the 3rd of December 2024 also a universal crime, to be punished independently from the fact that the conduct happened abroad), the foreign decision is very likely not to be recognized.

Problems may occur when the couple requires registration of their parenthood before the Civil Registrars or in the procedure following the denial of the competent Civil Registrar to register.