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PART 1: 'NEW FAMILIES' AND THE LAW

Introduction

Written law does not always keep pace with the times and consequently many of the families formed thanks to a variety of assisted reproduction techniques (ART) discover that their social status is totally or partially non-existent on a legal plane. This study explores and analyses their predicament.

In addition to the numerous 'social' ways of forming a family, the advent of ART (above all heterologous procedures involving genetic material from a third party) and of surrogacy has led to the fragmentation of the notions of motherhood and fatherhood, which were previously unitary, creating potential confusion regarding the *status filiationis* of the child.

In the life history of children born through these techniques there are, in effect, more than two potential and/or factual parental figures and in view of this multiplicity, the generally rigid bi-parental family paradigm on which the law of filiation is based demands that a choice be made. Who has the right to parental status, to the wardship of the child, and/or to contact rights? Which elements – genetics, affections, gestation or intention – deserve a (marginal or decisive) weight in determining the status, or more generally, the family situation of the child? What role does the principle 'best interests of the child' play in this choice? How is the limit of public policy to be enacted? These are just some of the questions that national courts have had to face, seeking a solution in the written law, which is often silent on the matter, or even explicitly prohibits the procreative practice enacted. However, at the same time, it is possible to count on the precious contribution of the European Court of Human Rights (ECHR).

This report explores the role played by national judges in bridging this gap, highlighting the logics, the techniques and the principles that have guided their modernisation of existing law in consideration of the new family situations.

After illustrating the social-legal context and the problems faced (Chapter 1), Chapter 2 examines the ECHR system in depth, analysing the rulings of the ECHR on matters regarding ART and single-parent families. Later chapters, on the contrary, are dedicated to the analysis of the increasingly plentiful jurisprudence provided by the national courts.

Starting from the observation that the problem of determining the *status filiationis* of the child born using ART has been examined even in countries whose legislators have intervened permissively, the analysis does not have a predefined geographical coverage. On the contrary, it tends to be as inclusive as possible, even moving beyond the European frontiers and including decisions from the United States, Canada, Australia and South Africa. Given the immensity and the disparity of the question, the jurisprudential analysis was divided into two main parts. The first part – Chapters 3 to 6 – examines the controversies that have originated from the use of heterologous

techniques. The second part – Chapters 7 to 10 – concentrates on the cases that have followed the practice of surrogacy. Finally, Chapter 11 offers some conclusive considerations, identifying the principle of the 'best interest(s) of the child', the public policy clause and the jurisprudence of the ECHR as the principal jurisprudential elements that respond to the effective need to regulate acts which (although prohibited by the law) actually take place. Acts that have led to the birth of one or more children, and often, also to the creation of affective relationships.

PART 1: “NEW FAMILIES AND THE LAW

Chapter 1

'New Families' and a comparison of the laws on filiation

1. *'New' methods of procreation and filiation*

Until recently, in the western world, studies of the family were mainly focused on the nuclear family model, composed of a married heterosexual couple and their biological children. In addition to representing the most widespread family situation, the nuclear family had long been considered the ideal place to guarantee the psychological and physical integrity of the child, while ensuring adequate progress of the educational function. The traditional model of the family enjoyed privileged treatment on both the social and the juridical plane, since it had represented the starting point for legislation on family matters since the nineteen seventies[1]. Up to then, (and in Italy until the reform of family law of 1975) the family based on marriage was the only family model accepted and recognised, within which also filiation found full recognition and protection[2]. There is an evident trace of this ideology in Article 29, paragraph 1, of the Italian Constitution, which defines the family as follows: "The Republic recognises the rights of the family as a natural society founded on marriage." thus making express reference to the 'legitimate family' and excluding from the legislation in force – at least according to a reading of the constitutional norms shared by part of the doctrine[3] – unions which, although not founded on a conjugal link, are characterised by a stable and lasting bond.

It is therefore clear that, coherently with the concerns presented by Moro in the Constituent Assembly, although originally of a social nature,[4] the family does not enjoy a sphere of autonomous

1We would like to thank Elena Campadese for her assistance with the research.

G.O. Cesaro, P. Lovatti and G. Mastrangelo, *Introduzione*, in Id. (ed.), *La Famiglia si Trasforma. Status familiari costituiti all'estero e loro riconoscimento in Italia, tra ordine pubblico e interesse del minore*, Milano, Franco Angeli, 2014, p. 15.

2 A. Di Fede, *La famiglia legittima e i modelli familiari diversificati: luci e ombre, scenari e prospettive*, in R. Pane (ed.), *Nuove frontiere della famiglia. La riforma della filiazione*, Napoli, Edizioni Scientifiche Italiane, 2014, p. 45.

3 See, *inter alia*, A. Ruggeri, *Idee sulla famiglia e teoria (e strategia) della Costituzione*, in "Quaderni Costituzionali", 2007, N. 4, p. 753; G. Giacobbe, *Famiglia: molteplicità di modelli o unità categoriale?* in "Diritto di Famiglia e delle Persone", 2006, N. 4, p. 1230.
According to these authors, the choice made by the Constitution does not implicate that different models of family cannot be foreseen, but rather that, in existing legislation, the only constitutionally guaranteed model is the natural family based on marriage. They believe that the exclusion of other models of social aggregation from the category 'family' would have juridical effects. Although these cannot be realised through regulatory instruments, which basically, if not formally, compare these aggregations with the 'family' that emerges from the Constitution. In a position of net contrast are those who state that, despite the preference expressed for a family based on marriage, if read in combination with Article 2 of the Constitution, Article 29 does not propose an exclusive model. According to this reading, those forms of cohabitation which, although not expressly foreseen by the Constitution, are based on stability and responsibility. See, *inter alia*, R. Pane, *Il nuovo diritto di filiazione tra modernità e tradizione*, in R. Pane (ed.), *Nuove frontiere della famiglia. La riforma della filiazione*, Napoli, Edizioni Scientifiche Italiane, 2014, p. 25; Di Fede, *La famiglia legittima e i modelli famigliari diversificati: luci e ombre, scenari e prospettive*, cit., p. 52.

4 During the preparatory work for Article 29 of the Constitution, Moro emphasised the importance of defining the family as a social fact, supporting the formula "the family is a natural society", with the aim of freeing it from state

regulation with regard to the state authorities. The State and, in particular, the law, do not impassibly observe the family phenomenon; rather, they facilitate, encourage and, at times, sanction the formation and the formalisation of the family organisations[5]. By taking the experience of the traditional family as a reference and encouraging similar affective bonds, the law imposes rigid and universally valid references, denying recognition and protection to those who find themselves in 'anomalous' situations not considered by the normative guidelines. In other words, by attributing different levels of recognition and juridical safeguards to the diversified forms of family, the law plays a coercive and punitive role in the life of the persons whose circumstances and desires do not correspond to the 'norm'. In effect, the recognition of the family founded on marriage as the only social formation considered worthy of legal protection has produced a system that limits the freedom to choose alternative forms of cohabitation on which to base a union, a system that is very distant from social reality[6].

In recent years, we have seen changes of various kinds – demographic, sociological, cultural and scientific – that have determined the evolution of the social understanding and (although to a lesser extent and at a decidedly slower rate) of the juridical connotation of the notion of 'family'. These changes, *in primis* the introduction of divorce, have highlighted the fragility of the traditional model and, at the same time, the plurality of the forms and the ways of constituting a family. Although with specific peculiarities according to each national context, the changed conception of the family is essentially based on the obsolescence of the model of the family based on marriage as the only paradigm relevant for the law[7]. There can be no doubt that the tendency is to equate, at least in substance, the legitimate family and the natural one. In other words, marriage ceases – at least explicitly – to be the necessary requisite for creating legally familial relations. This also implicates the obsolescence of the principle – enshrined in the Italian Civil Code of 1942 – that, in order to be recognised by the law, filiation presupposes a conjugal bond between the parents.

The family of contemporary society, called "family in the days of the multitudes" by the sociologist Aldo Bonomi, is therefore the result of various destructuring processes that, since the

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interference. In Moro's thinking, the accent on the word 'natural' was therefore to be read as an attempt to erect a barrier against the State, in order to preserve the family as an extra-social and fluid phenomenon that stood alone. The following passage from the discussion of the first Subcommission of the Commission for the Constitution of November 6th 1946 is significant. "Moro declared that he voted in favour of the formula, since it corresponded to an evident concern of a political nature […] which regarded the battle against the State totalitarianism, which affected above all the family, and could in this way more easily affect the freedom of the individual. In declaring that the family is a natural society, it was intended to establish that the family has its own sphere of autonomous order with regard to the State, which, when it intervened, was faced by a reality that it could neither maim nor alter." The preparatory works can be consulted on line at www.nascitacostituzione.it (last access 14 September 2016).

5 F. Casucci, *Elogio della famiglia (secondo una tecnica di performance e a proposito del metodo giusletterario)*, in Pane (ed.), *Nuove frontiere della filiazione. La riforma della filiazione*, cit., 2014, p. 31.

6 M. Porcelli, *La Famiglia al plurale*, in "Diritto di Famiglia e delle Persone", 2014, N. 3, p. 1241.

7 Pane, *Il nuovo diritto di filiazione tra modernità e tradizione*, cit., p. 25.

nineteen-eighties, have affected the nuclear family and have multiplied the forms, the roles and the cultures[8]. This process of pluralisation involves the changes in the woman's role within the family and in the public sphere, the recognition of the right to dissolve the marriage and the advent of the 'new' forms of family[9] that differ from those originally enshrined in the Italian Civil Code, including common-law couples, homosexual couples, single-parent families and the establishment of ethnically and religiously diversified models.[10] Although they vary, the 'new' family models are often linked by the dissolution of the sexuality-marriage-procreation triad.[11] In Italy, the twenty-first century has marked an exponential increase in the births within families not based on marriage. While in 1999 the children born outside marriage represented only 10% of the total number of births, by 2009 they had reached 20% and, in 2012, even 25%.[12] At present, therefore, one child in four is born to parents who are not joined by a conjugal bond.[13] The proliferation of unregistered cohabitation and of births outside marriage, accompanied by the high rate of divorce, have made it possible to discuss procreation outside the institution of marriage. Even earlier, the widespread diffusion of contraception in the nineteen seventies and the liberalisation of abortion – introduced in Italy with the law 194/1978 – opened the way for "sexuality without reproduction" [14].

More recently, the medical-scientific evolution has further accelerated the changes in the family environment, introducing not only 'negative' interventions (contraception and abortion) but also 'proactive' interventions on human procreation. In particular, the advent of medically assisted reproduction procedures have made 'reproduction without sexuality' possible and, obviously, also in the absence of a conjugal bond. The rapid development of medical science and the growing rate of infertility and/or sterility has led to the establishment of a new form of filiation – known as 'assisted filiation' – which joins natural filiation and adoptive filiation.[15] In Italy, in 2013, 71,741

8 A. Bonomi, *Le trasformazioni sociali del concetto di famiglia* in G.O. Cesaro, P. Lovatti and G. Mastrangelo (ed.), *La famiglia si trasforma. Status familiari costituiti all'estero e loro riconoscimento in Italia, tra ordine pubblico e interesse del minore*, cit., p. 25.

9 These families are considered 'new' only in the sense that the law and the jurists have become aware that they exist and have begun to explore the phenomenon relatively recently, although they have existed in the social reality for some considerable time.

10 Bonomi, *Le trasformazioni sociali del concetto di famiglia*, cit., p. 25.

11 R. Collier and S. Sheldon, *Fragmenting Fatherhood: A Socio-Legal Study*, London, Hart, 2007, p. 234; A. Lorenzetti, *Coppie same-sex e fecondazione assistita: la progressiva decostruzione del paradigma familiare* in M. Azzalini (ed.), *La procreazione assistita, dieci anni dopo. Evoluzioni e nuove sfide*, Ariccia, Aracne, 2015, p. 121. See also, F. D. Busnelli and M. v. Vitucci, *Frantumi europei di famiglia*, in "Rivista di diritto civile", 2013, N. 4, pp. 767-787.

12 Istat, *Avere Figli in Italy negli anni 2000*, 2014, p. 9. Available online: http://www.istat.it/it/files/2015/02/Avere_Figli.pdf

13 *Ibidem.*

14 P. Zatti, "*Natura*" *e* "*cultura*" *nella procreazione artificiale*, in G. Ferrando (ed.), *La procreazione artificiale tra etica e diritto*, Padova, Cedam, 1989, p. 177; G. Famiglietti, *Filiazione e Procreazione*, in Convegno Annuale del Gruppo di Pisa, Catania, 7-8 June 2013, p. 29. Available online: http://www.gruppodipisa.it/wp-content/uploads/2013/05/FAMIGLIETTI.pdf

15 G. Baldini, *Riflessioni di biodiritto*, Padova, Cedam, 2013, p. 21.

couples underwent ART and 12,187 children were born thanks to the use of these techniques. This figure represents 2.4% of the total births in Italy (514,308 live births, according to ISTAT).

The contemporary family is therefore also a "biopolitical place."[16] In the past, the questions of assisted reproduction and single-parent families were not even considered; today, on the contrary, to speak of 'family' necessarily means dealing with these topics. Before us lies a reality that can neither be avoided nor revoked. A growing number of same-sex couples and singles wish to enjoy the experience of becoming parents and, when the national laws do not allow this, they choose to go abroad, where it is possible to adopt, or in the case of male couples, to have children through surrogate motherhood. Therefore, despite the legislation, numerous same-sex couples or single parents are currently raising children. The family has become the place of biopolitical experimentation for the courts and the parliaments, inevitably involved – not only at national level – in the definition of the legitimate or non-legitimate forms of being together.[17]

It is therefore undeniable that the courts are increasingly called upon to decide regarding the legal effects that derive from the use of ART and, more generally, to rule on the constitution of 'new families', revising the traditional categories of family law, which are inapplicable or inadequate, since they were conceived and formulated on the basis of very different presuppositions. Amongst these is the assumption that conception, and therefore reproduction, could only occur by 'natural' methods, that is through sexual union. Thanks to the developments in medical sciences, we have seen the obsolescence of the naturalistic paradigm of reproduction.[18] A sexual relationship has ceased to be the necessary presupposition for generating a human being and birth appears to be increasingly independent from the mere naturalistic causality, becoming ever more the consequence of medical-scientific interventions, the expression of the freedom of self-determination of the individual.

Moreover, the increase in the possibilities of individual choice outside the 'natural' schemes of a biological, temporal and social nature removes another assumption: that according to which, in order to create a family, the compresence of a man and a woman in fertile age is necessary. In fact, scientific progress has determined the procreative self-sufficiency of the woman – who can realise her parental project by contacting a semen bank – and of the man – who can become a father through surrogacy.[19] Likewise, from a temporal standpoint, the reproductive techniques offered by science allow the woman to conceive even beyond the fertile age, just as *post-mortem* procreation

16 Bonomi, *Le trasformazioni sociali del concetto di famiglia*, cit., p. 26.
17 *Ibidem.*
18 Baldini, *Riflessioni di biodiritto*, cit., pp. 6-7.
19 *Ibidem*, p. 28.

can be realised using the cryopreserved genetic material of the defunct partner to impregnate the surviving partner.[20]

Another assumption challenged by scientific developments in the medical field is the biological and voluntary factor.[21] Until recently, the law attributed the social responsibility for the procreation to the subject who, with their genetic material, contributed to the conception and therefore the birth of the child.[22] The reproductive revolution has greatly accentuated the proactive element of procreation, so that it is necessary to review the legal definitions of motherhood and fatherhood.[23] Finally, the scientific progress has made possible filiation within a couple, whatever the biological gender of the components. Thus, the gradual acceptance of ART – and of adoption – by homosexual couples has overcome another classic foundation of the law of filiation (closely linked to the former) according to which each child has (and, for harmonious development, must have) two parental figures as a reference point – and specifically, a father and a mother.

We are therefore seeing "not the death of the (traditional) family, but its transformation into a new perspective, where it is increasingly more correct to speak not of 'family', but of 'familial models'."[24] The processes of change triggered by the new aspects referred to above are not yet over. The present family model is developing and contemporary families are in a phase of temporal suspension. To use one of Bonomi's expressions, they find themselves in a limbo between "no longer" and "not yet".[25] That is, today's family is *no longer* the patriarchal or mononuclear family, typical of the twentieth century, but at the same time, it is *not yet* an expression of a well-defined new model. The study of the family and the regulation of the relationships of filiation must therefore take into account the heterogeneous nature of a reality that is transforming rapidly and which drives and prevails over the aforementioned law, whether the legislator wishes it or not.

2. *The 'new families': from written law to jurisprudence*

Awareness of the existence of 'plural families'[26], composed of a multiplicity of familial forms that stand alongside the nuclear heterosexual family united in matrimony, and of the suddenness with which social change acts on the legislation should drive the legislator towards a new reading of family relationships. In particular, it should spur him to review the legal notion of family which, in today's society is no longer necessarily founded on marriage, introducing more

20 *Ibidem.*
21 *Ibidem*, p. 32.
22 *Ibidem.*
23 *Ibidem.*
24 *Ibidem*, p. 27.
25 Bonomi, *Le trasformazioni sociali del concetto di famiglia,* cit. p. 26.
26 Porcelli, *La Famiglia al Plurale*, cit.

modern and efficacious regulations to govern the social, personal and financial effects of the constitution and the dissolution of the new family constellations. Many European systems have already shown a certain acceptance of the new family models, such as homosexual-parent and single-parent families, common-law or step families; in effect, any social formation that, whatever the juridical qualification, performs the family function[27]. Other legislative systems have preferred to take a more cautious route towards modernity, observing (more or less) in silence the development of the new reality. Therefore, the legislative approaches adopted do not all point in the same direction.

According to the reconstruction proposed by d'Avack, in the face of the problems posed by the technological era – and more generally, the appearance of 'new' family models – two main ethical, cultural and legal models have been consolidated.[28] The first, the so-called 'libertarian model', encourages the right to privacy and self-determination in the reproductive field. The premise from which the libertarian model derives is more in keeping with the legal experiences of the Anglo-American world and states that every person has the right to procreate, or not, and that this right is based on individual freedom. This approach sees the procreative choice as a fundamental right to produce offspring 'when', 'how' and 'with whomever' one wishes, whatever the conditions of sterility/infertility, favouring the interests and the positions of the adults at the expense of the child, who will necessarily submit to the consequences of the parental choices. The absolute right to become a parent – on which this model centres – also has an 'antagonistic' aspect, that is, protection for the individual against state interference in his or her free procreative choices. In a libertarian model, therefore, the state must avoid drawing up normative solutions that include value judgements on the decisions of the individual, thus encouraging and not hindering new family formations.

The second model – which is more common in Europe – centres on the responsibility that limits the absolute self-determination of the individual. Examples of this approach – called 'personalist' by d'Avack – can be seen in the national constitutions and in some international agreements, such as the Convention on Human Rights and Biomedicine or the European Convention on Human Rights (formerly, The European Convention for the Protection of Human Rights and Fundamental Freedoms). Despite a marked disparity of normative approaches, the legislators of the various European countries have generally balanced the fundamental values safeguarding the individual. On the one hand, the freedom of those who have access to ART , mainly justified by the right to health, and on the other hand, the protection of the child (children)

27 Pane, *Il nuovo diritto di filiazione tra modernità e tradizione*, cit., p. 26.

28 L. d'Avack, *Il progetto filiazione nell'era tecnologica. Percorsi etici e giuridici*, Torino, Giappichelli, 2014, p. 11. On the emphasis of the right to be a parent, typical of the North American doctrine (at least until the nineties), see L. Lenti, *La procreazione artificiale. Genoma della persona e attribuzione della paternità*, Padova, Cedam, 1993, pp. 38-49.

born, including the right to know one's origins, the right to a family, to grow up in a suitable family environment, and the right to physical and psychological integrity.[29] From this equilibrium, come different legislative choices: some more 'closed', which prefer the traditional model of family and others more 'open' which do not exclude the legitimacy of the 'new' forms of family.[30]

Whatever the model chosen, there is no doubt that the intervention of the law has not always been satisfactory and convincing. The normative deficiencies that characterise current legislation have often been attributed to a lack of determination or a hesitation by the legislator in taking a firm position on ethically or morally sensitive questions. Although we recognise the validity of this theory, it is important to note the existence of at least one other factor – of a more 'physiological' nature – which makes a far-reaching legislative intervention an objective that is difficult to reach; that is the lack of a comprehensive understanding of the scientific factors (which in turn can be attributed to the technicisms and the rapidity with which progress and discoveries are made in the scientific field) and, more generally, to the difficulty in tracking the increasingly new and varied reality, giving adequate and precise answers to needs that are manifested by a society in rapid transformation[31].

One fact is certain: the inertia, the indifference or the inability of the legislator have not prevented private autonomy from filling the vacuum.[32] Therefore, given the effective manifestation of new instances of recognition and legal safeguards, the arduous task of providing an answer to the new family phenomena has fallen to the share of the judges. In fact, the latter, with the help of the international sources, *in primis*, the ECHR and the jurisprudence of Strasbourg, has undertaken the difficult task of constructing the evolution of the right of filiation in law. We are seeing therefore the migration of the protection of these rights from the parliamentary seats to the tribunals and the

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29 d'Avack, *Il progetto filiazione nell'era tecnologica. Percorsi etici e giuridici*, cit., p. 22.

30 *Ibidem*, p. 21.

31 Particularly representative of the varied results that follow the use of medically assisted procreation techniques and, above all, of the unforeseeable events that may occur, is the situation – taken up by the media at the end of 2017 – of Jessica Allen, a surrogate mother from California who gave birth to twins, only one of whom was her biological child. From a scientific standpoint, it is still not clear how this could happen. There are two possible explanations: either the woman had a second ovulation following the implant of the embryo formed from the gametes of the couple who commissioned her as a surrogate, or one of her eggs, that had already been fertilised during a sexual union with her husband, but for some reason, not yet implanted in the uterus – took advantage of the particularly welcoming uterine environment created to facilitate surrogacy. The fact that the two babies did not have the same DNA was only discovered after the birth, when the commissioning couple noticed the marked physical difference between the twins. When the confirmation arrived, the 'clients' – in addition to claiming damages from the surrogate mother – declared that they did not intend to raise a baby that was genetically not theirs and that they intended to put him up for adoption. Finally, the child was returned to Jessica Allen and her husband, who obtained wardship only following a difficult legal battle. Although the child was biologically their son, in virtue of the surrogacy agreement, the legal parents and therefore the persons who appeared on the birth certificate were the 'commissioning parents'. For an account of the events, see the interview given by Jessica Allen: J. Ridley, *I rented out my womb – and they almost took my own son*, New York Post, October 25th 2017. Available online: http://nypost.com/2017/10/25/i-rented-out-my-womb-and-they-took-my-own-son/.

32 Di Fede, *La famiglia legittima e i modelli diversificati: luci e ombre, scenari e prospettive*, cit., p. 55.

courts, both national and supranational. In other words, in countries where legislation has not been introduced, or where it has been introduced in an incomplete or inadequate manner, it has fallen to the courts to settle the tensions arising from recourse to new methods of procreation and filiation, distinguishing between the various rights and the interests in play – those of the children, on the one hand, and those of the parents (whether genetic or social) on the other.

This intermingling of functions can also be seen in Italian legislation. In particular, the history of the regulation of ART originates, and is so far characterised by, a situation of legislative inadequacy. Even in the absence of specific legislation, the use of ART has been widespread since the nineteen-eighties; it is therefore from that moment onwards that the judges, despite the silence of the legislator, began to "weave the law" [33] starting from the existing norms. In 1998, the Italian Constitutional Court was called on to rule on the unconstitutionality of Article 235 Italian Civil Code (regarding the admissibility of the disowning of paternity by a husband who had previously given his consent to the assisted heterologous insemination of his wife), thus filling the normative vacuum and guaranteeing the protection of "numerous constitutional needs", including "the guarantees for the new-born child" and his/her "rights with regard to the person(s) who have freely chosen to welcome him/her assuming the relative responsibilities." [34]

Six years later, the parliament approved the Italian law N. 40 of February 19th 2004,[35] which has since been severely criticised. The criticisms concern above all the decision of the legislator to grant the embryo (in Article 1, *il concepito*, the conceived) a juridical status equal to that of all the other subjects involved in the ART procedures from the moment of conception. This choice, in turn, reflects the will of the legislator to see ART exclusively as a therapeutic treatment for resolving pathological conditions of sterility and infertility and not as a freely practicable alternative to procreation through a sexual union.[36]

The configuration of the unborn baby as the holder of rights also explains the prevision of a series of limits and sanctions that have created a certain illogicality amongst the objectives sought – or at least declared – by the law N. 40 and its effective enactment. Amongst the contradictions contested are the exclusion of couples who are not sterile but who bear genetically transmissible diseases, but at the same time the prohibition of heterologous insemination.[37] This prohibition

33 v. Tripodina, *Il "diritto" a procreare artificialmente in Italia: una storia emblematica, tra legislatore, giudici e Corti*, in "Rivista di BioDiritto", 2014, N. 2, p. 68.

34 Italian Constitutional Court, N. 347, 26 September 1998.

35 Italian Law N. 40 dated 19 February 2004, *Norme in materia di procreazione medicalmente assistita*, published in the *Gazzetta Ufficiale* N. 45 dated 24 February 2004. Available online: http://www.camera.it/parlam/leggi/04040l.htm.

36 Baldini, *Riflessioni di biodiritto*, cit., p. 47.

37 A. Musumeci, *La legge 40/2004 tra giudici ordinari e Corte Costituzionale – un dialogo difficile ma necessario*, in M. Azzalini (ed.), *La procreazione assistita, dieci anni dopo – Evoluzioni e nuove sfide*, Ariccia, Aracne, 2015, p. 74. In an interesting manner, Giacobbe explains the prohibition of surrogacy and heterologous techniques, as set out in the text of Italian Law N. 40, referring to the capacity of these practices to affect the procreative relationship (and therefore

appears even more discriminatory in view of the fact that the same law regulated the *status filiationis* of the children born from heterologous ART (and who are therefore the consequences of a forbidden practice) since it was clear that the couples who could afford it would turn to foreign clinics in order to avoid the Italian prohibition. These contradictory rulings, therefore, although they appear *prima facie* to be the work of an absentminded legislator, constituted a normative corpus rationally and logically conceived in order to guarantee the utmost protection for the embryo.[38]

Some of these contradictions have been overcome only thanks to the jurisprudential evolution, which has restored the coherence of the norms by eliminating some rules incompatible with the fundamental principles of the law. Since 2004, in fact, the aforementioned law has been gradually dismantled, and the result is a normative corpus profoundly different from the one originally approved. This difference, however, cannot be attributed to the interventions of the legislator to update the law, but rather to the action of the judges in the lower courts, of the Italian Constitutional Court and of the supranational courts, committed to harmonising certain provisions of the original law to the international and European standards on the matter. The last stages of this partial rewriting of the law, which is simply the product of an awareness of the existence of diversified family models, dates from quite recent times. In 2014, precisely ten years after the law came into force, the Italian Constitutional Court abandoned the prohibition against heterologous techniques[39] and, a year ago, it declared the illegitimacy of the exclusion from ART of fertile couples who bear transmittable genetic diseases, responding to a criterion of gravity that already allowed access to therapeutic abortion.[40]

The history of ART in Italy is therefore characterised by a continual interweaving of written law and jurisprudential law, where the latter plays a predominant role in determining the final aspect of the fabric.[41] The present state of the law on ART is, in fact, much more the fruit of the interventions of the courts and the judges than the result of the regulations initially foreseen by the legislator. This preponderant contribution of jurisprudential law, moreover, not only marks the regulation of ART, it is also indicative of the legislator-judge relations typical of all the most recent rights in this field.[42] The Italian legislator appears, in fact, to be constantly overdue with regard to

parenthood), that is the bond between the persons who procreate and the child that is procreated, altering the model of family recognised by Article 29 of the Italian Constitution. A problem that, on the contrary, does not exist in the case of homologous insemination, following which the procreative relationship is unvaried, since it is irrelevant on the legal plane how the conception takes place. See, Giacobbe, *Famiglia: molteplicità di modelli o unità categoriale?*, cit., pp. 1236-7.

38 Baldini, *Riflessioni di biodiritto*, cit., p. 51.

39 Italian Constitutional Court, N. 162 dated 10 June 2014.

40 Italian Constitutional Court, N. 96 dated 5 June 2015, which conforms to the ruling of the ECHR in *Costa and Pavan v. Italy* (appeal N. 54270/10, ruling dated 28 August 2012) to which we refer in the next chapter.

41 Tripodina, *Il "diritto" a procreare artificialmente in Italia: una storia emblematica, tra legislatore, giudici e Corti*, cit., p. 83.

42 *Ibidem.*

the technological and social evolution and the problems that derive from it; and when it begins to close the gap and issue norms, it tends to do so according to a 'coercive' or 'top-down' model. It imposes models of behaviour inspired by a normative vision of what is considered to be for the good of the individual by the (parliamentary) majority, at the expense of the realisation of the will of said individual.[43]

The question considered in this report, moreover, is undoubtedly one of the juridical fields in which the gap between the legislative proclamation and reality, and therefore the tension – identified by Zagrebelsky – between codification and the fundamental rights of the individual are particularly marked.[44] In fact, on the one hand there is the aspiration to regulate the questions that interest the legislator, obliging the judge to exclude from his evaluation anything that the abstract case does not contemplate, while on the other hand, there is the need to give practical and effective protection to the rights of the individuals involved.[45] This is why the judges and the courts are often called upon to fill the vacuum or to remedy the defects and the absurdities of the legislation which, according to the classic method of codification, includes few general clauses or expressions referring to values, but tends to amalgamate a vast range of cases in general and abstract categories, describing them in detail.[46]

In addition to characterising the reality of the situation, the prevalence of jurisprudential law over written law is considered the preferable route, also at theoretical level. Part of the doctrine has declared that, in matters regarding fundamental rights, jurisprudential law has overtaken written law, praising the former as the only way to ensure effective protection of rights. Firstly, by guaranteeing dynamism in the protection of fundamental rights and therefore favouring the adaptability of the right to the peculiarities and the demands of the specific case and, more generally, to a rapidly evolving reality; and secondly, by avoiding definitive choices between the values and the interests in play and, therefore, taking decisions applicable to the specific cases.[47] Springing from these considerations is the intention expressed by the doctrine to strengthen and intensify the already active 'dialogue' between the courts, that is the processes of interaction and cooperation between national, European and international judges, the consequent reciprocal semantic exchange and the transmission of jurisprudential values.

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43 *Ibidem.*

44 V. Zagrebelsky, *Codificazione e diritti fondamentali della persona nel contesto europea. La difficile convivenza*, in L. Vacca (ed.), *Il codice civile ha 70 anni ma non li dimostra*, Napoli, Jovene, 2016, pp. 15-24.

45 *Ibidem.*

46 *Ibidem.*

47 See, *inter alia*, L. Ferrajoli, *Diritti fondamentali e bioetica. La questione dell'embrione*, in S. Rodotà and M. Tallacchini (ed.), *Trattato di biodiritto. Ambito e fonti del biodiritto*, S. Rodotà and P. Zatti (ed.), Milano, Giuffrè Editore, 2010, p. 231; S. Rodotà, *La vita e le regole. Tra diritto e non diritto*, Milano, Feltrinelli, 2009, p. 9.

The decisive role played by jurisprudential law in matters regarding the 'new families' is not confined to our legislation, but has become a more or less widespread phenomenon also in other legal systems. The jurisprudence analysed in the chapters that follow highlights the generalised delay and the difficulty with which the national legislators have regulated the multitude of legal questions raised by the scientific and social evolution, in a period of profound and definitive changes such as ours. The legal path of the 'new families' is not always linear and free of contradictory legal results, but rather the fruit of a process determined by chance and by necessity.[48] The events examined in the following chapters are indicative of a certain schizophrenia in the system and the considerable margin of discretion – considered by some to be 'arbitrary' – granted to the judges and the courts and exercised according to their personal system of values and principles, or to the individual circumstances, with a high rate of occasionality.[49] In some cases, this margin of discretion has made way for value judgements for the purpose of 'punishing' or at least discouraging individual choices not approved by the legal system, choices that were often triggered by the need to avoid legal prohibitions regarding the recourse to certain procreative techniques and/ or the accessibility to the parental experience for certain categories.

This ongoing entanglement between written law and jurisprudential law is the premise for the analysis carried out in the following chapters. The aim is to examine the role played by the national judges in bridging the gap between the normative situation and the social reality of the 'new families' and, therefore, in managing new family realities using legislation that does not consider them.[50]

3. *The inevitable impact of the new methods of procreation and filiation on the notions of family law: determining the status filiationis*

The scientific-technological evolution and the social-cultural changes referred to above have profoundly transformed certain traditional juridical institutions, requiring operators in the fields of law and doctrine to discuss new or unexplored topics. One of the legal sectors most in need of careful rethinking and continual adaptation to the new family phenomena is, undoubtedly, family law and, in particular, the discipline of filiation. When we speak of 'new families' the attribution of

48 Musumeci, *La legge 40/2004 tra giudici ordinari e Corte Costituzionale – un dialogo difficile ma necessario*, cit, p. 76; Lorenzetti, *Coppie same-sex e fecondazione assistita: la progressiva decostruzione del paradigma familiare*, cit., p. 117.

49 *Ibidem*, p. 117.

50 In this direction, although in a different context, it is worth mentioning the recent ruling of the German Constitutional Court, which has recognised the right to belong to a third gender and therefore not to be registered as male or female on the birth certificate. See *Civil Status Law Must Allow a Third Gender Option*, Press Release No. 95/2017 of the Constitutional Court, November 8th 2017. Available online: http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2017/bvg17-095.html;jsessionid=25A9208786F4914C045F5686D1BF613C.1_cid361.

parenthood – on which this study concentrates – is a question that cannot be resolved immediately, because the social reality of the family bonds generated by recourse to new forms of filiation and procreation does not correspond to the traditional model of family set out in the Italian Civil Code and other sources.

Legal systems have tended, since time immemorial, to indicate the genetic/biological datum as the basic criterion for determining *status filiationis*. In other words, starting from the assumption that the legal relationship of filiation inevitably reflects the natural reality, in harmony with what is known as the 'principle of truth'.[51] Although this constitutes the starting point for the law of filiation, it is not the only principle that governs it. In the history of European civilisation, the rule that has posed the greatest number of limits is that of the *favor legitimationis*. Above all, before the fading of interest in the family based on marriage, it was considered acceptable to sacrifice the biological truth in order to protect the legitimate family. When speaking of 'new families', however, these two rules cease to be the only criteria potentially decisive for determining the *status filiationis*. In the context of ART, as in cases of adoption, human determination assumes an undeniable role, at least on the factual plane.[52] The question therefore arises whether human determination, in addition to influencing the circumstances effectively lived by these families, is capable of producing legal consequences and, in particular, it becomes important in the constitution of the relationship of filiation.

However, before we explore the sensitive question of the determination of *status filiationis*, a brief overview of the various reproductive techniques may be useful for better understanding the medical-scientific substrate of the legal problems that emerge in the field of the right to filiation. Assisted Reproduction Techniques (ART) encompass "all those treatments and laboratory procedures that include the manipulation in vitro of eggs and spermatozoa or embryos for the purpose of starting a pregnancy."[53] They are, therefore, medical-instrumental procedures that substitute the sexual union between a man and a woman in order to attain the conception of a human being, using personal genetic material (homologous techniques) or third-party genetic material (heterologous techniques).[54] While the aim – that is the birth of a child – is therefore identical to that of natural filiation, the means used are different.

The forms of ART can be divided into three distinct methods: homologous procreation, heterologous procreation and surrogacy.[55] Homologous procreation is realised within the couple using the genetic material of both partners, with the help of medical personnel. The conception can

51 Lenti, *La procreazione artificiale. Genoma della persona e attribuzione della paternità*, cit., p. 50.
52 d'Avack, *Il progetto filiazione nell'era tecnologica. Percorsi etici e giuridici*, cit., p. 26.
53 Istituto Superiore di Sanità, *Glossario*: http://www.iss.it/binary/rpma/cont/Glossario.pdf (last access: 20 June 2016).
54 Baldini, *Riflessioni di biodiritto*, cit., p. 23.
55 This classification is proposed by Baldini, *Riflessioni di biodiritto*, cit., p. 24.

occur *in vivo* – that is in the natural environment – or *in vitro* – that is in a test tube. This technique tends not to raise problems of a legal or a moral nature because the biological-genetic derivation and, therefore, the filiation of the child can be traced to both parents. [56] In the case of heterologous techniques, on the other hand, the fertilisation and the conception occur thanks to the genetic contribution of a (male or female) donor outside the parental couple and, therefore, can only take place *in vitro*. The use of genetic material from a third party leads to scenarios that present a higher degree of complexity. In fact, in addition to allowing the disassociation between sexuality and procreation (the binomial on which the traditional family is based), heterologous fertilisation involves a further cleavage of the aspects of the reproductive event, since the genetic heritage of the child is not the fruit of the meeting between the gametes of the aspiring mother and the aspiring father. In cases of heterologous fertilisation, therefore, the genetic parents are different people from the social parents (the persons who intend to play this role in society) and consequently, it is necessary to choose which bond should be attributed juridical importance.[57]

Amongst the techniques of heterologous fertilisation, the donation of spermatozoa is a widely used process because it allows filiation for a wide range of subjects, such as couples with severe male infertility, or the risk of the transmission of a genetic disorder by the man, for women who wish to become single mothers and for lesbian couples. Heterologous fertilisation can also involve the maternal line and, in this case, it is a question of donation of oocytes (eggs) that will be fertilised by the sperm of the male partner, before they are transferred to the womb of the female partner. Thanks to the medical-scientific evolution, the process foresees the union in the laboratory of the gametes of the father and the mother, with the extra input of another woman (the donor) who offers a portion of mitochondrial DNA to substitute the defective DNA of the natural mother. This is one of the methods most recently perfected for preventing and eliminating genetic disorders transmitted by the mother. In February 2015, the United Kingdom became the first nation in the world to authorise the creation of children with three biological parents, thanks to the introduction of a new law.

The third form of assisted procreation – known as surrogate motherhood (the terms surrogate maternity or surrogacy are also used) – is by far the most controversial since it completely subverts the conventional perception of motherhood, in which the woman who gives birth is both the genetic mother and the social mother of the child.[58] With respect to the usual procedures of

56 Nonetheless, experience teaches us that also the use of homologous techniques can raise the dilemma of 'social parenthood *versus* genetic parenthood'. The cases of 'errors', or of 'exchange' of genetic matter and embryos, such as the ones that occurred at the Ospedale Pertini in Rome (examined in chapter 6), show that the cases most difficult to resolve are not necessarily cases of heterologous techniques.

57 G. Capizzi, *Questioni vecchie e nuove su status filiationis e PMA – Breve cronistoria*, in "Rivista di BioDiritto", 2014, N. 2, p. 114.

58 *Ibidem*, p. 125.

assisted procreation (homologous or heterologous) explained above, this practice requires the collaboration of a female third party, who makes her uterus available, agreeing to take the pregnancy to term and then to deliver the child born to the couple or to the single parent, who will assume parental responsibility. According to whether the surrogate mother simply houses an embryo that is genetically extraneous to her, or, vice versa, contributes to the conception by offering her gametes, a distinction is made between gestational surrogacy and traditional surrogacy. It is therefore clear that the definition of 'motherhood' can refer to three different women: the birth mother, that is the woman who takes the pregnancy to term, the genetic mother, who supplies the fertilised egg, and the social mother, who originates the procreative project, aiming to obtain the parental responsibility and to create an affective bond with the child.

As is evident from the explanation of surrogacy, one of the inevitable consequences of ART is the multiplicity of parental figures. The functions of motherhood and fatherhood – once unitary – are fragmented in various components abstractly traceable to different subjects and the figure of the social parent emerges as a figure distinct from that of the biological parent. In considering procreation realised using ART, one of the most complex tasks facing the jurist is, therefore, to establish whether relationships of fatherhood, motherhood or filiation are formed and, above all, between which of the participants in the procreative process they exist. In other words, he/she must answer the following questions: who are the parents? who has the 'right' (if it is possible to speak of a 'right') to be considered a parent, on the basis of which circumstance, of which behaviours he/she enacted and of which intentions declared? While, if seen from the standpoint of the child, the questions will be: what is my family status? Why have I received the status of 'direct descendant' of a given person?

These questions become even more problematic when a conflict arises between the various subjects who have taken part in the procreative project. In some cases, therefore, in addition to resolving the already difficult question of *status filiationis* (the parent(s)/child (children) relationship), the jurist is also called upon to disentangle the complex relationships between the many and competing parental figures, or those who aspire to this role. As can be seen from the jurisprudence analysed in the following chapters, it is not rare for the donor or the surrogate mother to change their mind and to decide to play a social role in the life of the child that goes well beyond their biological or genetic contribution. In other cases, diversity of opinions on the management of the event can cause friction between the parties involved, who hold opposing interests.

The fragmentation of parenthood that derives from these new forms of procreation continues to find the operators in the legal field unprepared. The surprise effect is the order of the day: the discovery of new reproductive techniques or quite simply, the occurrence of human vicissitudes not

contemplated by law generates situations and requests with respect to which the law lacks (adequate) solutions, since it is based on different schemes and assumptions. Even though the question of the determination of the *status filiationis* emerges more strongly in the context of ART, it is important to note that the same problem arises with respect to same-sex couples who adopt a child. Although they remain two markedly distinct events, both adoption and heterologous ART realise filiation through an 'implant' – in one case social and affective and in the other physical[59] – and, consequently they produce a social parenthood that does not correspond *in toto* to genetic parenthood.

Now, let's cut to the chase; when dealing with the determination of *status filiationis*, the fundamental problem is as follows. The law has traditionally anchored the definition of the *status filiationis*, to two main rules, forged on the image of the traditional family and therefore problematic when interpreted and applied to the phenomenon of the 'new families'. These two rules attribute the family status thanks to certain automatisms: motherhood is determined as an immediate consequence of the natural birth, in harmony with the principle *mater semper certa est* and since it was not possible to ascertain on the basis of a natural fact, and therefore could not be established with equal certainty, paternal status was attributed on the basis of legal assumptions of paternity and conception during the marriage, which can be summarised in the brocard *pater est quem nuptiae demostrant.*[60] While the presumption of paternity was the solution adopted in view of the impossibility of determining with acceptable certainty who was the father of a given child, the presumption of conception in constancy of marriage was created to govern another uncertainty: the impossibility of determining with acceptable precision the duration of every single pregnancy.

When these presumptions were introduced, the circumstances to which they gave an answer were effectively uncertain.[61] Nowadays, however, it is possible to definitively ascertain the genetic paternity and the duration of every single pregnancy. In consideration of scientific progress that offers increasingly precise solutions to these queries and therefore presents numerous hypotheses in which the *fictio iuris* does not correspond to a parallel natural reality, the mechanism of the presumptions loses its *raison d'être* and its essentiality. In other terms, since absolute certainty can now be reached through simple laboratory tests (for example, genetic testing) there is no longer the need nor the expediency to blindly trust the legal presumptions.

It is therefore clear that, although they are often the only possible direct solution, the attributive rules of the status offered by the right to filiation may result obsolete with respect to the

59 Famiglietti, *Filiazione e Procreazione*, cit., p. 57.

60 Article 231 of the Italian Civil Code: "The husband is the father of the child conceived or born during the marriage."

61 Lenti, *La procreazione artificiale. Genoma della persona e attribuzione della paternità*, cit., p. 261.

needs of the new family realities, which feign ignorance of these rules, neglecting important aspects of the new medical-scientific acquisitions and the social evolution. As will emerge from the jurisprudence analysed in the following chapters, the lack of a normative discipline conceived specifically to regulate the new family phenomena leads to a foregone consequence: the application of a normative system that was conceived and written without considering them.[62] The jurist must therefore quite frequently struggle to find a solution applicable to phenomena not disciplined by the law (since they were not taken into consideration by the legislator), making use of the limited or inadequate instruments offered by the legislation in force,[63] with the risk of an unjustifiable compression of the fundamental rights of the persons involved.[64]

At this point, a couple of examples may serve to briefly illustrate some of the human vicissitudes in which the aforementioned technical rules are destined to intervene. In the first place, we will consider the case of a married couple who make use of a sperm donation. In this method, as previously mentioned, the genetic contribution is offered by a subject other than the spouse of the mother, who takes part in the procreative project in a wholly 'irresponsible' manner, that is, without the intention of assuming the role of social father with respect to the child.[65] The recourse to this technique, therefore, leads to the scission of the notion of fatherhood, since it is possible to identify a genetic father (the donor) whose spermatozoa are used for the conception, and a social father – that is the man who intends to play the role of parent to the child, as if it were genetically his own. This disintegration poses the fundamental problem of the attribution of legal fatherhood: whether it should be ascribed to the genetic father or to the social father.[66] Presuming that there are no *ad hoc* rules on the matter of sperm donation, the husband of the mother (the social father of the minor) will be named on the birth certificate, even though he has no genetic bond, in harmony with the rule *pater est quem nuptiae demostrant*. In this situation, therefore, the application of the usual rules for attributing the status would in effect recognise the intention of the parties; that is the intention of the couple to become parents and that of the donor to facilitate the realisation of the couple's parental project, without incurring any parental responsibility. Furthermore, the rules would attribute juridical importance to the bonds already effectively existing or, otherwise, destined to be consolidated; if we were to stop here, therefore, the application of the traditional rules would not give rise to any concerns. However, the legal presumptions also involve problematic aspects since

62 *Ibidem*, p. 9.

63 *Ibidem*.

64 *Ibidem*, p. 2.

65 Famiglietti, *Filiazione e Procreazione*, cit., p. 21.

66 Obviously, this is only one of the various problems raised by the recourse to a sperm donation. Other critical points concern, for example, eventual disownment of paternity and its admissibility in consideration of the genetic situation, when the partner of the mother has agreed to the treatment. See, Lenti, *La procreazione artificiale. Genoma della persona e attribuzione della paternità*, cit., pp. 216-7.

they imply total ignorance of the 'detail' of the sperm donation and, thus, hinder the ascertainment of the biological truth, to the detriment of the interest and the right of the child to know its genetic origins.

The application of the technical rules to cases that differ from the usual schemes may also lead to decisions even more prejudicial to the well-being of the minor, and for the interests of the adults involved. In certain situations, the attribution of the *status filiationis* in conformity with the traditional filiation rules means certifying the existence of family relationships that correspond neither to the intentions of the parties, nor to the reality of their lives and, at the same time, depriving those bonds effectively gifted with an emotive and social dimension of legal recognition. In other words, on the legal plane, the relationships of 'form' may prevail – since they correspond to the model of the traditional family – to the detriment of the 'effective' relationships.

The recourse to surrogacy, in systems that do not regulate it, may lead to situations that are typical of this second scenario, which is even more complex than the previous one. As mentioned above, the main question that surrogacy poses is 'who should be considered the mother and according to which criteria'? In particular, the imperative legal interrogative is whether to recognise greater importance for the gestational contribution, valorising the intrauterine bond between mother and foetus, or to emphasise the genetic factor; or even to give precedence to the social role and the initial procreative project, seen as an expression of the intention to accept parental responsibility, independently of the genetic and biological situation. In the absence of laws that allow and regulate this practice, the recourse to surrogacy gives rise to situations in which the application of the technical rules for attributing the status leads to extremely problematic results.

The principle *mater semper certa est* (valid for procreation deriving from sexual union) in fact attributes legal motherhood to a woman who, although she takes part in the procreative process as a birth mother , has no interest in the child born and, probably, no genetic bond. What is more, the presumption of maternity for the woman who gives birth also deprives the woman who, even if not genetically linked to the child, certainly constitutes the *conditio sine qua non* for the birth of the child and, above all, is the one who intends to assume the role of mother to the child.

The application of the rule *mater semper certa est* therefore creates a gap between the legal reality and the social reality, compromising above all the interests of the child born, who finds himself/herself in the paradoxical situation of being the child of an unknown woman who is not interested in the procreative project that generated him/her.

As emerges from the report of the Council of Europe, the well-being of the children born and raised in the 'new families' depends not only on the nuclear family and, therefore, on the intensity of the bonds between the parents and the children, but also – and above all – on the legal

regime applicable, according to whether it supports or limits the continuity and the development of these relationships and, therefore, according to the level of legal protection and recognition attributed to them.[67] The lack of recognition of the family relationships existing between social parents and the child born of a surrogate mother gives rise to numerous difficulties in terms of parental responsibility, maintenance and rights of succession, difficulties that affect the everyday life of the subjects involved. It is sufficient to consider that in the absence of recognition, the social parents are deprived of the right to take decisions that concern the fundamental aspects of the life of their children, such as health and education. The irrelevance for the law of their bonds may also mean that they are excluded from state subsidies and tax benefits, specifically conceived in support of families. Further uncertainties may arise in the case of parental conflict or separation, since the child would not automatically be accorded the protection foreseen by the laws governing separation and divorce and, consequently, the position of each parent in relation to the wardship, the maintenance and the right to contact with the child would be undefined.

Naturally, these are only some of the contradictions that the traditional filiation rules can present when applied to family forms not contemplated by the legislator. Although existing case law is much more extensive and more variegated, the examples given above clearly show that the "scission of minds and bodies" – that is of those who wish to have a child and those who offer the genetic material – means that the mechanism of what were, until recently, valid rules of reference for governing the reproductive event now misfire.[68] As shown above, the validity of the ancient brocard *mater semper certa est* has been cast in doubt by the possibility of procreating thanks to a surrogate mother and, similarly, the donation of sperm has made the presumption of paternity uncertain. It is therefore necessary to overcome the tension that has been created between the social reality experienced by the individuals involved and the legal validity attributed to it, finding a suitable solution to the specific situations – a task that, in the majority of cases, has fallen to the courts.

Finally, it seems important to emphasise that this need exists not only when the legislation lacks *ad hoc* rules for regulating the new family phenomena, but also when existing rules expressly prohibit recourse to these forms of filiation. The jurisprudence to which we will refer in the next paragraph (examined in greater depth in the chapters that follow) is representative of the difficulties, or even the impossibility, of preventing certain situations from occurring and producing legal effects, even where they are the object of internal prohibitions.[69] Although current Italian legislation prohibits certain forms of filiation it is a fact that a considerable number of people have

67 N. Lowe, *A Study into the Rights and Legal Status of Children Being Brought Up in Various Forms of Marital or Non-Marital Partnerships and Cohabitation*, Strasbourg, Secretariat of the Directorate General of Human Rights and Legal Affairs, 2009, p. 3. Available online: http://www.coe.int/t/dghl/standardsetting/family/Other_documents_en.asp

68 Baldini, *Riflessioni di biodiritto*, cit., p. 31.

recourse to these same techniques abroad – where they are permitted and regulated – later asking for the legal recognition of the relationship of filiation, validly established elsewhere.

This phenomenon involves not only the couples who turn to foreign clinics in order to have a child through heterologous fertilisation or surrogacy. The recourse to what is known as 'procreative tourism' is an option also for single persons and for homosexual couples who choose to adopt in order to fulfil their parental project. In Italy, for example, the law on adoption is based on the paradigm of a married heterosexual couple[70] and the need for a matrimonial bond between the aspiring parents implies that, in order to become parents, singles and same-sex couples must go abroad, where the panorama is much more open and diversified. In an increasing number of nations, the adoption procedures have been opened to homosexuals, whether single or part of a couple. Consequently, although it is not possible for them to become biological parents, a vast number of persons experience parenthood because they have formed relationships of filiation abroad – alone or with their partner – taking advantage of a more permissive legislative framework. In recent years, therefore, the question of recognising the 'new families', whether they are formed of same-sex couples or created thanks to ART, has emerged also in countries such as Italy, where both adoption and ART are reserved for heterosexual couples and surrogate motherhood is expressly forbidden. Since it is impossible to elude or cancel a circumstance, especially when a human being was born as a result of it, the judge has the arduous task of bridging the deficiencies of existing law in order to overcome the contradictions and adequately protect the interests in play, *in primis* those of the child.

4. *The rights and the interests in play in the procreative event*

4.1 *Is there a right to parenthood?*

One of the legal questions raised by the advent of the 'new families' is whether it is possible to identify, amongst the tangle of national and international legislations, a fundamental right to procreate and, in general, to become parents. Until fifty years ago, to speak of procreation as the object of a right would have amazed and perhaps caused upset. Procreation was considered a natural event and therefore occurred only when and if nature permitted.[71] Birth therefore was seen as "a gift of Providence."[72] Only later, with the official recognition by the Italian State that it was possible to

69 Lorenzetti, *Coppie same-sex e fecondazione assistita: la progressiva decostruzione del paradigma familiare*, cit., p. 128.

70 Article 6, paragraph 1, Italian Law 149/2001: "Adoption is permitted for persons who have been united in matrimony for at least three years."

71 Tripodina, *Il "diritto" a procreare artificialmente in Italia: una storia emblematica, tra legislatore, giudici e Corti*, cit., p. 67; P. Serra, *Maternità e paternità negli ultimi 50 anni: dalla nascita come dono della Provvidenza, alla nascita pianificata dai genitori, alla nascita come diritto dei genitori,* in "Minorigiustizia", 2015, N. 2, p. 115.

72 Serra, *Maternità e paternità negli ultimi 50 anni: dalla nascita come dono della Provvidenza, alla nascita pianificata dei genitori, alla nascita come diritto dei genitori*, cit., p. 113.

control procreation by means of contraception and abortion, did the relationship between the procreators and the children change; imposing on the former the duty to plan the creation of a new life and to meet the needs of the child, and therefore introducing the responsibility to avoid having children when the resources necessary for meeting their needs were lacking.[73]

Nowadays another revolution is underway. The reproductive techniques that originate from the most recent applications of bio-medical research allow the conception of a child where this would not have been possible by means of a sexual union between a man and a woman, increasing the opportunities to realise the desire for parenthood. Consequently, in addition to being a natural event, procreation is now also the object of scientific artifices and, therefore of deliberate choices.[74] These changes have meant that the procreation is increasingly seen as a right and, since this redefinition is the fruit of the medical-scientific acquisitions, the right to assisted procreation has been defined as a typical "right of the age of the technique."[75]

There is no doubt that procreation and, in general parenthood, can be ascribed to the individual identity of the subjects and, therefore, constitute significant manifestations of human dignity and the free expression of the personality. The emergence of the importance of procreation in itself as a right has two main implications.[76] *In primis*, the choice or the fact of becoming parents cannot be imposed or forbidden.[77] This means that the State cannot enact measures or policies that even indirectly affect the right to procreative freedom – for example, sanctions due to the number of children or strategies for enforced family planning – nor can those who do not wish to have children be punished. The second projection of this right concerns its positive dimension and this is the most controversial dimension because it refers to the limits – assuming there are any – that can be placed on its practice.

The claim of the 'fundamental right to have a child' has raised fears in those who consider it an expression of a unilateral vision of the parental project, capable of transforming the desire to procreate into an absolute right and subordinating the interests of the child to the enactment of the only pretensions-expectations taken into consideration: those of the aspiring parent.[78] In other terms, posing the question in terms of the expectation of a right, and more precisely the right to have a child, risks pandering to those pressures that aim to guarantee the protection of an unlimited

73 *Ibidem*, p. 114.

74 *Ibidem*; v. Piciocchi, *Bioethics and Law: Between Values and Rules*, in "Indiana Journal of Global Legal Studies", 2005, p. 471-482.

75 Tripodina, *Il "diritto" a procreare artificialmente in Italy: una storia emblematica, tra legislatore, giudici e Corti*, cit., p. 67.

76 A. D'Aloia and P. Torretta, *La procreazione come diritto della persona*, in S. Canestrari, G. Ferrando, C.M. Mazzoni, S. Rodotà and P. Zatti (ed.), *Trattato di biodiritto. Il governo del corpo* (vol. II), Milano, Giuffrè Editore, 2011, p. 1342.

77 *Ibidem.*

78 d'Avack, *Il progetto filiazione nell'era tecnologica. Percorsi etici e giuridici*, cit., p. 33.

intention, to be realised at any cost, whatever the methods used,[79] putting the right of the adults before that of the child.[80] There is, therefore, the risk of creating a sort of causal link, with relevance on the legal plane, between the intention to procreate and the behaviours enacted for this purpose (cause), on the one hand, and the fact of having a child and raising it as one's own (effect), on the other.[81]

This is the reason part of the doctrine, aware of the possible, risky and substantial projections that configuring procreation as a right could assume, prefers to distinguish between the right to procreate and a right to procreative freedom; emphasising the need to set limits for the methods and the times of procreation and stressing the dangers of a vision that reduces procreative freedom to a personal choice without bounds.[82] Eugenio Lecaldano, a philosopher active in the field of bioethics, defines the right to procreate as that of having a personal genetic parentage.[83] The right to procreative freedom, on the other hand, consists of the margin of discretion of the individual to choose which techniques and practices to use in order to satisfy their procreative desire. Based on this reconstruction, abortion is central to the right to procreative freedom, seen as the choice not to procreate.[84]

In the debate regarding the possibility of configuring procreation and, therefore, parenthood as a fundamental right of the individual, the ruling of the Italian Constitutional Court n. 162/2014[85] is also significant. In declaring that the absolute prohibition of medically assisted heterologous procreation foreseen by Law 40/2004 is unconstitutional, the Court clarified that: "the decision […] to become parents and to form a family that includes children constitutes an expression of the fundamental and general freedom to self-determine […] which can only be incoercible, providing it does not harm other constitutional values and this also when it is exercised by means of the decision to resort to for this purpose heterologous ART procedures."[86]

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79 *Ibidem.*

80 L. Spina, *Tra nuove forme di genitorialità e nuovi interventi normativi, non perdiamo di vista i diritti del minore*, in "Minorigiustizia", 2015, N. 2, p. 11.

81 Lenti, *La procreazione artificiale. Genoma della persona e attribuzione della paternità*, cit., p. 73.

82 Famiglietti, *Filiazione e Procreazione*, cit., p. 132; D'Aloia and Torretta, *La Procreazione come diritto della persona*, cit., p. 1342.

83 E. Lecaldano, *Bioetica. Le scelte morali*, Rome-Bari, Laterza, 1999, pp. 137-8.

84 *Ibidem.*

85 The ruling is available online: https://www.cortecostituzionale.it/action-SchedaPronuncia.do?anno=2014&numero=162.

86 Italian Constitutional Court, ruling N. 162 dated 10 June 2014, § 6.The definition of the decision to become parents as an incoercible freedom advanced by the Italian Constitutional Court is confirmed in the ECHR jurisprudence relating to operations of forced sterilisation or similar procedures practiced in the absence of the full and informed consent of the women in question. Numerous rulings have been pronounced against Slovakia (*V. v. Slovakia*, appeal N. 1 8968/07, ruling dated 8 November 2011; *N.B. v. Slovakia*, appeal N. 2 9518/10, ruling dated 12 June 2012; *I.G. and others v. Slovakia*, appeal N. 1 5966/04, ruling dated 13 November 2012); in which the judges of Strasbourg found a violation, not only of Article 3 ECHR, but also of the positive obligations deriving from Article 8 ECHR, considering that the Slovak authorities had not guaranteed effective protection of the reproductive capacity of the appellants, women of Rom

This freedom, nonetheless, is not without limits, adds the Court. Medically assisted procreation affects a number of interests on a constitutional level and these interests demand "a balance that ensures a minimum level of legislative protection for each of them."[87] It therefore follows that, like the protection recognised by the law for the embryo within the assisted procreation procedures, the protection of the need to procreate – for which Law n. 40 was drawn up – cannot be considered absolute, but must be balanced against the opposing needs. Nonetheless, in the opinion of the Italian Constitutional Court, the limitations set for procreative freedom should never take the form of an absolute prohibition of access to a technique, unless "the prohibition is the only method for protecting other interests of a constitutional nature", such as the best interests of the child.[88]

Procreation therefore seems "to be identified more as a complex container, a convergence of rights and interests, at times conflictual, of principles and objective evaluations, of 'functions' and responsibilities, of duties."[89] In fact, even when the existence of a right to parenthood and/or procreation is admitted, like any other right (or perhaps more than any other right), its actuation must confront other rights and interests coexisting in a reciprocally recognised relational dimension.[90] It is therefore in this circumstance that the intervention of the judge becomes essential, given his/her exclusive capacity to proceed with a careful evaluation and balancing of the rights and interests in question, in order to adopt the measures most suitable for the specific case.[91]

4.2 *The best interests of the child: two main readings*

Amongst the various interests that are brought into play in the procreative situation and which affect the reasons behind the principle of the self-determination of the individual, it is necessary to pay particular attention to the rights of the child and the safeguarding of his/her best interests. In view of a supranational legislative framework with wide-ranging safeguards, it appears undisputed that the best interests of the child are central to the values to be protected in questions of family life that concern them. Considering the pre-eminent position reserved for the minor by the legislation, it is not surprising that the best interests of the child – conceived or already born – can limit the full realisation of the right to procreate.[92]

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ethnicity.

87 Italian Constitutional Court, ruling N. 162 dated 10 June 2014, § 6.

88 *Ibidem*. As is known, this ruling does not benefit homosexual couples, for whom access *ex novo* to the experience of parenthood through ART or full adoption is still precluded.

89 D'Aloia and Torretta, *La procreazione come diritto della persona*, cit., p. 1341.

90 *Ibidem*, p. 1343.

91 Lorenzetti, *Coppie same-sex e fecondazione assistita: la progressiva decostruzione del paradigma familiare*, cit., p. 125.

92 D'Aloia and Torretta, *La procreazione come diritto della persona*, cit., p. 1352.

This, obviously, is true for the forms of filiation that are realised through adoption or ART, rather than sexual union. In adoption procedures, the right of the child to a family is the guiding criterion that leads to the realisation of this family model, inevitably affecting the content of the interests and the legal positions of the aspiring parents. In a similar manner, in ART procedures, the right to become a parent exists in a plurilateral framework and confronts, first, the right to life of the unborn child and the respect for their dignity as person *in fieri*.[93]

On this point the Italian law 40/2004 is, once again, representative. As anticipated above, the legislator has chosen to introduce a somewhat rigid normative scheme which, in addition to prohibiting recourse to surrogacy and – until 2014 – also to heterologous techniques, defines a closed catalogue of subjects authorised to access ART: "adult couples not of the same sex, married or cohabiting, of potentially fertile age, both alive."[94] This set of subjective requisites seems to have a very precise aim, ensuring that the subject conceived by means of these techniques can enjoy the right to have a family that corresponds, as far as possible, to the traditional model, being composed of two parental figures of the opposite sex and considered more suitable to meet the educational and formative interests of the child.[95]

Although the notion of the 'best interests of the child' has received increasing consideration, and, as time has passed, has achieved the rank and relevance of a general clause, the fundamental interrogative on what are 'the best interests' and how it should be evaluated remains unanswered. What are the parameters – cultural, ethical, psychological, religious and/or medical – with respect to which a judge establishes what is truly best for a child in a given situation? Should the short-term consequences of the decision and therefore the contingent interests of the child, or his/her future interests be protected at all costs?[96] Is it the quality of the family relations, or their continuity, even if they were created illicitly, that deserve more attention? There are numerous, if not an infinite number of reasonable questions that could be asked and reasonable answers that could be given on the matter.[97] Since it does not give precise and comprehensive decisional criteria, but is rather an "empty container (that) must be filled with content from elsewhere", it is not surprising that the practical application of this principle has had diametrically opposite and almost uncontrollable effects.[98]

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93 *Ibidem,* p. 1344.

94 Legge 40/2004, cit., art. 5.

95 F. Santassuoso, *La procreazione medicalmente assistita. Commento alla legge 19 febbraio 2004, N. 40*, Milano, Giuffrè, 2004, p. 47.

96 L. Lenti, *L'interesse del minore nella giurisprudenza della Corte europea dei diritti dell'uomo: espansione e trasformismo*, in "Nuova Giurisprudenza Civile e Commentata", 2016, N. 1, p. 149.

97 E. Lamarque, *Prima i bambini. Il principio dei 'best interests of the child' nella prospettiva costituzionale*, Milano, Franco Angeli, 2016, p. 75.

98 L. Lenti, *Note critiche in tema di interesse del minore*, in "Rivista di diritto civile", 62, 2016, N. 1, p. 105.

What makes the identification of the child's best interests a particularly complex operation is the polyvalence of the notion that – as stated by Lamarque – "they become suitable for all seasons and all occasions."[99] The ambiguity inherent in the notion of 'best interests' can be a double-edged weapon. While it is true that its vagueness represents a strength (or at least a necessary evil) since it allows the judge to tailor a solution for the child whose future is in play at that time, it is also true that this fluidity allows the judge more margin of discretion. In particular, it may open the way for evaluations of an ideological nature, leaving room for the dominant opinion, that is the perception shared by the majority of the individuals in the reference society (or held by the deciding judge) and, therefore may act as an expedient aimed at masking other values, other principles and choices of legal policy.[100] It may also act as a *passepartout*, offering an objective foundation for any decision by the judge who, although lacking a clear and adequate motivation, explicitly refers to the principle.[101] It is therefore a notion that lends itself to an omnidirectional diffusion, with the obvious danger that its reference becomes merely a stylistic formula.[102]

In moving from a national context to a European and international context and back again, adapting to the various legal traditions and to the subjects who make use of it (legislators or judges, public or private) although never changing its name, the principle of 'best interest' has developed various personalities and taken on multiple meanings and significances.[103] Amongst these, the Italian doctrine has emphasised two main versions of the principle which can be summarised in the expressions *interesse del minore* or 'best interest of the child', in the singular form, and *interessi dei minori* or 'best interests of children', in the plural form.[104] In its first form, the principle in question appears as "the priority on the plane of legal policy" and, as such, establishes the direction to be taken by the legislator, in his role of compiler of the laws, and by the judge, who should constantly propose an interpretation intended to favour it.[105] In its second form, on the other hand, it is invoked by the judge in order to set aside individual rules of the legislative system – formulated as corresponding to the interests of minors in general – in the name of the need to render justice in the current case, in the proclaimed interest of a given minor.[106]

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99 Lamarque, *Prima i bambini. Il principio dei 'best interests of the child' nella prospettiva costituzionale*, cit., p. 64.

100 Lenti, *Note critiche in tema di interesse del minore*, cit., pp. 106-7.

101 *Ibidem.*

102 Lenti, *L'interesse del minore nella giurisprudenza della Corte europea dei diritti dell'uomo: espansione e trasformismo*, cit., p. 148.

103 Lamarque, *Prima i bambini. Il principio dei 'best interests of the child' nella prospettiva costituzionale*, cit., p. 72.

104 Lenti, *Note critiche in tema di interesse del minore*, cit., p. 93. See also, L. Lenti, "*Best interests of the child" o "best interest of children*", in "Nuova Giurisprudenza Civile e Commentata", 26, 2010, N. 3, pp. 1157-1165. This twofold meaning is also present in the text of Article 3 of the UN Convention on the Rights of the Child (1989), which sanctions the priority of the interests of the child to be applied both to the actions and the decisions of the administrative and legal authorities and to the decisions of the legislator.

105 Lenti, *Note critiche in tema di interesse del minore*, cit., p. 87.

106 *Ibidem*, pp. 87 and 93-4.

According to the meaning attributed to it, therefore, the best interests of the child fulfils the two different functions mentioned above which, as will emerge from the jurisprudence analysed in the chapters that follow, can easily stand in contrast to each other. While, in the plural form this principle – in application of the *one-size-fits-all* logic – expresses the (general-preventive) need to identify a measure that can efficiently protect any minor in a particular situation of vulnerability, in the singular form, it pursues the need to 'tailor' a personalised solution, designed to take into account the specific nature of the situation in which the minor is involved.[107] Thus, on the one hand, it protects the well-being of minors seen as a general and abstract category, and on the other hand, it is the specific condition of the individual minor, involved in the specific case, that informs the behaviour of the legal figure.[108]

When employed in its first meaning, the rule of the best interests of the child has, at times, been translated into extreme – and in our opinion, unreasonable – forms of protection. Some judges have, for example, considered – without adequate scientific confirmation – that solitary procreation or growing up within a homoparental family can cause serious personality disorders in the minor and that, therefore, these family unions are *a priori* incapable of guaranteeing the protection of the minor's best interest.[109] It is clear that similar interpretations inevitably penalise and stigmatise those relationships of filiation considered 'anomalous' since they do not conform to the model of the traditional family, confirming the latter as the ideal place to guarantee adequate development for a minor.[110]

In the opposite sense, stands the interpretation adopted by the Italian Court of Cassation in the ruling number 601, issued on January 11th 2013, in which it recognises – for the first time – the legitimacy of the wardship of a minor granted to a separated mother and her female companion. Rejecting the claim of the father that the new family in which the minor was living (composed of two women in a homosexual relationship) was unsuitable from an educational standpoint, the Supreme Court stated that his views constituted, "mere prejudice, which is harmful for the balanced development of the child who in fact lives in a family based on a homosexual couple."[111]If similar arguments (based on neither scientific certainties nor testimonies) are to be decisive in determining the wardship of the minor – add the judges, "[…] it takes for granted what is to be demonstrated,

107 Lamarque, *Prima i bambini. Il principio dei "best interests of the child" nella prospettiva costituzionale*, cit., p. 65.
108 Lenti, *Note critiche in tema di interesse del minore*, cit., p. 93.
109 The same reasons were presented by the Hon. Dorina Bianchi in the report on the Italian bill (26 March 2002) that indicated the risks of a psychological nature for the minor, deprived of the relationship with their natural parents, to justify the prohibition of heterologous ART procedures.
110 A. Lorenzetti, *Bilanciamento di interessi e garanzie per i minori nella filiazione da fecondazione eterologa e da maternità surrogata*, in G.O. Cesaro, P. Lovatti and G. Mastrangelo (ed.), *La Famiglia si Trasforma. Status familiari costituiti all'estero e loro riconoscimento in Italia, tra ordine pubblico e interesse del minore*, Milano, Franco Angeli, 2014, p. 97.
111 Italian Court of Cassation, ruling N. 601 dated 11 January 2013, § 3.

that is the harmfulness of that family context for the child."[112] With this decision, the Court therefore clarifies that the sexual orientation of the parents cannot determine *a priori* the resolution of wardship of a minor, but on the contrary, the best interests of the child must be the subject to specific evaluation, case by case.

According to part of the doctrine, nonetheless, also this reading could imply risks. If the second form is applied, the principle of 'best interest' can – as the case law shows – conflict with the principle of legality,[113] producing paradoxical consequences due to which the protection of the minor becomes the preservation of consolidated circumstances that were, in fact, enacted through the illegal conduct of an adult and, therefore, results in the protection of circumstances forbidden by the legislative system, such as the commercialisation of children.[114] In these cases, the exception to the best interest of the individual minor tends to conform also to the interests of the adults, precisely in virtue of the affective relationship created between them.[115] For the purpose of demonstrating the possible effects of the application of the principle in the singular form, Lenti referred to cases – which were widely reported in the media at the end of the eighties – of attempts to acquire by usucaption minors purchased on the market. It is however undeniable that, even in more recent times, the same danger arises with respect to children born following surrogacy or heterologous techniques that takes place abroad in violation of a national prohibition.

With reference to the cases of 'trading' Lenti observed that the evaluation of the best interests of the child involved, if enacted in a short time, that is according to the perception of time typical of a minor, might lead to the dubious decision to leave him/her with the purchasers.[116] In fact, if the minor has lived with the purchasers long enough to be able to form affective bonds with them, the actuation of his/her best interest would impose the decision not to alter the *status quo* by virtue of the fact that relocation with another family could cause a psychological trauma. Even if evaluated in the light of the specific case (far from subjective interpretations), therefore, the principle of the 'best interests' might promote the legalisation of actions considered illegal by the legislative system, constituting a future danger for all those minors who find themselves in a similar situation.[117]

112 *Ibidem.*
113 Lenti, *Note critiche in tema di interesse del minore*, cit., p. 87.
114 Lenti, *La procreazione artificiale. Genoma della persona e attribuzione della paternità*, cit., pp. 269-70.
115 Lenti, *Note critiche in tema di interesse del minore*, cit., p. 95.
116 Lenti, *La procreazione artificiale. Genoma della persona e attribuzione della paternità,* cit. pp. 269-270.
117 *Ibidem.*

4.3 *The limit of public policy and its declination with respect to the best interests of the child*

Cases of surrogacy and heterologous fertilisation that took place abroad, infringing the national prohibition, exemplify another conflict that can emerge between the opposing needs in safeguarding the procreative event. The contrast between the best interests of the child and the general clause of public policy, aims to prevent the application of foreign laws and the recognition and actuation of rulings issued abroad and incompatible with the fundamental principles of national legislation. Since the distinction between the notion of national public policy and international public policy has now been overcome, public policy is constituted not by "any imperative regulation of civil law, but rather […] by fundamental and principles that characterize the ethical-juridical attitude in a given historical period."

In the present historical period, Italian legislation – like other systems – finds itself in a rather delicate situation, since it is called upon to deal with the legislation of other States in the European Union that admit innovative solutions in family matters and yet it cannot prescind from safeguarding certain universal principles, including respect for fundamental rights.[118] Public policy, today, represents a sort of 'playing field' on which domestic values and the obligations deriving from the European sources – *in primis*, the Charter of Fundamental Rights of the European Union and the ECHR jurisprudence – meet and merge.[119]

Since Italian law now belongs to an international community, there has been an evolution in the concept of public policy with regard to the content, an evolution with a twofold result. On the one hand, the extension of the notion of public policy, due to the inclusion of principles of international origin and, on the other hand, re-evaluation of the importance to be attributed to certain principles originally considered fundamental, in some cases even deciding that they were no longer relevant.[120]

In view of the applications for transcription of foreign rulings in the country of origin, whether a birth certificate following surrogacy or an adoption proceeding in favour of a homosexual couple, the question posed is whether the limit of public policy hinders recognition of the relationship of filiation set up abroad between social parents and the minor. In these situations, the national judge is required to evaluate whether the coherence of the law would be undermined by the

118 P. Franzina, *Some Remarks on the Relevance of Article 8 of the ECHR to the Recognition of Family Status Judicially Created Abroad*, cit., p. 615. Original text: "Rather, public policy represents (…) a sort of playing field where national values and supra-national imperatives meet and merge".

119 P. Franzina, *Some remarks on the relevance of article 8 of the ECHR to the recognition of family status judicially created abroad*, cit., p. 615. Original text: "Rather, public policy represents (…) a sort of playing field where national values and supra-national imperatives meet and merge".

120 v. Irti, *Digressioni attorno al mutevole concetto di ordine pubblico*, in "La Nuova Giurisprudenza Civile e Commentata", 2016, N. 3, p. 490.

recognition of the foreign ruling and, more specifically, whether the effect produced – the attribution of a relationship of filiation, in the absence of a biological bond, or otherwise outside the hypotheses of adoption and ART permitted by national law – is incompatible with the ethical, economic and political principles of the law itself. Consequently, before invoking the limits of public policy, the national courts must "define or redefine the content"[121] and, as mentioned above, in identifying which principles in that given historical moment establish the law, they must also take into account the rules and principles that have become part of the national legal system due to the assumption of obligations under international law.

Nonetheless, this obligation for the judges has often been translated into fairly wide margin of discretion when ascertaining the elements that configure the conflict with, and the potential breakdown of the coherence of the Italian legal system. This, in turn, explains the tendency, found by both the legislator and the doctrine, to invoke the public policy clause with excessive ease and frequency, in order to hinder the recognition of family bonds not based on traditional canons. This tendency is represented by the ruling N. 24001 handed down on September 26th 2014 by the Italian Court of Cassation on the question of surrogate motherhood.[122]

The case concerned a married Italian couple who had travelled to Ukraine in order to gain access to gestational surrogacy (with oocytes from a donor). Given the absence of any biological bond with the minor and the attempt to elude the prohibition of surrogacy imposed by Italian Law N. 40, the Juvenile Court of Brescia declared the minor adoptable and ordered him to be placed with another family. Following confirmation of the first instance judgement by the Appeals Court in Brescia, the couple appealed to the Italian Court of Cassation, stating, amongst other things, that the judges should have verified (when evaluating the conformity of the foreign ruling with public policy) whether taking the child away from the family in which he had lived since birth and with whom he had created an affective relationship, effectively corresponded to his best interests.

Rejecting the appeal, the Supreme Court recognised that the decisions regarding minors must be based on the best interests of the child, as an integral element of international public policy, but then concluded with a wholly abstract evaluation, unconnected to the case in hand.[123] This ruling therefore falls within the category of cases in which the best interests of the child play a role that extends public policy to include almost all juvenile law.[124] The Court, in fact, stated that: "[…] the Italian legislator, in truth, has reasonably considered that this interest is realised precisely by

121 *Ibidem*, p. 491.

122 The ruling (filed 11 November 2014) is available online: http://www.sentenze-cassazione.com/sentenze-cassazione-2014/testo-ruling-fecondazione-eterologa-surrogazione-maternita/.

123 B. Salone, *Contrarietà all'ordine pubblico della maternità surrogata e dichiarazione di adottabilità del minore*, in "Diritto Civile Contemporaneo", 7 December 2004.

124 J. Long and M. Naldini, *"Turismo" matrimoniale e procreativo: alcune riflessioni socio-giuridiche*, in "Genius", 2015, N. 2, p. 164.

attributing maternity to the birth mother and entrusting […] to the institution of adoption realised with all the guarantees inherent in the legal procedure, rather than a simple agreement between the parties, the realisation of parenthood unconnected by a biological bond."[125] In this case, therefore, the prevalence of the clause of public policy is the fruit of a choice made *a priori* by the legislator – not attributing to the judge any margin of discretion to be exercised in concrete cases. It does not, even minimally, take into account the prejudicial effects that, in the specific situation, the lack of recognition of the foreign ruling on which the family bond is based would have on the minor.

Despite the risk of an excessive recourse to the limit of public policy, there is no lack of cases in which the conflict between the two principles has been resolved in a diametrically opposite manner and the principle of 'best interests' has, instead, led to a restrictive reading of the public policy; highlighting the need to bear in mind the consequences of the refusal to recognise the foreign ruling for the minor in question. It is sufficient to consider the ruling issued on February 13th 2009 by the Appeals Court of Bari, presented with an application to transcribe two British parental orders, which attributed the maternity to the social mother and not to the birth mother, in execution of a surrogacy agreement.[126]

In recognising the *status* acquired abroad, the Court decided that the prevalence of biological maternity over social maternity is not, *per se*, contrary to international public policy and that the prohibition of surrogacy in Italy (Law 40/2004) is not therefore an obstacle to the transcription. Despite the evident presence of a fundamental principle to be safeguarded, the Court added, the absence of conflict between public policy and the effects of the foreign ruling must be evaluated above all in the best interests of the child, which must prevail over any legislative indication.

With regard to the circumstances of the case in question, the judge at the Court of Bari observed that the recognition of the parental orders fully conformed to the best interests of the children (aged 11 and 8 years old) who had been raised by the social mother since birth as her own children and were recognised as such by British law. It was therefore essential, in the opinion of the judge, to transcribe the foreign rulings in order to guarantee the formal certainty of the *status filiationis* validly formed in the United Kingdom, and in order to allow the minors and their mother to exercise the fundamental right of freedom of circulation recognised to European citizens.

This opinion has recently received authoritative confirmation from the Italian Court of Cassation which, with the important ruling N. 19599/16, set out what could be considered the

125 Italian Court of Cassation, ruling N. 2 4001 26 September 2014, § 3.1.

126 On this ruling see, *inter alia*, M. Castellaneta, *Dietro l'interesse del minore si nasconde il rischio di un turismo procreativo*, in "Guida al Diritto", May 2009, p. 66.

present position on the relation between the clause of public policy and the principle of the best interests of the child.[127]

In a case concerning same-sex parents, the judges of the court of third instance confirmed the crucial nature of the 'best interests of the child' as a guiding parameter in establishing whether to order the transcription of the foreign birth certificate of a child conceived through heterologous ART in Spain and carrying the indication of two mothers. After having clarified that – for the purposes of the ruling of non-infringement of public policy – the judge is required to evaluate whether the foreign measure opposes, not the national law *per se*, but rather the need to safeguard the human rights set out in the Constitution and in the European and international safeguards. The Italian Court of Cassation has specified that, in such cases and in similar circumstances, the best interests of the child corresponds to the right of the minor involved to maintain the family status validly acquired abroad, in conformity with the *lex loci*, which allows and regulates procreative practices forbidden in Italy.

Incidentally, also in the jurisprudence of the ECHR, the general clause of the 'best interests of the child' has acted as a countermeasure with respect to the prohibitions of national legislation on matters of *status filiationis* formed abroad. It is sufficient to consider the rulings on the matter of recognition of adoption procedures carried out abroad – in particular *Wagner v. Luxembourg*[128] and *Negrepontis-Giannisis v. Greece*[129] – which, in turn, have influenced the more recent jurisprudence on the matter of surrogacy, examined in the sections that follow. These rulings derive from the lack of recognition of two foreign adoption procedures, one in favour of a single woman and the other in favour of a monk, because they were considered to be in conflict with public policy.[130] In both cases, the Court recognised the continuity of the individual and family status, providing they were validly constituted abroad and corresponded to an effective family reality, therefore finding an infringement of Article 8 ECHR. According to the Court, therefore, respect for private and family life demands that 'limping' situations, in which a family bond is recognised in country X, but not in country Y, should be avoided where possible, so that the minor can feel fully integrated in his/her family.[131]

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127 This ruling will be analysed in detail in the second part of this report, dedicated to heterologous ART, in particular in chapter 3, which analyses the (Italian) jurisprudence deriving from the recourse to heterologous techniques in other countries.

128 *Wagner and J.M.W.L. v. Luxembourg*, appeal N. 76240/01, ruling dated 28 June 2007.

129 *Negrepontis-Giannisis v. Greece*, appeal N. 5 6759/08, ruling dated 3 May 2011.

130 Luxembourg and Greek law, in fact, respectively excluded adoption in favour of single persons and monks.

131 M.M. Winkler, *Adozione legittimante del single, step-child adoption e famiglia monoparentale: aspetti internazionali privatistici*, in Cesaro, Lovatti and Mastrangelo (ed.), *La Famiglia si Trasforma. Status familiari costituiti all'estero e loro riconoscimento in Italia, tra ordine pubblico e interesse del minore*, cit., p. 115; Franzina, *Some remarks on the relevance of article 8 of the ECHR to the recognition of family status judicially created abroad*, cit., p. 612.

In addition to demonstrating the incapacity of the law to prevent *tout court* access to certain practices, these two rulings, although they offer opposing solutions to the same question, highlight some fundamental points with regard to the definition of the relations of filiation within the 'new families'. They show, above all, that in addition to raising strictly juridical questions, the 'new' forms of procreation and filiation give rise to ideological evaluations and ethical-moral considerations regarding the concepts of maternity and paternity and, above all of family, of the procreative function and the possible commercialisation of the bodies and the emotions of those involved.[132]

These rulings and, even more so, the life experiences from which they derive also illustrate the multi-faceted dimension of the procreative event. They are, in fact, always situations in which the choice to become parents and therefore to exercise the right to procreate involves (and poses a potential conflict with) the interests of the child, and with the national need to safeguard legal principles. Finally, the examples given above illustrate the decisive role played by the principle of the 'best interest' in the resolution of cases involving minors. This role, nonetheless, does not depend solely on the general jurisprudential tendency to recognise the best interests of the child as a pre-eminent consideration, but above all on the content that is attributed to it and, therefore, to the nature of the evaluation made by the judge, if inspired by the circumstances of the concrete or abstract case and inevitably drenched in prejudices.

132 Lorenzetti, *Bilanciamento di interessi e garanzie per i minori nella filiazione da fecondazione eterologa e da maternità surrogata*, cit., p. 84.

Chapter 2

The ECHR system: the basis of a shared legal approach

1. 'Family life': a continually evolving notion

In the attempt to keep step with the transformations in the family, national law and, in particular, the judges, find an important ally in the European Convention on Human Rights (ECHR) as it is interpreted by the Court of Strasbourg.[133] The safeguarding of the fundamental rights affecting family relationships has become increasingly important in ECHR jurisprudence and in the last two decades, the European Court has often been called upon to rule whether the right to respect for a private and family life, protected by Article 8 of the Convention has been infringed. The international dimension of the question of the 'new families' is clearly shown by the increase in the number of applications presented in Strasbourg. This escalation has offered the European Court the opportunity to establish reference points relating to the extension of the notion of 'family life' and the extent to which the law can obtain respect for this notion, thus offering a precious contribution to the gradual redefinition of a juridical concept of family life suited to the times.

Faced with rapid changes in scientific, social and interpersonal relationships (see previous chapter), the notion of 'family life' and more generally Article 8, have been subjected to an incessant process of critical re-elaboration, in order to adapt them to the social realities in which they are called to operate and to the needs they pose, under penalty of their lack of effectiveness. The result is a juridical notion of family that goes well beyond the confines of the traditional paradigm and equates the existence of a family life with a "*de facto* situation" consisting in the affective bonds between the members of the nucleus, independently of any juridical relationships between them. [134] Essentially two factors, acting concurrently, have led to the extension of the family forms considered worthy of safeguards under Article 8 ECHR: the reading of the Convention as a 'living instrument' that must be interpreted in the light of the current conditions and the increasing attention paid to the life experiences of the subjects involved.

In fact, the judges of Strasbourg have clarified that the notions of 'family' and 'family life' cannot be considered crystallised with reference to the historical period in which the European Convention was drawn up and adopted. On the contrary, the deliberately vague and generic formulation that characterises Article 8 (like all the other legal rights safeguarded by the Convention) allows, or even requires, a dynamic interpretation of the concept of 'family', that takes into account the social evolution and, in particular, the multiple experiences of family life

133 Nocco, *Il diritto a essere figlio di due mamme: come la CEDU aiuta i giudici a (in)seguire le trasformazioni della famiglia*, cit., p. 129.

134 L. Lenti, *Paradiso and Campanelli v. Italy: interesse del minore, idoneità a educare e violazioni di legge*, in "Quaderni Costituzionali", 2015, N. 2, p. 474.

manifested in modern society. This becomes necessary – according to the Court – in order to make the rights safeguarded by the Convention "concrete and effective, not theoretical and illusory", a need particularly felt in the family context, considering the rapidity with which the forms and the relationships within families change.

In addition to reflecting the growing social and cultural acceptance of the right of each individual to mould their family life according to their personal inclinations, the interpretation of the notion of 'family life' is still anchored to the life experience of the persons involved.[135] To be clear, the ascertainment of the existence of a family life depends on the examination of the specific case and on the evaluation of the circumstances: the guiding criteria is the intention pursued by the subjects involved.[136] In particular, the Court considers that a bond deserves the qualification of 'family life' when it is possible to ascertain that the persons involved wish to create a family.[137]

The most evident proof of this intention is to be found – in the opinion of the Court – in the decision of the couple to formalise their relationship, by marrying or by registering their union.[138] The legally formalised family therefore remains, to some extent, the privileged form of family, with respect to which the attribution of the qualification of 'family life' is triggered almost automatically, based on the mere legal relationship. Although it represents the first indicator of the intention to create a family, nevertheless, this form does not exhaust the relevant elements regarding the ascertainment of a family life. It would seem, in fact, that the Court intended to grant dignity and worth to *de facto* bonds, recognising the birth of relationships and legal *status* between the members independently from the presence of a legal bond, attributing relevance to the effective nature of the relationships. Consequently, the notion of 'family life' – as set out in the jurisprudence of Strasbourg – is not limited to legally institutionalised relationships (legitimate family) but includes also those based on a biological fact (natural family) and those that constitute a 'family' in the social sense, providing that close personal bonds exist.[139]

When operating outside the more 'traditional' hypotheses, that is lacking the formal requisites, the Court will ascertain the existence of a family life by attributing exclusive importance to the effective nature of the relationships. In other words, starting from the premise that the family functions can be carried out equally well by any social formation that sets the same objectives, whether based on a legal act or simply on the consent of the partners, the Court will evaluate the

135 v. Fatta and M. M. Winkler, *Le famiglie omogenitoriali all'esame della Corte di Strasbourgo: il caso della second-parent adoption*, in "Nuova Giurisprudenza Civile e Commentata", 2013, p. 527.

136 S. Choudhry and J. Herring, *European Human Rights and Family Law*, Oxford and Portland, Hart Publishing, 2010, p. 170.

137 *Ibidem.*

138 *Ibidem.*

139 S. Bartole, P. De Sena and V. Zagrebelsky, *Commentario breve alla Convenzione europea dei diritti dell'uomo e delle libertà* fondamentali, Padova, Cedam, 2012, p. 300.

intention to create a family beginning from a more pragmatic perspective that aims to consider above all the family structure.[140] Consequently, in the presence of certain factual indicators, such as cohabitation, the duration of the relationship or the presence of children, it will be possible to establish the existence of a family life also between *de facto* partners.

This extension of the notion of 'family life', however, has not benefitted all *de facto* relationships at the same time. In fact, until 2010 the Court considered that the protection for a family life regarded only heterosexual couples. Unlike relationships between partners of the opposite sex, the affective relationships between persons of the same sex were for a long time considered a mere expression of the private life of the subjects involved and, therefore, not comparable to heterosexual cohabitation.[141] Only in the well-known ruling *Shalk and Kopf v. Austria*,[142] did the Court state that, in view of the rapid evolution of social attitudes towards homosexual couples and the legislative changes that have followed in a considerable number of member states, it is necessary to include stable and lasting relationships between persons of the same sex within the concept of 'family life'. Although the Court does not draw practical consequences from this statement (rejecting the argument that Article 8 obliges the States to extend the institution of marriage to same-sex couples),[143] this decision undoubtedly reveals the interpretative activism of an international judge increasingly aware of the European social dynamic and of the circulation of the arguments amongst the Courts and the legislative systems.

The parameter for measuring the effective nature of the relationships remains a determining factor also when ascertaining the existence of a family life involving parent and child. According to the ECHR jurisprudence, in fact, the notion of a family life must be extended to both biological parentage accompanied by the presence of close personal bonds, and to the merely social

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140 *Ibidem.*

141 *Mata Estevez v. Spain*, appeal N. 5 6501/00, ruling dated 10 May 2001. The only safeguards for families dedicated to homosexual persons was limited to the residual hypothesis of natural filiation. See the case *Salgueiro de Silva Mouta v. Portugal*, appeal N. 3 3290/ 96, ruling dated 21 December 1999.

142 *Shalk and Kopf v. Austria*, appeal N. 3 0141/04, ruling dated 22 November 2010.

143 Although it declared the applicability of Article 12 ECHR to the specific case thus establishing that the right to marry cannot be limited to persons of different sexes, the Court also affirmed that the prevision of form of legal recognition for same-sex couples and, even more so, of homosexual marriage lies within national margin of discretion. Moreover, it seems interesting to note that, in presenting an evolutionary interpretation of Article 12 ECHR, the Court made use of the European Charter of Fundamental Rights, in particular of Article 9 which – without alluding to the gender of the aspiring spouses – states "The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights." Therefore the Charter, like the ECHR system, delegates the discipline of the matrimonial institute to the national legislators, thus creating the dangerous dichotomy between the law and its practical application by the States. On the role of the Charter in the interpretation of the ECHR, see v. Campiglio, *L'applicazione della Carta dei diritti fondamentali dell'Unione Europea in materia familiare*, in "Diritti Umani e Diritto Internazionale", 2015, N. 2, pp. 292-295. The ruling *Shalk and Kopf* has been partly overtaken by more recent jurisprudence – see *Vallianatos and others v. Greece* (appeals N. 2 9381/09 and 32684/09, ruling dated 7 November 2013) and *Oliari and others v. Italy* (appeals N. 1 8766/11 and 36030/11, ruling dated 21 July 2015) –, in which the Court, although confirming the wide margin of discretion allowed to the States on the matter of matrimony, established that Article 8 implies the obligation for the national authorities to prepare legal recognition for same-sex couples.

relationship of filiation that creates, with regard to third parties, the appearance of a family.[144] Therefore, what is known as legitimate filiation is worthy of the safeguards set out in Article 8, that is to say, the relationship of the parent with a child conceived during the marriage, even if at the time of the birth, or at a later date, the family union and therefore the conjugal cohabitation have lapsed.[145] Equally, 'family life' is constituted by the bond between the child and each of the natural parents: with the mother, in consideration of the birth[146] and with the father, by effect of the indicators of effectiveness – including cohabitation, the existence of a stable and lasting relationship and his interest and participation in the life of the child.[147] The Court has even considered qualifiable as 'family life' the relationship that could form between a child and the biological father, a relationship that did not develop for reasons beyond the control of the interested party. [148] It would therefore seem possible that the requisite of the effective nature of the relationships could be replaced by that of the 'thwarted intention' to establish an effective family bond. [149] In fact, as confirmed in the ruling *J. R. M. v. Netherlands* , mere biological fact is not sufficient to create a bond of family life between the sperm donor and the child born using ART worthy of the protection of Article 8. Instead, the *de facto* bond between an individual who has undergone a sex-change operation and the child born from the partner of biologically equal sex, conceived by means of sperm donation constitutes a 'family life'. [150] Although it did not rule that Article 8 gives rise to an obligation for the State to legally recognise the *de facto* bond existing between the child and the transsexual partner of the mother, the Court did recognise the social parenthood as a form of family life safeguarded by Article 8, emphasising, in the absence of the biological datum, the effective nature of the bonds and the appearance of family.

To conclude, the ascertainment of the effective existence of a family, as the necessary condition for invoking the protection offered by Article 8 ECHR, refers to the existence or the effective nature of the personal bonds between the applicants, independently of their legal qualification under the legislation of the country in question. [151] This pluralist vision elevates family relationships of various kinds to the rank of equal dignity and justifies the application of similar treatment, in particular, the granting of equal rights. It is, however, important to note that, despite

144 Sudre, quoted by Bartole *et al., Commentario breve alla Convenzione europea dei diritti dell'uomo e delle libertà fondamentali*, cit., p. 300.
145 *Berrehab v. Netherlands* , appeal N. 10730/84, ruling dated 21 June 1988.
146 *Marckx v. Belgium*, appeal N. 6833/74, ruling dated 13 June 1979.
147 *Lebbink v. Netherlands* , appeal N. 45582/99, ruling dated 1 June 2004.
148 *Schneider v. Germany* , appeal N. 17080/07, ruling dated 15 September 2011.
149 Bartole *et al.*, *Commentario breve alla Convenzione europea dei diritti dell'uomo e delle libertà fondamentali*, cit., p. 300.
150 *X, Y and Z v. UK*, appeal N. 2 1830/93, ruling dated 22 April 1997.
151 *Marckx v. Belgium*, cit.

the increasing emphasis on the substance of the relationships, the form remains the first indicator of the intention to create a family that the Court seeks and the concrete functions carried out by the family nucleus are taken into consideration only in the absence of the formal requisites. [152]

This attitude is, likewise, indicative of a more general tendency of the Strasbourg court to recognise that the States can reserve more favourable treatment for unions based on a conjugal bond. [153] Although it recognises the pluralism of the models of 'couple', the Court has, in fact, denied the total assimilation of the protection granted to the family based on marriage – to which registered partnerships are equated – to the legal treatment of *de facto* couples, whether heterosexual or homosexual. As will be seen from the analysis of the jurisprudence on matters of co-parental adoption by homosexual couples, the judges of Strasbourg consider marriage to be a particular situation that grants the subjects involved a "special status" [154] therefore legitimising the introduction of legal regimes that grant privileged safeguards to those who deliberately decide to assume the consequences that derive from it.

2. *A further area of expansion: the many obligations deriving from Article 8 ECHR*

In addition to enriching the range of interpersonal relationships that can be qualified as 'family life', the Court has progressively extended the scope of application of Article 8 ordering the member states to undertake new obligations, generally of a positive nature, designed to enforce the right to respect for the individual's private and family life.

It is by now clear that Article 8 comprises a twofold prescriptive content. On the one hand, the primary function of this provision is to protect individuals from any arbitrary interference by the public powers; that is any interference in the sphere of the individual and their family bonds. [155] Article 8, therefore, expresses first of all a negative obligation for the State: that of abstaining from any intrusive actions that may limit the exercise of the rights guaranteed. However, the protection of the individual against the action of the public authorities is not absolute. In fact, State interference in the enjoyment of the right to respect for the private or family life of persons is justified and, therefore, is not an infringement of the Convention when it meets the three conditions of legality, legitimate purpose and necessity in a democratic society, set out in the second paragraph of Article

152 Choudhry and Herring, *European Human Rights and Family Law*, cit., p. 170.

153 Bartole *et al.*, *Commentario breve alla Convenzione europea dei diritti dell'uomo e delle libertà fondamentali*, cit., p. 331.

154 *Gas and Dubois v. France*, appeal N. 25951/07, ruling dated 15 March 2012.

155 F. Pesce, *La tutela europea dei diritti fondamentali in materia famigliare: recenti sviluppi*, in "Diritti Umani e Diritto Internazionale", 2016, N. 1, p. 11; Bartole *et al.*, *Commentario breve alla Convenzione europea dei diritti dell'uomo e delle libertà fondamentali*, cit., p. 303.

8.[156] In a nutshell, interference, in order to comply with the dictates of the Convention, must above all be foreseen by a national law, which possesses the characteristics of accessibility and predictability.[157] Furthermore, it must aspire to the realisation of interests particularly worthy of protection, strictly those listed in the second paragraph of Article 8, which are: national security, public safety and the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others; finally, it must respond to an "imperative social need,"[158] and be proportional to the legitimate purpose.

For example, the Italian legislation on the right to privacy for a mother who had decided to give birth anonymously and to put her child up for adoption, was not judged to be compatible with the Convention due to lack of proportionality and reasonableness. In the well-known ruling *Godelli v. Italy*,[159] the Strasbourg judges decided that, although foreseen by national law and aimed at preventing tragic events (illegal abortions, infanticides and birth in precarious medical-health conditions) that could put the life of the woman and the child at risk, the fact that the natural child not recognised at birth would never have access to non-identifying information regarding the mother and the irrevocable secrecy were in contrast with Article 8, since this compromised the realisation of a fair balance between the mother's right to remain anonymous – the only right protected by Italian law – and the right of the adopted child to know their origins, an aspect of the private life protected by Article 8.[160]

This ruling, moreover, clarifies that, in addition to protecting the individuals against potentially invasive actions regarding their personal life (where amongst other things, the family relationships develop) the member states are also required by Article 8 to respect obligations of a positive nature.[161] In other words, the public authorities are called upon to meet obligations 'to act', or to adopt the measures that guarantee the effective enjoyment of the individual's right to respect for the private and family life, that is, measures designed to protect them from interference from

156 Art. 8(2): "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

157 Bartole *et al. Commentario breve alla Convenzione europea dei diritti dell'uomo e delle libertà fondamentali*, cit., p. 305; G. Sergio, *Potestà versus responsabilità genitoriale: la sofferta evoluzione della regolamentazione giuridica dei rapporti tra genitori e figli*, in R. Pane (ed.), *Nuove frontiere della famiglia. La riforma della filiazione*, Napoli, Edizioni Scientifiche Italiane, 2014, p. 100.

158 *Odièvre v. France*, appeal N. 4 2326/98, ruling dated 13 February 2003, § 40.

159 *Godelli v. Italy*, appeal N. 3 3783/09, ruling dated 25 September 2012.

160 This ruling followed another on the question of anonymous birth and the right to know one's origins, which, however, concerned French legislation. In the case *Odièvre v. France* (cit.), the European Court ruled that the French legislator, in allowing the child born from an anonymous birth to access non-identifying information and foreseeing the involvement of an independent authority for the purpose of appealing against the secrecy of the birth, had realised an adequate balance between the opposing needs for protection.

161 It seems nevertheless important to note that the distinction between negative and positive obligations, especially in relation to Article 8, is not particularly clear.

third parties. [162] On family matters, the doctrine of the positive obligations has served essentially for two purposes: to ensure legal recognition of family bonds existing between parents and children, whatever the relationship of 'legitimate' or 'natural' filiation, and to protect their integrity.[163]

In the name of the best interests of the child, the Court has always taken the side of equality of *status* between children born within a marriage and children born outside a marriage and has confirmed that the effective respect for family life demands that the state authorities recognise the legal importance of the existence of *de facto* bonds. One example of this is the well-known ruling *Marckx v. Belgium*, in which the Court clarified that in determining the discipline applicable to relationships of natural filiation the State "must act in a manner calculated to allow those concerned to lead a normal family life."[164] In particular, the Court added that, Article 8 generates the positive obligation for the national authorities to set up forms of protection capable of guaranteeing, from birth, the integration of the minor in his/her family. Consequently, in the specific case, the impossibility of creating a relationship of filiation between the natural mother and the child (merely by indicating the name of the woman on the birth certificate) and the consequent need foreseen by Belgian law to begin a procedure for recognition before a court, was not considered to conform to the convention, since it hindered the regular development of the *de facto* family bond, subjecting it to a restrictive and discriminatory legal regime compared with the one foreseen for legitimate filiation.

With regard to the second 'positive' dimension of the right to respect for family life, the Court has always firmly repeated the principle that, on the basis of Article 8, the State must adopt measures suitable for safeguarding the maintenance of family bonds between parents and children, facilitating the recovery of those interrupted, providing this is compatible with the best interests of the child. In a series of rulings the judges of Strasbourg decided that giving the mother the possibility to put a child up for adoption and/or fostering outside the family without informing, or against the wishes, of the natural father, when he was bound to the child not only by a genetic factor but also by effective family relationships, was a violation of Article 8.[165] Since a prolonged interruption of the relationships between the parents and the child could harm the solidity of the bond, the national authorities must avoid ordering the placement of the minor outside the family of origin, except where this measure safeguards his/her best interest. Even when the removal of the child is justified by this need (the only justification allowed), before ordering a similar measure, the

162 Bartole *et al.*, *Commentario breve alla Convenzione europea dei diritti dell'uomo e delle libertà fondamentali*, cit., p. 304.

163 U. Kilkelly, *Protecting children's rights under the ECHR: the role of positive obligations*, in "Northern Ireland Legal Quarterly", 2010, 61, N. 3, pp. 245-261.

164 *Marckx v. Belgium*, cit., § 31.

165 See, for example, *Keegan v. Ireland*, appeal N. 1 6969/90, ruling dated 26 May 1994; *Görgülü v. Germany* , appeal N. 74969/01, 26 May 2004.

public authorities are required to evaluate the possibility of adopting less radical solutions. Moreover, if such measures are ordered, the suspension of the parental responsibility and fostering outside the family are always to be considered temporary measures, and the national authorities have a positive obligation to revoke the measures and guarantee the reunification of the minor and the parents as soon as the circumstances allow it.

In the same perspective, the Court believes that Article 8, in guaranteeing for each individual the right to respect for their private and family life, protects the right of the parents and the children – but also of the children and the grandparents[166] – to maintain stable relationships in cases where a marriage breaks down or a *de facto* family separates. With regard to fostering of a child whose parents have separated, States therefore have the positive obligation to adopt measures designed to guarantee the preservation of balanced and continuative relationships between the minor and each parent, independently of the fact that the union between the parents no longer exists. In the opinion of the Court, the horizontal plane of the relationships between couples must be kept separate from the vertical relationships between parents and children.[167] Having said this, the nature and the extent of the measures that the States are required to adopt necessarily depends on the concrete circumstances and, therefore, situations of considerable conflict or where a parent has been responsible for abuse and violence towards the partner (or ex-partner) or their children will constitute an important factor in the judgement. Therefore, when contacts are requested by one of the parents but refused by the other, the national authorities must decide how to reach a fair balance between the opposing interests and rights and, where minors are involved, it will be the interests of the latter that will prevail over those of other members of the family.

For example, the decision of the national authorities to deny access rights to the non-custodial father for general and stereotyped considerations on the inadequacy of natural fathers to guarantee the well-being of the child, was considered to oppose the Convention and not relevant to the effective best interests of the child in question.[168] Similarly, the decision to deny wardship of the daughter exclusively because of the sexual orientation of the father was considered an infringement

166 *Scozzari and Giunta v. Italy*, appeals N. 3 9221/98 and 41963/98, ruling dated 13 July 2000.

167 Nocco, *Il diritto a essere figlio di due mamme: come la CEDU aiuta i giudici a (in)seguire le trasformazioni della famiglia*, cit., p. 133.

168 *Sahin v. Germany* , appeal N. 30943/96, ruling dated 8 July 2003. See also the rulings *Schneider v. Germany* (appeal N. 17080/07, ruling dated 15 September 2011) and *Anayo v. Germany* (appeal N. 20578/07, ruling dated 21 December 2010). In the former the Court stated that: "Having regard to the realities of family life in the 21st century, revealed, *inter alia*, in the context of its own comparative law research, (it) is not convinced that the best interests of children living with their legal father but having a different biological father can be truly determined by a general legal assumption. Consideration of what lies in the best interests of the child concerned is, however, of paramount importance in every case of this kind. Having regard to the great variety of family situations possibly concerned, the Court therefore considers that a fair balancing of the rights of all persons involved necessitates an examination of the particular circumstances of the case." (§ 100).

of the right to respect for family life.[169] Therefore, in the case of divorce or dwindling of the relationship between the parents, the public authorities, although they are considered better equipped to manage situations of family conflict,[170] must avoid formulating abstract evaluations regarding the possible negative influence of particular lifestyle choices and personal qualities of the parents on the well-being of the child. On the contrary, they have an obligation to set up measures that facilitate contact between the non-custodial parent and the children, in the best interests of the child.

The method adopted by the Court when evaluating the existence of (and respect for) a positive obligation by the States is based on the same principles applicable in determining the legitimacy of an interference.[171] In both cases, therefore, the operation consists in seeking the correct balance between the opposing interests of the individual and the needs of the community as a whole. In respecting the diversity and the cultural and legal traditions of the various States, the ECHR does not impose absolute uniformity in its application. [172] The State always enjoys a margin of discretion in fulfilling its duties – whether negative or positive – that is a certain discretional power in determining the point of equilibrium between the opposing needs and evaluating the proportionality of a measure. As is known, the granting of a national margin of discretion is owed, amongst other things, to the supranational nature of the control operated by the Court. It therefore, responds to the principle of subsidiarity, which foresees that the responsibility for the correct balancing lies *in primis* with the national authorities, who, given the direct contact with the driving forces of their country, are better placed than an international court to evaluate the importance of the various factors in play. In other words, this instrument is concerned to define the boundaries inherent in legal decisions – above all when adopted by an international court – with respect to the political decisions of the member states.[173] The degree of margin of discretion allowed to the States is not unlimited; in fact, the state intervention is subject to review by the Court, which, although it does not replace the evaluations of the national authorities, must guarantee that all the interests involved have been adequately taken into account, respecting the principle of proportionality. The supervision operated by the Court, in turn, assumes a different intensity according to the breadth of

169 *Salgueiro da Silva Mouta v. Portugal*, appeal N. 33290/96, ruling dated 21 December 1999.

170 *Sahin v. Germany* , cit., § 64.

171 Although the method used is the same, it is important to note that, when the object of the inquiry is the respect for a positive obligation, the principle of legality is not as rigidly applied as when determining the legitimacy of an interference. Similarly, the aims listed in the second paragraph of Article 8, although guiding the supervision of the Court, are not necessarily taken into consideration when evaluating the existence of a positive obligation. See, *inter alia*, Bartole *et al.*, *Commentario breve alla Convenzione europea dei diritti dell'uomo e delle libertà fondamentali*, cit., pp. 306-7.

172 *Sunday Times v. United Kingdom (n.1)*, appeal N. 6538/74, ruling dated 26 April 1979, § 61.

173 V. Zagrebelsky, R. Chenal, L. Tomasi, *Manuale dei diritti fondamentali in Europa*, Bologna, Mulino, 2016, p. 43.

the margin of discretion recognised each time to the State.[174] Generally, the evaluation of proportionality undertaken by the Court will be stricter when the margin of discretion granted is limited. Moreover, the extension of the latter varies according to a number of factors, *in primis* the presence or absence of a common denominator in the legal systems of the member states of the European Council regarding the matter in question. While the existence of a European agreement – determined on the basis of a comparative inquiry – tends to reduce the margin of discretion granted to the States and makes the adoption of divergent national measures incompatible with the Convention, the absence of a common approach, on the contrary, means that the national authorities enjoy greater freedom in evaluating the relative weight of the interests in play and in identifying the most appropriate means for protecting them.[175]

The breadth of the state's margin of discretion also depends on the content of the lawsuit and the nature of the interests in play. In the decisions that concern the protection of childhood, for example, the Court tends to grant wide margin of discretion to the national authorities, in virtue of their closeness to the subjects involved. Nonetheless, in cases where measures that affect contact rights, and therefore the continuity and stability of the relationships between the parents and the children, the margin of discretion granted to the State is decidedly less extensive. The state's margin of discretion is also more limited when an essential and particularly intimate aspect of the existence or the identity of the individual comes into play. [176]

At the same time, however, when the case raises delicate moral or ethical questions – such as medically assisted procreation, or the adoption of minors by homosexual couples or individuals – the State is generally granted a considerable margin for manoeuvre.[177] However, it is possible to note that often the moral questions emerge precisely when fundamental aspects of the existence and the identity of the complainants come into play; therefore, it is not clear whether the margin of discretion should be wide or limited.[178] Apart from these examples, it is important to observe the numerous and opposing elements that the Court considers do not lend themselves to an isolated and mechanical application; their effect on the breadth of the margin of discretion, on the contrary, essentially depends on the interaction between them and the circumstances of the specific case.[179] Due to the vague nature of these elements, the recognition of the margin of discretion has

174 Bartole *et al.*, *Commentario breve alla Convenzione europea dei diritti dell'uomo e delle libertà fondamentali*, cit., p. 311.

175 *Ibidem,* p. 311.

176 *Mennesson and Labassee v. France*, appeals N. 65192/11 and 65941/11, ruling dated 26 June 2014.

177 *Evans v. United Kingdom*, appeal N. 6338/05, ruling dated 10 April 2007.

178 The question is mentioned (but without a solution) in *Oliari and others v. Italy*, § 177.

179 Bartole *et al.*, *Commentario breve alla Convenzione europea dei diritti dell'uomo e delle libertà fondamentali*, cit., p. 309; O. Arnardóttir, *Equality and Non-Discrimination under the European Convention on Human Rights*, The Hague-London-New York, Martinus Nijhoff, 2003, pp. 63-7.

led to unforeseeable results and, even, to the protection of human rights according to a variable geometry.[180] This, in turn, has attracted a series of criticisms that, although they cannot be summarised in this volume, essentially insist on the need for a more coherent and systematic application and a more comprehensive motivation of the decisions by the Court, in support of greater legitimacy of the margin of discretion doctrine and, more generally, of the jurisprudence of the Court itself.

Although the notion of margin of discretion initially appeared in marginal and exceptional cases, over time it has dilated excessively, becoming a genuine 'doctrine'.[181] In fact, the Court has shown itself to be increasingly permissive and willing to recognise a certain margin of discretion for States in an increasing number of areas and with greater ease.[182] This tendency has also involved the jurisprudence relating to respect for private and family life, characterised by an increasingly frequent recourse to the notion of margin of discretion, to the extent where it has become a "fundamental principle" rather than "an exception".[183] In fact, while the need to put into place a legal representation that takes into account the new family realities– and, even before that, the proliferation of diversified forms of family – at European and international level, the moral dimension of the concept of 'family' and the delicacy of the ethical questions inevitably raised have ensured that the debates and the solutions adopted were strongly influenced by the specific nature of the legal system of reference and, more generally, by the cultural context of the countries involved.

Vis-à-vis this phenomenon, on the one hand the Court has made every effort to adapt the definition of family life mentioned in Article 8 to the present society, on the other hand, it has seemed inclined to recognise the richness and the diversity of the various approaches employed by the contracting States, thus attributing a wide margin of margin of discretion to the national authorities involved in resolving questions of family and juvenile law. We can therefore anticipate that, in order to ascertain the existence of a violation in family matters, the judges of Strasbourg

180 See, *inter alia*, Lord Lester of Herne Hill, QC, *The European Convention of Human Rights in the New Architecture of Europe*, in *Proceedings of the 8th International Colloquy on the European Convention on Human Rights*, Strasbourg, Council of Europe Publishing, 1995, p. 236; Y. Arai-Takahashi, *The margin of discretion doctrine: a theoretical analysis of Strasbourg's variable geometry*, in G. Ulfstein, A. Follesdal and B. Peters (ed.), *Constituting Europe: The European Court of Human Rights in a National, European and Global* Context, Cambridge, Cambridge University Press, 2013.

181 V. Zagrebelsky *et al.*, *Manuale dei diritti fondamentali in Europa*, cit., p. 43.

182 V. Zagrebelsky, *Parrillo v. Italy. Il destino degli embrioni congelati tra Convenzione europea dei diritti umani e Costituzione*, in "Diritti Umani e Diritto Internazionale", 2015, N. 3, p. 612.

183 *Ibidem*. One example is the ruling *Parrillo v. Italy* (appeal N. 4 6470/11, ruling dated 27 August 2015) on the question of the destination of embryos not used for research. In other circumstances, on the other hand, it would seem that the Court deliberately avoided any reference to the matter of margin of discretion, probably because a similar consideration would have compromised the reaching of a (pre)determined conclusion. See, *inter alia*, *E.B. v. France*, appeal N. 4 3546/02, 22 January 2008.

tend to apply the more moderate version of the test of proportionality and, therefore, to be satisfied by measures that respect the minimum requisite of mere reasonableness. [184]

3. *The interests of the child in ECHR jurisprudence*

The principle of the 'best interests of the child', although not mentioned in the ECHR text, appears in the jurisprudence of the Court of Strasbourg assuming – as in the national context – various meanings and functions. Amongst the conventional forecasts that it often accompanies, is Article 8 ECHR. Therefore, on matters of family law, rather than the interests of the child in general being safeguarded, this principle is above all a fundamental factor of the right of each individual to respect for their private life – in particular, the right to personal identity – and, above all family life.[185]

In the ECHR jurisprudence, the function assigned to it and, consequently, the position that the best interests of the child assumes with regard to the fundamental rights of the parents are ambivalent. In some cases (above all those older ones) the best interests of the child represents the 'legitimate purpose' that, according to the second paragraph of Article 8 (when the other requisites are equally respected,) can be used to justify the adoption of measures that limit the right to respect for family life of the appellant parent by the public authorities. These measures include the suspension of meetings between the parent and the child or their more limited frequency, the assignment of the minor to the public services, fostering by third parties or even the declaration of the state of adoptability of the child, thus ending any relationship with the family of origin.[186]

This interpretation – which reflects the original Anglo-American concept of the principle – uses the best interests of the child as a criterion for evaluating the juridical basis of any state interference and therefore responds to the need to protect the weak subjects by limiting the exercise of fundamental rights by the adults, with respect to whom it assumes an antagonistic position.[187]

It is therefore a use reserved for circumstances of particular gravity, capable of jeopardising the physical or psychological health of the minor or at least compromising their balanced development – for example, in the case of violence and sexual abuse – with respect to which the only solution is to remove the child from the family.[188] Consequently, if the State does not offer

184 Choudhry and Herring, *European Human Rights and Family Law*, cit., p. 32.
185 Lenti, *L'interesse del minore nella giurisprudenza della Corte europea dei diritti dell'uomo: espansione e trasformismo*, in La Nuova Giurisprudenza Civile e Commentata, 2016, N. 1, p. 149.
186 E. Lamarque, *Prima i bambini. Il principio dei 'best interests of the child' nella prospettiva costituzionale*, cit., pp. 92-4 and p. 100.
187 *Ibidem*, p. 94.
188 Lenti, *L'interesse del minore nella giurisprudenza della Corte europea dei diritti dell'uomo: espansione e trasformismo*, cit., pp. 155 *et seq.*; Lamarque, *Prima i bambini. Il principio dei 'best interests of the child' nella prospettiva costituzionale*, cit., p. 94.

assistance from the social services in order to allow the parents to keep their children with them, the ECHR censures the lack of, or inadequacy of the interventions in support of the family of the minor who was removed, since – to facilitate the continuation or recovery of family cohabitation – these measures should have been made available by the national authorities.[189]

In addition to this approach, over time, a new way of employing the principle of 'best interest' has developed, reinforcing the minor's right to personal identity or, even more often, to the right to enjoy a family life with his/her own parents. According to the reconstruction offered by some authors, it is even possible to identify in the Strasbourg jurisprudence a presumption that the mere fact of maintaining relationships with their parents corresponds to the best interests of the child, except – of course – in particularly prejudicial situations which must be proven by the public authorities to avoid undue interference.[190]

Cases in which the Court uses the principle of 'best interest' to confirm and repeat the right of the minor to develop and preserve a reciprocal affective bond with his/her parents are therefore quite frequent.[191] Also, given the necessarily relational nature of the right in question,[192] it is obvious that, when it is used in this sense, the best interests of the child tends to coincide with that of the parents (the appellants) in maintaining the continuity of their affective bond and therefore, in many rulings of the Strasbourg Court, the priority of the best interests of the child is translated into the effective promotion of the interests of the adults.[193]

This 'new' function of support aimed at the best interests of the child is evident in the cases *Mennesson and Labassee v. France*[194] – dealt with in the next paragraph – in which the Court censured the national authorities for having denied the transcription of the birth certificate of twins born through surrogacy abroad. In this ruling, the reference to the best interests of the children had the effect of guaranteeing a stronger protection of the right of the minors to their personal identity, which – amongst other things – was of particular relevance in the case in question, since the appellant was the genetic father of the minors.

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189 *Ibidem*. See, for example, a series of appeals against Italy: *Zhou v. Italy* (appeal N. 3 3773/11, ruling dated 21 January 2014); *Akinnibosun v. Italy* (appeal N. 9056/14, ruling dated 16 July 2015); *S.H. v. Italy* (appeal N. 5 2557/14, ruling dated 13 October 2015).

190 Lenti, *L'interesse del minore nella giurisprudenza della Corte europea dei diritti dell'uomo: espansione e trasformismo*, cit., p. 150; M. G. Ruo, *'The best interest of the child' nella giurisprudenza della Corte europea dei diritti dell'uomo*, in "Minorigiustizia", 2011, N. 3, p. 42.

191 Lenti, *Note critiche in tema di interesse del minore*, cit., p. 94. Amongst the many rulings: *Gnahoré v. France* (appeal N. 4 0031/98, ruling dated 19 September 2000); *Neulinger and Shuruk v. Switzerland* (appeal N. 4 1615/2007, ruling dated 6 July 2010); *Raban v. Romania* (appeal N. 2 5437/08, ruling dated 16 October 2010); *Mamchur v. Ukraine* (appeal N. 1 0383/09, ruling dated 16 July 2015).

192 G. Sergio, *La giustizia minorile. Dalla tutela del minore alla tutela civile dei diritti relazionali* in L. Lenti (ed.), *Tutela civile del minore e diritto sociale della famiglia*, vol. IV del Trattato di diritto di famiglia, Milano, Giuffre Editore, 2012, p. 26.

193 Lenti, *Note critiche in tema di interesse del minore*, cit., p. 95.

194 Appeals N. 65192/11 and 65941/11, rulings dated 26 June 2014.

Also in the more recent case *Mandet v. France*,[195] the ECHR interpreted the right to respect for private life in the light of the best interests of the child. This case concerned a minor who – although conceived in a period during which Mr and Mrs Mandet were separated – had in effect always been looked after by the Mrs Mandet and her new husband, who had recognised the child as his own. A few years later, the biological father applied for recognition of his paternity, with the effect of eliminating the previous relationship of filiation. The appellants (the mother, the social father and the child) claimed that the ruling of non-recognition, in addition to infringing respect for their family life, was in contrast with the best interests of the child which – from their standpoint – demanded protection for the integrity of the relationship between the child and the person who had raised him until then, thus ensuring the emotional stability of the minor involved. Presenting a different viewpoint, the ECHR established that the best interests of the child coincided with the ascertainment of the biological paternity, and that the maintenance of the affective relationship with the social father was not at risk because the French authorities had granted parental responsibility to the mother and the child could continue to live with her and the social father. In this case, therefore, the reference to the principle of 'best interest', in addition to strengthening the right of the minor to his personal identity, also served to establish the prevalence of this right over any other right – also protected by Article 8 ECHR – of the minor to a family life.[196]

The *Mandet* case highlights the conceptual ambiguity inherent in the principle of 'best interest', allowing the judges to use it as they wish and relieving the Court (or even wholly exempting it) from the responsibility of advancing an adequate motivation in support of its decisions.[197] This ruling also exemplifies the tension – mentioned in the previous chapter – between the best interests of the child in the singular form and the best interests of the child in the plural. The reading of the 'best interest' offered by the majority lies in the presumed correlation between the genetic truth and the best interests of the child and therefore proposes an abstract vision of the minors' welfare, that prescinds from the effective situation of the individual minor involved, whose one true wish was to preserve his family status.

To use the words of Justice Nussberger in his dissenting opinion, the best interests of the child is sometimes – *in primis*, in the case in question – used by the Court as "a stereotyped formula to defend the interests of others."[198] This vision is also found in part of the doctrine, according to which, notwithstanding the apparent safeguards for the conventional rights of the minor, it is not possible to exclude that the recourse to the 'best interest' in fact plays a merely specious or even

195 Appeal N. 3 0955/12, ruling dated 14 January 2016.
196 Lamarque, *Prima i bambini. Il principio dei 'best interests of the child' nella prospettiva costituzionale*, cit., p. 99.
197 *Ibidem*, p. 101.
198 *Mandet v. France*, cit.

rhetorical role, giving a more noble justification to the result of the balancing act of the Court which, although it aims to safeguard also the minor, essentially aims to guarantee respect for the right of an adult.[199]

The adoption of an adult-centric approach that deals with the case above all from the standpoint of the parents and often accompanies an inquiry into the position of the child that is little interested in the peculiarities of his/her personal situation, could be explained, according to Lenti, by the fact that the parents are the appellants and that, therefore, the Court must give an answer to their requests.[200]

These observations are clearly in contrast with the configuration generally attributed to the work of the ECHR as a judgement on the individual, concrete case, based on an in-depth analysis of the specific aspects of the question and the dynamics in play, refusing all generalisations and placing the specific minor involved at the centre of the case.[201] This statement, however, must be balanced against the supranational nature of this Court and, therefore, against the specific role that it is called upon to play. In fact, since it expresses itself retrospectively, it is decidedly easier for the ECHR to observe and criticise the work of the national authorities stating that they should have taken different measures,[202] but it is equally true that – as the European judges themselves have recognised in some rulings – evaluating the best interests of the child involved is the duty above all of the national authorities who, in virtue of their direct contact, are in a privileged position to identify the needs of the parties in question.[203]

Now that the area of application of Article 8 and the state obligations deriving from it have been clarified, the sections that follow consider some of the most significant rulings of the European Court, in order to outline the extensive effects that the right of respect for private and family life has assumed with regard to the new family phenomena. Of particular importance for the present study is the jurisprudence on ART and adoption by homosexual individuals and same-sex couples, questions that, in recent years, have been exposed to a critical rethinking and an incessant jurisprudential evolution, not only in Italy and in the other countries of the Council of Europe, but also at the level of the European Courts.

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199 Lamarque, *Prima i bambini. Il principio dei 'best interests of the child' nella prospettiva costituzionale*, cit., pp. 105-6.

200 Lenti, *L'interesse del minore nella giurisprudenza della Corte europea dei diritti dell'uomo: espansione e trasformismo*, cit., p. 150.

201 Lamarque, *Prima i bambini. Il principio dei 'best interests of the child' nella prospettiva costituzionale*, cit., p. 108.

202 Lenti, *L'interesse del minore nella giurisprudenza della Corte europea dei diritti dell'uomo: espansione e trasformismo*, cit., p. 151.

203 Choudhry and Herring, *European Human Rights and Family Law*, cit., p. 20. Some examples: *Johansen v. Norway* (appeal N. 1 7383/90, ruling dated 7 August 1996), § 64; *Sahin v Germany* (appeal N. 3 0943/98, ruling dated 8 July 2003), § 64; *Salgueiro da Silva Mouta v Portugal* (appeal N. 3 3290/96, ruling dated 21 December 1999), § 25.

4. *The key rulings on matters concerning the 'new families': ART*

4.1 *Access to ART: 'upstream' questions*[204]

To use Burbergs' expression, Article 8 ECHR can be compared to a 'nursery garden' in which multiple new rights, unimaginable in 1950, are cultivated.[205] The dynamics of this process, explains Burbergs, reflects the way trees grow: branches and twigs have grown from the trunk of Article 8, corresponding to new interests that lie within the area of application of the law and, in turn, they have grown and given life to other branches, and therefore to other interests considered worthy of protection.[206] This phenomenon of progressive expansion has made it possible, amongst other things, to include under Article 8 the new subjective motions arising in the procreative field.[207] The first stage of this evolution is represented by the rulings *Evans*[208] and *Dickson*[209], in which the Court dealt with the question of the intention to become parents.

In the case *Evans v. United Kingdom*, the appellant challenged the interdiction from using the embryos already formed using her genetic material, after her ex-partner (who supplied the male gametes) asked for them to be destroyed. Evans claimed that this was a violation of her private life since, being unable to procreate by other means, she was thus denied the right to become a genetic mother. Therefore, the Court first had to deal with the question of applicability of Article 8 – invoked by the appellant – to the question in hand. The Strasbourg judges ruled on the question adopting an evolutionary interpretation of Article 8, in particular stating that respect for private and family life implies the right to respect for the decision to become a genetic parent. In the opinion of the Court, therefore, given the vital importance for each and every person, parenthood (in both a positive and a negative sense) must be included in the rights of the individual with regard to their private and family life.

Although the Court accepted the exceptional nature of the woman's situation, it established that the wish to become a genetic mother might be limited in order to respect the fact that her partner did not wish to become a genetic father. British legislation, which allows the sperm donor to withdraw their consent before the embryo created through IVF is implanted, was considered

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204 The distinction between 'upstream' and 'downstream' questions is adopted by Lorenzetti, *Coppie same-sex e fecondazione assistita: la progressiva decostruzione del paradigma familiare*, cit., p. 118.

205 M. Burbergs, *How the right to respect for private and family life, home and correspondence became the nursery in which new rights are born*, in E. Brems and J. Gerards (ed.), *Shaping Rights in the ECHR – The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, Cambridge, Cambridge University Press, 2014, p. 315.

206 *Ibidem*, p. 326.

207 V. Sisto, *Il diritto alla "genitorialità" del detenuto in una pronuncia della Corte europea dei diritti dell'uomo*, in "Minorigiustizia", 2015, N. 1, p. 299.

208 *Evans v. United Kingdom*, cit.

209 *Dickson v. United Kingdom*, appeal N. 4 4362/04, ruling dated 4 December 2007.

compatible with Article 8 because, according to the Grand Chamber, it balanced the opposing rights and needs, which not only included the conflicting rights of the couple, but also the best interest of the future child, and questions of public importance, such as the principle of safeguarding consent and certainty of rights.

Confirming the above decisions, it is important to emphasise that, in the specific case, the doctrine of the margin of discretion played a decisive role in the evaluation of the legitimacy of the rejection of the appellant's challenge. In fact, the Court stated that, given the delicate bioethical questions raised by the challenge and by the absolute absence of European agreement on the matter, the issue "comes within the margin of discretion which the Court generally considers that States should enjoy in this sphere". Although it does not infringe the Convention, the *Evans* case is a first step towards the progressive articulation of the content of the right to parenthood by the European Court.

The sentence *Dickson v. United Kingdom* concerned the prohibition for a prisoner serving a life sentence and his partner, to use ART to start a family. In this case, the Strasbourg judges were called upon to decide whether the State could limit or even exclude the right to artificial insemination as an integral part of the sentence, or in the best interests of the child, who throughout the period of imprisonment would be raised only by the mother and deprived of the presence of the father. After repeating that the right to become genetic parents using ART was nothing more than a practical application of the wider right to a private and family life, the Court decided on the proportionality and adequacy of the decision made by the national legislator. In fact, explained the Court, although the national authorities enjoy wide margin of discretion in balancing the public interest in the management of the prison system and the right of the individual to become a genetic parent, in carrying out this operation, they are required to take into account the specific circumstances of the case in question. In particular, the fact that authorised conjugal visits are not foreseen by the British penitentiary system, access to ART was the only way that the couple could enact their desire for parenthood. In the opinion of the Court, therefore, depriving them of access to the assisted fertilisation procedures was not compatible with Article 8, since it implied an excessive sacrifice of the individual right with respect to the general interest pursued through the detention of the individual.

Further proof of the elasticity of the notion of 'private and family life' is the ruling *S. H. and others v. Austria,* in which the Court clarified that Article 8 also includes the right for couples to conceive a child and to make recourse to ART for this purpose.[210] This case derived from the

210 *S.H. and others v. Austria*, appeal N. 5 7813/00, ruling of the First Section dated 1 April 2010, § 60. Even though not strictly relevant, the right to respect for the decision to become genetic parents was further developed giving rise to the right to choose the circumstances in which to become parents. See *Ternovszky v. Hungary*, appeal N. 67545/09, ruling dated 14 December 2010 (home birth).

prohibition for two sterile couples who wanted to access sperm donation as part of *in vitro* insemination and, in general, the donation of eggs – practices prohibited by Austrian legislation – in order to realise their desire for parenthood. Although they recognised that the margin of discretion narrowed when the controversy concerned an important aspect of the existence or the identity of the individual (as in the case in question) the Grand Chamber decided that the moral and ethical sensitivity of the questions raised and the absence of a consolidated common view at European level "with regard to the importance of the interests in play or the best way of safeguarding them" allowed the Austrian legislator wide margin of discretion in regulating questions relating to ART. Considering, in particular, the possibility of access to homologous fertilisation in Austria, or heterologous fertilisation abroad, the Grand Chamber decided that the restrictions set by national legislation did not exceed the margin of discretion of the State and that they were an expression of the reasonable balance between the right to procreation, on the one hand, and the need to preserve the certainty of family relationships – and, more particularly, to avoid duplicate maternity in harmony with the known principle *mater semper certa est*, protecting the right of the individual to know their genetic origins – on the other.

More recently, the European Court ruled on the Italian regulations regarding ART and, in particular, the impossibility for fertile couples who carried hereditary disorders, to make use of *in vitro* fertilisation and pre-implant genetic diagnosis.[211] In the well-known ruling *Costa and Pava v. Italy*, the Court stated that, although it is not possible to recognise the 'right to have a healthy child', the "right of the appellants to give birth to a child who is not affected by the genetic disorder of which they are healthy carriers and to make use for this purpose of medically assisted procreation techniques and pre-implant diagnosis, falls within the safeguards offered by Article 8", since this procreative choice is a form of expression of the private and family life of the appellants.[212]

Having ascertained the applicability of Article 8 in the specific case, the Court then established that the public authorities' prohibition was an unjustified interference in the private and family life of the appellants, and therefore an infringement of Article 8, recognising a contradiction in the Italian legal system. The judges, in fact, unanimously decided that prohibiting recourse to *in vitro* procreation and pre-implant diagnosis was disproportional to the possibility – foreseen by the same legislation – of making recourse to therapeutic abortion if the child conceived was found to be affected by genetic disorders. In the opinion of the Court, if, as the Italian State sustains, the national prohibition aimed to protect the child conceived, then, the measure in question was unsuitable for attaining this objective. By encouraging the abortion of the foetus, the Court

211 Veto set by Law 40, in particular, Articles 4 and 5, which allow access to ART and therefore to pre-implant diagnosis for couples who, following medical tests are found to be sterile or infertile.

212 *Costa and Pavan v. Italy*, cit., § 57.

explained, it in fact risked producing much more serious consequences than the selection of the embryo following pre-natal diagnosis, both for the conceived child, who would be in a more advanced stage, and for the parents, in particular for the mother.

4.2 *Surrogate motherhood: 'downstream' questions*

Finally, it is worth considering the increasing jurisprudence in matters of recognition of the relationship of filiation perfected abroad through surrogacy. The fundamental query that the Court has been required to answer is whether the refusal to transcribe a foreign birth certificate in the public registers, because it is contrary to public policy, constitute undue interference in the private and family life of the persons involved. With the twin sentences *Mennesson* and *Labassee*,[213] the Strasbourg judges took an important step towards recognition of the principle of safeguarding the effective best interests of the child born through surrogacy.[214]

The European Court has stated that the right to a private life also protects the primary interest of defining one's identity as a human being, including one's *status* as the son or daughter of two parents, and that therefore the refusal to recognise the legal importance of an existing family bond is a violation of the right to respect for the private life of the minor(s) involved.[215] In fact, although the States enjoy wide margin of discretion, given the delicate nature of the ethical questions involved in regulating surrogacy and the lack of European consensus on the matter, these powers lessen when they concern the question of parenthood and involve particularly intimate aspects of the identity of an individual.

In the opinion of the Court, these considerations are even more important in cases like the one in question, involving children born through surrogacy, where there is a biological bond with the parent who has applied for recognition of the filiation. [216] Since the biological relationship is an essential component in the identity of each individual, in the opinion of the Court, it is not possible to maintain that it is in the best interests of the child to deprive him/her of the legal

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213 *Mennesson* and *Labassee v. France*, cit.

214 E. Falletti, *La procreazione assistita tra Strasbourgo e Lussemburgo*, in M. Azzalini (ed.), *La procreazione assistita, dieci anni dopo – Evoluzioni e nuove sfide*, Ariccia, Aracne, 2015, p. 277; S. Tonolo, *Identità personale, maternità surrogata e superiore interesse del minore nella più recente giurisprudenza della Corte europea dei diritti dell'uomo*, in "Diritti umani e diritto internazionale", 2015, p. 204.

215 On the contrary, the Court states that, given the practical effects that the lack of recognition of the relationship of filiation has had on the family life of the appellants, and the margin of discretion enjoyed by the State, the lack of recognition has not prevented the appellants from enjoying their right to respect for their family life. In fact, the appellants were able to move to France shortly after the birth of the children and to live with them in conditions generally equivalent to those of other families. In the opinion of the Court, moreover, there is no reason to believe that there is an effective danger that the children will be separated from their parents due to the uncertainty of their legal position in France. The Court reached the same conclusions in the recent cases *Foulon* and *Bouvet v. France* (appeals N. 9063/14 and 10410/14, rulings dated 21 July 2016), where two fathers claimed that the refusal of the French authorities to recognise the legal value of their relationship with their biological children born in India through surrogacy infringed Article 8; and in the case *Laborie v. France* (appeal N. 4 4024/13, ruling dated 19 January2017), regarding twins born through surrogacy in Ukraine to a heterosexual couple.

216 *Mennesson and Labassee v. France*, cit., § 100.

recognition of the *status filiationis* when this relationship corresponds to the biological reality and when both the minor and the parent ask for full recognition.

Until a few months ago, the European Court therefore appeared to tend towards the valorisation of the best interests of the child born through surrogacy and directly involved in the proceeding, whose importance involved and justified the reduction of the applicative sphere of the clause of public policy . The recent decision of the Grand Chamber in the appeal *Paradiso and Campanelli v. Italia*[217] seems, however, to suggest the adoption of a new approach intended to oppose the phenomenon of procreative tourism in order to respect the interests of the individual minor involved in the specific case. [218] Although the circumstances from which this appeal derives are similar to those of the French case, this ruling did not concern the question of whether a birth certificate regarding surrogacy could be transcribed, but rather the question of adoption.[219] Two other elements differentiate this question from the *Mennesson and Labassee* appeals: in addition to the absence of a genetic bond between the child and the contracting party, on the procedural plane, the appellants were not recognised as having the right to act as legal representatives of the minor and therefore the analysis of the Court only concerned the possible infringement of the appellants' rights.[220] The child was born to a surrogate mother in Russia and, two months later, the application for the transcription of the Russian birth certificate in the Italian public records was rejected as contrary to public policy. Furthermore, in the meantime a genetic test had established that the presumed father had no genetic bond with the child and, consequently, the authorities ordered that the minor should be removed from the family, entrusted to an institute and only when he was two years old, fostered by another family. Mr and Mrs Campanelli therefore claimed that the decision of the national authorities to declare the minor abandoned, despite the fact that he had two loving parents who had raised him from birth, and to suspend their parental rights, was an infringement of Article 8.

After clarifying that the *de facto* bond between the appellant and the minor born through surrogacy, although brief, constitutes a form of family life protected by Article 8.[221] The second Section of the Court in fact severely censured the removal of the child from the family, since it was

217 *Paradiso and Campanelli v. Italy*, appeal N. 2 5358/12, ruling dated 24 January2017 (Grand Chamber).

218 D. Rosani, *"The best interests of the parents". La maternità surrogata in Europa tra interessi del bambino, Corti supreme e silenzio dei legislatori*, in "Rivista di BioDiritto", 2017, N. 1, p. 131; A. Viviani, Paradiso e Campanelli *di fronte alla Grande Camera: un nuovo limite per le "famiglie di fatto"?* in "Genius", 4, 2017, N. 1, p. 79.

219 Lenti, *Paradiso and Campanelli v. Italy: interesse del minore, idoneità a educare e violazioni di legge*, cit., p. 472. As Lenti suggests, in the background there is also a fundamental question of principle: what importance must be attributed to the circumstance that the family relationships for which recognition is requested were created by the appellants knowingly infringing the laws? L. Lenti, *Ancora sul caso Paradiso & Campanelli v. Italia: la sentenza della Grande Camera*, in "Nuova Giurisprudenza Civile e Commentata", 2017, N. 4, p. 495.

220 As already established by the Court, second section (§ 45 *et seq.* of the ruling dated 27 January2015).

221 *Paradiso and Campanelli v. Italy*, cit., ruling dated 27 January2015, § 69. The Court observed that, although the cohabitation between the appellants and the minor had only lasted six months, a *de facto* bond had in fact been created.

ordered on the basis of considerations regarding the educational unsuitability of the couple, presumed solely on the basis of the illegal nature of their conduct, that is their decision to circumvent Italian legislation on matters concerning ART and adoption. In fact – the Court added – the need to safeguard public policy cannot give "*carte blanche* to any measure,"[222] but must take into consideration the best interests of the child – in this case, the continuation of the relationships consolidated – whatever the nature of the parental relationship, genetic or social. In the case in question, therefore, only the need to protect the minor from a serious and imminent danger could justify the extreme measure of removing the child from the family. Since there was no evidence of such a danger, the Court concluded that the measure taken had led to a breakdown in the balance of the interests in play, in particular with respect to the protection of the best interests of the child, infringing Article 8.[223]

The Grand Chamber, with 11 votes in favour and 6 against, concluded that the national authorities, in ordering the removal of the minor, did not exceed their margin of discretion on matters of private and family life. Amongst the elements that led to the decision was, *in primis*, the interpretation – called by Viviani "somewhat formalistic" [224] - of the notion of family life and the relationship existing between parents and child which, in the opinion of some, is not coherent with the extended definition based on the mainly qualitative criteria up to now set out by the Court itself.[225] Although accepting the traditional approach of the Court, which considers a family life to exist on the basis of factual and not juridical evaluation, the Grand Chamber decided that, while a common parental project existed and there had been an affective relationship between the child and the appellants since his early months of life, the brevity of their cohabitation, the absence of a

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222 *Ibidem*, § 80.

223 Although it ascertained an infringement of Article 8, the Court did not order the Italian authorities to restore the original family situation, since the minor had in the meantime formed an affective bond with the foster family.

224 Viviani, Paradiso e Campanelli *di fronte alla Grande Camera: un nuovo limite per le "famiglie di fatto"?*, cit., p. 79; M. Gervasi, *Vita familiare e maternità surrogata nella ruling definitiva della Corte europea dei diritti dell'uomo sul caso Paradiso and Campanelli*, in "AIC Osservatorio Costituzionale", 2017, N. 1, 18 April 2017. Available online: http://www.osservatorioaic.it/vita-familiare-e-maternit-surrogata-nella-ruling-definitiva-della-corte-europea-dei-diritti-umani-sul-caso-paradiso-et-campanelli-c2e.html;

225 Viviani, Paradiso e Campanelli *di fronte alla Grande Camera: un nuovo limite per le "famiglie di fatto"?*, cit., p. 82. v. Masciotta, *La Grand Chambre pone un freno alla forza espansiva della "vita familiare": uno stop all'attivismo giudiziario in tema di maternità surrogata nel caso Paradiso e Campanelli contro Italia*, in "AIC Osservatorio Costituzionale", 2017, N. 2, 21 July 2017. Available online: http://www.osservatorioaic.it/la-grand-chambre-pone-un-freno-alla-forza-espansiva-della-vita-familiare-uno-stop-all-attivismo-giudiziario-in-tema-di-maternit-surrogata-nel-caso-paradiso-e-campanelli-contro-Italy.html; L. Poli, *La Grande Camera e l'ultima parola sul caso Paradiso e Campanelli*, in "SIDI blog", 21 February 2017. Available online: http://www.sidiblog.org/2017/02/21/la-grande-camera-e-lultima-parola-sul-caso-paradiso-e-campanelli/. This represents, moreover, one of the fundamental points on which the opinion of the dissenting judges was based. In their opinion, there was – amongst other things – the fact that the brevity of the cohabitation in itself cannot be the only relevant factor, it must also be analysed in the light of the fact that the appellants had in fact acted as parents even before the birth of the child(§ 5).

genetic link and the profound legal uncertainty due to the 'illegal' origin of their family bond excluded the existence of a *de facto* family life.[226]

The judges of Strasbourg agreed, however, to examine the case in relation to the private life of the appellants and, therefore, to establish that removing the child infringed their rights under Article 8 ECHR – in particular, their decision to become parents. On this matter, the Grand Chamber verified whether the national authorities had reached a fair balance between the interests in play, public and private. With respect to the former, the judges emphasised questions of general prevention, amongst which they found the defence of the order and, above all, the protection of the children: as specified by the Court itself "not only the child in question, but also children in general."[227]

The Italian laws on adoption aim to protect the minor from illegal practices and pursue the fundamental public interests, such as the prevention of trafficking of human beings.[228] In addition to pursuing a legitimate purpose, the measure of removing the child and declaring him available for adoption were – in the majority opinion – also proportional: the state interference in the private life of the appellants was, in fact, justified by the need to prevent the legalisation of a situation deliberately created by the appellants in order to circumvent national laws.[229] The question of surrogacy, therefore, although it was not the object of contention from a technical-juridical standpoint, seems to have assumed fundamental importance on the plane of legal policy, exercising, in practice, a certain influence on the positions held by the European judges.[230]

Therefore, as emerged from the arguments summarised above, another factor that – together with the notion of family life – led to the result of non-infringement of Article 8 was the appreciation of the 'best interests of the child' or, in the opinion of some, its marginalisation in the ruling by the Grand Chamber.[231] Far from omitting all reference to the best interests of the child, the Grand Chamber in effect accepted the evaluation made by the Italian legal authorities stating that, considering the age of the minor and the brief period of cohabitation, the child would not suffer serious or irreparable harm from the separation.[232] Although it stated that it did not underestimate the emotional suffering of the appellants, the Grand Chamber concluded that, amongst the various

226 *Paradiso and Campanelli v. Italy*, cit., ruling dated 24 January2017, §§ 156-7.
227 *Ibidem*, § 197 (translation by Rosani, *"The best interests of the parents". La maternità surrogata in Europa tra interessi del bambino, Corti supreme e silenzio dei legislatori*, cit., p. 126).
228 *Ibidem*, § 202.
229 *Ibidem*, § 215.
230 Lenti, *Ancora sul caso Paradiso & Campanelli v. Italia: la sentenza della Grande Camera*, cit., p. 495.
231 V. Nardone, *La pronuncia della Grande Camera sul caso Paradiso e Campanelli v. Italia tra famiglia de facto, margine di apprezzamento e interesse superiore del minore*, in "Ordine internazionale e diritti umani", 2017, N. 1, p. 117; Viviani, Paradiso e Campanelli *di fronte alla Grande Camera: un nuovo limite per le "famiglie di fatto"?*, cit., p. 79; v. Honorati, *Paradiso e Campanelli v. Italia: atto finale*, in "Quaderni Costituzionali", 2017, N. 2, p. 438.
232 *Paradiso and Campanelli v. Italy*, cit., ruling dated 24 January2017, §§ 208-215.

interests in play, the national authorities were required to attribute priority not to the need to preserve *de facto* family bonds, but rather the public interest protecting the rules regarding adoption.[233] In a certain sense, therefore, the final result recalls the ambiguity to which we referred in the previous chapter, between the interest of the individual minor, evaluated in practice, and the interest of the child seen as a general and abstract category establishing that – in the case in question – it was the second sense that played a greater role for the purposes of the balancing. [234]

The Grand Chamber's intervention in the case *Paradiso and Campanelli*, not only gave rise to criticism by part of the doctrine for a presumed lack of coherence with the practice in matters of interpretation of Article 8,[235] but also, undoubtedly, stimulated considerations and rethinking with regard to who/what constitutes a family life worthy of protection and on the effective limits of state interference in matters of private and family life. What clearly emerges is the importance of the genetic factor. In fact, while in the French cases, the fact that the appellant was the genetic father of the twins undoubtedly led to increased protection for the minors' right to a private life (read together with the best interests of the child), in the more recent case *Paradiso and Campanelli*, the lack of a genetic bond with at least one member of the couple, the illegal origin of the situation and the brevity of the cohabitation all represented elements on which the Grand Chamber based the inexistence of a family life.[236]

As shown above, nonetheless, the presence of a genetic link is not sufficient to guarantee the existence of a family life. The Court itself, in its final decision, refers to previous cases in which the national authorities were condemned for having violated the family life of the appellants even though there was no genetic bond nor a legal relationship of filiation.[237] These are, however, *de facto* relationships that have a legitimate origin – created by a foreign ruling of adoption, [238] a ruling

233 A. Margaria and V. Zagrebelsky, *Procreazione medicalmente assistita e genitorialita: le direttrici della Corte europea dei diritti dell'uomo*, in "Minorigiustizia", 2017, N. 1, p. 144; Rosani, *"The best interests of the parents". La maternità surrogata in Europa tra interessi del bambino, Corti supreme e silenzio dei legislatori*, cit., p. 126 and pp. 131-2. Viviani proposes, instead, a more critical reading of the decision, stating that the best interests of the child was totally excluded from the assessment pursued by the majority of the Grand Chamber. It is, therefore, a case in which the reference to the 'best interests of the child' represent a formal clause, rather than a general legal principle. Viviani, *Paradiso e Campanelli di fronte alla Grande Camera: un nuovo limite per le "famiglie di fatto"?*, cit., pp. 83-85.

234 Rosani, *"The best interests of the parents". La maternità surrogata in Europa tra interessi del bambino, Corti supreme e silenzio dei legislatori*, cit., pp. 131-2; Honorati, *Paradiso e Campanelli v. Italia: atto finale*, cit., p. 439.

235 Viviani, *Paradiso e Campanelli di fronte alla Grande Camera: un nuovo limite per le "famiglie di fatto"?*, cit., p. 80; Honorati, *Paradiso e Campanelli v. Italia: atto finale*, cit., p. 438. To some extent, Lenti also agrees with this criticism. Although considering that the result reached by the Grand Chamber is fair, Lenti states that the exclusion of the existence of a family life was not a necessary passage in motivating the correctness of the Italian authorities' measures. The Grand Chamber should, in fact, have recognised the existence of a *de facto* family life, concluding that, in the case in question, other interests played a more important role for the purposes of the equilibrium.. Lenti, *Ancora sul caso Paradiso & Campanelli v. Italia: la sentenza della Grande Camera*, cit., p. 501.

236 For an in-depth analysis of the concept of family and, in particular, of fatherhood, that emerges from this ruling of the ECHR, see A. Margaria, *The Construction of Fatherhood. The Jurisprudence of the European Court of Human Rights*, forthcoming, Cambridge University Press, chapter 2.

237 *Paradiso and Campanelli v. Italy*, cit., ruling dated 24 January 2017, § 149 *et seq.*

238 *Wagner and J.M.W.L. v. Luxembourg*, cit.

of fostering outside the family[239] or, the application of the presumption of paternity for the husband of the birth mother[240] – and not, as in this case, the consequence of an illegal act by the aspiring parents.[241]

It is precisely on the basis of this acute observation that Lenti shows how the ruling of the Grand Chamber has implicitly established "compliance with the initial law" as a further requisite for determining whether a *de facto* relationship falls within the notion of family life under Article 8.[242] Just like the genetic factor, nonetheless, this new element is not always necessary, but becomes the object that, when balanced against other factors, can serve to demonstrate the effective and concrete nature of the relationship in question, including the duration, the rapidity with which the national authorities have intervened to terminate the illegal situation and the evaluation made by the authorities themselves that the separation will not cause serious harm to the minor.[243]

Concluding, the European Court, when called upon to rule on the regulation of the new family phenomena produced through recourse to ART, seems to distinguish between the questions raised 'upstream', that is prior to the conception and birth of the minor, and those which arise 'downstream', that is once the child is born. With regard to the first category of questions – such as the regulation of access to ART – these lie, in the opinion of the Court, within the margin of discretion of the national legislator. As stated in *S. H. and others v. Austria* and in the rulings on matters of surrogacy, it is the national authority that establishes which techniques are allowed and on the basis of which assumptions. The work of the legislator is, nonetheless, subject to the judgement of reasonableness of the Court; in other words, the legislator can evaluate the various options without prejudice to the limit of reasonableness of the limitations and/or the distinctions set out.

Moving on to the 'downstream' questions, the position adopted by the Court – in the light of the ruling of the Grand Chamber in *Paradiso and Campanelli* – is less clear. On the one hand, the jurisprudence of Strasbourg emphasises the importance of the experience of those involved, of preserving the continuity of the affective bonds between the minor and the intentional parents, and of guaranteeing legal weight to *de facto* relationships. This approach firmly places the responsibility for demonstrating the suitability of the individuals and the couples involved to raise and educate a child on the state authorities. However, in its most recent rulings, the Court itself provided eloquent support for the need to safeguard the principle of legality, which, although not in itself decisive,

239 *Moretti and Benedetti v. Italy* (appeal N. 1 6318/07, ruling dated 27 April 2010; *Kopf and Liberda v. Austria* (appeal N. 1 598/06, ruling dated 17 January 2012).
240 *Nazarenko v. Russia* (appeal N. 3 9438/13, ruling dated 16 July 2015).
241 Lenti, *Ancora sul caso Paradiso & Campanelli v. Italia: la sentenza della Grande Camera*, cit., p. 500.
242 *Ibidem.*
243 *Ibidem.*

must be taken into account when balancing the opposing interests. Despite these apparently irreconcilable tendencies, it seems possible to state that, also in *Paradiso and Campanelli*, the profile of the best interests of the child comes into play, assuming an alternative guise – not new to the doctrine – that leaves more room for considerations that protect the minors as a juridical category and, consequently attributes greater weight to the violations of national laws.

5. *Key rulings regarding the 'new families': adoption by homosexual persons*

Although the questions regarding ART are particularly evident in the jurisprudential, political and social debate, there have also been considerable changes in another area of the protection of the fundamental rights of families: that of homosexual parents. So far, the judges of Strasbourg have ruled on two different ways in which homosexual individuals and partners can form a family: adoption by singles and co-parental adoption, or adoption of the biological child of the partner.[244] While adoption by a single is intended to create an *ex novo* family relationship, co-parental adoption, due to the context in which it is requested, is intended to guarantee the legal formalisation of a *de facto* family.

It is important to anticipate that these forms of adoption differ also in the effects. The adoption by a single produces attenuated legal effects: unlike full adoption, it does not end the bonds between the adopted minor and the family of origin, but produces a new relationship of filiation, which is added to the first.[245] Co-parental adoption, on the other hand, allows an individual to adopt the biological child of the partner, assigning the vested parental rights with those of the partner and thus sharing these rights, so that the child will enjoy two legally recognised parental bonds.

In 2002, the ECHR Court ruled on adoption by homosexual persons. In the case *Fretté v. France*,[246] the appellant – a single, homosexual man – claimed that the refusal to authorise the adoption was exclusively motivated by his sexual orientation and, therefore, was an unjustified interference in his right to respect for his private and family life. The Court, instead, felt that the French authorities, although they had excluded the appellant due to his sexual orientation and therefore quite independently from his human and educational qualities, had legitimately prevented the enactment of his parental project. Before commenting on the claim, however, the Court dealt with the question of the applicability of Articles 8 and 14, invoked by the appellant. Article 8 does not foresee a right to adopt, however French legislation does allow adoption by singles, therefore the Court employed the notion of 'additional rights' to extend its judgement to the conditions that

244 There is a third method – joint adoption by a married couple – on which the Court has not yet ruled.

245 M.C. Vitucci, *Orientamento sessuale e adozione nella giurisprudenza della Corte europea dei diritti umani*, in "Diritti umani e diritto internazionale", 2013, N. 2, p. 483.

246 *Fretté v. France*, appeal N. 3 6515/97, ruling dated 26 February 2002.

had effectively determined the refusal of authorisation and to verify the conformity with the prohibition of discrimination.[247]

On this matter, the Court first observed that the decision of the national authorities undoubtedly pursued a legitimate aim: the protection of the health and the rights of the minors who would potentially be involved in the adoption proceedings.[248] The judges also noted that the State enjoys wide discretional powers in these matters, not only due to the lack of a common denominator in the legislation of the Member States, but also to the differing opinions amongst the scientific communities regarding the possible consequences of adoption by homosexual parents and the limited number of studies on the topic.[249] The Court ruled that the differentiated treatment that had sacrificed the appellant's interest was proportionate to the aim pursued (to protect the best interest of minors available for adoption) and therefore did not constitute a breach of Article 14, especially if related to the objective uncertainty on both the scientific and legal plane, that marks the subject.

The *Fretté* decision was undoubtedly problematic, with three judges out of seven partially dissenting. However, their opinion was acknowledged some years later, in the case *E.B. v. France*,[250] when the Grand Chamber – overturning the previous decision – ruled against the refusal to authorise an adoption by a woman who cohabited with a partner of the same sex, and who had applied to adopt a minor, availing herself of the possibility to adopt as a single parent. In the wake of the *Fretté* case, but this time explicitly, the Court repeated that, should the State choose to go beyond the obligations deriving from Article 8 – guaranteeing, as in the case in question, the right for singles to adopt – the State cannot then, practice, adopt discriminatory measures, since this would infringe Article 14. The Court was therefore required to verify whether the refusal was supported by adequate justification, that is to say, not merely based on the appellant's sexual orientation. Although the national authorities had based their refusal solely on the absence of a paternal figure and the ambiguous nature of the partner's commitment, without explicitly mentioning the 'lifestyle choices' of the appellant, the Court felt that the sexual orientation of the appellant had always been at the centre of the debate, assuming a decisive role also in the evaluation of her application. Since French legislation recognises the right for singles with proven human qualities and educational capacity to apply to adopt, the Court concluded that the justifications presented by the government were neither serious nor persuasive and that, therefore, the disparity of treatment for the appellant could not be considered compatible with Article 14 in conjunction with Article 8. Incidentally, it would seem interesting to note that in this ruling, the Court does not

247 Bartole *et al.*, *Commentario breve alla Convenzione europea dei diritti dell'uomo e delle libertà fondamentali*, cit., p. 334.
248 *Fretté v. France*, cit., § 38.
249 *Ibidem*, §§ 41 and 42.
250 *E.B. v. France*, cit.

mention the margin of discretion that, in the previous decision, played a fundamental role in establishing the conformity of the refusal to authorise adoption by Mr Fretté.

More recently, the Court has been forced to deal with another of the more controversial topics in the European debate on the recognition of LGBT families, that of co-parental adoption. The case *Gas and Duobois v. France*[251] concerned the impossibility for a woman committed to a homosexual relationship to adopt her partner's child, unless the bond between the child and the biological mother was terminated. French legislation – as interpreted by the national courts – requires the transfer of all the parental rights and duties from the biological parent to the adoptive parent, except where the adoptive parent is the spouse of the biological parent. The national authorities had therefore rejected the application of the appellants because, in addition to opposing the intentions of the couple, it was considered contrary to the best interests of the child to deprive the biological mother of her parental rights.

The appellants believed that they had been discriminated against because of their sexual orientation, since the French legislation excluded the possibility to share parental responsibility between couples of the same sex, while this is admissible for married couples. Moreover, in their opinion, the French legislation indirectly discriminated heterosexual d*e facto* couples, since the latter could benefit from the exception foreseen for married couples by marrying, while this is not an option for homosexual couples.

The Strasbourg judges, while emphasising that the Convention does not guarantee the right to adopt, nor the right to form a family, considered Article 8 applicable in consideration of the fact that a *de facto* family relationship existed between the minor, the biological mother and the partner.[252] For the first time in the notion of family life, this decision led to "the vertical bond between the homosexual couple and their offspring,"[253] Nevertheless, the Court's ruling has produced a 'paradoxical' overall result, as Justice Villiger stated in his dissenting opinion. If we consider the principle of the best interests of the child, here it is precisely the best interest of the specific minor involved that has been frustrated, depriving the child – due to the sexual orientation of the components of the family – of the right to enjoy two parents who share the rights and duties of parental responsibility.

However, the Court stated that there was no discriminatory treatment since, although the institution of matrimony attributes a privileged *status* from which particular social and juridical consequences derive, the appellants were not in a legal situation comparable to that of a married

251 *Gas and Dubois v. France*, cit.

252 *Ibidem*, § 37.

253 F. Chiovini, *Omogenitorialità, margine di apprezzamento, interesse del minore: l'instabile bilanciamento dei giudici di Strasbourgo*, in "Nuova Giurisprudenza Civile Commentata", 2012, p. 960.

couple. Moreover, in the opinion of the Court, it was not even possible to speak of indirect discrimination contrary to the Convention: in fact, although homosexual relationships are now classified as 'family life', the Articles 8 and 14 do not require the Member States to guarantee same-sex couples access to marriage. This inequality can, therefore, be traced to the freedom of the States to regulate access to the institution of marriage, in particular reserving it for heterosexual couples (as previously confirmed in *Shalk and Kopf v. Austria*).

Less than a year later, the judges of Strasbourg again ruled on the question of co-parental adoption, this time criticising the Austrian legislation that, unlike French law, denied any possibility of co-parental adoption outside marriage, but offered the possibility of sharing parental responsibility also to *de facto* couples, providing they were heterosexual. The *ratio* of the Austrian legislation, as interpreted by the national courts and according to the observations of the government, was to preserve the 'traditional family', in order to safeguard the best interests of the child, preventing them from having two parents of the same sex.[254] In the case *X and others v. Austria*, the Court was therefore called upon not only to examine whether there was an unjustified disparity with the treatment accorded to a married heterosexual couple, when one spouse intended to adopt the biological child of the other, but – above all – with a similar situation involving an unmarried heterosexual couple.

With this decision, the European judges undoubtedly went beyond the previous rulings. In fact, in dealing with the claimed disparity in treatment between homosexual and heterosexual *de facto* couples, in addition to underlining the importance of guaranteeing legal recognition for the *de facto* family of the appellants, the Court clarified that this choice was the one that best safeguarded the best interests of the child – an element totally ignored by the ruling *Gas and Dubois*.[255] Although the need to protect the traditional family constitutes, in principle, a legitimate objective that justifies unequal treatment, the Court stated that it is necessary to take into consideration the changed concept of 'family', from which derives the obligation for the States to introduce measures to protect other forms of family, that the Court itself believes correspond to the notion of 'family life'. It therefore follows that the protection of the traditional family can be pursued within the limits of proportionality, or on condition that it does not clash with the need to guarantee the protection of other family models, recognised and protected by Article 8 according to this evolutionary interpretation.

Since the government had not presented any proof that LGBT families are *a priori* incapable of looking after a child, the Court concluded that the supposed unsuitability of the homosexual couples to raise a child could not legitimately be advanced as a justification for the unequal

254 *X and others v. Austria*, appeal N. 1 9010/07, ruling dated 19 February 2013, § 76.
255 *Ibidem*, §§ 127 and 146.

treatment of heterosexual and homosexual couples in access to adoption, therefore constituted a violation of Article 14 in conjunction with Article 8.[256] This is a fundamental passage of the decision, because the Court decidedly and clearly sides against the prejudice – frequently invoked to justify the prohibition of adoption by homosexuals – that the child 'needs' a father and a mother, in favour of the best interests of the child assessed with regard to the specific situation.[257] This ruling states that homosexual couples, except when it has been proven otherwise, must be considered suitable to raise a child.

On the other hand, we cannot ignore that the Court is still tied to the superiority of the family model based on marriage. In examining the disparity of treatment compared to married couples, in fact the judges merely reiterate the French decision and, before that, the well-known ruling *Shalk and Kopf v. Austria*, supporting the jurisprudence according to which marriage can legitimately attribute different effects, and therefore lead to prerogatives excluded for other types of union, in particular with reference to the rights and duties connected with filiation. According to the Court, the alleged discrimination was admissible, since it was due to the margin of discretion granted to the States in regulating the conditions for access to the institution of marriage.

To conclude, it would seem clear that the ECHR jurisprudence on matters of LGBT parenthood has developed and "runs on the tracks of the principle of discrimination."[258] Although the Court is committed to restructuring the concept of family, including first of all the stable and lasting cohabitation between persons of the same sex and, later, in *Gas and Dubois*, also the vertical relationship between same-sex couples and their offspring, it has not gone any further. Rather than deriving from the notion of 'family life' the effective recognition of an autonomous right to start a family, the Court has preferred to examine the appeals from the standpoint of infringement of the prohibition of discrimination in the guarantee of the right to a private and family life. In the light of present jurisprudence, the (potential) LGBT family would therefore seem to enjoy a safeguard conditioned by the treatment reserved for their heterosexual counterparts. In the cases referred to above, in fact, the Court declares itself competent to review the conditions for adoption foreseen by national law (although the Convention does not guarantee the right to adopt) only where it is possible to leverage the discriminatory dimension of the appeal and, therefore, the fact that the State in question already foresees access to adoption for single parents or heterosexual couples.

256 *Ibidem*, §§ 142 and 146.

257 Fatta and Winkler, *Le famiglie omogenitoriali all'esame della Corte di Strasbourgo: il caso della second-parent adoption*, cit., p. 525; A.M. Lecis Coccu-Ortu, *La Corte europea pone un altro mattone nella costruzione dello statuto delle unioni omosessuali: le coppie di persone dello stesso sesso non possono essere ritenute inidonee a crescere un figlio*, in "Forum Costituzionali", 15 March 2013, p. 4.

258 Fatta and Winkler, *Le famiglie omogenitoriali all'esame della Corte di Strasbourgo: il caso della second-parent adoption*, cit., p. 526.

In addition to subordinating the protection for LGBT parents to the principle of non-discrimination, the rulings on matters of co-parental adoption seem to reinforce the idea that homosexual couples can only be compared to cohabiting heterosexual couples, and not to those who are married.[259] It would seem, in fact, that in the opinion of the Court, any privileged treatment reserved by national legislation for heterosexual couples must be extended to *de facto* homosexual couples, on penalty of infringing the Convention.[260] On the contrary, where the benefits are offered only to married couples and not to *de facto* heterosexual couples, the State can legitimately choose not to grant them to same-sex couples and, therefore, the hypothesis of unequal treatment between married couples and cohabiting homosexual couples would remain fundamentally unchallengeable. Although it has the positive effect of extending to LGBT couples a series of advantages already contemplated by the law in favour of cohabiting heterosexual couples, this formulation is unsatisfactory, because it anchors the recognition of the right to the opportunity to exercise a choice – whether to marry – that is precluded to homosexuals, thus subjecting them to an indirectly discriminatory regime.[261]

259 *Ibidem*, p. 527.

260 *Ibidem.*

261 Chiovini, *Omogenitorialità, margine di apprezzamento, interesse del minore: l'instabile bilanciamento dei giudici di Strasbourgo*, cit., p. 961.

Part 2

Heterologous ART

Chapter 3

Filiation Following Heterologous ART: Critical Aspects

1. *Heterologous ART in written law*

As mentioned in the first chapter, assisted reproduction can be of two kinds, similar with regard to the medical techniques used, but very different with regard to the respective ideological implications and the practicalities. What is known as 'homologous' assisted reproductive technology foresees that the gametes used for the insemination come exclusively from the couple in question. In addition to being more socially acceptable, this method is more easily recognised by the legal authorities, precisely because there is no genetic interference that could cast doubt on the parenthood of the couple or the family identity of the new nucleus that is created. It can be considered – to some extent – a mere 'medical adjustment' necessary when the couple are not able to conceive and therefore to autonomously generate a pregnancy through sexual union.

'Heterologous' ART is considerably more controversial and it is to these techniques that the second part of the report is dedicated. Unlike the first type, the heterologous techniques are usually employed in the presence of sterility and/or infertility involving one or both members of the couple who wish to procreate; conditions that make recourse to homologous ART impractical or ineffective and, therefore, necessitate the use of gametes supplied by a third-party donor. These techniques are not only a revolutionary breakthrough from the medical-scientific standpoint: the fact that there are three subjects potentially parentally involved in the procreative process and that this is not realised by means of sexual union involves a substantial obsolescence of the traditional marriage-sexuality-reproduction link,[262] and therefore potential confusion with regard to the determination of the *status filiationis*.

While homologous fertilisation does not raise – at least in principle – particular doubts regarding the identity of the subjects involved (since the couple in question cover the genetic and social parental roles), the fragmentation of the parental functions into components that can be traced to the various subjects involved in heterologous ART, can make it problematic to determine who has the right to acquire parental status, or, in the widest sense, who holds parental rights with regard to the child (children) born. This is particularly true when conflicts arise between the various participants and/or the private initiative is driven beyond the situations foreseen by the legislator.

262 A. Lorenzetti, *Coppie same-sex e fecondazione assistita: la progressiva decostruzione del paradigma familiare* in M. Azzalini (ed.), *La procreazione assistita, dieci anni dopo. Evoluzioni e nuove sfide*, Ariccia, Aracne, 2015, p. 121.

The legislative panorama on matters of heterologous ART – if compared to that concerning surrogacy – is decidedly more homogeneous and permissive.[263] In fact, at least within the European Union, we can no longer see systems that absolutely prohibit recourse to all heterologous ART (as we shall see, in the most restrictive cases its use is limited to certain types). Therefore, although the attitude of the national legislators tends to favour the use of heterologous MAP techniques, on the one hand there are laws that allow access with relative liberality and on the other, laws that favour a more cautious approach. Typical of the first approach is, for example the United Kingdom. In addition to not foreseeing limits to the number of oocytes that can be fertilised (the embryos can also be frozen) or a maximum age for undergoing treatment, access to the donation of gametes is also allowed for same-sex couples. However, on matters of *status filiationis*, the *Human Fertilisation and Embryology Act* 2008 (HFEA 2008) updated, or rather, integrated the previous regime, effectively extending the range of subjects qualified for heterologous ART and, even more importantly, allowed to be recognised as the legal parents of the children born.[264] The rules of the *Human Fertilisation and Embryology Act* 1990 (HFEA 1990), in fact, reflected a heteronormative vision of the family, seen as composed of two parents of different genders. In this sense, the regulation that required the clinics to consider the well-being of the child and, in particular, "the need for a father", before authorising the treatment, was particularly significant.

In 2008, this term was replaced by the neutral expression "the need for supportive parenting", thus opening the door of heterologous ART also to single women and to lesbian couples. In keeping with the intention to equalise the legal safeguards for parenthood sought by couples composed of two women with those offered to heterosexual couples, the reform extended the application of presumed fatherhood to the 'civil partner' or companion of the same sex. On the basis of current legislation, therefore, the 'civil partner' – like the husband in a married heterosexual couple[265] – is automatically recognised as the legal parent of the child born, except when they have not given their consent to the treatment.[266] In the case of a couple who are stably cohabiting, whether heterosexual or homosexual, the partner of the woman who undergoes ART acquires parental status providing that, at the moment of the transfer of the sperm or the embryo that leads to conception, both the aspiring parents have consented to be recognised as the parent of the unborn child.[267]

263 v. Ragni, *Gestazione per altri e riconoscimento dello status di figlio*, in "Genius", 2016, N. 1, p. 6.
264 The law is available online: https://www.legislation.gov.uk/ukpga/2008/22/contents.
265 HFEA 1990, section 35 (regulation unchanged).
266 HFEA 2008, section 42.
267 HFEA 2008, sections 43 and 44 for lesbian couples not in a civil partnership; sections 36-37 for unmarried heterosexual couples.

At the extreme opposite, we find the Austrian legislation, whose particularly restrictive approach has also caused the ECHR Court to intervene in the case *S. H. and others v. Austria*, already mentioned in the previous chapter. In fact, the Austrian law on assisted procreation excludes both egg donation and the use of sperm from a donor in *in vitro* fertilisation procedures. The only heterologous ART allowed is therefore the donation of sperm *in vivo*.

Although it has gradually become more flexible, also Italian legislation – if compared with that of neighbouring countries – is marked by a generally limitative orientation. As mentioned earlier, the intervention of the Italian legislator on matters of ART was procrastinated and only introduced very recently with Law N. 40 of 19 February 2004. Prior to that, despite customary reports, this country was not a "procreative Far West"[268]: access to ART was regulated by ministerial circulars and subject to the medical deontological code of the time, whose protocols were generally respected.[269]

For the purposes of this report, the most important change made by the legislator concerns heterologous fertilisation. Before 2004, this procedure was allowed, although it was not carried out within the national health system, but after the introduction of Law N. 40 it was prohibited. Nonetheless, with the ruling N. 162 of 9 April 2014, the Constitutional Court declared that the prohibition of medically assisted heterologous fertilisation was constitutionally illegitimate (in particular, articles 4, paragraph 3; article 9, paragraphs 1 and 3; article 12, paragraph 1 of Law N. 40), reviving the normative framework that preceded the introduction of the law.[270]

This ruling is based on two fundamental premises: the first, that the protection of the embryo set out in Law N. 40 was not absolute but "limited to the need to identify a fair balance with the protection of the needs of the procreation"; the second, that heterologous ART can be identified as a medical treatment.[271] Starting from this conceptual basis, the Court considered that the prohibition of heterologous ART was incompatible with the right, sanctioned by the joint application of articles 2, 3 and 31 of the Italian Constitution, to self-determination with regard to the decision to become parents, and with the safeguards for psychological health sanctioned by Article 32 of the Constitution. The Constitutional Court also found "an unjustified, different treatment for couples

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268 U. Salanitro, *I requisiti soggettivi per la procreazione assistita: limiti ai diritti fondamentali e ruolo dell'interprete*, in "La Nuova Giurisprudenza Civile Commentata", 32, 2016, N. 1 0, p. 1360.

269 *Ibidem.*

270 Interestingly, D'Amico points out that this ruling did not declare the illegitimacy, in general, of the prohibition of heterologous ART, but 'only' eliminated from the original group of subjects excluded the infertile or sterile couples. The possible invalidity would in fact have been – continues D'Amico – a choice of a mainly political nature, decidedly extraneous to the ruling on constitutionality required of the Court. The question is discussed in G. D'Amico, *La sentenza sulla fecondazione "eterologa": il peccato di Ulisse,* in "Quaderni Costituzionali", 34, 2014, N. 3, pp. 663-666 and in A. Ruggeri, *La sentenza sulla fecondazione"eterologa": la Consulta chiude al dialogo" con la Corte CEDU,* in "Quaderni Costituzionali", 34, 2014, N. 3, p. 662.

271 F. Vari, *A proposito della decisione N. 1 62 del 2014 della Corte costituzionale in materia di procreazione eterologa*, in "Quaderni di diritto e politica ecclesiastica", 2, 2014, N. 3, pp. 621-622.

affected by the more serious pathologies, according to their economic situation" since wealthier couples had the option of becoming parents by going abroad, where techniques prohibited in Italy are permitted.[272]

Despite the lapse of the prohibition of heterologous procedures, the present legislative text continues to exclude certain categories of subject from the possibility of realising their desire for parenthood. The precise intention of the legislator is to safeguard the foetus as far as possible, by ensuring that it is born into a family as close as possible to the traditional model, considered most suitable for meeting its educational and formative interests.[273] In fact, the subjects allowed access to ART procedures (not only heterologous, but also homologous) are "couples who are of age, of different genders, married or cohabiting, potentially fertile, both living."[274]

The risk of discrimination therefore persists, also because it is impossible to become a parent *ex novo* through full adoption. In fact, it is above all couples composed of two women who are forced to leave the country for the purpose of generating a child genetically linked to one of them, using donated sperm.[275] Therefore, in addition to the unequal treatment according to economic status – identified by the Constitutional Court – there is also inequality based on the sexual orientation of the aspiring parents.

Finally, on the matter of *status filiationis*, the Law N. 40 establishes that the proactive criteron determines the legal parenthood of the child. In addition to assigning the status of legitimate child, or of a child formally recognised by the couple, it imposes a twofold prohibition: a) of disownment of fatherhood by the spouse or the cohabiting partner, who has given consent to the treatment, and b) of anonymity for the mother. In the more specific hypothesis of heterologous ART, Law N. 40 therefore adheres to the more general tendency to exclude the figure of the donor from the life of the minor. The third paragraph of Article 9, in fact, has always sanctioned recourse to heterologous procedures, even when they were prohibited and continues to foresee that "the donor of gametes does not acquire any legal parental relationship to the unborn child and cannot assert any right with regard to him/her, nor be the holder of any obligations."

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272 *Ibidem*, p. 625.

273 F. Santosuosso, *La procreazione medicalmente assistita. Commento alla legge 19 febbraio 2004, N. 4 0*, Milano, Giuffrè, 2004, pp. 44-47 and widely, A. Lorenzetti, *Bilanciamento di interessi e garanzie per i minori nella filiazione da fecondazione eterologa e da maternità surrogata*, in *La famiglia si trasforma. Status familiari costituiti all'estero e loro riconoscimento in Italia, tra ordine pubblico ed interesse del minore*, ed. G.O. Cesaro, P. Lovatti and G. Mastrangelo, Milano, Franco Angeli Edizioni, 2014.

274 Article 5, Law N. 40, 19 February 2004.

275 The need to make recourse to procreative tourism is found, although in a different manner, also when a male couple decides to pursue a project of shared parenthood. In this case, the aspiring parents are obliged to turn to a surrogate mother in a country where this practice is legal.

2. *Heterologous ART and 'status filiationis': three critical scenarios*

The involvement of a (male or female) donor in the procreative process necessarily means that there are a number of potential and/or effective parental figures in the life of the minor, however, if we compare this with the effects of surrogacy, the fragmentation of the notions of paternity and, above all, of maternity that derives from the use of heterologous techniques is decidedly less marked. While in the case of surrogacy, it is possible to identify up to six parental figures, heterologous ART has the more limited effect of separating the genetic contribution from the proactive one and, after the birth, from the social role, for only one of the aspiring parents, thus creating a maximum of three potentially parental figures. In the case of egg donation, the status of mother is – hypothetically, at least – traceable to one of the two women, that is the birth/social mother and the donor/genetic mother, without the more complex tripartition of gestation-oocytes-intention. In the most common hypothesis of sperm donation, there are two paternal figures: the donor, given his genetic contribution and the social father, given his procreative intention and the parental role effectively played only after the birth of the child.

To define the status of the child born from heterologous ART is therefore a decidedly more linear operation and the reason for this greater simplicity can be found in the generally more permissive regimes, which lead to a reduced recourse to procreative tourism. While the practice of surrogacy continues to meet widespread normative resistance and is completely prohibited in most legal systems, or, in any case, subject to strict limitations that effectively reduce the chances of being able to fulfil the desire for parenthood within the national borders, in the same countries, heterologous ART is – with some exceptions – generally lawful and accessible regardless of the nature of the relationship between the aspiring parents (married or cohabiting), their sexual orientation and even, the presence of a partner or a spouse.

Therefore, while making use of a surrogate mother generally means moving temporarily to a country where this practice is allowed, the need to leave the country in order to generate a child by heterologous ART occurs only in relatively exceptional circumstances, at least in Europe. These different dynamics mean that the recognition of the bonds between the intentional/social parents and the child conceived by ART encounters greater obstacles when the child is born through surrogacy. As soon as the commissioning parents, accompanied by the child, return to their country of origin, the fact that the child was born thanks to a surrogate mother tends to clash with the national prohibition on this practice. In any case, the absence of regulations governing this method of filiation and the existence of laws established to respond to the needs of family phenomena from past times is highlighted. It is precisely due to this tension that the demand for recognition of family bonds created in conformity with the foreign law – which allows surrogacy and assigns parental

responsibility to the contracting parties – is not easily accepted, in the meantime leaving the children to be raised by the contracting parties in a sort of legal limbo. [276]

In the case of heterologous ART, on the other hand, since this practice is more acceptable on a legal (and social) plane, the problem of recognition of the family status acquired elsewhere occurs decidedly less frequently. More generally, the question of the *status filiationis* tends to be the source of fewer concerns since these techniques, apart from being widely permitted, are also regulated by norms that consider their peculiarities. Generally speaking, recourse to heterologous ART does not give rise to any legal parental relationship between the child and the donor of gametes, who cannot claim any right or be the holder of duties with regard to the child. Parenthood is assigned according to the intentions of the parties and, therefore, to those who expressed the intention to become parents through recourse to ART.

Even so, it is still possible to identify three scenarios in which the *status filiationis* and, more generally, the family situation of the child conceived by heterologous ART is not immediately defined. In particular, it is not clear whether and to what extent the social factor, that is the bond between the child and the adult who, although genetically extraneous, took part in the procreative project planned with the partner and who in fact plays the role of 'primary caretaker', must be taken into consideration; nor if and to what extent the genetic factor *per se* is significant; whether the intentions of the parties prior to the procedure must be a criterion for the resolution of the specific case and, finally, should these elements lead to conflicting results (regarding parenting and the family situation of the minor) which is to be considered decisive, or in any case worthy of greater attention. The following scenarios also correspond to the three categories into which the jurisprudence examined in this chapter has been subdivided.

The first – to which chapter three is dedicated – includes those cases in which a couple composed of two women went abroad in order to procreate a child through heterologous ART. For the purposes of this report, this scenario can be considered typically Italian since our legislation is one of the few that maintains particularly restrictive subjective requisites.[277] As mentioned above, in fact, in addition to having abandoned the prohibition on heterologous ART only recently (2014) and therefore with some delay compared with other European legislations, even today, our legislator limits access to the techniques that presuppose the use of genetic material from third parties to

276 The controversial question of surrogate maternity and, in particular, the repercussions that this practice involves on the plane of filiation, are the subject of analysis in the third part of this report (chapters 7-10).

277 It would seem that a reform is foreseen in France, allowing access to heterologous ART for all women, including lesbians and single women. The decision was announced by the French Secretary of State responsible for equal opportunities. See, F.Q., *France, verso la procreazione assistita per lesbiche e single:* "*è una questione di giustizia sociale*", Il Fatto Quotidiano, 12 September 2017. Available online: http://www.ilfattoquotidiano.it/2017/09/12/France-verso-la-procreazione-assistita-anche-per-lesbiche-e-single-via-libera-nel-2018/3852695/.

couples of different genders, married or cohabiting in Italy.[278] Heterologous procreation therefore remains a privilege reserved for those unions that embody or imitate the ideal of the traditional family.

It is for this reason that lesbian couples who wish to have a child genetically linked to at least one of them (and *de jure* single persons) are forced to undertake heterologous procreative treatment abroad, with repercussions at times problematic in the legal definition of their family relationships with the child. To be more precise, as in the hypothesis of surrogacy abroad, the bond of filiation that is most at risk of lack of formalisation and, therefore of legal nonexistence is, obviously, that between the child and the social parent (mother). In the case of a child born to two women, through heterologous ART carried out abroad, the recognition of the intent and the parental role effectively played by the social mother and, more generally, the relationship between the minor and both the mothers, can assume – according to the circumstances of the specific case – up to three different legal configurations. These are the adoption of the partner's child; the transcription of the foreign birth certificate carrying the names of two mothers; and the transcription of the foreign ruling of adoption of the partner's child.

Before briefly illustrating the other two jurisprudential categories, it seems appropriate to clarify that some of the events belonging to this first type cannot be considered genuine cases of procreative tourism because, although one or both of the aspiring parents are Italian citizens and the application for recognition of the filiation relationship was presented to the Italian authorities, the persons involved are domiciled in the country where the procedure was carried out and the child was born. Therefore, there was no temporary transfer to a foreign country for procreative purposes.

The second scenario – analysed in Chapter 4 – occurs when there is a conflict between the (male or female) donor, on the one hand, and the commissioning couple or the legal mother of the child born from heterologous ART on the other. Although the details vary from case to case, the plot remains the same: the desire expressed by the donor to formalise their bond with the child – through assignment of parenthood, of shared wardship or contact rights, which clashes with the desire of the mother or the contracting/social couple to exclude 'outsiders' – whose contribution, according to their understanding of the facts, was limited to supplying genetic material – from their family life. The controversy arises therefore from the misunderstandings regarding the ART agreement reached – at times informally – between the parties, or when the donor changes their mind about their involvement in the life of their child.

Finally, in the third and last category are the cases known as "erroneous heterology". In Chapter five we will examine three situations – taken from different jurisdictions – in which the

278 Article 5, law N. 40, dated 19 February 2004.

aspiring parents intended to carry out a homologous procedure, but due to a medical error, in effect received heterologous ART. In fact, the aspiring mother gave birth to one or more children genetically extraneous to herself and to her husband, since they were conceived from the gametes of another couple who had been treated at the same clinic with the intention of carrying out homologous fertilisation. The erroneous exchange of genetic material therefore highlights – once again – the tension between genetic parenthood and social parenthood (not to mention biological) which, in the absence of laws that foresee medical error in the ART procedures, becomes a legal question.

Chapter 4

Assisted Reproduction Techniques Carried Out Abroad

1. Introduction: the Italian situation and the question of homosexual parents

Considering the particularly restrictive nature of Law N. 40/2004 compared to other European legislations on matters of ART, it is not surprising that, according to the data gathered in 46 clinics operating in Belgium, the Czech Republic, Denmark, Switzerland, Slovenia and Spain, 31.8% of all the ART procedures carried out for foreign patients involved Italian citizens (followed by Germans, 14.4%; Dutch, 12.1% and French 8.7%).[279] The results of this survey are tangible proof of the unsurmountable obstacles that, despite the gradual dismantling of the law by the jurisprudence, the prohibitionist structure of Law N. 40 continues to pose, in particular for a precise category of the population – homosexual couples.

279 F. Shenfield et al., *Cross Border Reproductive Care in Six European Countries*, in "Human Reproduction", 25, 2010, N. 6, pp. 1361-1368.

In fact, while it is true that – following the introduction of Law N. 76 dated 20 May 2016[280] – couples composed of persons of the same sex are no longer forced to go abroad to 'gay-friendly' legislations in order to formalise their unions through marriage or a civil partnership, it is equally true that – by law – these couples are excluded from any possibility of satisfying their desire for parenthood. Since marriage is reserved for heterosexual couples and adoption (at least adoptive legitimation) is a conjugal privilege, couples composed of persons of the same sex cannot adopt in Italy. Furthermore, Law N. 40, as previously mentioned, allows recourse to ART only for heterosexual couples, who are married or cohabiting.[281] Consequently, in order to have genetic offspring, the need for procreative tourism remains. Nonetheless, this necessity varies, according to whether it is a male or female couple who are pursuing a shared parental project.[282]

In the first case, the aspiring parents are obliged to make recourse to surrogacy in a country where this practice is legal. The child will therefore be born abroad and the birth certificate – inconformity with the *lex loci* – will carry the names of the contracting parties as the legal parents of the child. On the other hand, if it is a lesbian couple who wish to become parents, the method is relatively simple: in fact, the loophole is to be found in Article 5 of Law N. 40/2004, which excludes single women and homosexual couples from the subjects permitted to use ART. Therefore, it will be sufficient to go abroad – where the legislation does not foresee the same subjective requisites – and carry out heterologous ART, using the sperm of a donor and the oocytes of the woman who will give birth or, in order to guarantee the biological bond between the child and both the women, those of the female partner. Unlike the case of male couples, however, the birth can take place in Italy.

Setting aside surrogacy (since the third part of this report will deal with the question), we must note that, at present, recourse to heterologous ART in a foreign country can give rise to a situation in which, in effect, both the women play the parental role to the child who descends genetically from only one of them. Nevertheless, only the relationship between the birth mother (who in some cases is also the genetic mother) of the child enjoys legal recognition. The fundamental need that the law must face is therefore the protection for the right of the child to a definite family status and to the stability of the bonds with those who care for him/her, a responsibility that, in the absence of legislation on the matter, lies with the judges.

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280 The text of the law is available online: http://www.gazzettaufficiale.it/eli/id/2016/05/21/16G00082/sg

281 On the incompatibility of this exclusion by the Italian legislator, with the veto of discrimination on the basis of sexual orientation, as set out by the jurisprudence of the Strasbourg and Luxembourg Courts, see J. Long, *Omogenitorialità e principio di discriminazione in base all'orientamento sessuale*, in "Bioetica", 2011, N. 2, pp. 220 *et seq.*

282 L. Lenti, *Unione civile, convivenza omosessuale e filiazione*, in "La Nuova Giurisprudenza Civile Commentata", 2016, N. 1 2, p. 1707.

Based on the existing case law, it is possible to identify three main channels – corresponding to three jurisprudential subcategories through which the aspiring mothers have attempted to ensure recognition, in our legislation, of the shared relational and family project that, due to the limits and prohibitions of national law, was realised abroad. First, the adoption of the partner's child (stepchild adoption), secondly, the transcription of the birth certificate drawn up in conformity with the law of the country in which the child was born and, finally, registration of the adoption procedure of the partner's child issued by the foreign authorities.[283]

Before delving into the details of the jurisprudence, it is however possible to say that, independently of the path chosen, the judge in question has generally based the evaluation of the application for recognition on the verification of the suitability of the same-sex parental family in order to realise the best interests of the child. The rulings that follow therefore lie within the widest jurisprudential tendencies (consolidated in Italy and elsewhere) which considers a mere prejudice the statement that it is harmful for the balanced development of the minor to grow up in a family composed of persons of the same sex. This leads to the necessity – highlighted by the judges – to assess the capacity of the appellants to take on and fulfil the parental functions, considering the individual circumstances as for heterosexual couples.[284]

2. *The adoption of the child of a same-sex partner*

2.1 *The normative context*

Although the Italian legislator is well aware that homosexual couples can, in effect, become parents through recourse to ART procedures carried out abroad, he has preferred to ignore the fact, presumably convinced that silence would be sufficient to exclude the emergence of this event.[285] As is known, in fact, after intense parliamentary battles over the keenly awaited legislation on civil partnerships, the option of allowing stepchild adoption was rejected. The intention of the majority who approved the elimination of the original Article 5 (aimed at extending the adoption of the partner's child, as per Article 44 letter b) from the definitive text of the law was to keep the institutions of marriage and civil partnership as distinct as possible in the matter of filiation. They also intended to prevent and punish behaviour by aspiring parents considered degenerate – in particular the recourse to surrogacy abroad.[286]

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283 *Ibidem.*

284 These principles were also stated on matters of wardship following separation/divorce and on the question of including the children in the family formed by a homosexual parent with a partner of the same sex, context not analysed here since they are not relevant for the present study. On this matter see, A. Rotelli, *I diritti delle famiglie omogenitoriali nel panorama giuridico nazionale e internazionale*, in *Le famiglie omogenitoriali in Italy*, ed. P. Bastianoni and v. Baiamonte, Reggio Emilia, Junior Edizioni, 2015, p. 35.

285 Lenti, *Unione civile, convivenza omosessuale e filiazione*, in La Nuova Giurisprudenza Civile Commentata , 2016, N. 12, p. 1707.

286 *Ibidem*, p. 1708; G. Ferrando, *Il problema dell'adozione del figlio del partner. Commento a prima lettura della ruling della Italian Court of Cassation N. 1 2962 del 2016*, in La Nuova Giurisprudenza Civile Commentata , 2016, N.

Although not contemplated by existing law, the situation in which the social mother wishes to formalise the affective bond created with the child conceived abroad as part of a parental project shared with the genetic mother, by recourse to stepchild adoption, occurs in any case. To meet the needs of the minor for emotional and relational continuity with respect to the two mothers who have been caring for him/her stably in the long term, the judges called upon to resolve the practical cases have, in the meantime, taken responsibility for re-elaborating the scope of application of the laws concerning adoption in specific cases, since there are no prerequisites for a declaration of adoptability, which is a prelude to full adoption, which would be in the best interests of the child involved.[287]

More specifically, the law that has undergone a significant jurisprudential evolution, culminating in the configuration of the adoption of the child of a same-sex partner, is Article 44, point d) of Law N. 184/1983, which foresees the adoption in specific cases "when the impossibility of pre-adoptive wardship has been ascertained."

Before analysing the jurisprudence, it is worth adding a few considerations for the purpose of showing the comprehensive way in which the recognition of stepchild adoption by homosexual couples has been introduced into the present legislative context and, more specifically, how it relates to the rules set out in Law N. 76 of 20 May 2016, which, although it does not directly regulate the matter, offers interesting cues.

On this question, paragraph 20 of Article 1 of the law appears decisive since, after having ratified the terminological equivalence of 'civil partnership' and 'marriage' with the aim of preventing the risk that – in matters not expressly regulated by the law – couples in a civil union be subject to unequal treatment compared with married couples,[288] provides for two exceptions to this rule: "the rules of the Civil Code not explicitly referred to in this law, as well as the provisions of the Law N. 184 of 4 May 1983." In view of the parliamentary debates that preceded the introduction of the law, the purpose of the latter was to preclude the operativity of the rules on adoption – which presuppose the existence of a marital relationship – in favour of couples in a civil union.[289]

However, these exceptions are followed by a third and last paragraph which, expressly referring to current legislation on matters of adoption ("without prejudice to the regulations in force

9, p. 1218. By reason of this punitive logic, the right of the minor to a secure family status and the continuity of the emotional bonds has been sacrificed in order to respond to the supposed need to pursue general, preventive aims.

287 G. Matucci, *Adozione omogenitoriale e diritti costituzionali del minore*, Forum di Quaderni Costituzionali, 14 July 2016, p. 4. Available online : http://www.forumcostituzionale.it/wordpress/wp-content/uploads/2016/06/matucci.pdf

288 Article 1,paragraph 20: "[…] the rules that refer to marriage and the rules containing the words 'spouse', 'spouses' or equivalent terms […] also apply to each of the parties in a civil union between persons of the same sex."

289 M. Farina, *Adozione in casi particolari, omogenitorialità e superiore interesse del minore*, in "La Nuova Giurisprudenza Civile Commentata", 2016, N. 7-8, p. 980.

on matters of adoption") refers instead to (and preserves) the provisions whose application is not contingent on the existence of a conjugal relationship, including Article 44, point d) that – as previously mentioned – allows the adoption in special cases when pre-adoptive wardship is impossible.[290]

Therefore, while the parliamentary battle and its outcome can be interpreted as indicative of the legislative intention to exclude that a civil partnership can give rise to a family, which, going beyond the relationship with a same-sex partner, is capable of parentage[291], at the same time, the prevision for postponement (Article 1, paragraph 20) which allows recourse to adoption in specific cases is – at least according to part of the doctrine – a symptom of the parliament's desire to encourage the continuity and the formalisation of relationships between the minor and the adults who care for him/her, whatever their sexual orientation. [292]

In practical terms, therefore, by allowing the adoption in particular cases under Article 44, the Law N. 76 has not prevented the formation – or rather the progressive consolidation – of a right that offers legal protection for the interests of the child in the recognition of those affective relationships which, although they arose and matured in same-sex parental contexts, contribute to his/her serene and balanced development. In conclusion, therefore, although the opportunity to foresee the adoption of the child of the same-sex partner by legislative means has been lost, with the use of the point d) in cases of same-sex couples, we have reached the same result that would have been produced with the approval of the original version of the law. [293] The most significant stages that have led to the admissibility of stepchild adoption for same-sex couples, as a means for realising the best interests of the child for a stable and lasting relationship with the (female) partner of the biological mother, will be analysed in the next paragraph.

2.2 *The jurisprudential evolution of Article 44, point d) Italian Law N. 184/1983*

As from 2014, lesbian couples who realise a shared parental project abroad by using sperm donation, can obtain recognition of the *de facto* family relationship between the social mother and the minor applying for adoption in particular cases, in accordance with Article 44, point d) of Italian Law N. 184/1983. This type of adoption lends itself to the needs of the situation since, unlike full adoption, it does not create a relationship of filiation *ex novo*, but aims to consolidate and formalise

290 *Ibidem.*

291 P. Zatti, *Introduzione al Convegno*, in "La Nuova Giurisprudenza Civile Commentata", 2016, N. 12, p. 1665.

292 G. Palmeri, *Le ragioni della trascrivibilità del certificato di nascita redatto all'estero a favore di una coppia same-sex*, in "La Nuova Giurisprudenza Civile Commentata", 2017, N. 3, p. 366; G. Curcio and L. Trovato, *L'utilizzo dell'art. 44, comma 1, lett. d della Law N. 1 84/1983 nei casi di omogenitorialità: le ragioni del sì*, in "Minorigiustizia", 2017, N. 1, pp. 153-159. In disaccordance, A. Aragno, *L'utilizzo dell'art. 44 lett. d nei casi di omogenitorialità: le ragioni del no*, in "Minorigiustizia", 2017, N. 1, pp. 146-152.

293 M. Gattuso, *La vittoria dei bambini arcobaleno*, Articolo 29, 22 June 2016. Available online: http://www.articolo29.it/2016/la-vittoria-dei-bambini-arcobaleno/

existing affective bonds.[294] Moreover, in particular cases, the adoption can be authorised only in the circumstances indicated in Article 44, point d)[295] which indicates "the established impossibility of pre-adoptive custody." It is precisely thanks to an evolutionary interpretation of this term that the adoption of the child of a same-sex partner has become an institution of mere jurisprudential creation, rooted in the social transformation that accepts a plurality of family realities.[296]

According to jurisprudential approaches prevalent in the years immediately following the introduction of Law N. 184/1983, point *d*) was applicable only in situations of *de facto* impossibility, with the consequence of allowing the adoption only for a child who was, in any case, in a state of abandonment. In these situations, the adoption was intended to increase the number of possible adopters, because, unlike full or adoptive legitimation, it was also open to unmarried couples and single people.[297]

Far from being seen as a container for a series of quite exceptional hypotheses, according to the most recent jurisprudence, this restrictive interpretation should be replaced – or better integrated – by a more extensive reading, which includes the hypothesis of *de jure* impossibility.[298] According to this latter formulation, point d) would be applied also when the child is not technically in a state of abandonment, but where there is an interest in recognising the parental relationships.[299]

Over time, the institution has therefore evolved considerably, becoming a "safety valve" under which circumstances very different from those initially foreseen by the legislator have taken cover.[300] To use the words of the Constitutional Court, point d) of Article 44 is now "a sort of residual clause for special cases that do not fall within the area of 'legitimising' adoption, allowing

294 For more information on the premises and the legal consequences of the two types of adoption, see Matucci, *Adozione omogenitoriale e diritti costituzionali del minore*, cit.

295 The other hypotheses foreseen by the legislation are as follows: in the case of orphans without a mother or a father, already cared for by relatives or acquaintances (point *a*); in the case of children who have created a family relationship with the partner of their parent (point *b*); with regard to orphans or disabled children for whom it has not been possible to find a couple suitable and at the same time willing to take them under a pre-adoptive fostering agreement (point *c*).

296 V. Montaruli, *La 'stepchild adoption' approda alla nomofilachia*, in "Minorigiustizia", 2017, N. 1, p. 161.

297 M. Gattuso, *Tribunale per i minorenni di Roma: sì all'adozione del figlio del partner ed al doppio cognome, l'omogenitorialità é "sana e meritevole d'essere riconosciuta,"* in Articolo 29, 29 August 2014. Available online: http://www.articolo29.it/2014/tribunale-per-i-minorenni-Rome -riconosce-giuridicamente-mamme-ed-assegna-cognome-lomogenitorialita-sana-meritevole-dessere-riconosciuta/.

298 Italian Constitutional Court, ruling N. 383, 7 October 1999. In this ruling, the Constitutional Court clearly and persuasively illustrates the distinction between adoptive legitimation and adoption in special cases. Only the former requires the state of abandonment of the child; the latter aims to realise the child's right to a family when, lacking the conditions for adoptive legitimation, it is in any case necessary to proceed with the adoption in order to safeguard the interests of the child.

299 Lenti, *Unione civile, convivenza omosessuale e filiazione*, cit., p. 1711.

300 G. Ferrando, *L'adozione in casi particolari: orientamenti innovativi, problemi, prospettive*, in "La Nuova Giurisprudenza Civile Commentata", 2012, N. 2, p. 682.

the adoption of the minors also when the conditions set out in paragraph 1 of Article 7 do not subsist", that is when the judge was not able to proceed with the declaration of adoptability. [301]

The first scenario of *de jure* impossibility to which the jurisprudence has extended the application of point d) is that of a minor raised within an extended family, for example by an aunt and uncle. The child is not in a state of abandonment and, at the same time, cannot be adopted under point a) of the same law because the parents are still alive.[302] Being the fruit of the recent jurisprudential evolution, this norm has also been used to deal with situations considered permanent semi-abandonment (in these cases, point d) is called 'lenient adoption')[303] to formalise the relationships formed between reconstituted families[304] or even to give a legal guise to bonds formed abroad in accordance with institutions unknown in our legal tradition, for example *kafala*.[305] In adopting a reading not strictly limited by the intentions of the 1983 legislator, the jurisprudence – at all levels – has therefore taken advantage of the vague and particularly flexible outlines of this institute to deal with the many circumstances in which the legal recognition of the existing bond with the adopters corresponded to the minor's right to have a certain and stable family status.[306]

An applicative scenario that has appeared only recently – which we will deal with in the present paragraph – concerns cohabiting homosexual couples. The first case in which adoption by the non-biological mother was allowed, thus recognising her social parenthood of a little girl, conceived abroad through heterologous assisted fertilisation as part of the couple's procreative project, was ruling N. 299, 30 July 2014 from the Juvenile Court in Roma, and was fundamental in driving the evolution of the rights of same-sex families in Italy.[307] With this ruling, the judges clarified that the adoption in particular cases, in harmony with the intentions of the legislator, aim to "encourage the consolidation of the relationships between the minor and the relatives, or the persons who take care of the minor, foreseeing the possibility of an adoption with more limited effects than adoptive legitimation, but with less strict conditions", therefore agreeing that the impossibility demanded by letter d) of Article 44 must be interpreted also in a legal sense.

This ruling starts from the standpoint of the child: it is the Juvenile Court, in fact, that adheres to the open interpretation of letter d) since it makes it possible to fully safeguard the effective interests of the child in recognising coparenting, in the light of the relationship of filiation

301 Italian Constitutional Court, ruling N. 3 83, 7 October 1999.

302 *Ibidem.*

303 Appeals Court Genova, 1 December 1995.

304 Juvenile Court Milano, 28 March 2007; Appeals Court Firenze, 4 October 2012.

305 Juvenile Court Trento, 5 March 2002 and Juvenile Court Trento, 10 September 2002.

306 Ferrando, *Il problema dell'adozione del figlio del partner. Commento a prima lettura della ruling della Italian Court of Cassation N. 1 2962 del 2016*, cit.

307 Available online: http://www.articolo29.it/adozione-in-casi-particolari-second-parent-adoptionmerito/. This ruling was confirmed by the Appeals Court Rome, ruling N. 7127, 23 December 2015 and subsequently by the Court of Cassation, ruling N. 12962, 26 June 2016.

effectively formed with the social mother. Coherently, the judge omits all reference to the horizontal relationship between the two women – who were married in Spain and registered in the register of civil unions of the City of Roma – concentrating solely on the vertical relationship between the child and the aspiring adopter, in the belief that only a comprehensive evaluation could lead to the recognition of the affective bonds and the benefits for the minor.[308]

In favour of an extensive reading of point d), the Court first of all refers to the text of the law, or to a non-detailed impossibility, which seems to allow its application also in situations where it is legally impossible to issue a declaration of adoptability, since the minor is already being cared for by the biological parent.[309] The *ratio* of the institution of adoption in special cases moves in the same direction, (coinciding with that generally pursued by laws on adoption) and is set out in Article 57, paragraph 2 of Law N. 184/1983 which clearly indicates the obligation for the interpreter to verify whether the adoption in accordance with Article 44 is in the best interests of the child.[310]

In addition to the literal wording, observes the judge, the jurisprudence has already – on a number of occasions – attributed to point d) a meaning that goes beyond the mere *de facto* impossibility allowing access to adoption in particular cases for cohabiting couples, in circumstances in which the adoption realised the best interests of the child involved by definitively including him/her in the existing family.[311] These sentences – in the opinion of the Juvenile Court – are proof of the reduction of the criterion of *imitation naturae*, according to which the adoption should reflect the model of the traditional family based on marriage, and the consequent primary need to protect the best interests of the child, above all with regard to the existing affective bonds between the persons of the adoptive relationship to be formed.[312] These conclusions cannot – continues the judge of the Juvenile Court – be extended to the same-sex cohabitant.[313] In view of similar case law, an interpretation that aims to exclude the same sex cohabitant *a priori* would in fact be unreasonable and unjustified.[314] To preclude the adoption of the partner's child for

308 Nevertheless, some believe that the ruling in question starts from an adult-centric perspective, focussed on an ostensible right of the same-sex couple to adoptive parenthood. In this sense, R. Carrano and M. Ponzani, *L'adozione del minore da parte del convivente omosessuale tra interesse del minore e riconoscimento giuridico di famiglie omogenitoriali*, in "Diritto di famiglia e delle persone", 2014, p. 1555; M. G. Ruo, *A proposito di omogenitorialità adottiva e interesse del minore*, in "Famiglia e Diritto", 2015, p. 587.

309 Juvenile Court Rome, ruling N. 299, 30 July 2014, p. 4.

310 *Ibidem*, p. 3. Some authors, on the contrary, believe that the interpretation given by the judge of the Juvenile Court contradicts both the spirit and the *ratio* of the law. See, *inter alia*, G. Miotto, *Adozione omoparentale e preminente interesse del minore*, in "Diritto di famiglia e delle persone", 2015, pp. 1338 *et seq.*

311 Juvenile Court Rome, ruling N. 2 99, 30 July 2014, p. 4. In particular, the judge refers to the ruling N. 626/2007 of the Juvenile Court Milano and to ruling N. 1 274/2012 of the Appeals Court of Firenze.

312 Juvenile Court Rome, ruling N. 2 99, 30 July 2014, p. 6.

313 *Ibidem.*

314 *Ibidem*, pp. 6-8.

homosexual couples, without first verifying the parental suitability of the member of the family in question and therefore merely on the basis of sexual orientation, would – states the Court – lead to a disparity of treatment that, in addition to being prohibited by the Constitution, contrasts with the consolidated principle developed by the jurisprudence of the ECHR, which states that differentiating between *de facto* heterosexual and homosexual couples – also with regard to the adoption of the partner's child – infringes Article 14, read in conjunction with Article 8 of the Convention.[315]

To return to the specific case, the Juvenile Court stated that the presupposition of Article 44 point d) is to be considered realised, since the child is not in a state of abandonment and could not be placed in pre-adoptive custody. The child – who is five years old – had been born and raised by the two women, and she considers them her primary affective references, having created with both an unbreakable bond that, independently from the legal non-classification, in effect – observed the judge – is no different from a genuine parental bond.[316] In view of the results of the psychological and social assessments, to deprive the minor of the rights and the benefits deriving from these bonds – stated the judge – would have been clearly in contrast with the realisation of her best interest.[317] In these circumstances, stepchild adoption constitutes the most suitable instrument, since – without the need to construct a legal situation *ex novo* – it acts on the *status quo* formalising a situation that has existed for some time and acting exclusively in the best interests of the child in question.[318]

This ruling therefore promotes and understanding of the best interests that takes into consideration the effective situation in which the minor in question is involved, stating that – on the contrary – it is not possible to presume the harmfulness for the minor of being raised by same-sex parents, nor can this family context be considered *a priori* an impediment for the fulfilment of the best interests of the child. To endorse similar ideological positions and, therefore, not recognise the social parenthood of the co-mother, would in fact mean stigmatizing that which the Court described as "a different form of parenthood but equally healthy and worthy of being recognised as such."[319]

This intervention was particularly appreciated by the doctrine since, by releasing adoptions in particular cases from the condition of a state of abandonment, it leaves behind the hermeneutic approaches – which, for reasons of mere legal formalism, risk compromising the interests of the

315 The Roman judge, in particular, refers to the ruling of the Grand Chamber of the ECHR in *and others v. Austria*, cit. Miotto is critical also with regard to this point of the ruling and considers baseless the alleged tension between a more restrictive interpretation of point d) which excludes homosexual couples and Articles 8 and 14 ECHR. Miotto, *Adozione omoparentale e preminente interesse del minore*, cit., pp. 1356 *et seq.*

316 Juvenile Court Rome, ruling N. 299, 30 July 2014, p. 9.

317 *Ibidem.*

318 *Ibidem.*

319 *Ibidem*, p. 10.

child.[320] Furthermore, it is a ruling that – as hoped by Long – "has set a precedent". [321] Except for some first instance decisions[322] – later contested and set aside – which exhumed the original and restrictive interpretation of point d) referring it exclusively to the mere *de facto* impossibility, (until mid-2016) the jurisprudence almost unanimously endorsed a wide-ranging and evolutionary reading of the point, in the best interests of the children involved, using the institution of adoption in special cases to legally recognise the *de facto* co-parenting within same-sex couples.

The jurisprudential thread inaugurated by the ruling of the Juvenile Court of Roma, 30 July 2014 has recently received authoritative confirmation from the Italian Court of Cassation (ruling N. 12962, 24 May 2016) which – in line with the decision of the Juvenile Court (in the ruling analysed) and with that of the Appeals Court of Roma (23 December 2015) – ordered the adoption in special cases in favour of the female partner of the biological mother of the child. [323] Referring to the historical ruling N. 383/1999 of the Constitutional Court, the Supreme Court clarified that, in Italian law, there are two types of adoption: adoptive legitimation, which demands the minor be in a state of abandonment, and non-adoptive legitimation, which is based on different conditions, according to the circumstances and the relationship between the minor and the aspiring adopter.[324]

According to this distinction, continued the Court, the notion of 'impossibility to proceed with pre-adoptive custody' under point d) cannot be considered a legal impossibility (and not merely *de facto*) and therefore includes all those situations – like the case in question – in which, although there is no state of abandonment, it is effectively in the interests of the child to preserve and formalise the affective relationships that he/she has formed with those who have cared for him/her. This interpretation, the Court stated – is coherent with the present framework of juvenile law (including the recent reforms of filiation) which insists on the affective and educational continuity of the bond between the adopter and the adopted as an essential factor for the fulfilment of the 'best interests of the child.'[325]

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320 Farina, *Adozione in casi particolari, omogenitorialità e superiore interesse del minore*, cit., p. 978.

321 J. Long, *Adozione in casi particolari e second-parent adoption*, Articolo 29, 15 December 2014. Available online: http://www.articolo29.it/2014/adozione-in-casi-particolari-second-parent-adoption/. This view is shared by M. Winkler, *Genitori non si nasce: una sentenza del Tribunale dei minorenni di Rome in materia di second-parent adoption all'interno di una realtà omogenitoriale*, in "Giustizia Civile", 13 November 2014.

322 Juvenile Court Piemonte-Valle d'Aosta, ruling dated 11 September 2015: point *d*) presumes material impossibility of pre-adoptive custody; later overturned by the Appeals Court Torino, ruling dated 27 May 2016; Juvenile Court Milano, 17 October 2016, point *d*) presumes a serious shortcoming in the parental figures and cannot, therefore, be applied in the case of a minor already cared for by the biological parent), later overturned by the Appeals Court Milano, ruling dated 9 February 2017. For a critical note, see: A. Nocco, *L'adozione del figlio di convivente dello stesso sesso: due sentenze contro una lettura "eversiva" dell'art. 44, lett. d), l. N. 1 84/1983*, in "La Nuova Giurisprudenza Civile Commentata", 2016, N. 2, pp. 205-215.

323 Available online: http://www.articolo29.it/adozione-in-casi-particolarilegittimita/

324 Italian Court of Cassation, ruling N. 1 2962 del 26 May 2016, p. 34.

325 *Ibidem*, pp. 38-9.

The other pillar on which the Court of Cassation based its reasoning is the principle of non-discrimination, as set out in the jurisprudence of the European Court of Human Rights. A particular reference was made to the ruling *X and others v. Austria*, in which the European judges stated that, although the Member States enjoy margin of discretion in allowing unmarried couples to undertake co-parental adoption, if this practice is admitted, homosexual couples cannot be treated differently from heterosexual couples, on penalty of infringing Article 14 read in conjunction with Article 8 of the Convention. Consequently, in harmony with these principles and considering the accessibility of adoption under Article 44, point d) for single persons and unmarried couples, the assessment of the conditions foreseen by the law cannot attach importance – even indirectly – to the sexual orientation of the claimant and the nature of the homosexual relationship existing between the two women. [326]

The non-discrimination principle was cited also to reject the other reason for appeal (which in the text of the decision is analysed first) regarding the failure to appoint a guardian *ad litem* for the minor. The Court had been called upon to decide, in particular, whether the existence of a sentimental relationship with the social mother placed the biological mother – legal representative of the minor and therefore required to consent to the adoption – in a situation of potential conflict of interest with the minor, to the extent where it was necessary to appoint a guardian *ad litem.* On this point, the judges took a clear position: either it is asserted (although in the absence of any scientific or legal basis) that it is precisely the homosexual nature of the parental relationship that is potentially incompatible with the interests of the child; or, in keeping with the principles set out above, it must be excluded that the parents' wish to consolidate their project for a relationship and parenthood be assessed negatively, since it is in the nature of this type of adoption to strengthen, through the formalisation of the family situation planned and created together, also the relationship between the parents. [327]

Following the Court of Cassation, also the Appeals Court of Torino and the Appeals Court of Milano ruled in a similar manner, thus overturning the decisions of the respective first instance courts. In the Milano case, the Juvenile Court – acting after the ruling of the Court of Cassation N. 12962, 24 May 2016 – had presented a new reading of the legal framework that identified a "serious deficiency of the parental figures" as the reason for adoption in special cases and, in order to avoid any danger of discrimination based on the sexual orientation, therefore precluded the adoption of the biological child of the partner for both homosexual and heterosexual couples. [328] According to

326 *Ibidem*, p. 43.

327 *Ibidem*, pp. 24-5. On this point see, Ferrando, *Il problema dell'adozione del figlio del partner. Commento a prima lettura della ruling della Italian Court of Cassation N. 1 2962 del 2016*, cit., p. 1219.

328 Ruling dated 17 October 2016. Available online: http://www.articolo29.it/adozione-in-casi-particolari-second-parent-adoptionmerito/. Regarding this ruling, see G. Ferrando, *A Milano l'adozione del figlio del partner non si può fare*, in "La Nuova Giurisprudenza Civile Commentata", 33, 2017, N. 2, pp. 171-193.

the judge of the court of first instance, this interpretation of Article 44 corresponded also to the intentions of the legislation with regard to civil unions: "the fact that during the discussion of the law the question of whether to extend adoption under Article 44, point b) was considered (and adoption in general) shows that it was not originally foreseen." [329]

The Appeals Court emphasised another aspect of the question, observing that, although the article that foresaw the amendment of Article 44 point b) was not actually included in the definitive text, the legislator had felt the need to expressly state in paragraph 20 that "the conditions provided for and allowed by current legislation on adoption was not affected." [330] The introduction of this safeguard clause should be seen – in the opinion of the Appeals Court – as the expression of the intention of the parliament to protect the jurisprudential evolution that has led to the extension of the notion of impossibility of pre-adoptive wardship (Article 44, point d), in fact, after the law on civil unions was emanated, further rulings accepted applications for adoption under Article 44, point d).

Amongst these, it is worth mentioning the very recent interventions of the Juvenile Court of Bologna which, not only clarified the function of the third subparagraph of the aforementioned paragraph 20, in the wake of the Milano precedent, [331] but went decidedly further, clearly stating that "the affective relationship between two persons of the same sex, who recognise each other as part of a shared life project, with the intent, the wish and common dreams for the future, the sharing of fragments of daily life, constitute to all intents and purposes a 'family', a place in which it is possible to raise a minor, without the mere factor of the homosexual relationship becoming a formal obstacle. [332]

Even before the rulings of the Bologna court, it is necessary to mention the ruling of the Juvenile Court of Venezia (31 May 2017) which, although admitting the application for adoption and referring to case law – in its evaluation of the reliability of the two mothers – specified that the mothers themselves were aware of the need to allow the child to "relate also to persons who were not homosexual" in order to guarantee adequate development."[333]

329 Juvenile Court Milano, ruling dated 17 October 2016, p. 21.

330 Available online: http://www.articolo29.it/adozione-in-casi-particolari-second-parent-adoptionmerito/. Regarding this ruling, see M. Gattuso, *Anche da Milano, dopo la Cassazione, Rome e Torino, semaforo verde per l'adozione coparentale*, *Articolo 29*, 8 May 2017. Available online: http://www.articolo29.it/2017/anche-da-milano-dopo-la-cassazione-Rome -e-torino-semaforo-verde-per-ladozione-coparentale/.

331 Juvenile Court Bologna, ruling 8 June 2017, p. 7. Available online: http://www.articolo29.it/2017/la-vita-non-si-ferma-lunione-civile-la-famiglia-i-diritti-dei-bambini/. The judge clarifies that the purpose of the third subparagraph of paragraph 20, Law 76/2016 is not to clarify for the interpreter that the lack of legislation regarding access to co-parental adoption must not be read as a veto or opposition to recent case law in favour of co-parental adoption in accordance with letter *d*)."

332 *Ibidem*, p. 8.

333 Juvenile Court Venezia, ruling dated 31 May 2017, p. 1. For a critical note on the ruling and the text, see M. Gattuso and A. Schillaci, *Il dialogo tra le corti minorili in materia di stepchild adoption*, Articolo 29, 11 September 2017. Available online: http://www.articolo29.it/2017/il-dialogo-fra-le-corti-minorili-in-materia-di-stepchild-adoption/.

Finally, we will briefly mention the ruling of the Juvenile Court of Palermo (30 July 2017) which – although it ruled in favour of stepchild adoption for same-sex couples – includes a perplexing conclusion.[334] In fact, despite the explicit adhesion to the indications of the Court of Cassation,[335] the Palermo judges rejected the appeal of the co-mother, stating that the consent given by the biological (and legally recognised) mother was vitiated since she was unaware of the loss of her role of parent with parental responsibility which, according to the reading of Article 44 in conjunction with Articles 48 and 50 of Law N. 184/1983 proposed by the same judge, would have followed the adoption in favour of the partner.[336] Therefore, despite the fact that the indications of the Court of Cassation were expressly cited, in effect they were deprived of any legal effect.[337]

Despite the particular nature of these last two decisions which, although the agree at least in principle with the majority view (and even accept the application for adoption in the Venetian case) are traces of a persistent resistance of a legal nature (Palermo) and a cultural nature (Venezia).[338] The jurisprudence analysed therefore shows the presence and the progressive consolidation of a trend that admits the possibility of adopting the biological child of the cohabitee or partner within a same-sex couple, whether *de facto* or in a civil union. In the circumstances examined above the acceptance of the application to proceed with the stepchild adoption lies essentially in the principle of the continuity of the affections: "the *ratio* of this institution is, in fact, that of consolidating, where the conditions foreseen by the law subsist, existing bonds and to avoid protracted *de facto* situations lacking in legal status."[339]

A legal framework has arisen founded on a constitutionally based reading that, in the absence of statutory provisions on the subject, ensures respect for the right of the child to have a

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334 *Ibidem.*

335 Juvenile Court Palermo, ruling dated 30 July 2017, § 2, p. 3.

336 *Ibidem*, § 5, p. 8 *et seq.* Article 48 foresees that "if the minor is adopted by two spouses, or by the spouse of one of the two parents, the parental responsibility for the adoptee and exercise of said responsibility shall be shared." According to the Palermo judge, therefore, in a case of mere cohabitation (as in the case in question) the stepchild adoption would necessarily annul the relationship of the minor and the legal parent. Therefore, the latter would be called upon to give their consent not only to the adoption in favour of the cohabitee, but also to the lapse of their parental responsibility. This exegesis in the laws on matters of adoption – considered by Gattuso and Schillaci anything but persuasive – gave rise to the intervention of the Juvenile Court of Bologna and created a lively debate between the Juvenile Courts. With a ruling dated 20 August 2017, the Bologna judge decided that the law on matters of adoption must be interpreted in the light of the reform of filiation of 2012, in particular of the principle of uniqueness of the status of child, and that, more specifically, it is not possible to desume from Articles 48 and 50 that the responsibility is to be exercised jointly only when the adopters are married. As stated by part of the doctrine, these rulings would therefore be lacking in legal force, having a merely symbolic worth. On this latter point, see M. Sesta*, L'unicità dello stato di filiazione e nuovi assetti delle relazioni famigliari*, in "Famiglia e Diritto", 2013, p. 236; G. Ferrando, *La nuova legge sulla filiazione. Profili sostanziali*, in "Corriere Giuridico", 2013, N. 4, p. 529.

337 Gattuso and Schillaci, *Il dialogo tra le corti minorili in materia di stepchild adoption*, cit.

338 *Ibidem.*

339 Italian Court of Cassation, ruling N. 12962, 26 May 2016, pp. 22-3.

family, regardless of prejudices and ideological bias about the sexual orientation of the adopter, when adoptive legitimation is not a viable path. [340]

In a historical and political period such as the present one, in which we see intense ethical and value-related conflicts, the use of point d) of Article 44 in the case of same-sex parents is therefore a valid instrument for dealing with the rapid evolution in the affective and family relationships with respect to which the judge, unlike the legislator, cannot remain indifferent if he is to protect the best interests of the child. In a certain sense, therefore, the jurisprudence analysed above anticipates what has been realised by politicians in other European and non-European countries, immediately guaranteeing children born and raised in homosexual contexts adequate safeguards of European inspiration. [341] Italy has pursued a decidedly more difficult and uncertain path, but with probably more significant symbolic implications: the rights of children have in fact been recognised not thanks to an unwilling legislator, but because these human rights do not fall within the margin of discretion of the parliamentary majority. [342]

3. *Transcription of the foreign birth certificate of the child born through heterologous ART*

As an alternative to stepchild adoption, a same-sex couple who, in order to avoid national legislation, has made recourse to a foreign clinic for the purpose of generating a child through heterologous ART can obtain the recognition of the relationship of filiation validly constituted elsewhere by applying for the registration of the foreign birth certificate. In these cases, therefore, what the parental couple wish to attain is not the (subsequent) formalisation of an existing and consolidated affective relationship (as in the cases of stepchild adoption), but rather the recognition, from birth, of the family bonds existing between the child born through heterologous ART carried out abroad and his/her two mothers.

The fundamental question to which the judge must provide an answer (which, as we will see in the third part of the report, is the same as the one posed in cases of international surrogacy) it is therefore, whether the recognition of the relationship of filiation legitimately formed in the foreign country where the child was born, but deriving from the use of procreative techniques prohibited by national law, inasmuch as they are contrary to public policy , which, in matters of international civil law and according to the constant jurisprudence of legitimacy, must be seen as international public policy .

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340 Farina, *Adozione in casi particolari, omogenitorialità e superiore interesse del minore*, cit., p. 976.

341 Gattuso, *Tribunale per i minorenni di Roma: sì all'adozione del figlio del partner ed al doppio cognome, l'omogenitorialità è "sana e meritevole di essere riconosciuta"*, cit.

342 *Ibidem.*

In keeping with the solutions foreseen by other European legislator systems, the rulings that follow propose a notion of public policy with increasingly loose boundaries and directed towards the principles and values of supranational origin, thus contributing to the gradual restriction of the area of operativity of this clause as a barrier against the registration of the family status constituted abroad. Considered in the light of the more extensive European jurisprudence in matters of transcription of the family certificates issued abroad, the limit of public policy has gradually given way to the need to guarantee the best interests of the child born thanks to heterologous ART carried out abroad. In fact, while it is true that in matters of recognition of marriage, it is no longer possible to include diversity of gender between the spouses amongst the principles of public policy , in both the countries that allow the transcription and those that still deny it – including Italy[343] – in the field of surrogacy abroad, as we will see in the third part of this volume, the progressive erosion of the role of public policy has been particularly slow and discontinuous.

In the Italian context, the first case in which the jurisprudence appeared favourable to the transcription of a foreign birth certificate indicating two mothers was the one that followed a decree issued by the Appeals Court of Torino on 29 October 2014. Although some months earlier (30 July 2014) the Juvenile Court of Roma had allowed – with an equally innovative ruling – a co-mother to adopt her female partner's child, the ruling of the Torino Appeals Court was of historical significance, since it ordered recognition of the double maternity from birth.[344] Up to that moment, in fact, the only form of recognition of family relationships that arouse in homosexual families following heterologous ATR carried out abroad was 'stepchild adoption'.

At the heart of the question was a boy born following heterologous ART to a homosexual couple composed of two women, resident in Spain, where they had married and later divorced by mutual consent. [345] Nonetheless, it was an atypical heterologous technique since both women had contributed to the birth of the child. The first (of Spanish nationality) became pregnant and gave birth; the second (of Italian nationality) supplied the oocytes that were fertilised with the sperm of a donor. At the birth of the child, the two women were registered as mothers in Spain. When the Public Records Office of Torino received a copy of the birth certificate from the Italian Consulate in Barcelona, it refused to transcribe the birth certificate with the indication of two mothers, stating that it was contrary to Italian public policy .

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343 J. Long and M. Naldini, *"Turismo" matrimoniale e procreativo: alcune riflessioni socio-giuridiche*, in "Genius", 2015, n. 2, p. 165.

344 M. Gattuso, *Minore nato da due donne in Spagna: l'atto di nascita può essere trascritto in Italia*, Articolo 29, 7 January 2015. Available online http://www.articolo29.it/2015/minore-nato-donne-in-spagna-latto-nascita-puo-essere-trascritto-in-Italy/.

345 As observed by di Napoli, therefore, this case is not an example of so-called procreative tourism, since the appellants, at the time of the heterologous procedure, were domiciled in Spain. See, E. di Napoli, *La Corte d'Appello di Torino di fronte alla fecondazione assistita eterologa all'estero*, in "Genius", 2015, N. 1, p. 259.

In support of this refusal, the Court of Torino had stated that the recognition of the family relationship formed abroad was prevented, in particular, by the fundamental principle of Italian legislation according to which the mother is only the person who gives birth and consequently it is impossible to attribute the same statues to the consort. Given the impossibility of giving binding legal effect to the foreign certificate and therefore the – nonexistence, for Italian law – of a relationship of filiation between the child and his genetic mother, in the opinion of the Court, the minor could not even be granted Italian citizenship.

The Appeals Court of Torino then ruled – overturning the ruling of the first instance court – for the first time in Italy that the foreign birth certificate carrying the indication of two mothers had full legal force in Italy, because it served to safeguard the best interests of the child in maintaining a stable relationship with both women.[346] In their reasoning, the Appeal Court judges overturned the argument of public policy : this cannot be an obstacle to the transcription, but imposes that "a *de facto* situation that has existed for years must be guaranteed legal effect, in the exclusive interest of the child, who has grown up with the two women and recognises them both as mothers."[347] What is important for the evaluation of the best interests of the child, said the Court, is in fact the vertical relationship that has formed between the so-called social mother and the child, which must be kept distinct from the horizontal relationship between the two women.[348]

Referring to the precedents of the ECHR – in particular, *Mennesson and Labassee v. France* and *X and others v. Austria* – the Appeals Court further emphasised that the lack of transcription of the Spanish birth certificate would cause serious harm for the minor, since it would limit his right to personal identity and would lead to the attribution of a lopsided legal status. In fact, on Italian territory the minor would not have any legally effective relationship with either his co-mother nor with her parents and, therefore, no one to exercise parental responsibility. [349] The disadvantages for the minor would be even more evident – in the opinion of the judges – since the two mothers had divorced in the meantime. The lack of recognition of the relationship between the child and the co-mother would, in effect, make it impossible to enact the regime of wardship established by the

346 The text of the decree is available online: http://www.articolo29.it/corte-dappello-torino-sezione-famiglia-decreto-29-October -2014/. In addition to the contributions already cited, on the Appeals Court decision, see G. N. La Diega, *La trascrizione del certificato di nascita del figlio dei coniugi "same sex". Filiazione omogenitoriale, ordine pubblico internazionale e interesse del minore nella recente giurisprudenza torinese*, in "Diritto civile contemporaneo", 2, 2015 (January-March), N. 1. Available online: http://dirittocivilecontemporaneo.com/2015/01/la-trascrizione-del-certificato-di-nascita-del-figlio-di-coniugi-same-sex-filiazione-omogenitoriale-ordine-pubblico-internazionale-e-interesse-del-minore-nella-recente-giurisprudenza-torine/; S. Celentano, *La trascrizione in Italia dell'atto di nascita del figlio di coppia omosessuale*, Questione Giustizia, 23 January2015. Available online: http://www.questionegiustizia.it/articolo/la-trascrizione-in-Italy-dell-atto-di-nascita-del-figlio-di-coppia-omosessuale_23-01-2015.php.

347 Appeals Court of Torino, 29 October 2015, p. 7.

348 *Ibidem.*

349 *Ibidem*, pp. 7-8.

foreign court, who had intervened when the civil union between the two legal mothers ended and, therefore make it difficult for the child to preserve an affective relationship with the non-biological mother. [350]

This case finally reached the Court of Cassation, which – rejecting the appeals presented by the *Procuratore Generale della Repubblica* and by the Italian Home Office against the decree of the Appeals Court – confirmed the solution proposed by the judges of the second instance, not finding obstacles to the transcription of the birth certificate.[351] With the ruling N. 19599 dated 21 June 2016, the judges of the Supreme Court issued a series of legal principles that, in the absence of legislation on the matter, contribute to clarifying the framework of same-sex parenthood in Italian law.[352]

This ruling constitutes, in particular, a significant stage in the progressive evolution of the notion of public policy and the gradual reduction of its effect on jurisprudence. In fact, the Court of Cassation advances a conception that, distancing itself from the traditional stance, of nationalist inspiration, shows its gradual abandonment of a function of a defensive type and a considerable acceptance of foreign laws, legal institutions and values, exalting the integrated normative constellation that derives from the numerous interactions between national legal systems and levels of safeguards.[353]

According to the reconstruction carried out by the Court, international public policy is to be seen as "the overall principles that characterise the legal system in a given historical period, but inspired by the need to protect the fundamental human rights common to the different legal systems and placed at a higher level than ordinary legislation." [354] Consequently, in the opinion of non-contrast with public policy , the judge must verify not whether the certificate is the application of a discipline that conforms to or differs from the national one, but whether it conflicts with the need to protect fundamental rights, enshrined in the Constitution, in the Founding Treaties and in the EU Charter of Fundamental Rights, or the European Convention on Human Rights.[355]

In this interpretative perspective, therefore, the mere fact that the national legislator does not foresee, or prohibits, a certain case in Italy does not *per se* make the foreign certificate

350 *Ibidem*, p. 8.

351 Italian Court of Cassation, ruling N. 19599, 21 June 2016. Available online: http://www.articolo29.it/trascrizione-atto-di-nascitalegittimita/.

352 A. Schillaci, *Le vie dell'amore sono infinite. La Corte di Cassazione e la trascrizione dell'atto di nascita straniero con due genitori dello stesso sesso*, Articolo 29, 3 October 2016. Available online: http://www.articolo29.it/trascrizione-atto-di-nascitalegittimita/.

353 *Ibidem.*

354 Italian Court of Cassation, ruling N. 19599, 21 June 2016, § 7, p. 22.

355 *Ibidem*, pp. 26-7. Against this "limited" notion of public policy, see G. Luccioli, *Il caso del figlio nato da due madri. L'interesse del minore e il limite dell'ordine pubblico*, in "giudicedonna.it", 2016, N. 4, p. 4. Available online: http://www.giudicedonna.it/2016/numero-quattro/index.htm. According to Luccioli, the assessment of the compatibility of the foreign certificate should not only be carried out with respect to values directly inferred from the constitutional and mandatory supranational laws, since it is possible to recognise essential values and principles not directly set out in the Constitution but deducible from the more extensive constitutional setting.

incompatible.[356] For the purposes of its recognition, states the Court, it is necessary to consider the cardinal principle of national and international family law, the best interests of the child which, in the case in question, lies in his right to the preservation and continuity of the status of son of both mothers, a status validly acquired abroad.[357]

In order to maintain the equilibrium, continues the Court, the best interests of the child can be legitimately sacrificed only for the purpose of safeguarding those values and principles of the legislative system that, since they cannot be subverted by the ordinary legislator, rise to the rank of public policy. According to this interpretation, states the Court, neither Law N. 40/2004 nor Article 269 Italian Civil Code, according to which the mother is the person who gives birth, can therefore be invoked to prevent the transcription of the foreign birth certificate, since these are norms with which the legislator has exercised his discretion in a matter that does not impose constitutionally obliged legislative choices.[358]

With regard to Law N. 40/2004, the aspect that stands out is not the prohibition of surrogacy. In fact, despite the claims of the appellants, the Court insists on the fact that the procreative procedure carried out differs from the practice of surrogate motherhood, since the pregnancy was not carried to term by a woman outside the couple; therefore the child was not ceded to the contracting parties, which is a crucial element of surrogacy. In the opinion of the Court, the biological and genetic contribution of the two women lies within a shared parental project and, consequently the case in question is more similar to heterologous fertilisation.[359] What is therefore under discussion, in this case, is the prohibition – foreseen by Article 5 of Law N. 40/2004 – for same-sex couples to make recourse to ART. In any case, continues the Court, this norm and more generally the law on matters of ART, being a mere expression of one of the possible choices of the legislator regarding matters within his powers of regulation, they are not capable of hindering the transcription of the foreign certificate.[360]

Nor can the brocard *mater semper certa est* (set out in Article 269 Italian Civil Code) which in the case in question would prevent the genetic mother from claiming her status as mother, be considered a principle of public policy. It is, in fact, explains the Court, a mere option that the

356 Italian Court of Cassation, ruling N. 19599, 21 June 2016, § 7, pp. 23-4.

357 *Ibidem*, §§ 8.2-8.3, p. 30 *et seq.* Luccioli considers the evaluation of the best interests of the child by the Court debatable since it is anchored to the mere legal fact of the acquisition of a status and, therefore, totally unconnected with the life experience of the minor in question and from the practical nature of his affective relationships. The author therefore describes it as "the fruit of an ideology." See, Luccioli, *Il caso del figlio nato da due madri. L'interesse del minore e il limite dell'ordine pubblico*, cit., p. 6.

358 Italian Court of Cassation, ruling N. 19599, 30 September 2016, §§ 10.1 and 11.1.

359 *Ibidem*, § 10.2, pp. 42-5. Operating this distinction, the judges of the Supreme Court avoid taking up a position on the similar but controversial question of whether it is possible to recognise *status filiationis* validly formed abroad between the minor born abroad from a surrogate mother and the commissioning parties – on which the third part of this report will concentrate.

360 *Ibidem*, § 10.1, p. 41.

ordinary legislator could amend in order to guarantee a better normative adaptation to the present social context. In fact, although the rule that states that the mother is the person who gives birth "has been a fundamental principle for millennia, used to photograph the legal effects of the total correspondence in a single woman of she who gives birth and she who transmits the genetic heritage", over the years, medical-scientific progress has allowed the severance of the figure of the pregnant mother and the person who supplies the gametes, making this correspondence no longer essential.[361]

Following these changes, continues the Court, the attribution of maternity occurs in a wider framework, in which not only the pregnancy and the birth play a role, but also the transmission of the genetic heritage and, within certain limits, the assumption of parental responsibility, particularly when, as in the case in question, the result is a stable family nucleus.[362] Also in the light of the more general valorisation of the *de facto* families and the affective relationships that transcend a legal qualification, therefore, the Court concludes, without any hesitation, both the appellants are mothers.[363]

In our legislation, adds the Court, it is not even possible to configure a prohibition for homosexual couples to welcome and generate children.[364] The presence of two parental figures of the same sex – and, more generally, the legal framework of the relationship between the parents – cannot, therefore, negatively affect the status of the child or his/her living conditions.[365] The Court has therefore stated that the clause of public policy cannot be validly invoked to justify discrimination on the basis of personal or social characteristics. The possible unsuitability for assuming parental responsibility and the consequent harm that would derive from placing a minor in a family with same-sex parents cannot be based on mere prejudices, but must be effectively demonstrated.[366] Nor can the repercussions of any infringement of the prohibitions fall on the child, since this cannot be ascribed to him/her, being enacted by the adults who made recourse to procreative techniques not permitted in Italy.

The Supreme Court therefore believed the application for transcription should be accepted, ordering the transcription of the birth certificate showing the family bond of the child with both mothers. The lack of recognition of this relationship in Italy would, in fact, give rise to a situation of legal uncertainty which – as the Appeals Court had already stated, making reference to the teachings of the ECHR – is destined to negatively affect the development of the personal identity of

361 *Ibidem*, § 11.1, p. 47.
362 *Ibidem*, pp. 48-49.
363 *Ibidem*, § 12.1, p. 55.
364 *Ibidem*, p. 56.
365 *Ibidem*, pp. 54-55.
366 *Ibidem*, p. 55.

the minor in question, which derives from the expression of genetic descent.[367] Considering the two mothers' divorce, moreover, to oppose the transcription would have harmed the interest of the child to have two parents, contrasting with the rule foreseen by Article 24, paragraph 3, of the Charter of Fundamental Rights of the European Union, which states that, "Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.[368]

The Court of Cassation thus adopts a pragmatic approach with the intention of safeguarding the interests of the child, born within a shared and aware parental project, to continue to live in the family composed of two mothers, with whom he has formed affective bonds.[369] Read from the standpoint of the child, this decision states that it is a fundamental right of the 'rainbow children' to maintain a legally recognised family relationship with both their mothers or fathers. The concept of family that emerged is therefore rooted in the family situation effectively experienced by the subjects involved; a view that, not necessarily presupposing the genetic descent of the children, valorises the affective bonds that develop within a family, independently of the procreative method used. Rather than on factors of a biological nature, therefore, the fact of the family bond being worthy of recognition and protection lies – in the words of the Court – in the "fundamental freedom of individuals to self-determine and to form a family, under non-discriminatory conditions." [370]

The same line of argument characterised the decree issued by the Juvenile Court of Napoli (11 November 2016) which intervened a few months later on an almost identical situation.[371] The minor involved in this question was not genetically and/or biologically linked to both the mothers, being born following a procedure of assisted fertilisation, enacted using sperm from a donor and the oocytes of the woman who would give birth.

In addition to confirming the extended meaning of public policy set out by the Supreme Court in the fundamental ruling 19599 of 21 June 2016, the decision of the Juvenile Court of Napoli presents a new element, of particular interest. In evaluating the compatibility of the foreign birth certificate carrying the names of two mothers, particular importance is given to the introduction with Law N. 76/2016 of the institution of civil unions between persons of the same sex. The Juvenile Court states, in particular, that "the ascertainment of parenthood based on a circumstance other than the biological fact, but which can be traced to the relationship existing between two women" is to be considered compatible with public policy , above all if it is considered that also in

367 *Ibidem*, § 8.2, p. 32.
368 *Ibidem*, p. 33.
369 I. Rivera, *La trascrizione dell'atto di nascita formato all'estero tra tutela dell'ordine pubblico internazionale e superiore interesse del minore*, in "Genius", 2017, N. 1, p. 70.
370 Italian Court of Cassation, ruling N. 19599, 30 September 2016, § 12.1, p. 56.
371 The decree is available online: http://www.articolo29.it/trascrizione-atto-nascitamerito/.

our legislation there is now an institution – the civil union – which is similar to marriage, with the consequence of "allowing, in the interest of the child, that either woman can, as shown by the *de facto* cohabitation, play the role of mother, even if she was not the partner who gave birth." [372]

The existence of a stable and legally recognised relationship between the two women (who married in Spain) is certainly one of the conditions that led the Juvenile Court to affirm that the foreign birth certificate could be transcribed. Another element on which the Neapolitan judge placed emphasis was, in fact, the existence of a shared parental project between the two women, attested in particular by the consent given by the non-biological mother to recourse to heterologous ART. [373] The refusal to transcribe the birth certificate would in fact seriously undermine the interest of the child – and of his personality – above all in the presence of a family model realised through the considerable integration between his physical datum, constituted in his birth from the genetic mother and the spiritual datum, that is the assumption of parental responsibility by the co-mother, married to the former, who – in harmony with common feeling and with the legal directives expressed at supranational level – is worthy of legitimation, also considering the absence of a danger of a mercantile logic behind the bonds formed. [374] On the basis of these considerations, the Juvenile Court of Napoli therefore concluded that public policy could not represent an obstacle to the integral transcription of the birth certificate of a minor born into a union between two persons of the same sex who have deliberately chosen to share and enact the parental project. [375]

Finally, on the same topic it is worth mentioning the ruling N. 14878 dated 26 October 2016 (filed 15 June 2017) of the Italian Court of Cassation, which is particularly important because it was the first time the Court dealt with the question of the compatibility of the law on civil unions (Article 20) with the rules on matters of filiation. [376] Unlike the previous cases, the homosexual couple presenting the appeal – composed of two women of Italian nationality, married and domiciled abroad – applied to the Court of Venezia for the rectification and substitution of the birth certificate made out abroad, which was originally transcribed with only the mother who gave birth indicated as the mother of their son, to show both mothers. In support of its refusal, the Appeals Court – confirming the ruling of the Court of the first instance – noted that the transcription

372 Court of Napoli, 11 November 2016, pp. 6-7.

373 A. Schillaci, *Il Tribunale di Napoli ordina la trascrizione di un atto di nascita straniero con due madri*, Articolo 29, 7 December 2016. Available online: http://www.articolo29.it/2016/il-tribunale-di-napoli-ordina-la-trascrizione-di-un-atto-di-nascita-straniero-con-due-madri/.

374 Court of Napoli, 11 November 2016, p. 7.

375 *Ibidem*, p. 8.

376 The ruling is available online: http://www.articolo29.it/2017/riconoscimento-dellatto-di-nascita-da-due-madri-in-difetto-di-legame-genetico-con-colei-che-non-ha-partorito-nota-a-cass-civ-sez-i-15-June -2017-n-14878/. In its previous rulings, N. 1 9599, 30 September 2016 and N. 1 2962, 26 May 2016, the Court had avoided expressing itself on this point, since the Law N. 76/2016 was not applicable *ratione temporis*.

requested did not constitute a mere rectification, but necessarily related to the validity in Italy of the marriage between the two women and was, therefore, contrary to Italian public policy .

The first passage of the motivation concerns precisely the relationship between the introduction of the law on civil unions and the enactment of the legislation. On this point, the Supreme Court accepted the doctrinal opinion (referred to above) according to which, from a systematic interpretation of paragraph 20 of Law N. 76/2016, must lead, on the one hand, to the impossibility of ordering full adoptions or adoptions in special cases under Article 44 point b) (adoption of the spouse's child) and, on the other hand, the legitimacy of the decisions of some judges of the second instance and – recently sanctioned by the Court itself with rulings N. 12962 dated 26 May 2016 and N. 19599 dated 30 September 2016 – to extend the application of Article 44, point d) to the cases of *de jure* impossibility of pre-adoptive custody, since they independent of the state of abandonment of the minor.[377]

Guided by the same legal principles set out in the ruling N. 19599 dated 30 September 2016, the Supreme Court therefore confirmed the non-opposition to public policy – to be read in an internationalist key – of the indication of the two mothers on the foreign birth certificate. The fact that the national legislator prohibits or does not contemplate the case in question – specifically, recourse to heterologous ART by homosexual couples – does not prevent, in fact, the rectification of the birth certificate of the minor in the Italian public records, since it is necessary to respect the right of the minor to the *status filiationis*.

As emphasised by the doctrine, this ruling does not simply confirm (its) "natural precedent"[378], thus also making a *novum* which – according to the reading of Stefanelli – is embodied in the application of the protection under Article 9, paragraph 1 of the Law N. 40/2004 for children conceived using heterologous ART in conformity of the law in the country where they were born.[379] As the Supreme Court recalls, even prior to the lapse of the prohibition of heterologous ART dictated by the ruling 162/2014 of the Italian Constitutional Court, this regulation guaranteed the stability of the *status* of the child born within or outside a marriage, excluding the possibility of exercising the right to disownment of paternity and that of appeal against the recognition of the natural child by the spouse or partner who gave their consent to the procedure.[380]

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377 Italian Court of Cassation, ruling N. 14878, 15 June 2017, pp. 10-11.

378 *Ibidem*, p. 21.

379 S. Stefanelli, *Il riconoscimento dell'atto di nascita da due madri, in difetto di legame genetico con colei che non ha partorito. Nota a Cass. Civ., sez. I, 15 giugno 2017, N. 1 4878*, in Articolo 29, 10 July 2017. Available online: http://www.articolo29.it/2017/riconoscimento-dellatto-di-nascita-da-due-madri-in-difetto-di-legame-genetico-con-colei-che-non-ha-partorito-nota-a-cass-civ-sez-i-15-June -2017-n-14878/

380 Italian Court of Cassation, ruling N. 14878, 26 October 2016, p. 22.

Although Law N. 40/2004 foresees that the partners be of different gender and that they can access ART only in cases of sterility, the Supreme Court has stated that Article 9 – intended to remedy he phenomenon of procreative tourism – must be considered applicable also when the couple is composed of persons of the same sex who, in order to get around the prohibition set by Article 5 of the same law, underwent heterologous procedures abroad.[381] In the light of the pre-eminence of the best interests of the child, which accompanies the prohibition of discrimination on the basis of sexual orientation and therefore the need to maintain the plane of the vertical mother-child relationship distinct from that of the relationship between the parents, the Court believes that the status of children recognised by the couple should also be open to those born from heterologous procedures abroad, within a same-sex parental project.

With this intervention, the Supreme Court adds another brick in the construction, through jurisprudence, of a system that grants full recognition to family bonds validly formed abroad, safeguarding the fundamental rights of the homosexual families – *in primis* of the children – and reducing the gap between the lives of these people and the inadequate – or better absent – normative response.[382] Although the national law (law on civil unions) does not refer to the possibility for homosexual couples to have children, in fact, the pragmatic approach that seems to guide the Appeals Court and the Supreme Court highlights and responds to the need to valorise the preservation of the family project pursued and realised deliberately and responsibly, above all in order to protect the minor in his/her psychological-physical development and the affective relationships formed and consolidated.[383] The rulings analysed above thus dissociate from the now obsolete reconstruction that derives parental responsibility exclusively from the biological truth, highlighting the fact that the *status filiationis* depends also on social factors of responsibility. To quote Ferrando, "the uniqueness of the status of son/daughter [now] corresponds to a plurality of forms of filiation: generation, adoption, the assumption of responsibility towards the child." [384]

4. *The recognition of a foreign ruling of stepchild adoption*

The last scenario that has appeared before the Italian courts, following recourse to heterologous ART abroad by a lesbian couple, involves the adoption of the child of the same-sex partner ordered by the foreign authorities. The problem that arises in these circumstances is, therefore, whether the foreign ruling can be transcribed and, an even more controversial question, what effects it will have on Italian legislation. In particular, whether the adoption ordered by the

381 *Ibidem*, pp. 22-23.
382 G. Palmeri, *Le ragioni della trascrivibilita del certificato di nascita redatto all'estero a favore di una coppia 'same-sex'*, in "La Nuova Giurisprudenza Civile Commentata", 2017, N. 3, p. 365.
383 Rivera, *La trascrizione dell'atto di nascita formato all'estero tra tutela dell'ordine pubblico internazionale e superiore interesse del minore*, cit., p. 76.
384 G. Ferrando, *Diritto di Famiglia*, Bologna, Zanichelli, 2015, p. 260.

foreign authorities can produce the effect of full adoption that it produces in the legislation of origin, also in Italy, or whether it is necessary to recognise a more limited effect, which is typical of adoption in special cases.[385]

Although limited, from the existing jurisprudence there emerges a trend in favour not only of considering the application to transcribe the certificates in the public records worthy of acceptance, but also to maintain unvaried the legal consequence of the adoption procedure ordered by the foreign judge, with the aim of protecting the interest of the child to preserve – also on the plane of legal form – the same family relationship validly constituted abroad with both mothers.[386]

Typical of this trend is the recent ruling of the Appeals Court of Milano.[387] The case brought to the intention of the Court concerned a lesbian couple – Italian citizens, domiciled in Spain – who as part of a shared parental project, had made use of donor sperm to procreate a daughter genetically linked to one of them. At birth, only the birth mother (who is also the genetic mother) recognised the child (X). However, this legal reality did not reflect the couple's *de facto* situation. X, who at the time of the hearing was twelve years old – had been raised, maintained financially and educated by both women since birth. [388] The two women later married and, on the request of both, the Spanish judge had declared the full adoption of the minor in favour of the social mother, since she was the spouse of the biological mother, attributing to the child also the double surname. However, a few years later, the two women divorced and, on the request of the two ex-spouses, the Spanish authorities had ordered the joint wardship of the daughter.

When she moved to Italy, the social mother applied to the Juvenile Court of Milano to obtain the recognition of the Spanish adoption order, with the same legitimising effects as the foreign legislation. The judge, having considered the circumstances as a 'national' adoption of the (minor) daughter of a spouse, realised abroad by an Italian citizen, declared that the Court lacked jurisdiction and invited the claimant to present an application for transcription directly to the public records office.

However, the latter refused to proceed because the adopter was not married to the biological mother of the minor, since at that time marriage between persons of the same sex was not recognised in Italy and that, therefore, the adoption procedure ordered in Spain could not be attributed to any of the hypotheses of adoption in special cases foreseen by Article 44, Law 183/1984.

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385 Lenti, *Unione civile, convivenza omosessuale e filiazione*, cit., p. 1716.
386 *Ibidem.*
387 Appeals Court Milano, ruling N. 2543, 16 October 2015. Available online: http://www.articolo29.it/2015/la-corte-dappello-di-milano-dispone-la-trascrizione-di-una-adozione-piena-da-parte-della-mamma-sociale/.
388 *Ibidem*, § 16.

During the debate on the potential inclusion of stepchild adoption in the text of the law on civil unions, the Appeals Court – although confirming the impossibility of recognising the marriage of the two women in Spain and, consequently, the subsequent divorce – ordered the transcription of the Spanish adoption ruling. Anticipating the arguments of the Milano Court, while the marriage cannot be transcribed because it is contrary to the principles of public policy of our legislation, the adoption can be transcribed because, in relation to this question, the need to guarantee respect for public policy gives way to the best interests of the child to the recognition of the *status filiationis* validly constituted abroad and the underlying family relationship consolidated over time.[389] This ruling thus assumes historical importance since, through the transcription, a full adoption of a minor by the social mother was accepted in Italy for the first time – and not merely a special case adoption – granting the adopter all the rights and duties that derive from natural filiation.

Confirming the classification of the case in question operated by the Juvenile Court, the appeal judges first rejected the theory that international adoption laws could be applied, since the minor in question was not in a state of abandonment and the parental couple were domiciled abroad.[390] It was rather a question of recognising the foreign adoption, in accordance with Articles 65 and 66 of Law N. 2108, 31 May 1995 on matters of international civil law, the Board – after accepting that the ruling (issued by a Spanish authority, on the request of both women, with the ascertained full consent of the biological mother) was fully effective in Spain, excluded that the ruling was contrary to public policy on the basis of the following considerations[391]

Although the Law N.184/1983 (Article 6) reserves adoption for married couples, the same law – observes the Court – also admits exceptions: Article 25, in particular, foresees that in the

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389 v. Benanti, *L'adozione piena del figlio del partner dello stesso sesso, pronunciata all'estero, è efficace in Italia, nel superiore interesse del minore*, in "La Nuova Giurisprudenza Civile Commentata", 2016, N. 5, pp. 733-4. The author believes that, due to the impossibility of transcribing the marriage between the two women, in the case in hand, it was not possible to apply the institution of adoptive legitimation that – in accordance with Law N. 184/1983 – is reserved for married couples.

390 This question was later the object of a ruling by the Constitutional Court, N. 76/2016 (order for reference of the Juvenile Court Bologna, 10 November 2014). This case concerned two women (both American citizens, one having also Italian citizenship) regularly married in Washington State who, before formalising their relationship had made recourse to assisted fertilisation and procreated two children, genetically linked to each of them. Immediately after the birth, they had each adopted the biological child of the other. For personal reasons, the family had then moved to Italy and the woman with Italian citizenship had applied to the Juvenile Court of Bologna for the recognition of the American adoption procedures and, at a practical level, of her parental role in Italy. The judge raised the question of constitutional legitimacy under Articles 35 and 36 of Law N. 184/1983 (relating to the legal effects of the adoption of foreign minors ordered abroad) in the part that does not allow the judge to evaluate in the case in hand, whether the recognition of filiation formed abroad corresponds to the best interests of the child. For a note on the ruling of the Juvenile Court, see v. Ragni, *Il riconoscimento in Italia dell'adozione del figlio della partner del medesimo sesso alla luce della recente prassi delle corti Italiane*, in "Genius", 2015, N. 2, pp. 226-239. The Constitutional Court declared the question of constitutional legitimacy inadmissible because the referring judge had erroneously considered the foreign decision as a hypothesis of international adoption, while it was in fact a question of recognising the foreign ruling. For a note on the ruling of the Constitutional Court, see L. Marzialetti, *Le sentenze straniere di stepchild adoption omogenitoriale. Il discrimine tra automaticità del riconoscimento e giudizio di delibazione*, in "La Nuova Giurisprudenza Civile Commentata", 2016, N. 9, p. 1177 *et seq.*

391 Appeals Court of Milano, ruling N. 2543, 16 October 2015, § 19.

exclusive interest of the child, the adoption can be ordered only for the spouse who, during pre-adoptive custody, has decided to end the marital relationship.[392] With the same intention, the Court also refers to Article 44 point d) and to the extensive reading that the jurisprudence has reserved for it – at first and second instance – admitting, in a series of very recent rulings (analysed above), the adoption in special cases by a person who is not married of the child of their same-sex partner.[393] It does not seem possible to observe therefore, concludes the Court, the existence of an absolute prohibition of adoption of a minor, whether in a state of abandonment or not, by an unmarried person.[394]

Referring to the teachings of the Court of Cassation and the ECHR, the appeal judges further confirmed that growing up in a family with same-sex parents, does not, *per se*, cause any harm to the minor.[395] Every family situation must therefore be evaluated individually, taking into account the best interests of the child and his right to live with and maintain ongoing relationships with all the parental figures who, whatever their sexual orientation, have shown themselves to be capable of offering the child the care and affection essential for a serene and harmonious development.[396]

In the light of this legal context, as set out in national and supranational jurisprudence, in the opinion of the Appeals Court, there is no reason to consider the foreign ruling that allowed full adoption between an unmarried person and the recognised child of the partner of the same sex is contrary to public policy , once it has been established that the recognition of the foreign adoption procedure protects the right of the minor "to the maintenance of the family life constructed with both parental figures and the maintenance of the positive affective and educational relationships that have been consolidated with them, thanks to prolonged cohabitation with both of them and the adoption procedure."[397]

Considering the circumstances of this case, the full adoption – adds the Court – appears to be the most suitable solution since, in creating a parental relationship identical to the one that follows natural filiation, the minor is granted a much wider and more beneficial range of rights than those granted with special case adoption, also (and above all) with regard to the family of origin of the adopter, with whom X had formed and preserved important affective relationships.[398] Thanks to the recognition of the full adoption ordered by the Spanish judge, the position of the child with respect to the biological mother and her family of origin will remain unvaried and, additionally, X

392 *Ibidem*, § 23.
393 *Ibidem*, § 24.
394 *Ibidem*, § 25.
395 *Ibidem*, §§ 26-7.
396 *Ibidem*, § 27.
397 *Ibidem*, § 28.
398 *Ibidem*, 30

will enjoy material support not only from the adoptive mother, but also from her relatives.[399] In addition to ordering the transcription of the Spanish adoption procedure, the Appeals Court also admitted the recognition of the regulatory agreement, signed by the two mothers and ratified by the Spanish judge, which foresaw the joint wardship and the maintenance of ongoing and important relationships between the minor and both parents-[400]

With generally similar motivations, the Appeals Court of Napoli allowed the recognition of full adoption of two children born in France, the fruit of the shared parental project of a French-Italian couple, who married in France and resided there before the adopter moved to Italy.[401] This situation differs, however, from the previous one inasmuch as the transcription concerns a crossover co-parental adoption: both the mothers had, in fact, obtained the adoption of the biological son of the spouse and wanted the respective procedures to have legal effect in Italy.

The two mothers asked the Appeals Court to declare the refusal of the public records office to transcribe the certificate, based on the fact that the marriage between the parents (mentioned in the adoption proceedings) had no legal effect, illegal. The explanation given by the Court regarding the scope of the national judge, before discussing the specific case, is particularly important. Since it is the foreign authority that verifies the existence of the conditions for adoption, including the fact that it corresponds to the best interests of the child, the only responsibility for the authority that transcribes the certificate is to examine its effects on Italian law in the light of the canon of public policy, therefore excluding any discretionary assessment.[402]

Having excluded the competence of the Juvenile Court (for the same reasons as those adopted by the Milano Court in the previous case) the Appeals Court of Napoli declared the French procedure of co-parental adoption compatible with international public policy which, "in a plural system, of which our legislation is part",[403] is defined by "synergies that derive from the interaction between the supranational sources and the national ones."[404] In the light of the reference normative context, amongst which the norms of protection of the fundamental rights and the principle of the best interests of the child are considered of particular importance, the Neapolitan judge complied with the direction inaugurated by the Milano Court, excluding the opposition to public policy of the foreign co-parental adoption procedure, since its recognition corresponds, in practice, to the best

399 *Ibidem.*
400 *Ibidem*, § 32.
401 Appeals Court Napoli, ruling dated 30 March 2016. Available online: http://www.articolo29.it/corte-dappello-di-napoli-ruling-del-30-March-2016/.
402 *Ibidem*, p. 7.
403 *Ibidem*, p. 5.
404 *Ibidem.*

interests of the child in maintaining his affective relationships with both the mothers, which were consolidated thanks to the prolonged cohabitation and the adoption procedure.

This ruling and, even before that, the intervention of the Appeals Court of Milano thus add another block in the complex mosaic of recognition and protection of same-sex families which, in the face of the obdurate silence of our legislator, has so far been composed by jurisprudence. In addition to confirming the compatibility of the adoption of the child of a same-sex partner with international public policy , in harmony with the counsel of the Juvenile Court of Roma with the ruling dated 30 July 2014, the measures referred to above guarantee – although for reasons linked to case-law, more than the will of the judges themselves – a dense layer of safeguards for the family life existing between the social mother and the child. In fact, the foreign adoption of the partner's child is recognised in all its effects, as adoptive legitimation, thus constituting a parental bond and not only that of filiation, like the one that results from special case adoption.

5. *Final observations: the jurisprudential safeguards make up for the silence of the legislator*

As anticipated, Law N. 76/2017, in foreseeing a set of norms designed to regulate homosexual affective relationships, does not include specific measures regarding filiation and adoption, except for the reference to Law N. 184/1983 designed to exclude the general applicability in same-sex parental contexts. Filiation is therefore confirmed as one of the areas in which the unequal treatment of married couples (and therefore heterosexual) and couples in civil unions (and therefore homosexual) persists, at least in written law. Having left the controversial question of stepchild adoption unresolved on a legislative plane and more generally abstaining from regulating the matter of same-sex parents ordering an *ad hoc* measure, the parliament has delegated to the courts the responsibility for evaluating, case by case, the possibility of attributing legal effect – for example, through the institution of special case adoption – to family bonds, already existing between the partner and the child of the other partner in couples composed of persons of the same sex.

To conclude, it is clear that the rulings analysed in the previous paragraphs that it is the intention of the judges to fill the gap between the family dynamics of modern society, in particular the formation of families composed of persons of the same sex and their effective access to the experience of parenthood, and the legislation that, although it offers precious cues, in a certain sense, continues to ignore these new relational and parental realities. The measures analysed in this chapter constitute undeniable proof of the widespread system of protection and recognition that – if only at 'merely' jurisprudential level – our legislation offers to same-sex parents, in view of the various life choices they may have made.

There are essentially two driving forces that have led to the sudden opening. First of all, the adoption of a functional definition of family that valorises the substance, that is the *de facto* relationships existing between the components, rather than the form, that is the legal act from which they originated or, more generally, the circumstance that these relationships have formed in a context that does not conform to the heterosexual paradigm. Secondly, the precedence of the best interests of the child, seen as the intention to preserve the legal relationship of filiation validly formed abroad and the affective relationship with the person who has cared for him/her, has affected the configuration of public policy and, consequently, the weight that this clause assumes for the purpose of evaluating the application for recognition carried out by the judge.

For the sake of thoroughness, it is necessary to observe that this jurisprudential framework also includes the rulings deriving from recourse to surrogacy abroad – the subject analysed in the third part of the volume – and the recent intervention of the Juvenile Court of Firenze on matters regarding recognition of foreign adoption procedures.[405] After extending the applicability of Article 44 point d) to the question of adoption of the partner's child in homosexual couples, and after recognising the legal effects of the foreign birth certificate carrying the names of two mothers and to foreign co-parental adoptions within couples composed of two women, the Florentine rulings – although they do not concern minors born thanks to ART – have further enriched the panorama of the tools safeguarding same-sex parents, ordering the transcription of two certificates issued respectively by the British and the American authorities who had ordered the adoption of two minors by two male couples, with Italian citizenship by domiciled abroad for many years. [406]

Although this jurisprudential orientation has so far proved to be the most suitable to provide a legal response to the ever more frequent requests for recognition presented by homosexual parents, the concern that this trend – although majoritarian (and sanctioned by the Court of Cassation) – is not capable of guaranteeing a stable level of protection for the subjects in question remains.[407] It cannot, in fact, be denied that, at least initially, the delegation that our legislator has conferred on the jurisprudence implies the possibility that the appeals courts adopt divergent positions, even following the intervention of the Court of Cassation.[408] Hence the desire for a legislative intervention expressed – or rather, renewed – by some authors who see the introduction

405 Juvenile Court Firenze, rulings dated 7 March 2017 and 8 March 2017. Available online: http://www.articolo29.it/trascrizione-atto-adozionemerito/.

406 On the effects of these rulings, see A. Schillaci, *"Una vera e propria famiglia": da Firenze un nuovo passo avanti per il riconoscimento dell'omogenitorialità*, in Articolo 29, 13 March 2017. Available online: http://www.articolo29.it/2017/una-vera-e-propria-famiglia-da-firenze-un-nuovo-passo-avanti-per-il-riconoscimento-dellomogenitorialita/.

407 G. Galasso, *Unione omoaffettiva e adozione*, in "Genius", 2017, N. 1, 89.

408 Gattuso and Schillaci, *Il dialogo tra le corti minorili in materia di stepchild adoption*, cit. For a discussion of the legal consequence of the compromissory nature that characterises Law N.76/2016, see: G. Buffone, M. Gattuso and M. Winkler, *Unione civile e convivenza*, Milano, Giuffrè, 2017.

of *ad hoc* legislation as the only way of realising a normative system that deals with the topic of homosexual parentage in a coherent and systematic manner, thus averting the danger of contrasting decisions.[409]

409 For a discussion of the legal consequences of the compromissory nature of Law N.76/2016, see, G. Buffone, M. Gattuso and M. Winkler*, Unione civile e convivenza*, Milano, Giuffrè, 2017.

Chapter 5
Controversies Between The Various Participants In Heterologous ART

1. *Introduction*

The second scenario in which the *status filiationis* and, more generally, the family relationships of the child conceived through heterologous ART are not immediately clear is that in which a conflict arises between the various participants in the heterologous ART procedures. On the one hand, the donor (male or female) who, after the birth of the child generated using their gametes intends to intensify their involvement in the life of the child and/or formalise it by obtaining – according to the situation – parental status, joint wardship or, at least, the recognition of access rights. On the other hand, the mother of the minor or the intentional/social parents who, instead, oppose any form of participation by the donor, stating that, as agreed before the ART procedure was carried out, the contribution of the counterpart would involve only the supply of genetic material and that, therefore, the legal parenthood and, in practical terms, the growth and the development of the child would be their affair.

In the absence of specific legislation designed to resolve such conflicts, these circumstances require the judge not only to consider whether it is opportune to consider the agreement between the parties susceptible to execution, but also the importance to be attributed to the genetic link between the donor and the child for the purpose of defining their relationships on a legal plane.

For clarity, the existing case law has been divided into three categories: the first concerns the 'classic' scenario of sperm donation, in which the donor is an extraneous third party. The cases examined in the paragraph below (4.1), however, have the particularity of involving donors who, rather than being anonymous are friends or acquaintances of the lesbian couple who intend to satisfy their desire for parenthood. The problems analysed in paragraph 4.2 arose, on the other hand, between ex-partners: this is, therefore, a case of a shared parental project realised with the genetic and biological contribution of both the aspiring parents who, when their relationship ended, had differing ideas regarding the role that the genetic (non-gestational) parent should play – or rather, maintain – in the life of the child. The third category (paragraph 4.3) includes controversies that followed procedures of self-fertilisation realised at home without any medical assistance, the fruit of informal agreements between the parties.

Unlike the previous chapter, which looked closely at Italian jurisprudence, the decisions that follow come from foreign jurisdictions, in particular from Ireland, the United Kingdom, the United

States, Canada and Australia. The absence – at present as far as I know – of controversies of this kind in the Italian jurisprudential panorama seems to be partly due to the prolonged prohibition in our legislation of recourse to heterologous ART (which as mentioned was withdrawn only in 2012) and also to the strict subjective conditions that still characterise the legislation, excluding amongst others same-sex couples.

To anticipate the results of the analysis that follows, the jurisprudence has generally adopted an inclusive logic, rather than selective, showing itself to be favourable to attributing some form of recognition to the role played by all the subjects involved in the ART procedure, including the donors. In view of the interest manifested by the latter in participating in the lives of their children, often accompanied by a 'history of caregiving', the jurisprudential tendency has been to admit exceptions to the rule – typical of the legislations in matters of heterologous ATT – which exclude any right and/or duty for the donor (male or female), guaranteeing a legal recognition of the bond of genetic filiation, according to the situation: from the maximum of joint wardship to the minimum of foreseeing only indirect contacts.

Although it is not a determinant factor, it would therefore seem that the genetic datum continues to exercise a certain influence – recognised more or less expressly – in the decision to offer a legal effect to the involvement of the donor in the life of the child. The justification invoked in support of these exceptions often coincides with the need to safeguard the best interests of the child directly involved. A more careful reading, however, brings to light decisions that, rather than being inspired by the everyday reality of the family whose recognition is in play, lies in certain presuppositions typical of the paradigm of the traditional family from which, in other ways, they are distant. While on the one hand the breakaway from the bi-parental model promotes a vision of family relationships in keeping with the times, on the other hand, this deviation from what is considered the norm at times, does not commence from a modernised or pluralist conception of parenthood, but aims essentially to guarantee a constant paternal presence in the life of the minor.[410]

2. *Donor who is not part of the couple*

The belief that knowing the truth regarding the method of one's conception and maintaining a relationship with one's biological father is good for the well-being of a child born following assisted fertilisation emerges particularly clearly and undeniably in the rulings that have followed the conflicts that arise between the parental couple and the external donor. In some of these cases, it would even seem possible to identify a presumption in favour of recognising access rights for the donor, a presumption that is based on the 'best interests of children', rather than on the 'best

410 F. Kelly, *Producing paternity: The Role of Legal Fatherhood in Maintaining the Traditional Family*, in "Canadian Journal of Women and the Law", 21, 2009, N. 2, p. 349.

interests of the child'. In fact, it is often not the situation of the minor directly involved that is examined. The judge's decision seems, instead, to be guided by an essentialist reading of the principle of the best interests of the child, according to which it is presumed that developing some sort of contact with the sperm donor/genetic father will realise the interest of any minor born from heterologous ART, whatever the specific circumstances of the case.

The ruling of the Irish Supreme Court seems to move in this direction in the case *J McD v PL and BM*.[411] On the basis of an agreement with a couple composed of two women in a civil union, domiciled in the United Kingdom (B and C), A had donated his sperm so that B and C could enact their parental project. D was born from the procedure of assisted fertilisation. The contract – in writing – foresaw that A would not assume any parental or economic responsibility towards the child, who would, however, be informed of the genetic paternity. Following the birth, the relationship between the parties deteriorated and A expressed the wish to be part of the life of his biological child, as a father. Given the opposition of B and C, a legal dispute was undertaken and A – although his request to be nominated the guardian of the minor – obtained the right to access the child.

The decision of the Supreme Court is, for the reasons that follow, an expression of an attitude that – while *prima facie* – it may appear contradictory – can be considered a 'compromise' in the delicate and controversial field of homosexual parenthood, where strong resistance of a cultural nature persists: in fact, while on the one hand the judges deny the status of family to a nucleus composed of two women and their child generated thanks to heterologous ART, on the other hand, they recognise the capacity of a couple composed of two women to offer a loving family environment in which to raise their child.[412] The element of this ruling that, in addition to representing the dividing line between the judgment of the Supreme Court and that of the High Court,[413] has raised criticism from the doctrine concerns, precisely, the failure to qualify the group composed of A, C and D as a family, under national and ECHR law. In the opinion of the Supreme Court, the High Court – stating that a *de facto* family life existed between the appellants and the

411 *J McD v PL and BM*, Supreme Court of Ireland, 12 October 2009. Available online: http://www.courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/f0accee6d7a4dc3780257688003f5272?OpenDocument

412 F. Ryan, *Are two Irish Mammies (Even) Better than One? Heteronormativity, Homosexuality and the 1937 Constitution*, in E. Carolan (ed.), *The Constitution of Ireland: Perspectives and Prospects*, Bloomsbury Professional, 2012. Available online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2397730.

413 In the first instance, nonetheless, the application of the donor was rejected by the High Court (2008). Judge Hedigan based the decision on the psychiatric assessment of the minor, stating that to recognise the role of guardian or attribute access rights to the donor would lead to "the loss of a tranquil and calm upbringing of the child". For a brief reconstruction of the main arguments of the judge of the first instance, see F. Ryan, *Are two Irish Mammies (Even) Better than One? Heteronormativity, Homosexuality and the 1937 Constitution*, in E. Carolan (ed.), *The Constitution of Ireland: Perspectives and Prospects*, Bloomsbury Professional, 2012, pp. 435-6. Available online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2397730.

child – had gone beyond the 2009 interpretation of family life set out in Article 8 ECHR supplied by the Strasbourg Court. In fact, it would only be in 2010, with the appeal *Schalk and Kopf v. Austria*, that the ECHR would extend the protection for family life offered by Article 8 to cohabiting homosexual couples.[414] For the same purpose, the judges of the Supreme Court refused the claim that the Constitution – being silent on this point – allowed a homosexual couple to be recognised as a family under Irish law.[415]

Despite the *incipit*, this ruling – from a substantial standpoint – did not neglect the dynamic relations and the bonds that had developed and been consolidated between the women and the child. Judge Denham, in particular, emphasised that the context of care and love in which the child had grown up was an important factor to be taken into account in evaluating the well-being of the child: "… the circumstances of the case show that the respondents have lived together for years in a loving relationship and that they provide a settled and loving home for the child."[416] Therefore, although on the formal plane B, C and D cannot be considered a family, the Supreme Court implicitly, or explicitly, according to the judge took into consideration and to some extent recognised the actual situation in which the child had grown up until that time.

Overturning the decision of the High Court – which had excluded any participation of A in the life of D – the Supreme Court therefore considered the request of the donor worthy of partial acceptance, recognising the right to access in the light of the advantages that maintaining contact with the biological father would bring to the child. Although therefore the concrete form of the family nucleus involved was evaluated by the Court, the result of the dispute adheres to a family model that is strongly based on the biological paradigm.[417] For proof of this, it is sufficient to observe the lack of attention paid by the Court to the position of C, the partner of the mother of the child. The opinions expressed by Justice Murray and Justice Fennelly reveal that the co-mother does not have any constitutionally or legally relevant relationship with the child she cares for, despite the fact that he was the result of a shared parental project within the couple.[418]

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414 On the international dimensions of this case, see M. L. Kane, *Lesbian Co-parenting and Assisted Reproduction: In an Age of Increasing Alternative Family Forms, Can Ireland Continua to Ignore the Need for Legislative Boundaries to be Placed on "Fertile" Ground?*, in "Trinity College Law Review", 13, 2010, pp. 18-23; M. Cahill, *McD v L and the Incorporation of the European Court of Human Rights*, in "The Irish Jurist", 45, 2010, pp. 221-9.

415 On this point the opinion of Judge Murray is particularly important, "[…] the mere fact that the law could be said to be silent as regards a specific situation does not necessarily mean that it is unaffected by the law or the Constitution. Silence of the law may speak volumes for the legal status to be accorded or not to be accorded to a particular subject matter or situation". On the problematic relationship between the Irish family law and the notion *de facto family life*, see v. O. Mahony, *Irreconcilable differences? Article 8 ECHR and Irish law on non-traditional families*, in "International Journal of Law, Policy and the Family", 26, 2012, N. 1, pp. 31-61.

416 *J McD v PL and BM*, cit., Opinion of Judge Denham, § 79.

417 Ryan, *Are two Irish Mammies (Even) Better than One? Heteronormativity, Homosexuality and the 1937 Constitution*, cit., p. 441.

418 *J McD v PL and BM*, cit., Opinion of Judge Murray, under Adjudication on Claims under Article 8; Opinion of Judge Fennelly, § 115.

Moreover, while with regard to the relationship existing between the two women and the child the evaluation of the judge was based on the assessment of the circumstances in the individual, practical case, when justifying the assignment of access rights to the donor, no effort can be seen to personalise the evaluation of the 'best interests', by identifying with the life of D. The statement that the child will benefit from contact with his biological father, in fact, is not supported by clear references to the nature and the intensity of the bond effectively existing between A and D. On the contrary, it would seem to be based on considerations of a general and abstract nature that affirm the correspondence to the interests of the child, *a priori*. The comments of Judge Fennelly confirm the importance attributed to the existence of a genetic link between the donor and the child:

"The blood link, as a matter of almost universal experience, exerts a powerful influence on people. The father, in the present case, stands as proof that participation in the limited role of sperm donor under the terms of a restrictive agreement does not prevent the development of unforeseen but powerful paternal instincts. (…) More importantly, from the point of view of the child, the psychiatrists were in agreement that a child should normally have knowledge, as part of the formation of his or her identity, of both parents, in the absence compelling reasons to the contrary. There is natural human curiosity about parentage."[419]

The effects of a presumption in favour of contact between the child born from heterologous ART and the donor becomes even more visible if we take into consideration a ruling handed down by the English High Court in October2015.[420] The case concerned two homosexual couples, one male and one female, both united in civil partnerships. The two women wished to become mothers and therefore made use of the sperm of one of the two men. Two female children were born of the heterologous fertilisation procedures, A and B who, at the time of the hearing were fourteen and ten years old. After years of total absence, the biological father and his partner had applied to the courts in order to obtain the recognition of access rights with regard to A and B.

Although not only the couple, but also the children, opposed the request of the donor, stating amongst other things that the legal dispute itself was ruining their childhood, the judge decided that indirect contact (in writing) and limited to certain periods of the year was in the best interests of the children. Although recognising that the girls had, up to that time, grown up serenely, the judge – assuming an almost paternalistic attitude – motivated the acceptance of the male couple as follows: "I remain clearly of the view that the fathers have something of real value and importance to add to the lives of the girls. (…) I continue to hope, though with increasing pessimism, that A and B will one day come to recognise this."

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419 Opinion of Judge Fennelly, § 81.

420 *Re A and B (Contact) (No 4)*, High Court, 14 October 2015. Available online: http://www.familylawweek.co.uk/site.aspx?i=ed149316.

Although it was not expressly ruled, the decision to formalise the position of the donor by granting access rights reflects the conviction that, also in a situation where the child is lovingly cared for by the mother and her female partner, the paternal descent must not be wholly neglected.

Finally, it is worth considering the ruling *M.A.C. v M.K.* issued by the Appeals Court of Ontario (Canada) in 2009. In this case, the genetic mother of the child conceived by assisted fertilisation and her partner M.A.C. and M.K., the donor wanted the child to be raised by three parents and for the family bond between the child and the three adult figures to appear also on the birth certificate. Given the impossibility of realising the multi-parent project and the consequent disagreements between the parties, M.A.C. presented an application for adoption that, if accepted, would have deprived M.K. of the status of legal father.[421]

Ruling in favour of the donor, the Court emphasised the relevance – difficult to overcome – of the genetic datum, referring to the adoption as "the statutory guillotine of the biological relationship".[422] Considering the role played by MK. in the child's life and the original plan to form a family composed of three parents, the Court chose to satisfy the parental expectations of M.K., denying any recognition of the role of 'primary caretaker' effectively played by M.A.C., who was, however, allowed to consolidate her role with the child by applying for custody.

Due to the simple fact that M.A.C. was genetically extraneous to the child, the Court automatically classified the appellant as stepparent,[423] thus significantly weakening the legitimacy of her request and assigning priority to the position of M.K. despite his effectively secondary role in the life of the child.[424] To decide otherwise – stated the Court – would have led to the risk of "severing the child's sense of her place in the world, her confidence in her experience of the world and her understanding of who her family is."[425] Although clearly excluding a preference for the nuclear family[426] – disapproving the intention of the women to exclude M.K. from the life of the

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421 Although not relevant to this paragraph, it is worth citing a very similar case, decided by the same judge, in which the impossibility of actuating the multi-parent project initially pursued by the parties did not become a dispute between the lesbian couple and the donor. In the case *A.A. v B.B. and C.C.* (2007), the judge of the first instance, although recognising that it would be in the best interests of the child to recognise parental status for all three adults, then decided that it was necessary to respect the limit of two parents (a mother and a father) established by law. On the contrary, the Ontario Court of Appeals, after noting the need to update the laws on filiation, decided to make recourse to the *parens patriae* jurisprudence to bridge the normative deficiencies crated by the advent of ART, in order to grant parental status to the three adults involved. For a reconstruction of the principle passages of the decisions in the first and second instance, see L. Harder e M. Thomarat, *Parentage Law in Canada: The Numbers Game of Standing and Status*, in "International Journal of Law, Policy and the Family", 26, 2012, N. 1, pp. 77-80. For an in-depth survey of the Canadian jurisprudenc on matters of the new family, see N. Bala and v. Ashbourne, *The Widening Concept of Parent in Canada: Step-Parents, Same-Sex Partners and Parents by ART*, in "Journal of Gender, Social Policy and the Law", 20, 2012, N. 3, pp. 525-560.

422 *M.A.C. v M.K.*, Ontario Court of Appeals (2009), § 70.

423 *Ibidem*, § 37.

424 Harder and M. Thomarat, *Parentage Law in Canada: The Numbers Game of Standing and Status*, cit., p. 71.

425 *M.A.C. v M.K.*, cit., § 64.

426 *Ibidem*, § 33.

child since it was incompatible with the best interests of the latter – this ruling constitutes a further example of the decisive role that the genetic factor assumes in the resolution of disputes that arise following heterologous ART and, thus, adheres to a heteronormative vision of the family.

In conclusion, although *prima facie* justified by the need to safeguard the right of the minor to a definite and stable status, to avoid negative effects on the development of his/her personal identity, the opinion of those who, with a somewhat critical attitude, have interpreted the jurisprudence analysed in this paragraph as the expression of the judges intention to guarantee as far as possible the continuative presence of the paternal figure in the life of the child, in harmony with the ideal of the bi-parental, heterosexual family, appears comprehensible. [427] Despite assuming an apparently neutral attitude with regard to the sexual orientation of the parental couple and, at times, even recognising the capacity to guarantee the child a serene and harmonious development, these rulings produce the inevitable consequence of leaving couples composed of two women in an extremely precarious legal position.[428]

3. *Disputes between ex-partners*

In the existing jurisprudence, it is also possible to trace a series of events in which the donor (male or female) involved in the dispute is also the ex-partner of the legal mother of the child. These are generally cases known as 'co-maternity', that is conflicts that follow a similar procreative procedure to that which led to the ruling N. 19599 dated 21 June 2016 of the Italian Court of Cassation, mentioned above. In these situations, within a homosexual couple, both the women who wish to become mothers have made their contribution – genetic or gestational – to the birth of the child, generated using donated sperm. The disagreement, in these circumstances, arises when the legal mother – the one who gave birth to the child – and her ex-partner who, in addition to supplying her genetic material, following the birth, played the role of social mother and, despite the fact that she is separating from her partner, wishes to preserve and formalise the bond formed with the child, against the wishes of the legal mother.

For example, the case *DMT v TMH*[429], recently judged by the Supreme Court of Florida, falls within this category, admitting – for the first time – that a child can have two mothers.[430] The

427 F. Kelly, *Producing Paternity: The Role of Legal Fatherhood in Maintaining the Traditional Family*, cit.

428 Ryan, *Are two Irish Mammies (Even) Better than One? Heteronormativity, Homosexuality and the 1937 Constitution*, cit., p. 441.

429 Supreme Court of Florida, 7 November 2013. Available online: http://www.floridasupremecourt.org/decisions/2013/sc12-261.pdf.

430 D. Tilley, *D.M.T. v. T.M.H.: Breaking Down Barriers to Same-Sex Parenthood*, JURIST - Sidebar, 3 January2014. Available online: http://jurist.org/sidebar/2014/01/daniel-tilley-florida-art.php. For a panorama of other co-maternity cases decided by American courts, see D. NeJaime, *Marriage Equality and the New Parenthood*, in "Harvard Law Review", 129, 2016, N. 5, pp. 1222-9. In all these cases, the judge in question has established that both the women must be considered mothers to the child.

child was desired and cared for by both women until the moment they separated and the legal mother, DMT, moved with the child to Australia. DMH opposed the application for joint wardship presented by TMH because she wanted to remain the only legal parent. The judge of the first instance stated that, according to a ruling of the Florida Assisted Reproductive Technology Statute, the (male or female) donor was excluded from the acquisition of any parental right with regard to the child, except when the donor was a member of the commissioning couple who undertook heterologous procreative procedures in order to fulfil a shared parental project. Along they were in fact a commissioning couple, the application of TMH could not be accepted, continued the judge, due to the effects of the legal definition of 'commissioning couple' as an aspiring mother and an aspiring father – the unions between persons of the same sex do not fall within the special case regime foreseen by the law.

On appeal, the Supreme Court – even before the Appeals Court – accepted TMH's request, declaring the aforementioned Florida Assisted Reproductive Technology Statute unconstitutional, since it was detrimental to the principle of equality. In particular, the Supreme Court stated that, "the State would be hard pressed to find a reason why a child would not be better off having two loving parents in her life, regardless of whether those parents are of the same sex, than she would by having only one parent."[431] This statement assumes particular significance, continues the Court, if we consider the choice of the legislator to not limit the definition of 'commissioning couple' to persons united in marriage.[432]

Facing the same procreative scenario, but within a heterosexual couple, the law orders the automatic recognition of parenthood for the contracting father, whatever the nature of his relationship with the mother, whether married or cohabiting. The only category that does not benefit from this treatment is, therefore, same-sex couples.

Although concentrating on the question of constitutional legitimacy and, consequently, on the rights of TMH, the Supreme Court emphasised that it was necessary not to lose sight of the fact that there was a child at the centre of this question, and their best interests governed the extent to which each parent should be part of their life. [433] Since the appellant – in addition to being the intentional mother and having formed an affective bond with the child – is also the genetic mother of the child,[434] there are no reasons to doubt her parental suitability,[435] and an 'all-or-nothing'

431 Supreme Court of Florida, cit., p. 39.

432 *Ibidem*, p. 40.

433 *Ibidem*, pp. 5-6.

434 For a critical reading of the decision – in particular, of the potentially negative effects of the attribution of a decisive weight for the genetic link accompanied by the intention to become a mother, see. M. Johns, *Constitutional Law: Biological Relationships and Intent v. Waiver in Establishing Protected Parental Rights*, in "University of Florida Journal of Law and Public Policy", 26, 2015, pp. 91-98.

435 Supreme Court of Florida, cit., pp. 46-7.

decision between the two mothers is not necessary.[436] The Supreme Court therefore concluded by inviting the trial court to determine, on the basis of the best interests of the child, the methods and the times for relations between the child and both mothers.

The English Appeals Court reached a similar decision in March 2014, when it ruled on an application for joint wardship presented by A, the genetic mother of twins born thanks to assisted fertilisation as part of a shared parental project with her ex-partner, R, the birth mother .[437] Although the twins had lived with and were raised by both women until the age of four and a half, in the eyes of the law, only R enjoyed the status of mother. In the case in question, in fact, the present legislation (Human Fertilisation and Embryology Act 2008) could not be applied because it came into force only after the conception of the twins. Under this law, when a couple composed of two women (united in a civil partnership or not) undertake heterologous ART, the partner who consented to the procedure acquires parental status towards the child.

In this case, moreover, R had begun a new relationship with C, who had been attributed parental responsibility for the twins. Although A continued to be present in the life of the twins, also after her separation from R, the judge of the first instance had ordered the exclusive wardship in favour of the birth mother, believing that it would be inappropriate to raise A to the status of co-mother. The Appeals Court, on the other hand, decided that although a ruling on the wardship depended exclusively on the best interests of the child, and cannot therefore be based on the mere presence of a biological bond and/or the fact that the appellant had played a parental role in the life of the twins, the judge of the first instance had not taken into account all the relevant factors and that, above all, they had not attributed the deserved importance to the circumstance that the appellant was also the genetic mother of the twins.[438] Although leaving the decision of the judge of the first instance, the Appeals Court emphasised the need to reflect on the compatibility with the best interests of the child of a family situation in which, in the life of the twins, there is a non-genetic mother with parental responsibility and a genetic mother who is deprived of this responsibility.[439]

This type of dispute can also arise within heterosexual couples. The Australian case *Groth and Banks* is one example.[440] At the centre of the question was a child born through heterologous ART using the sperm of Mr Groth, the ex-partner of the biological mother, Ms Banks. The couple separated in 2002, but remained friendly relations. In 2007, following a diagnosis of testicular

436 *Ibidem*, p. 6.
437 *Re G (Children),* Court of Appeal, 25 March 2014. Available online: http://www.familylawweek.co.uk/site.aspx?i=ed128566.
438 *Ibidem*, §§ 52-57.
439 *Ibidem*, § 53.
440 Family Court of Australia, 11 June 2013. Available online: http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FamCA/2013/430.html.

cancer, Mr Groth decided to have his sperm frozen before undergoing chemotherapy, in order to be able to have a child with his ex-partner, as friends. The child was conceived through IVF. The father was present at the birth and maintained regular contact with the boy, until his friendship with the mother broke down and she disappeared. The father then tried to formalise his relationship with the child, applying for joint wardship and, alternatively, the recognition of access rights. The mother opposed the application stating that the agreement reached with Mr Groth foresaw that she would be the only parent of the child and that he would play only a marginal role, similar to that of an uncle, in the life of the minor.

The Australian Family Court that decided on the case accepted the genetic father's application, stating that ordering joint wardship was in the best interests of the child, which is "the paramount consideration." [441] In the opinion of the Court, "it is the child's right to have the benefit of both of his parents having a meaningful involvement in his life, subject to that being in his best interests[442] and therefore, the judge must avoid depriving the father of parental responsibility in the face of a 'mere' problem of communication with the mother.[443] Moreover, on the basis of the psychological assessment, Mr Groth was not a minor figure in the life of the child; in fact, the boy had formed an affective bond with the father that, although not as solid as the one formed with the mother, showed "early signs of attachment behaviour." [444] There was, therefore, no reason to reject the presumption of parental responsibility for both genetic parents and, in particular, to exclude the father from exercising his role of education, care and instruction, since the maintenance of significant relationships with both parental figures would necessarily be beneficial for the child. [445] The judge therefore ruled that the boy could continue to live with the mother, but should maintain frequent and regular contacts with the father, who – having parental responsibility – actively participates in decisions regarding the minor.

In the light of these decisions, the chances that the donors (whether male or female) will obtain joint wardship of their biological child is reduced to those cases in which there is a confluence of factors – amongst which the presence of a 'history of caregiving' is of particular importance and, in addition to the genetic factor, shows the appropriateness of the recognition requested. Although it is not decisive, but rather supplementary or integrative, to the mere existence of a genetic link, in the opinion of some, this approach could be problematic. [446] In fact, the judge

441 *Ibidem*, § 140.
442 *Ibidem*, § 49.
443 *Ibidem*, § 179.
444 *Ibidem*, § 151.
445 *Ibidem*, § 155.
446 R. Brandt, *Genetic ties, Social Ties and Parental Responsibility*, BioNews 819, 14 September 2015. Available online: http://www.bionews.org.uk/page_565696.asp.

may note the presence of an affective bond between the donor and the child that in itself would be insufficient, but which precisely due to the genetic factor, finally legitimates the granting of rights for the appellant. The negative effects of this jurisprudential attitude, moreover, would go well beyond the individual cases examined, becoming an incentive to hinder the formation of relationships that benefit the child's well-being by those who, in order to procreate; make use of the contribution of a donor. [447]

4. Self-insemination

Finally, it is not rare for misunderstandings to arise regarding the role of the various protagonists in the life of the child, following self-insemination practices, that is situations in which, on the basis of informal agreements between the parties, the insemination with donor sperm is carried out at home, rather than in a specialist clinic, without medical assistance. In the majority of cases, the couples are composed of two women who choose to undertake this procreative method. The so-called do-it-yourself heterologous insemination, in fact, for a long time remained the only method by which this category of subjects could satisfy their desire to become parents, before the services offered by the clinics became accessible also to homosexual couples.

Even now that the access is no longer an obstacle, a number of lesbian couples continue to prefer do-it-yourself ART for the advantages it offers, including the possibility for the aspiring mothers to manage their fertility independently, without state interference. They are able to carry out the procedure in a familiar environment, without facing the medical environment, which tends to be considered homophobic, can use the sperm of an acquaintance or a friend who – lacking the requisites established by law – could not donate at clinics and, what is more, the procedure is free of charge. [448]

Although in some contexts there are doubts about whether it is legal,[449] in practice, self-insemination continues to be practised and, therefore, to produce effects that involve the legal plane. Precisely due to its uncertain legal classification, however, the consequences that derive from this type of insemination are often the object of disputes between the parties, above all when one of them changes their mind and decides not to comply with the informal agreement reached before the conception. A scenario of rather frequent disputes, in which the judge is called upon to clarify the

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447 *Ibidem.*

448 F. Kelly, *An Alternative Conception: the legality of home insemination under Canada's Assisted Human Reproduction Act*, in "Canadian Journal of Family Law", 2010, p. 150.

449 In Canada, for example, the Assisted Human Reproduction Act does not include any regulations that explicitly govern self-insemination at home. Nonetheless, the section 10(3) of the same law prohibits a series of activities that includes – according to a certain interpretation – this practice. In fact, this regulation prohibits, amongst other things, "obtaining", "preserving" and "transferring" human gametes without a licence. On this point, see Kelly, *An alternative conception: the legality of home insemination under Canada's Assisted Human Reproduction Act*, cit., p. 151.

status filiationis of the child and, more generally, his family relationships, which sees on the one hand the donor who intends to formalise his presence in the life of his biological child and, on the other, the contracting/social parental couple who wish to protect the integrity of their family and therefore reject any intrusion by the donor.[450]

In the absence of legislation that expressly foresees and regulates self-insemination, it is doubtful whether the legislation on matters of ART can be applied, in the part that excludes the formation of a legal relationship between the child and the donor, to whom it is not possible to attribute either rights or duties regarding the biological child (*non-paternity rule*). In order to establish whether the donor's appeal can be accepted, the point to clarify is whether the method and the context in which the insemination took place influence the rules attributing the statuses that determine the resolution of the concrete case and, more generally, on the management of donor-child relationships.

In two American cases, the judge decided that the donor of the sperm was the legal father of the child precisely due to the DIY nature of the insemination procedure, specifying that, on the basis of said legislation, the applicability of the non-paternity rule – invoked by the commissioning couple – was reserved (in California)[451] for situations in which the genetic material used was supplied by an authorised physician, or (in Virginia) [452] was realised thanks to the use of medical technology. In both circumstances, therefore, it was not possible to exclude the formation of a legal relationship between the donor and the child born of heterologous ART since, in the case *Jhordan C*

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450 It is not possible to exclude the opposite scenario: that is, that the donor is called upon to 'play a role' in the life of the child, providing for the maintenance of the biological child, despite the fact that they show no interest in the child. See, for example, the case of William Marotta, initially considered the legal father of the girl born following a donation of sperm and therefore responsible for the financial maintenance of the same (23 January 2014). This decision was later overturned by the Appeals Court (December 2016). The Shawnee County District Court in fact excluded any responsibility for Marotta, attributing the status of second parent to the partner of the biological mother. For a brief account of this case, see N. Hyder, *Craiglist sperm donor is legal father, US court rules*, BioNews 739, 27 January 2014. Available online: http://www.bionews.org.uk/page_390812.asp; A. Blackburn-Starza, *Craiglist sperm donor not legally child's father*, BioNews 880, 2 December 2016. Available online: http://www.bionews.org.uk/page_748200.asp. For two similar events in the United Kingdom, see: M. Roberts, *UK sperm donor fights child support demands*, BioNews 437, 10 December 2007. Available online: http://www.bionews.org.uk/page_13251.asp; J. Jebelli, *Private sperm donor ordered to pay child support*, BioNews 680, 5 November 2012. Available online: http://www.bionews.org.uk/page_204629.asp.

451 Court of Appeal of California, 28 March 1986. Available online: http://law.justia.com/cases/california/court-of-appeal/3d/179/386.html. The regulation in question is Article. 7005, letter d) California Code of Civil Procedure: "A donor of sperm provided to a licensed physician for use in assisted insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived."

452 Court of Appeals of Virginia, 21 April 2015. Available online: http://caselaw.findlaw.com/va-court-of-appeals/1698099.html. As can be seen from the ruling (p.5), in Virginia the law on ART defines "assisted reproduction" as follows: "a pregnancy resulting from any intervening medical technology, whether in vivo or in vitro, which completely or partially replaces sexual intercourse as the means of conception. Such intervening medical technology includes, but is not limited to, conventional medical and surgical treatment as well as non-coital reproductive technology such as assisted insemination by donor, cryopreservation of gametes and embryos, in vitro fertilisation, uterine embryo lavage, embryo transfer, gamete intra-fallopian tube transfer, and low tubal ovum transfer."

v Mary K, the procedure had not involved any medical personnel, while in the case *Bruce v Boardwine*, the woman had injected the donor's sperm using a turkey baster.[453]

To analyse the Californian case in more detail, Mary – on the basis of an informal agreement reached with Jhordan – had inseminated herself with her friend's semen and given birth to Devin, the fruit of a parental project shared with Victoria. Shortly after the birth, a dispute arose between the parties regarding the role that Jhordan would play in the life of the child (if any). Mary insisted that she had warned Jhordan that she did not want a donor who wished to be an ongoing participant in the child's life. Jhordan, on the contrary, believed that they had agreed that the child would see his father at least two or three times a week. Given this divergence, Jhordan appealed to the courts for recognition of his paternity of Devin.

In the meantime, Mary and Victoria cared for the child. Victoria, in addition to accompanying Mary to the medical examinations throughout the pregnancy, was also present at the birth and had taken on the role of co-mother. What was more important, she was recognised as such by Devin himself. Thanks to her involvement, Victoria became part of the proceedings, applying for joint wardship of Devin. The Appeals Court – confirming the decision of the trial court – accepted Jhordan's claim, however they both excluded his participation in the decisions regarding the life of the child, stating that to attribute parenthood to the donor was the direct consequence of Mary and Victoria's decision not to realise the conception through ART and, therefore, to renounce the non-paternity rule.

In order to avoid misunderstandings, the judge concluded by stating, "[…] our opinion in this case is not intended to express any judicial preference towards traditional notions of family structure or toward providing a father where a single woman has chosen to bear a child."[454] Rather than being based on value judgements relating to the desirability of one family model rather than another, a matter that moreover – stated the same judge – public policy in these areas is best determined by the legislative branch of government, not the judicial. The attribution of parental status for a donor and the recognition of the mere right to access in favour of the co-mother therefore derives from a literal interpretation of the non-paternity rule, which cannot be applied to cases of do-it-yourself heterologous insemination.[455]

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453 For a wide-ranging panorama of the problems relating to the determination of filiation that have followed the use of sperm from a donor who is a friend or an acquaintance of the aspiring parents, and on which the American courts have ruled, see, D. Forman, *Exploring the boundaries of families created with known sperm providers: who's in and who's out?*, in "University of Pennsylvania Journal of Law and Social Change", 19, 2016, N. 1, pp. 41-105.

454 Court of Appeal of California, 28 March 1986, Parte IV Conclusions.

455 For a critical note regarding the decision of the judge to base the determination of the *status filiationis* in conformity with the non-paternity rule on the use of medical technologies/involvement of a physician, see R. Brandt, *Medical intervention should not define legal parenthood*, BioNews 801, 11 May 2015. Available online: http://www.bionews.org.uk/page_523229.asp.

In a ruling issued by the English High Court in November 2015,[456] however, the fact that the insemination procedure occurred at home and, therefore, without medical assistance, was not considered important for the purpose of regulating the family relationships of the minor born from the procedure. In this case, because the aspiring mothers were in a civil union, the partner of the woman who gave birth had acquired parental status in accordance with the Human Fertilisation and Embryology Act 2008. The donor, who had visited the child until the two mothers opposed his greater involvement, did not wish to acquire the status of father, but merely the right to access.

After clarifying that "the critical welfare considerations are the stability and security of the relationships within the family"[457], the judge stated that allowing the donor to have direct contact with his son, who at the time was four months old, would have compromised the equilibrium of the family in which he was born and had been raised until that time, thus creating the unacceptable risk of causing him emotional suffering. The agreement between the parties prior to the conception was not therefore considered important, since the judge was called upon to regulate the relationship between the father and the son only on the basis of the child's current needs.[458] This said, the High Court nonetheless foresaw that the donor could remain in contact with his son through written correspondence, for the purpose of granting the child the opportunity, in the future, of meeting him or at least obtaining information about the genetic father, if he so wished. In this manner, the judge seems to have intended to reach a balance between, on the one hand, the need to protect the primary family unit from third-party 'intruders' and potential generators of conflict, and on the other, the need to encourage contacts between the minor and his biological father.[459]

5. *Final observations: the best interests of the child, but which?*

Despite the varied nature of the circumstances analysed above, the thread of the rulings that have resolved the disputes between the mother(s) of the child and the (male or female) donor is 'the best interests of the child', which as emphasised in the first chapter, are susceptible to different interpretations. Recalling the fundamental distinction made by Lenti (and later taken up by Lamarque), the prevailing hermeneutical formulation is close to the abstract version of the principle of the best interests of the child which, rather than being sought in an individualised solution,

456 *X, Re (No 2: Application for contact by the biological father)*, 13 November 2015. Available online: http://www.familylaw.co.uk/news_and_comment/re-x-no-2-application-for-contact-by-the-biological-father-2015-ewfc-84#.Wdy-r2NSoy0.

457 Ibidem, § 49

458 *Ibidem*, § 9: "(…) X's welfare has to be looked at in the context of what her needs are now (…)".

459 F. D'Elia, *Il diritto del donatore di seme a conoscere e a frequentare il figlio nato con inseminazione assisted e*, in "Minorigiustizia", 2014, N. 3, 39.

recommends – once and for all – a certain measure as efficacious for the protection of any minor who finds him/herself in a condition of specific vulnerability.

In this precise context, it is the granting of some form of legal recognition to the child-donor relationship that is considered to conform to the realisation of the best interest of children born from heterologous ART, seen as a legal category and therefore holders of a uniform interest. Not being inspired by the life experience of the individual minor, a similar reading of the principle of the best interests tends to be based on positions with an ideological matrix that associate the well-being of the minor with the mere presence of certain conditions, without verifying the effective practicality in the specific case. In the jurisprudential framework analysed, there are essentially two factors presumed to meet the best interests of the child: the genetic factor and the presence of a paternal figure in the life of the child.

Although, as emerges from the case-law, the donors involved in the disputes previously mentioned had generally created or at least begun to develop an affective relationship with the child prior to the emergence of the conflict (since they were not anonymous, but friends or even ex-partners of the mother) it is not the existence of a *de facto* family life between the (male or female) donor and the child that is seen to be important in considering the request of the appellant worthy of acceptance, but rather the genetic origin of their bond. It is not surprising, therefore that the exaltation of the genetic factor is often accompanied by the underestimation of the social parenthood which, although it does not alter the social reality of the original family nucleus, is often translated into a partial recognition of the role of 'primary caregiver' effectively assumed by the co-mother and, even before that, the common procreative intent underlying the recourse to heterologous ART.

Pushing the analysis beyond the text of the rulings, this approach can be seen as the expression of the judges' intention to meet a twofold need. *In primis*, that of ensuring respect for the right of the minor to a clear genetic heritage as an integral part of his/her personal identity, in conformity with the directives of the jurisprudence of the Strasbourg Court. On this point, it seems however interesting to note the lack of explicit references to the plausible need to guarantee the child access to information concerning his/her genetic origins – a line of reasoning that it is difficult to challenge with regard to the legislation in question. Although in a decidedly vaguer manner, these rulings – which in the majority of cases concern families composed of two women – also seem to pursue the intention of recreating – even if forcedly, since the principal parental figures in the life of the child are the two mothers – the traditional heterosexual family foreseeing, through joint wardship or access rights, the participation of the only paternal figure available in the life of the child.

Chapter 6

Exchange of Genetic Material: parents 'by mistake'

1. *Introduction*

Errare umanum est, considering the complexity of the operations involved in medically assisted procreation procedures it is – unfortunately – also relatively frequent. These techniques, in fact, being medical treatments, present a certain margin of risk. Nonetheless, in a delicate area such as ART, where human lives are at stake, every single adverse event can produce tragic, painful consequences that are terribly difficult to manage from an ethical and legal standpoint.[460]

The errors referred to in this section consist, in particular, in the accidental exchange of genetic material – semen, oocytes or, even embryos – during homologous IVF procedures, which should ensure that the child born should present the genetic heritage of the intentional parents. More specifically, we will analyse events in which the oocytes of the woman were fertilised using the semen of the 'wrong' man, or the embryos of one couple were implanted in the uterus of the 'wrong' woman. The cases that follow therefore represent, we could say, the modern version of the exchange of new-born children, of which we here much less frequently than in the past. [461]

Although the divergence between the legal profile and the genetic truth is, in the framework of ART (and of adoption), "ontological," [462] these events represent an exception because, being procedures that are theoretically homologous, the gap between the genetic factor and the social/legal factor is "an exceptional event to be ascertained"[463], as in natural procreation. Since the exchange of genetic material was not deliberate, for the purposes of this study, these events reveal the tensions that can arise regarding who should be considered the parent of the child born: the genetic parents, that is those who supplied the gametes from which the 'disputed' child was born, or the woman who carried the future child in her womb and gave birth, or the people who took care of the child and raised him/her as their own until that moment?

The national legislation on matters of ART rarely give a clear and precise answer to this question and, in the absence of *ad hoc* laws, the resolution of the sensitive question of the relationship of filiation – which involves not only the rights of the aspiring parents, but also those of

460 Comitato Nazionale per la Bioetica, *Considerazioni bioetiche sullo scambio involontario di embrioni*, 11 July 2014, p. 12. Available online: http://presidenza.governo.it/bioetica/pdf/Considerazioni scambio_involontario.pdf.

461 Amongst the cases publicised most recently is the accidental exchange of new-born babies in a Cannes clinic, which was discovered in 2015, 20 years after the birth of the two girls. Available online: http://www.lastampa.it/2015/02/10/esteri/bimbe-scambiate-in-culla-risarcimento-milionario-XqHRZAntPE48ZDQ31yBMnM/pagina.html.

462 M. Bianca, *Il diritto del minore ad avere due soli genitori: riflessioni a margine della decisione del Tribunale di Roma sull'erroneo scambio degli embrioni*, in "Diritto di Famiglia e delle Persone", 2015, N. 1, pp. 200 and 202.

463 *Ibidem.*

the children – falls to the judicial authorities. In these circumstances, the judge is called upon to decide which are, or should be, the requisites necessary for the attribution of legal parenthood: the genetic contribution, the gestational contribution, the consent and the contract, the intention to procreate a child, the intention to raise a child as his/her parents, the existing or pre-existing bond with the minor, the activity of raising and caring for a child, the needs of the parents, the best interests of the child, the social and emotive parenthood, the economic support, the legal adoption or something else.

Nonetheless, before delving into the analysis of the jurisprudence in order to identify the rules, the principles and the logic employed by the judges in determining the *status filiationis* of the children born by mistake, the paragraph that follows offers a panorama – brief and concise – of the numerous cases of exchange that have occurred so far and of the legal questions – other than the definition of parenthood – that they have raised.

2. *An overview of the circumstances of 'exchanges'*

The errors that we will discuss in this chapter are more common than one might imagine. It is sufficient to consider that between the start of 2017 and the time of writing news of two possible exchanges has been published. In early January, the presumed exchange of phials at the University Medical Centre in Utrecht appeared in the newspapers. It would seem that, due to a procedural error, twenty-six women who underwent ART between April 2015 and November 2016 were fertilised with semen from a man other than the one who was intended to be the biological father, that is their partner or husband. [464] Amongst the women involved, thirteen had frozen their embryos for future use, four were pregnant and nine had already given birth – the oldest child was one year old at the time of the discovery. [465] Shortly after the admission by the Utrecht clinic, Reprofit – a clinic in the Czech Republic – announced that following a human error, two embryos were implanted in the wombs of the wrong women, both from a foreign country. [466] The inquiries are ongoing.

The moment and the methods due to which the error occurs vary according to the specific case. In some circumstances the exchange is discovered 'in time', that is prior to the birth. For example, we can mention a case in Torino, in 2004, when two women were given the 'day after pill' half an hour after one of the two couples involved had noticed that the semen used for their

464 For a brief account of the event, see, for example, G. Everett, *Sperm mix-up involving 26 women at Dutch IVF clinic*, BioNews 883, 9 January 2017. Available online: http://www.bionews.org.uk/page757822.asp.

465 *Ibidem.*

466 S. Robson, *Wrong embryos implanted into women at Czech fertility clinic popular with Brits*, Daily Mirror, 7 January 2017. Available online: http://www.mirror.co.uk/news/world-news/wrong-embryos-implanted-women-czech-9571617.

IVF carried the name of another man.[467] This event is similar to the one at St. George's Hospital in London in 2002, where two women who had been implanted with the 'wrong' embryos decided, for this reason, to interrupt the pregnancy; or the one at the IVF Wales Fertility Centre in 2009, where a tragic exchange of embryos – probably by an intern overloaded with work and under pressure due to the long list of patients awaiting treatment – ended with an abortion for the woman involved. [468]

In other cases, the error becomes known later, when an abortion is no longer an option. In fact, there are numerous situations in which the colour of the child's skin indicates that a mistake has been made. The first event of this kind of which we have evidence dates from 1986: Ms Julia Skolnick, a white woman, wanted to have a child using the frozen sperm of her defunct husband – who was also white – but due to a technical error, she gave birth to a black child. The first case taken up by the media involved the Stuarts, a white couple from Utrecht (Netherlands) who, in 1993, had twins, one white and one black. It was established that one of the oocytes of Mrs Stuarts had been erroneously fertilised with the semen of a black man, who had contacted the clinic in order to have a child through ART with his wife. In this case, the genetic father of the black twin did not apply for wardship and therefore the Stuarts have been able to raise the children as siblings.

More recently, it is worth mentioning the case of Jennifer Cramblett, a white woman from Ohio who twice[469] took legal action against a semen bank in Illinois for having wrongly supplied the semen of an Afro-American donor, leading to the birth of a mixed-race child that Ms Cramblett said she did not feel culturally ready to raise. Specifically, the woman feared that raising Payton in a small community, mainly home to white people, who she considered "too racially intolerant", would have exposed the child to racist attitudes that would have compromised her serene development.[470] According to the judge, however, the action for 'wrongful birth' brought by Ms Cramblett would be rejected since Payton was a healthy child and the conditions were lacking. The field of application of this case – the judge clarified – is limited to cases of negligence in which the

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467 N. Zancan, *Lo scambio di provette? È stato come uno stupro*, La Repubblica, 11 September 2004. Available online: http://ricerca.repubblica.it/repubblica/archivio/repubblica/2004/09/11/lo-scambio-di-provette-stato-come-uno.html.
Another exchange of sperm that ended with the assumption of the 'day after pill' occurred in Padova in 2009, see, for example, A. Priante, *Fecondata per errore col seme di un altro – per il giudice "non è lutto"*, Corriere del Veneto, 17 March 2016. Available online: http://corrieredelveneto.corriere.it/veneto/notizie/cronaca/2016/17-March-2016/fecondata-errore-col-seme-un-altro-il-giudice-non-lutto-240185578721.shtml.

468 J. Macfarlane, *'In ten seconds our world was shattered': Distraught IVF couple discovered their last embryo was given to the wrong woman – and then aborted*, Daily Mail Online, 14 June 2009. Available online: http://www.dailymail.co.uk/news/article-1192867/IVF-baby-given-wrong-woman--couples-embryo-aborted.html.

469 On the first case, see A. Blackburn-Starza, *Sperm mix-up case dismissed*, in Bionews 818, 7 September 2015 Available online: http://www.bionews.org.uk/page_563782.asp. On the second, see A. Blackburn-Starza, *Woman sues US sperm bank again for sperm mix-up*, in BioNews 849, 3 May 2016. Available online: http://www.bionews.org.uk/page_645165.asp.

470 A. Blackburn-Starza, *The Ohio sperm mix-up: What's the harm in giving birth to a healthy, beautiful baby girl?*, in BioNews 783, 8 December 2014. Available online: http://www.bionews.org.uk/page_476147.asp.

medical personnel neglected to report the risk of congenital and hereditary disorders, prior to the birth.

This catalogue of exchanges shows that, although the idea that similar errors could occur continues to amaze, they are not such exceptional and sporadic events as we might think. An unknown number of errors, in fact, do not emerge because there is no need to carry out genetic tests and, unlike the Cramblett case and others concerning people of different ethnicities, there is no immediate and evident difference between the child and the parents, difference that would arouse doubts and therefore determine the start of inquiries.[471]

The mismatches that derive from similar errors, obviously, generate embryos or, even children, who genetic heritage does not correspond – wholly or in part – to that of the intentional parents or to the one they desired. Following these exchanges, therefore, as mentioned above, legal disputes aimed at determining whom – amongst the various adults involved – should be considered the parents of the child in the eyes of the law. The case law that derives from these events, however, is not limited to this type, but also includes the disputes in which the parenthood of the child is not challenged. Amongst these, there are cases that do not derive from procedural errors, but from criminal behaviour by the medical personnel of the clinic that, although it creates a discrepancy between the DNA of the child born and that of the intentional parents and/or the chosen donor, is not relevant for the purposes of this study.

It is sufficient to mention, for example, the notorious case of the American doctor Cecil Jacobson who, during the eighties and nineties, used his sperm to fertilise the oocytes of about one-hundred and twenty patients without their consent.[472] The case of Dr Donald Cline who – in at least fifty occasions – would seem to have used his own gametes – instead of those of the donors carefully selected or, even, of the husbands – to fertilise the oocytes of the patients of the American clinic in which he worked, becoming the biological father of at least eight children. [473] The case of Dr Norman Barwin – ex-president of the Canadian Fertility Association who, in the nineteen-eighties (when he managed the Broadview Fertility Clinic), secretly used his semen to fertilise the oocytes of about a dozen clients.[474] Finally, an American couple – Paula and Jeff –discovered through DNA testing that their daughter Ashley – born thanks to ART carried out at Reproductive

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471 v. R. Mabry, "*Who is my real father?*" – *The delicate task of identifying a father and parenting children created from an in vitro mix up*, in "National Black Law Journal", 2004-2005, p. 60.

472 B. Drummond Ayres, *Fertility doctor accused of fraud*, The New York Times, 21 November 1991. Available online: http://www.nytimes.com/1991/11/21/us/fertility-doctor-accused-of-fraud.html.

473 A. Slater, *US fertility doctor accused of impregnating patients with his own sperm* , BioNews 869, 19 September 2016. Available online: http://www.bionews.org.uk/page_701587.asp.

474 M. Cook, *Canadian reproductive rights pioneer in disgrace over IVF mix-up*, BioEdge, 5 November 2016. Available online: https://www.bioedge.org/bioethics/canadian-reproductive-rights-pioneer-in-disgrace-over-ivf-mix-up/12077.

Medical Technologies (a clinic in Utah) – is not genetically linked to Jeff, her social father, but to Thomas Lippert, previously a member of the clinic's staff. [475]

Another category of legal proceedings that, although they do not fall within the scope of this chapter, often follow the exchanges, however, seek compensation for the harm caused by the clinic in which the exchange took place.

According to the prevalent jurisprudence, to have a healthy child, but different from the one desired or – from the standpoint of the minor – to be born healthy, but with characteristics different from those of one's parents – does not give rise to compensation. For example, in addition to the case of Jennifer Cramblett, referred to above, it is worth mentioning the British case – which was spoken of, although less recently – of the twins born with skin of a different colour from each other and from their parents, due to an exchange discovered only at birth.[476] In particular, the oocytes of the mother were erroneously fertilised with the semen of a black donor, rather than that of a white donor as requested by the woman.

The minors claimed compensation for the harm caused by the exchange on the basis of the three following reasons: first of all because they had been the victims of racist attitudes; secondly, because they had received unpleasant comments regarding the physical difference between themselves and their parents, to the extent where they believed they might have been adopted; and finally, because if they were to have a child with a mixed-race partner, the child born might have skin of a different colour from both parents.[477] The judge – that is the High Court and, later, the Northern Ireland Appeals Court (June 2011) – ruled against the claim, stating that, "in a modern, civilised society the colour of their skin – no more than the colour of their eyes or their hair or their intelligence or their height – cannot and should not count as connoting some damage to them."[478] It was therefore established that the twins, being "normal and healthy,"[479] had not suffered any legally significant harm.

The Appeals Court of Singapore was of a slightly different opinion. At the start of April 2017, it ruled on a case regarding the oocytes of a patient which were, mistakenly, fertilised with semen from a man other than her husband. The notoriety of this event is due principally to the

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475 A. Haque, *Fertility clinic worker's sperm swap uncovered by child's DIY gene test*, BioNews 737, 13 January 2014. Available online: http://www.bionews.org.uk/page_386972.asp.

476 See, for example, S. Sheldon, *Only skin deep? The harm of being born a different colour to one's parents*, in "Medical Law Review", 11, 2011, N. 4, pp. 657-668; M. Duggan and J. McCandless, *'Right Thinking People' and Suffering Through the Politics of Difference in Northern Ireland: A Feminist Judgment* in *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity*, ed. M. Enright, J. McCandless and A. O'Donoghue, London, Hart Publishing, 2017.

477 *A and B by C (their mother and next friend) v A Health and Social Services Trust*, Northern Ireland High Court, 13 October 2010; Northern Ireland Court of Appeal, 24 June 2011.

478 *Ibidem*, § 18.

479 *Ibidem*, § 23.

unusual claim for compensation presented by the couple, which was followed by an equally unusual decision, which creates a potentially dangerous precedent, since it seems to refer to the existence of a right to genetic affinity with one's children.[480]

In fact, the couple had asked for the reimbursement of the expenses borne for raising their daughter – born from an error – up to the age of twenty-one years of age. The Appeals Court, confirming the decision of the High Court, ordered that, since the care of the children was central to parental responsibility, the expenses linked to it should not give rise to a significant loss for the purposes of compensation.[481] This said however, the same judge, concluded that the couple should be compensated for the harm deriving from the lack of genetic affinity between the social father and the child (literally, "loss of genetic affinity") with a sum equal to 30% of the sum claimed by the appellants.[482] Establishing that, on the basis of the social importance attributed to ties of kinship, to be deprived of these bonds due to medical negligence gives rise to a 'tort' that has legal effect, the Singapore Appeal Court distanced itself (at least in part) from the prevalent jurisprudence in matters of 'wrongful birth', which has traditionally ordered the payment of compensation only in cases concerning minors born with serious genetic disorders and/or congenital diseases, to parents who were not adequately informed by the medical personnel.

3. The problematic determination of the status filiationis of those born 'by mistake'

The jurisprudential analysis that follows concentrates on three cases, from three different jurisdictions: the case *Deborah Perry-Rogers et al. v. Richard Fasano et al,*[483] decided by the Supreme Court of New York in 2000; the case *Leeds Teaching Hospitals NHS Trust v. Mr and Mrs A and Others*[484] on which the English High Court ruled in 2003 and, finally, the now well-known event at the Ospedale Pertini, on which the Court of Roma ruled in three appeals, in 2014, 2015 and 2016.[485] The factual circumstances characterising the events in question are almost identical. In all three cases, the two couples had contacted the same clinic with the intention of undertaking homologous ART. Therefore, none of the couples intended to donate their embryos or gametes, nor to use the embryos or gametes from a third party. Equally, none of the women who gave birth to the

480 M. Allyse, Is there a right to genetic affinity with one's children?, BioNews 897, 24 April 2017. Available online: http://www.bionews.org.uk/page_824150.asp.

481 *ACB v. Thomson Medical Pte Ltd and others*, Singapore Court of Appeal, 22 March 2017, §§ 87-94. Available online: http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/court-of-appeal-judgments/22753-acb-v-thomson-medical-pte-ltd-and-others.

482 *Ibidem*, §§ 125-136.

483 26 October 2010.

484 26 February 2003.

485 Civil Court of Rome, Section 1, 8 August 2014; 22 April 2015; ruling dated 20 April 2016.

'disputed' children intended to act as a surrogate mother for another couple and, at the same time, none of the couples intended to make use of the birth mother to fulfil their wish for parenthood.

These events differ, therefore, from the disputes that originated from recourse to surrogacy, since the problematic determination of the *status filiationis* of the child is not the consequence of a private agreement that was enacted in the knowledge that it infringed national law, nor of second thoughts, but of a serious medical error that cannot be attributed to the couples. In addition to being identical on the plane of the intention, in all three cases, there was a period of cohabitation between the biological parents – that is the birth mother, her husband and the child.

However, there are also discrepancies between the three situations. On a practical level, while the mismatch at the centre of the British event was the result of an unintentional exchange of semen, in the American and the Italian situations, the error concerned embryos that had already formed. A second difference regards the object of the dispute. While in the case *Perry-Rogers v. Fasano*, the Supreme Court of New York was called upon to rule on the possible recognition of access rights for the parental couple who were excluded from the relationship of filiation, in the Italian and the British cases, the judge had to deal with the much wider and more complex question of the determination of the *status filiationis*. In other words, to establish what relationship between the children born thanks to ART and the aspiring parents who took part in the procedures should be recognised by the law as a parent-child relationship. It is, nonetheless, more a formal difference than a substantial one, since as will be seen from the jurisprudential analysis, also the American ruling gives a clear message regarding which relationship should be privileged for the purposes of defining the relationship of filiation.

The three decisions do not express a uniform position but are three different approaches to the same question. The American decision is important because it attributes an absolute value to the genetic factor, thus denying any importance for the biological factor – that is the intrauterine bond created between the birth mother and the child – and to the social factor – that is the possible relationship developed between the minor and the family in which they were born and first received care. The Italian judges, on the other hand, sanctions the prevalence of the biological parenthood, since it is in the interest of the child to preserve their affective bonds with the woman who gave birth to them and her husband, the couple who has cared for them since birth. Although in opposite ways, therefore, both the decisions reflect a traditional and static vision of the family, reserving the status of legal parent to two (and only two) persons united in a couple and excluding the participation of other parental figures in the life of the minors involved.

The British judge, instead, established an intermediate vision, decidedly more in harmony with the family experiences of the persons involved and, in general, more open to the needs of the

new family phenomena. The decision regarding the Leeds Teaching Hospitals establishes, in fact, a crossed legal parenthood, binding the maternity to the gestation and the birth and the paternity to the genetic factor but it does not alter the family situation in which the minors have grown up so far. Although the legal father is the genetic one, in practice the parental responsibility remains with the man who has taken care of the minors as if they were his own children from the first day of their lives.

In addition to highlighting the disruptive effects of the ART on the fundamental concept of parenthood, more specifically, the three cases that we will analyse show that any technique that intervenes on the dynamics of procreation – including homologous procedures, which are abstractly lacking in problematics of a legal nature, both regarding the access to these techniques and the determination of the parenthood – can, if technical errors occur, give rise to problems of extreme complexity, on both the human and the legal plane. No technique, not even the most simple, is therefore exempt from the debate on the implications of the medical-scientific development in the procreative field for the determination of the *status filiationis*.

Finally, the three situations in question show that, although the family has been going through a transformation for decades, society and law continue to muddle through with notions of 'family' and images of maternity and paternity that it is impossible to reconcile or are incompatible. As emphasised by Flamigni, in fact, human error has a different impact according to the context in which it occurs and the evaluation that is attributed to it depends on the historical period and the value system of reference.[486]

The errors that have given rise to the legal disputes that follow all took place in a part of the world that has taken a given family model and a certain definition of maternity and paternity as valid.[487] If they had taken place in different social-cultural contexts, with different visions of how it is possible to be a mother or a father, very probably these errors would not have caused such an outcry. The fact that these events have caused such a reaction in our society is therefore a symptom, in the opinion of Flamigni, of a clash of paradigms between the traditional model of family (a heterosexual couple, married or cohabiting, with genetic offspring) and a 'new' model, which is the fruit of the scientific and social evolution of recent years and demands a radical rethinking of family relationships, filiation and parenthood.[488]

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486 Comitato Nazionale per la Bioetica, *Considerazioni bioetiche sullo scambio involontario di embrioni*, cit., Annotation by Prof. Carlo Flamigni, p. 16.
487 *Ibidem.*
488 *Ibidem*, p. 17.

3 *Perry-Rogers v. Fasano*[489]*: genetic parenthood prevails over biological/social parenthood*

In 1998, Donna Fasano gave birth to twins, one white (Vincent) and one black (Joseph) following an accidental exchange of embryos. The two couples involved – Rogers and Fasano – had undertaken homologous IVF procedures at the same New York clinic. Due to a medical error, the embryos of the Afro-American couple, the Rogers, were implanted together with those of the other (white) couple, the Fasanos, in the uterus of Mrs Fasano. The two babies, therefore, although they were twins, did not have the same genetic heritage: Vincent genetically belonged to the Fasanos, while Joseph was the fruit of the gametes of the Rogers. Mrs Rogers had also undertaken the procedure, but the implant had not been successful. Probably for this reason, the couple decided to take legal action against the Fasanos in order to obtain the exclusive parenthood of their genetic son.[490]

Let's take one step back. The couple were informed of the error a few weeks after Mrs Fasano discovered that she was expecting twins. The Rogers had tried to identify the person who had received their embryos. The Fasanos, on the other hand, had not taken any measures to establish the identity of the genetic parents of the twins, neither during the pregnancy nor in the months following their birth. The Rogers were informed of the birth of twins and, suspecting that they had a genetic link with Joseph, had asked for genetic testing on the child. The DNA test confirmed that their suspicions were correct and therefore their genetic parenthood. Given this proof and, apparently, in the interest of the child, the two couples reached an agreement under which the child would be handed over to the genetic parents – who would be recognised as the legal parents on the birth certificate. One condition of the agreement was that the Fasanos, who had cared for him as their own child until then, would be allowed to maintain contact with Joseph, who had been renamed Akeil by the Rogers family. At the age of four and a half months, therefore, Joseph/Akeil left the Fasano family and began to live with the Rogers.

Nonetheless, later, the Rogers, in contrast with the agreement, tried to exclude the Fasanos from their child's life and a legal battle between the couples began. The Rogers appealed to the courts to oppose the Fasanos' request for access rights and therefore to have the sole wardship of Joseph/Akeil implicitly confirmed. The *Perry-Rogers v. Fasano* case, like the British and the Italian cases, invites and offers considerations on one of the most common and controversial questions of

489 *Deborah Perry-Rogers et al. v. Richard Fasano et al.*, cit. http://caselaw.findlaw.com/ny-supreme-court-appellate-division/1366796.html.

490 Although it is not relevant for the purpose of this analysis, both couples sued the clinic for damages.

the era of ART: whether and to what extent genetics is relevant and/or decisive in identifying the legal parent(s) of the minor born thanks to these techniques and, more generally to regulate the presence of other parental figures in the life of the minor.

The case was brought to the attention of the Supreme Court of New York, which concluded that the Fasanos could not claim any rights with regard to the black twin. In particular, it was stated that, in the light of the new technologies of assisted procreation, the argument presented by the Rogers, that the birth mother did not have any access rights because she was a 'genetic stranger' to Joseph/Akeil was not sufficient to resolve the question and reject the Fasanos' claim.[491] Considering the complexity and the variety of situations arising from the use of ART, in fact, to adopt genetics as the only criteria to be considered when taking decisions regarding the future of Joseph/Akeil and the families involved would have been, in the opinion of the Court, simply inappropriate.[492]

This said, the judge confirmed that the Rogers should be considered the legal parents of Joseph/Akeil excluding completely the interaction between the Fasanos and the minor. Before dealing in detail with the Court's reasoning, it is worth anticipating the incoherent nature of the decision in question. In fact, the New York judge refused to adopt genetics as a guideline but, at the same time, reached a conclusion that can only be explained by the importance attributed to the *ius sanguinis*.[493] This argumentative incongruity seems to be attributable, at least in part, to the ambivalent attitude of the Court with respect to the weight to be attributed to the gestation and the biological bond that forms between the woman and the child.

According to current legislation (Domestic Relations Law), the subjects who have a protected right to access the child are the parents, the grandparents, the brothers and sisters who are totally or partially blood relations. Based on this norm, the Rogers stated that, in consenting to the transfer of Joseph/Akeil, the Fasanos had renounced the status of parents and therefore lost the possibility of obtaining a ruling that regulated the time and methods of the visits between themselves and the minor. The Court reached the same conclusion, establishing that the Fasanos had no right to contact, but on the basis of an apparently different argument. In particular, in the opinion of the Court, it was the behaviour of the Fasanos – considered inopportune – that justified their complete exclusion from the life of Joseph/Akeil.

The New York judge decided that in the case in question, which was comparable to an exchange of new-born babies which, if discovered 'in time', required – according to the law in force

491 Original text: "In recognition of current reproductive technology, the term 'genetic stranger' alone can no longer be enough to end a discussion of this issue".

492 Original text: "Given the complex possibilities in this kind of circumstances, it is simply inappropriate di render any determination solely as a consequence of genetics".

493 L. Bender, *Genes, Parents and Assisted Reproductive Technologies: ARTs, mistakes, sex, race and law*, in "Columbia Journal of Gender and Law", 2003, N. 1 2, p. 36.

at the time – the immediate restitution of the minor(s) to the genetic parents. In the opinion of the Court, therefore, since they were aware of the error from the start of the pregnancy, the Fasanos could and should have acted promptly – and above all before a significant affective relationship was formed between themselves and the minor – to remedy the exchange of embryos.[494]

To remedy the medical error with a mutual exchange – which would be similar to an exchange of new-born babies – was not, however, imaginable since, while the Fasanos had the genetic child of the Rogers, the latter did not have the genetic child of the former. When the error was discovered, moreover, it was not possible to restore the *status quo* prior to the exchange. The embryos that genetically belonged to the Rogers, once implanted in the uterus of Donna Fasano, had in fact already transformed into something different from the genetic material exchanged. It therefore seems evident that in this situation, similar to an exchange of new-born babies, the Court considered the gestational contribution of the woman to be lacking any significance.

The case illustrated is not, however, the only forcing of similarities on which the New York judge based his reasoning. In fact, although stating that it would be inopportune to consider Donna Fasano a 'biological stranger', the Court decided that the relative jurisprudence regarding conditional access rights for the social parent (ex-partner of the biological parent) was applicable to the case in hand. In particular, the Court invoked the principle – confirmed in the courts – according to which the custodial parents of a minor have the right to prevent any person – including the person who previously cared for and raised the child – to meet him/her as a further basis for rejecting the Fasanos' claim. Thus, the judge – once again – denied any effective role to the mere fact of gestation and, in particular, the biological bond that Donna Fasano had developed with the child that she had carried for nine months.

The gestational role played by the woman represented, nonetheless, the basis of the third and final analogy proposed by the Court, which concerned surrogacy. The reference case is *Johnson v. Calvert*[495], in which – given the conflict that had arisen between the surrogate mother and the commissioning parents – the Supreme Court of California had stated that, if the genetic dimension and the gestation do not coincide, priority must be given to the intentional mother, that is, the woman who desired and ensured that the child could be born, in order to raise him/her as her own

494 It is not clear, however, what the Fasanos could have done to avoid being considered guilty: abort the pregnancy, or recognise the parenthood of the Rogers and hand over Jospeh/Akeil as soon as possible? It is also necessary to add that, even accepting the behaviour of the parties as a fundamental criteria for the purposes of the final decision, the Rogers could also easily have been accused of acting in bad faith since, as soon as they obtained wardship of their son, they infringed the agreement with the Fasanos, preventing them from seeing Joseph/Akeil. It is not therefore clear why this argument was presented only against the Fasanos, unless it was the intention of the Court to recompose the traditional family (seen as a nucleus composed of the married couple and their biological children) – fragmented due to the exchange of embryos and preserving its integrity by excluding once and for all the presence of 'extraneous third parties'

495 Supreme Court of California, 20 May 1993. This case will be analysed in chapter 10.

child. Leveraging this principle, the New York judge therefore established that, even though the Fasanos had applied for wardship of the minor (and not merely for the right to contact), their request would not be accepted since, in line with the decision in *Johnson v. Calvert*, it was the Rogers who had desired the birth of Joseph/Akeil and, for this purpose, they had organised the gathering of their genetic material by the clinic.

In conclusion, therefore, although it recognised the existence of bonds between the woman and the foetus and between the twins, the Court rejected the Fasanos' claim. In the opinion of the judges, these relationships were the consequence of the apathetic attitude that, once informed of the exchange, the Fasanos had deliberately assumed in order to encourage the creation of a bond that they could make use of for the purpose of obtaining the recognition of rights that they would not otherwise have had.

It therefore seems possible to state that, in contradiction with what was explicitly stated, the court in *Perry-Rogers v. Fasano* effectively granted genetics a decisive role in resolving the case.[496] Although excluding the absolute value of the genetic factor, the Court believed that the Fasanos should have acted immediately, practically adopting the opposite position – considering *a priori* the genetic parents to be the legal parents of the child. In fact, since the Rogers had not adopted the minor and there was no contract for surrogacy between the couples, there was no other legal basis – except for genetics – that could allow the judge to confirm the Rogers as the legal parents and, above all, to definitively exclude the Fasanos from the life of the child that Donna, after carrying him in her womb for nine months, had cared for – together with her husband – until he was four and a half months old. With this decision, the judges therefore affirmed, based on a decidedly questionable value judgement, the prevalence of genetic parenthood that develops in a traditional family model and leaves no room for other affections.[497]

In the opinion of Bender (an American jurist who has long dealt with these questions), this decision is a further confirmation of the tendency of the judges to use 'genetic essentialism' when called upon to solve complex questions generated by errors in the field of assisted procreation.[498] According to this formulation, our genes and our DNA constitute the essence, the most important component of who we are as human beings; and, therefore, genetics should prevail over any other factor in the definition of *status filiationis*.

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496 L. Bender, *"To err is human" ART Mix-Ups: A Labor-Based, Relational Proposal*, in "The Journal of Gender, Race and Justice", 2005-2006, p. 478; Bender, *Genes, parents and assisted reproductive technologies: ARTs, mistakes, sex, race and law*, cit., p. 17.

497 I. Corti, *Due gemelli e quattro genitori interrogano il diritto. (Riflessioni in merito all'erroneo scambio di embrioni: ordinanza del Tribunale di Roma 8 August 2014)*, in "Rivista Critica del Diritto Privato", 2016, n.1, p. 138.

498 Bender, *Genes, parents and assisted reproductive technologies: ARTs, mistakes, sex, race and law*, cit., p. 4.

In the procreative context, tying parenthood only to the genetic factor and, more specifically, equating genetics and gametes – but not pregnancy – to genetic parenthood has important consequence also of a discriminatory nature. Even more explicitly, the adoption of an approach that raises genetics to the determinant criteria inevitably favours men compared to women since it reflects and reinforces a vision of the reproductive process that finds its roots in the male experience. In other words, it valorises the contribution to reproduction that is typically male: the supply of gametes. Genetic essentialism therefore, by reducing human beings to the content of their cells, considers only a minimum part of the female participation in the reproduction (supply of gametes) and ignores the contributions of a relational, affective and biological nature that only the woman – through the gestation, the intrauterine bonding, the labour the birth and at times the breast feeding – can offer.[499]

As shown in the case in question, an approach based on genetic essentialism is also insensitive to the needs of the minor since it neglects the importance of the affective relationships that are formed outside the genetic paradigm. By effect of a similar formulation, in fact, the other ways – different from genetics – through which family relationships are created are considered irrelevant for establishing not only who the legal parents of the minor are, but also who can continue to visit him/her. A similar approach, therefore, rather than seeing the genetic reality and the social reality as distinct but potentially copresent, adopts the logic of competitive rights: the prevalence of the genetic factor resolutely excludes any relevance of the social-affective component. [500] Furthermore, in the specific case, the declaration of parenthood for the Rogers led to the negation of any form of participation for the Fasanos.

In order to remain faithful to the traditional family model and – presumably – in the conviction that organising other family relationships would be harmful to the minor, the judge felt the need to choose between the two parental couples, a choice which a more modern and pluralistic vision of parenthood would not have required. The traditional conception of the family that lies behind this decision also reflects a mono-dimensional reading of the interest of the child. Although not explicitly mentioned, the only interest of the child that the New York judge felt it necessary to preserve was the knowledge of his origins and the construction of a relationship of filiation that corresponded to the genetic truth. In addition to establishing a strong correlation between this partial vision of the interests of Joseph/Akeil and the lack of recognition of access rights for the Fasanos, we can therefore conclude that a wider and less abstract interpretation of the best interests, which took into consideration also the social reality characterising the specific case in question,

499 *Ibidem.*

500 I. Corti, *Due gemelli e quattro genitori interrogano il diritto. (Riflessioni in merito all'erroneo scambio di embrioni: ordinanza del Tribunale di Roma 8 August 2014)*, in Rivista Critica del Diritto Privato, 2016, N. 1, p. 139.

would have encouraged different relational models and potentially more in harmony with the experiences and the emotions of the persons involved.

3.2 The Leeds Teaching Hospital case[501]: genetic truth coexists with social parenthood

Here is another case in which the lives of two strangers entwine due to a medical error. To married couples, Mr and Mrs A and Mr and Mrs B, went to the same clinic – Leeds Teaching Hospital – to undergo homologous assisted fertilisation. By error, and therefore without the consent of the parties, the semen of Mr B was used to fertilise the oocytes of Mrs A, who gave birth to twins, XA and ZA. For Mr and Mrs B, however, the same procedure of assisted fertilisation was not successful. The exchange of genetic material therefore became evident at the birth of XA and ZA, since Mr and Mrs A were white and the twins were black, and genetic testing later established that Mr B was the biological father of the children. Following this discovery, the life of the twins remained unchanged: they continued to enjoy the loving care and attention of the family A, in which Mr A played the paternal role in its social and psychological dimensions, without any contact with Mr B.

Although he was of the opinion that XA and ZA should remain with the family into which they were born and had now lived for more than a year (that is with Mr and Mrs A) Mr B applied to the High Court for a legal declaration of paternity. In fact, on birth, the twins had been registered as the children of Mr and Mrs A. The High Court was therefore only called upon to resolve the question of who was the legal father of the children, a question that essentially demanded a choice between genetic parenthood and social parenthood.

Since the situation was the unexpected result of the use of ART, there was no legislation or common law regulation to define the *status filiationis* of minors born from similar errors. In the absence of a law directly applicable to the situation, the High Court was forced to resolve the dispute by means of the general rule – which arose to regulate quite different family phenomena, since it was antecedent to the advent of ART – according to which the genetic father of the twins – and therefore not the man who was caring for them and raising them as his own children – is also the legal father.

Before reaching this conclusion, however, the High Court meticulously examined the legislation then active in matters of ART (Human Fertilisation and Embryology Act 1990) in order to understand whether the regulations therein could be of assistance in determining the paternity of the children. In particular, the judge asked whether the situation in which the semen of one man was

501 *Leeds Teaching Hospitals NHS Trust v. Mr and Mrs A and Others*, cit.

erroneously used to fertilise the oocytes of a woman, even though not expressly contemplated by the legislator, could be resolve in the light of the attributive rules of status set out in Section 28 of the Act. In the case of a married couple, paragraph 2 of this regulation foresees that, in the case of a pregnancy generated by the semen of a man other than the husband or the implanting of an embryo created using the genetic material of another man, the paternity must in any case be attributed to the husband (social father) of the woman who gives birth, unless – and this was the crucial question in this case – there is proof that he did not give his consent to the procedure.

At first sight, stated the High Court, this rule – under which Mr A would have obtained the status of legal father – could have been considered applicable. Mr and Mrs A were, in fact, married at the time of the creation of the embryos and they had both given their consent to the IVF treatment.[502] The fundamental question to be clarified was, nonetheless, as follows: what procedure di Mr and Mrs A consent to? Even though once the error had been discovered, Mr A had declared that he did not want to withdraw his consent and that he wanted to take advantage of the presumption of paternity foreseen by paragraph 2 of section 28, the judge stated that what mattered were the waivers signed by Mr A before the treatment began. In other words, whether Mr A had given his consent was a factual issue, to be ascertained independently of his point of view.

As the High Court observed, the waivers clearly show that Mrs A had given her consent only to the fertilisation of her oocytes with her husband's semen and to the implanting of two embryos at most in her uterus. Similarly, Mr A had agreed to the homologous insemination of his wife and had explicitly opposed the fertilisation of her oocytes with the semen of an anonymous or unknown donor.[503] The consent given by Mr and Mrs A was, therefore, strictly limited to the IVF procedure that foresaw the use of their gametes.

The same was true for couple B. In fact, the couple had signed the forms giving consent to homologous IVF but refusing the use of their gametes to treat other patients in the clinic. In the opinion of the judge, therefore, "[…] the mixing of the semen of Mr B with the eggs of Mrs A was not within the contemplation of either family and was entirely contrary to the written consents given by Mr A."[504] Since the embryo was the fruit of a medical error it had been created without the consent of Mr and Mrs A and the embryo implanted in the uterus of Mrs A was fundamentally different from the one that would have been generated with the sperm of Mr A (the only procedure to which the couple had given their consent), the High Court decided that in this case Section 28, paragraph 2 was not applicable.[505]

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502 *Ibidem*, § 24.
503 *Ibidem*, § 27.
504 *Ibidem*, § 29.
505 *Ibidem*, § 28.

The judge then evaluated the potential applicability of paragraph 3 reaching the same conclusion.[506] This regulation, like the previous one, aims to regulate the attribution of paternity to children born thanks to ART, but refers to a situation in which a woman undergoes assisted procreation treatment together with a man ("in the course of treatment services provided for her and a man together"). Specifically, it establishes that when an embryo, or semen and oocytes are planted in the uterus of a woman during ART that she is undergoing with a man, and the semen used comes from another man, the status of legal father is attributed to the person who – together with his partner – consented to ART in order to have a child. The point to be clarified was whether this rule only applied to *de facto* couples or was also applicable to married ones, such as Mr and Mrs A.

The same High Court had already ruled (one week earlier) on the case *Re R (a child)*[507] – where it had to decide whether the man who had taken part in most of the ART treatment with his partner, from whom he had separated at the time of the implant of the embryo in her uterus, should be considered the legal father of the child.

In that circumstance, the judge had defined paragraph 3 of Section 28 an "unusual" regulation, since it grants the status of father to a person who has no bond – either of blood or of marriage – with the child. Confirming the approach followed in *Re R (a child)*, the High Court therefore excluded that the field of application of paragraph 3 also extended to married couples. Moreover, added the judge, even if a looser interpretation were adopted, the dramatic error at the centre of the event would still have meant that it was impossible to speak of 'treatment together' in accordance with paragraph3.[508]

To overcome the inadequacy of Section 28 in regulating the consequences of an exchange of semen – as occurred in the case in question – the only solution open to the judge was to determine the paternity of the twins in the light of the general rule according to which Mr B, being the genetic father, was also the legal father of XA and ZA.[509] Not being married to the legal mother (Mrs A) at the moment of the birth, Mr B was the father of children born outside the marriage and, in accordance with Section 2(2) of the Children Act 1989, although he held the status of legal father, he was not automatically the holder of parental responsibility, which remained with Mr and Mrs A.

Finally, the High Court noted that Mr A could formalise his bond with the minors and thus be recognised as their legal father by presenting an application for adoption.[510] This procedure could, in fact, be completed also without the consent or against the wishes of Mr B (inasmuch as he

506 *Ibidem*, §§ 30-37.
507 19 February 2003, in *Leeds Teaching Hospitals NHS Trust v. Mr and Mrs A and Others*, cit., § 33.
508 *Ibidem*, § 37.
509 *Ibidem*, § 1.
510 *Ibidem*, § 52.

is a parent without parental responsibility), providing it was agreed that the adoptive project was in the best interest of XA and ZA.[511]

With the advent of ART, it is undeniable that the weight attributed to the intention and the desire to become a parent and be recognised as such has grown considerably, becoming the first test used to determine legal parenthood of the children born thanks to these techniques. In addition, in this case, Section 28 HFEA and, above all, the judge who declared it inapplicable have – by making the consent of the parties to a fundamental principle to be preserved throughout the treatment – remitted the definition of the *status filiationis* of XA and ZA to the voluntary criterion. In fact, while it is true that couple A – like couple B – contacted the clinic to enact their parental project, it is also true that, before the procedure began, they did not intend to become the parents of children whose genetic heritage did not completely correspond to their own. Therefore, however paradoxical it may seem, the decision of the High Court that attributes legal paternity to Mr B responds to the logic of the full actuation of the intentions of the parties.

Section 28 HFEA also seems to reflect the belief that in the contemporary families – not only in those created thanks to ART – what counts are the affective relationships, not the genetic ones.[512] *Prima facie*, the decision of the High Court in the Leeds case seems distant from this perspective.[513] On a superficial reading of the decision it may seem that rather than encouraging a 'social' vision of parenthood seen as an act/an activity – rather than a being – the judge attributed decisive importance to a medical error and, therefore, gave priority to the genetic factor declaring that the donor of the semen – rather than the man with whom the twins were growing up and had created a family bond – should be considered their father in the eyes of the law.

Nevertheless, a more careful examination of the situation reveals a quite different state of affairs: the judge actually considers parenthood a primarily social role.[514] The decision to grant the status of legal father to Mr B, in fact, does not imply the exclusion of Mr A from the life of the twins. On the contrary, the latter can – or rather must – continue to play the parental role that he voluntarily assumed towards XA and ZA at the time of their birth, inasmuch as he is the holder of parental responsibility, together with Mrs A. Unlike the Supreme Court of New York in the case *Perry-Rogers v. Fasano*, therefore, the English judge respected the life experience that the twins and the families involved had matured up to that time and, rather than following the logic of competing rights, adopted a mediating solution that recognised the complex social situation generated by the medical error.

511 *Ibidem*, § 53.
512 M. Ford and D. Morgan, *Misconceived Conceptions*, in "Journal of Medical Ethics", 2004, vol. 30, N. 5, p. 479.
513 *Ibidem.*
514 *Ibidem.*

The importance granted to the social dimension of the parental role becomes evident when the High Court evaluates the relevance of Article 8 of the Human Rights Act – which made the ECHR applicable in English law and, in particular, sanctions everyone's right to respect for their private and family life – for the purpose of resolving the case in question. Starting from the position of Mr B, the judge observed that – although he was the genetic father of the twins – he had not had an opportunity to establish any affective bond with the minors. [515] Consequently, even though he could clearly not be considered a donor in the traditional sense of the term (except within the homologous procedure with his wife), the only factor that linked him to XA and ZA was – given the sad circumstances of the case – precisely the use of his semen. [516]

Nevertheless, the mere contribution of genetic material, stated the High Court, is not sufficient to make a man the holder of the right to respect for family life protected by Article 8. As can be seen from the Strasbourg jurisprudence, the existence of a family life (in accordance with Article 8 of the Convention) presupposes affective relationships between the persons involved. In other words, the existence of a genetic bond offers the genetic father the opportunity to develop an affective bond with the child. However, this man did not accept any responsibility, nor did he show any interest in playing an effective role in the life of his children. Consequently, repeated the High Court, the situation in which a person donates his semen only in order to consent a woman to have a child through assisted fertilisation does not give the donor the right to respect for his family life with the minor. [517]

In support of this principle, the court reported the decision of the ECHR in the appeal *M v. Netherlands* .[518] In this case, the European judges stated that even a donor who had occasionally contributed to the needs of his biological child, born to and raised by a lesbian couple, did not fall within the persons who had a right to respect for their family life with the minor. The appeal of Mr M – who asked for recognition of access rights – was in fact considered inadmissible, despite his occasional contact with the son, confirming the insufficiency of the mere genetic factor in triggering the applicability of Article 8 ECHR. Even more so, stated the English judge, considering the lack of any contact between the twins and Mr B, this was the only possible outcome. [519]

On the basis of the same considerations Mr and Mrs A were considered the holders of a right to respect for their family life under Article 8 ECHR: Mrs A – stressed the High Court – is in fact the biological mother of the twins; Mr A has in fact assumed the paternal role since their birth and,

515 *Leeds Teaching Hospitals NHS Trust v. Mr and Mrs A and Others*, cit., § 44.
516 *Ibidem.*
517 *Ibidem.*
518 Appeal N. 16944/90, ruling dell'8 February 1993.
519 *Leeds Teaching Hospitals NHS Trust v. Mr and Mrs A and Others*, cit., § 45.

has thus created an affective bond with XA and ZA, whom he considers his own children. [520] To attribute legal paternity to Mr B would therefore be an interference in the family life of Mr and Mrs A. According to the judge, however, this interference was justified inasmuch as it was foreseen by the law and pursued a legitimate purpose – the protection of the rights and the interests of the twins. [521] Moreover, as mentioned above, the adoption constituted for Mr A a possible remedy that would overcome the obstacles to the full enjoyment of his family life with XA and ZA.

The decision of the English court, rather than choosing between two situations apparently in competition and mutually exclusive, sees the genetic factor and the social factor as potentially coexisting; all for the purpose of ensuring the protection of the interests of XA and ZA which, amongst the parties involved in the exchange represented – in the opinion of the High Court – those whose rights had been most seriously infringed. [522] In this manner, the judge reached a fair balance between the apparently opposing interests and the needs.

On one hand, the decision to keep the family situation of the twins unchanged and therefore to confirm their presence with the family A (in conformity with the agreement between the parties) responds to the need to protect the integrity of the family life existing between Mr and Mrs A and the minors. On the other, the recognition of legal paternity for Mr B, in accordance with the results of the DNA tests attributes fundamental importance to the existence of XA and ZA, that is their paternal identity and, thus, meets the interest of the children in knowing their genetic origins ("They also retain the great advantage of preserving the reality of their paternal identity"). [523] In fact, given the circumstances of the case, the judge decided that knowledge of the genetic truth was – compared with a fictitious truth, like that deriving from the presumption of paternity – more respectful of the twins' rights and their well-being. "[…] to refuse to recognise Mr B as their biological father is to distort the truth about which some day, the twins will have to learn through knowledge of their paternal identity." [524]

In conclusion, rather than trying to keep the image of the traditional family intact, removing anything that is not in keeping with it, the judge recognised the fragmentation of the paternal figure as an inevitable consequence of the exchange of semen. This decision shows that emphasising the genetic truth, when this does not coincide with the social reality of the children involved, does not necessarily mean downplaying or ignoring the relational and affective aspect of parenthood, but rather recognising the complexity of the new family phenomena. In the case in question, the declaration of paternity in favour of Mr B did not, in fact, prevent the consolidation of permanent

520 *Ibidem*, § 49.
521 *Ibidem*, § 54.
522 *Ibidem*, § 55.
523 *Ibidem*, § 56.
524 *Ibidem*, § 57.

relationships between the minors and Mr A and, at the same time, recognised the importance of genetic parenthood as an essential component of personal identity.

3.3 *The case of the Pertini hospital: biological/social parenthood prevails over genetic parenthood*

Finally, it is worth turning our attention to the most recent – at least among those known – event in which an exchange had effects on the determination of the *status filiationis*: the one that occurred in a Roman hospital. The factual circumstances of this event are widely known due to the media circus that followed it. This case began at the end of 2013, when two couples – both affected by infertility – contacted the Pertini Hospital in Roma to satisfy their desire for parenthood and beginning two distinct procedures for homologous fertilisation, the only procreative procedure that could legally be carried out at that time. Following a serious error in the laboratory and only discovered during the pregnancy of one of the women, the result was two heterologous procedures. The test tubes containing the embryos created *in vitro* using the gametes belonging respectively to the components of each couple were accidentally exchanged and the embryos were implanted in the uterus of a different woman from the one genetically destined.

To make the situation worse, while in one case the implantation of the embryo gave rise to a regular pregnancy from which, on August 3rd 2014, twins were born, the other couple did not reach the desired result. The exchange was confirmed prior to the birth, but the woman decided not to abort and expressed her intention to accept parental responsibility for the babies, even though they were not genetically hers. Her husband expressed the same intention. The other couple, emphasising the genetic factor – that is, the fact that the embryos erroneously implanted were exclusively the fruit of their genetic heritage – claimed the right of a relationship of filiation over the babies.

It was from this moment on that the agreement between the parties, *ab origine* unidirectional, cleaved.[525] Hence, it was necessary to establish who the mother and the father of the babies were, resolving a dilemma – which had never before been faced by the Italian judges – whose ethical difficulty was undeniable and which essentially arose from the need to meet totally opposing needs. On the one hand, it was necessary to guarantee the babies stable parental references and a family; on the other, to safeguard – as far as possible – the interests of those who made use of ART in order to become parents.[526]

The legal course of the situation was composed of four main stages: the application for an interim order presented by the genetic parents which ended with a ruling by the Court of Roma

525 A. Mendola, *Favor minoris e presidio del dato biologico*, in "Diritto di Famiglia e delle Persone", 2015, N. 2, p. 558.

526 Comitato Nazionale per la Bioetica, *Considerazioni bioetiche sullo scambio involontario di embrioni,* cit., p. 9.

dated 8 August 2014; the appeal presented to the ECHR, claiming an infringement of Article 8, which was considered inadmissible by the Strasbourg judges on 10 October 2014;[527] a second claim presented by the genetic father, rejected by the same Roman judge with a ruling dated 22 April 215; and finally, the application of the genetic parents for a declaration of genetic parenthood in their favour, which, in conformity with the previous rulings, was considered unfounded by the Court of Roma with a ruling dated 10 May 2016.

In the analysis that follows, we consider it opportune to linger, in particular, on the first ruling issued by the Court of Roma on 8 August 2014, since it represents the most significant ruling of the entire procedure because the later rulings simply reiterate the content. Before analysing this ruling, however, it is worth introducing – if only briefly – the opinion given by the *Comitato Nazionale per la Bioetica* (CNB), which – given the delicate ethical questions raised by the exchange of the embryos – was consulted even before the birth of the twins.[528] In view of the extreme complexity of the question, the CNB did not feel ready to establish the prevalence of one or the other parental couples, "[…] aware that whatever the situation in which the children grew up, the ethical dilemma would remain open,"[529] the committee simply presented arguments in favour of the various parental figures involved (the birth mother, the genetic mother, the genetic father and the legal or social father).

Although it did not express a "bioethical preference,"[530] the CNB emphasised that the balancing of the interests in play should be realised starting from the perspective of the best interest of the future children, who should have precedence inasmuch as they are the weakest subjects in the situation.[531] In other words, in the opinion of the CNB, the solution adopted should respond to the need to guarantee "two definite reference parental figures, with full legal responsibility and able to exercise the right to choose with awareness and authority what they consider best for their children,"[532] but at the same time overcome the logic of competing rights and, therefore, avoid excluding the other couple from the life of the children, since it would be fundamental for their serene and balanced development to create an important relationship with those who had contributed to their existence, either genetically or through gestation.[533] The danger of possible excluding behaviour by one family towards the other could be avoided, in the opinion of the CNB,

527 *X e Y v. Italy*, Appeal N. 41146/14, ruling dated 16 December 2014.
528 Comitato Nazionale per la Bioetica, *Considerazioni bioetiche sullo scambio involontario di embrioni*, cit.
529 *Ibidem*, p. 3.
530 *Ibidem.*
531 *Ibidem*,
532 *Ibidem*, pp. 10-1.
533 *Ibidem*, p. 11.

by foreseeing access rights, an essential tool for ensuring the children a serene life without conflict.[534]

As mentioned, the legal proceedings began even before the twins were born, when the genetic parents lodged an appeal before the Court of Roma under Article 700 Italian Code of Civil Procedure. The application for an interim order was intended to avoid the registration of the birth certificate in the name of the birth mother and, by legal effect, of her husband, asking, at the same time, to declare the legal parenthood in conformity with the genetic reality, with consequent handover of the babies at birth. The twins were born in the meantime, between the presentation of the appeal and the hearing and they were registered as the children of the birth mother and her husband. This fact forced the appellants to amend their request during the hearing, asking for the babies to be taken to a suitable institution, thus separating them from the biological parents or, alternatively, that they should be granted access rights in order to guarantee an immediate affective relationship with the minors. Both the claims were to precede the request to raise the question of constitutional legitimacy of the laws on filiation – whose application had led to the recognition of the counterparts as the parents of the children – since no exceptions to the principle *mater semper certa est* are admitted and this did not allow the genetic parents to present claims for the ascertainment of parenthood. [535]

The other couple – the biological parents – opposed the application for an interim order presented by the appellants observing that, following the birth on 3 August 2014 (that is the day before the hearing), the twins had legitimately acquired the status of children of the birth mother and, by effect of the presumption of paternity, of her husband, in accordance with current legislation and in the full realisation of the interests of the child to preserve the relationship with the mother who had given birth to them. The Public Prosecutor, who spoke at the hearing, also asked for the appeal to be rejected since it would fulfil the principle *mater semper certa est* and it would be in the interest of the child not to be separated from the biological mother.

On 8 August 2014, the single judge of the Court of Roma rejected the application for an interim order presented by the genetic parents of the twins, who had been born in the meantime (although it was the intention of the appellants to obtain a ruling *ante partum*), and declared the birth mother and her husband the legal parents of the babies. With this ruling, the judge therefore established that, also in the case of accidental exchange of embryos due to a technical error during

534 *Ibidem.*

535 In particular the appellants raised the question of constitutional legitimacy of *a)* Article 269 Italian Civil Code, which orders, without exceptions, that the mother is the woman who gives birth; *b)* Article 239, paragraph 1 Italian Civil Code, which foresees the possibility of claiming the status of child, only in the case of supposition of birth or substitution of a new-born child, and *c)* Article 243bis Italian Civil Code, which limits the right to reject paternity, above all due to the manifest disparity with the conditions set out in Article 263 Italian Civil Code, which establishes that action can be taken by anyone who has a legitimate interest.

homologous assisted procreation procedures, the *status filiationis* of the babies should be determined in accordance with the traditional attributive rules, which base the maternity on the element of the birth and the paternity on the marriage with the mother who gives birth, since this fully corresponds to the best interests of the child (children), which should have a pre-eminent position with respect to the other interests involved.

The Roman judge, in her comprehensive ruling, emphasised above all the circumstances of the case and, preliminarily, stated that the delicate nature of the question, in addition to the serious human consequences for all those involved, was due to the fact that "the law does not contemplate and does not explicitly regulate the case in question."[536] The arduous task that awaited the Court was, therefore, that of identifying, in the absence of a specific discipline, the guiding principle most suited to resolving the conflict regarding the *status filiationis* between the genetic parents, who provided the gametes, and the biological parents, that is the birth mother and her husband. The situation was made particularly complex by the absence of a law that expressly regulates the event in question, but above all, by the absolute singularity of the event itself, which raised doubts about the legitimacy of an application of current legislation by analogy.[537]

According to the reasoning of the Roman judge, the case in question was not wholly similar to any of the paradigms of medically assisted procreation and consequently, the rules foreseen by Law N. 40/2004 were of limited applicative relevance. The situation could not be ascribed, in the opinion of the judge, to the hypothesis of heterologous ART, since, at least initially, the consent to the use of the genetic material of other subjects and the identification of donors who knowingly intended to make available their genetic heritage, renouncing parental responsibility, was lacking.[538] The rules for attribution of status following heterologous ART – according to which those who give their consent to the procedure are considered the parents of the child (children) born, without the possibility for the father to disown paternity and for the mother to give birth anonymously[539] - were therefore inapplicable since the parties had given their consent only to homologous fertilisation procedures.[540]

Although sharing some important aspects, the situation in question could not even be included in the paradigm of what is known as surrogacy, since – at the moment of recourse to the ART – the essential elements characterising surrogacy were lacking. In particular, the woman who intended to undergo homologous fertilisation procedures and had given her consent only to this

536 Civil Court of Rome, Section 1, 8 August 2014, p. 3.

537 M.G. Cabitza, *Scambio di embrioni: errore medico e scissione delle figure genitoriali*, in "Rivista di BioDiritto", 2014, N. 2, pp. 200.

538 Civil Court of Rome, Section 1, 8 August 2014, p. 3.

539 Law N. 40/2004, art. 9, paragraphs 1 and 2.

540 Civil Court of Rome, Section 1, 8 August 2014, p. 3; Comitato Nazionale per la Bioetica, *Considerazioni bioetiche sullo scambio involontario di embrioni*, cit., p. 6.

practice, clearly did not intend to collaborate as a third party (becoming pregnant and giving birth on behalf of others and handing over the child at birth to those who had expressed the intention to accept parental responsibility) in the parental project of another couple. [541]

The pregnancy from which the twins were born was not the result of such an agreement, but rather the consequence of someone else's negligence; [542] it is an undeniable fact that both couples were pursuing a personal parental project and not on behalf of others. [543]

To use the expressions coined by the CNB, the judge stated that this was a case of "erroneous heterologous procreation" or "erroneous surrogacy", which, given its singularity, created a situation of uncertainty with regard to the motherhood and the fatherhood of the babies.[544] They are, therefore, as Bianca observed, expressions that have no technical relevance, but simply describe the effective situation, in which the genetic heritage of others was implanted in the uterus of the woman who gave birth after a pregnancy generated by the genetic heritage of third parties. [545] Briefly, the case was a special hypothesis of ART that had become a fact, but it was not possible to apply the legal regime foreseen by this type of filiation and parenthood, which is based on the intention and not on the genetic factor.

By substituting the determinant element of the consent (which has a binding value in every phase of the treatment that leads to MAP) and the principle of self-responsibility on which the laws on matters of assisted procreation are based, the human error made them inapplicable. [546] The error meant that the law had to act and navigate within new and unexplored areas, which were neither those of homologous fertilisation, from which the procreative process developed, nor those of

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541 Civil Court of Rome, Section 1, 8 August 2014, p. 3.

542 E. Luzi, v. Centola and M. Crusco, *Scambio di embrioni, genitorialità e status filiationis: tra verità genetica e appartenenza biologica*, in "Rivista di BioDiritto", 2016, N. 2, p. 295; Bianca, *Il diritto del minore ad avere due soli genitori: riflessioni a margine della decisione del Tribunale di Roma sull'erroneo scambio di embrioni*, cit., p. 188.

543 The doctrine has gone beyond the considerations of the Roman judge, examining further hypotheses of classification. Some authors (*inter alia*, Luzi et al., *Scambio di embrioni, genitorialità e status filiationis: tra verità genetica e appartenenza biologica*, cit., p. 295; Cabitza, *Scambio di embrioni: errore medico e scissione delle figure genitoriali*, cit., p. 201) have stated that the event in question could not be traced either to the hypothesis of donation of gametes or of a fully formed embryo, since – once again – the intention of the genetic parents to donate the embryo was lacking and the donation occurred by mistake. As the Comitato Nazionale per la Bioetica emphasised (*Considerazioni bioetiche sullo scambio involontario di embrioni*, cit., p. 7), the position of the genetic parents was not in fact comparable to the one in which the (male or female) donors of gametes stand, since they take part in the procreative process knowingly and cannot claim any rights or see any parental obligation towards the child imposed on them. In the opinion of the doctrine *inter alia*, Luzi et al., *Scambio di embrioni, genitorialità e status filiationis: tra verità genetica e appartenenza biologica*, cit., pp. 293-4; Cabitza, *Scambio di embrioni: errore medico e scissione delle figure genitoriali*, cit., p. 204) and of the CNB, moreover, it would seem possible to affirm that also the inapplicability of Article 240 Italian Civil Code by analogy, which allows the status of child as shown on the birth certificate (which shows the person who gave birth as the mother and as the father her husband) to be challenged when there is doubt about the birth or the substitution of the new born child. In the case in question, the birth effectively took place and the exchange of genetic material took place considerably before the birth and, therefore, did not involve persons who were already born

544 Civil Court of Rome, Section 1, 8 August 2014, p. 3.

545 Bianca, *Il diritto del minore ad avere due soli genitori: riflessioni a margine della decisione del Tribunale di Roma sull'erroneo scambio di embrioni*, cit., pp. 189-90.

546 *Ibidem*, p. 191.

heterologous fertilisation or surrogacy, which the process never considered. [547] The judge therefore found himself before a normative gap that it was necessary to bridge through interpretation, making use of the current laws, which were designed to regulate situations that do not contemplate the accidental exchange of embryos, such as the one that occurred at the Ospedale Pertini.[548]

Although noting the atypical nature of the situation and the absence of case law, the Court of Roma, in the end, found a solution by applying the legislation in force – in particular, the general principles on matters of ascertainment of the *status filiationis* – considered to fully correspond to the best interests of the child. Specifically, the sole judge of the Court of Roma established that the parents of the minor were the woman who gave birth and her husband. Amongst the principles in the existing legislation that justified this decision was, above all, Article 269, paragraph 3 Italian Civil Code[549], which attributes, without exception, motherhood to the woman who gives birth. According to current legislation, therefore, the parameter of attribution of the maternity is not the genetic truth of the conception, but the gestation and the birth.

The judge also observed that, despite the reform of 1975 (the dawn of assisted procreation techniques), the legislator had maintained the principle *mater semper certa est* and, therefore, the determination of the maternity linked to the historical event of the birth, even after the amendments introduced with the reform of filiation (D. Lgs. N. 154/2013), which, moreover, limited the possibility of challenging the status of child in cases of substitution or supposition of birth. [550] This, in the opinion of the judges, shows that the legislator considered the traditional norm still adequate for regulating family relationships on the maternal side, despite the acquired awareness of a scientific and social context that allows the separation of the various aspects of motherhood. [551]

Instead, the decision *ex latere patris* was based on the law of presumption of paternity, according to which the father of the child conceived or born during a marriage is the husband of the mother (Article 231 Italian Civil Code), which was also confirmed by the recent reform of filiation. [552] While stating that the situation did not lie within the paradigm of heterologous ART, the judge felt it opportune to observe that the *status filiationis* would not change in the hypothesis of a child born thanks to the use of ART – also heterologous – since Article 9 of Law N. 40 establishes that the father is not the donor of gametes, but he who gave his consent to the treatment, and who

547 Comitato Nazionale per la Bioetica, *Considerazioni bioetiche sullo scambio involontario di embrioni*, cit., Annotation by Prof.ssa Marianna Gensabella, p. 19.

548 Civil Court of Rome, Section 1, 8 August 2014, p. 4.

549 Article 269, paragraph 3 Italian Civil Code states that "maternity can be proved by showing that the person who claims to be the child is the same person that the woman claimed to be the mother actually gave birth to."

550 Civil Court of Rome, Section 1, 8 August 2014, pp. 4 and 7.

551 *Ibidem.*

552 Article 331 Italian Civil Code and D. Lgs. 28 December 2013, N. 154, foresees that "the husband is the father of the child conceived or born during the marriage."

consequently can neither disown the child, nor declare the recognition to be false. In support of the solution adopted, the judge explained that it fell within a wider context – to be found in our legislation, but not only – which separates the relationship of filiation from the genetic factor and attribute an increasing importance to the voluntary nature of the behaviour and the assumption of responsibility, thus attributing parenthood to those who, independently of their genetic contribution, intended to procreate the child.[553] The prevalence of biological/legal parenthood over genetic parenthood – added the Court – must not cause consternation also because the notion of family has evolved and is no longer linked to a genetic connection, being seen increasing as "the place of reciprocal affection and solidarity, the first community in which the personality of the individual transpires and develops."[554] Parenthood, therefore, in the interpretation proposed by the judge, means "voluntary, deliberate and informed parenthood, but also – as in the Ospedale Pertini case, undeliberate but in any case desired."[555]

The absolute value of the genetic factor – explained the Court – is therefore substituted by the evaluation of the effective family relationship and the best interests of the child involved. [556] This new approach emerges, for example, from the rulings of the ECHR in the case *Mennesson* and *Labassee v. France*,[557] in which – the Roman judge observes – the importance of the necessarily genetic nature of the relationship of filiation has been significantly reduced in favour of "the right of the minor to maintain the family bond consolidated over time."[558] The ECHR jurisprudence, like national jurisprudence (*in primis*, the well-known ruling of the Court of Cassation, N. 2315/1999, which marked the end of the biological truth as a cardinal principle in the system of the relationship of filiation) is – in the opinion of the Roman judge – proof of the fact that the right to personal identity is ever more independent of the genetic truth and, on the contrary, modelled by the sphere of the affections and the family experiences of the person involved.[559]

Further tangible proof of the scaling down of the genetic factor – added the Roman judge – are the new norms on the matter of disowning fatherhood and impugnation of recognition due to perversion of truth, introduced with the 2013 reform, which are justified by the need to seek a balance between the principle of truth of the filiation and the interest of the child to preserve the

553 Civil Court of Rome, Section 1, 8 August 2014, p. 4. On this point, Scalera believes that the principle of the voluntary nature of the act cannot be decisive for the purpose of deciding on the case in hand, since both couples intended to accept parental responsibility for the children. See A. Scalera, *Mater semper certa est? Considerazioni a margine dell'ordinanza sullo scambio di embrioni*, in "Nuova Giurisprudenza Civile Commentata", 2014, p. 1118.

554 Civil Court of Rome, Section 1, 8 August 2014, p. 5.

555 F. Campodonico, *Eterologhe 'da errore' e salomonici abusi. Commenti a margine della Risposta del Comitato Nazionale di Bioetica e dell'Ordinanza del Tribunale di Roma sul caso dello scambio di embrioni all'ospedale Pertini di Rome,* in "Rivista di BioDiritto", 2015, N. 1, p. 171.

556 *Ibidem.*

557 Appeals N. 65192/11 and 65941/11, 26 June 2014.

558 Civil Court of Rome, Section 1, 8 August 2014, p. 6.

559 *Ibidem.*

status.[560] Precisely in this sense, the new element of D. Lgs. 154/2013 foresees a time limit of five years from the birth after which it is no longer possible to undertake these actions. Thus, explains the Court, the legislator intended to give priority to the stability of the relationships consolidated over time and the maintenance of the affections on which personal identity is based, although not supported by a genetic bond, with respect to the emergence of the genetic or biological truth.[561]

In the light of these considerations, it is therefore clear that the necessarily biological or genetic nature of the filiation has been eliminated and that the assessment of the effective situation and of the family bond effectively existing has emerged as the guiding parameter used for resolving conflicts between opposing interests.[562] Consequently, stated the judge, it is precisely the effective relationships between the components of a family (however it is formed) that the law must guarantee, always in fulfilment of the best interests of the child.[563] In the specific case, therefore, the Court decided to reject the request of the appellants to raise questions of a constitutional nature regarding the laws on filiation, precisely because they are suitable for ensuring the satisfactory protection of the "interests of the child in the stability of their status and their right to live with their own family in accordance with current legislation."[564]

In addition to reflecting a more modern and practical vision of family relationships, therefore, the attribution of legal parenthood to the biological parents pursues – in the judge's opinion – another important objective: that of guaranteeing that the interest of the twins in maintaining affective relationships already consolidated receive adequate protection. The centrality reserved for the best interests of the child, raised to "guiding criteria for the purpose of balancing the opposing interests,"[565] is undoubtedly, the aspect of the ruling in which there is the most evidence of the imprint of the opinion given by the CNB. With reference to motherhood, the application of the principle *mater semper certa est* produces a result that aims to fulfil the interest of the child not to be separated from the mother who carried him/her in her womb and gave birth, considering that – says the Court – scientific literature is unanimous in recognising that it is precisely the uterus that creates a symbiotic bond between the mother and the child.[566] Not by chance, adds the Court, the uterine mother is the only one who can breastfeed the child.[567]

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560 *Ibidem.*
561 *Ibidem.*
562 *Ibidem.*
563 *Ibidem.*
564 *Ibidem*, p. 3.
565 *Ibidem*, p. 4.
566 *Ibidem*, p. 7. This point also emerges for the considerations of the CNB (*Considerazioni bioetiche sullo scambio involontario di embrioni*, cit., p. 7): "an undeniable biological, psychological and sensorial bond is formed between the birth mother and the child during the pregnancy."
567 Civil Court of Rome, Section 1, 8 August 2014, p. 7.

The same interest of the child to maintain consolidated relationships appears, in the opinion of the judge, with regard to the biological father. Considering the fact that, at the time of the ruling, the twins had already been born and were part of a family, the judge decided that it was in the interest of the children to maintain the affective relationship formed with the biological parents during the first days of life.[568] This relationship, in the opinion of the judges, is so significant that it prevents any other choice. The Roman judge, therefore, sanctioned the prevalence of biological parenthood over genetic parenthood as a solution that best reconciles the interest of the twins to remain within the family, seen as a community of affections that have already formed.[569]

Although the ruling of August 8th undoubtedly represents one of the most significant stages in the legal course of the event, it is worth, for the purpose of comprehensiveness, dedicating a few considerations to the steps taken later by the genetic parents. Seeing their first appeal rejected by the Court of Rome, the appellants decided to take the case to the ECHR, claiming that their right to respect for their private and family life, in accordance with Article 8 ECHR had been harmed.[570] The decision of the Strasbourg judges, however, did not present any considerations with regard to the appeal, which was considered inadmissible because the opportunities for national appeals had not been exhausted.[571] In particular, the Court stated that the appellants had not sued for damages due to medical negligence (as indicated in the decision of the Court of Rome), nor had they tried to ascertain the criminal liability of the parties involved. Equally, added the Court, the appellants had not presented a request for access to the administrative documents in order to obtain the information requested during the application for an interim order.

Having unsuccessfully attempted the European course, the genetic father presented a second appeal, suing the biological parents for disownment of paternity.[572] Being aware that this was not possible under existing law, the appellant asked the Court of Rome to consider the constitutional legitimacy of Article 243 Italian Civil Code, in the part that does not include the genetic father amongst the subjects permitted to propose the disownment of paternity in cases of substitution of embryos during assisted procreation procedures. With the same appeal, the genetic father asked for an interim order that would allow him to visit the twins – also in the presence of a third party specialised in family mediation in order to avoid compromising the possibility of creating of a parental relationship during the period necessary for ascertaining his rights.

568 *Ibidem*, p. 7.

569 *Ibidem.*

570 *X and Y v. Italy*, cit. For a comment on this decision, see, *inter alia*, A. Scalera, *La vicenda dello scambio di embrioni al vaglio della Corte di Strasbourgo*, in "Nuova Giurisprudenza Civile Commentata", 2015, pp. 385-386.

571 This requisite is foreseen by Article 35, paragraph 1 ECHR; I. Rivera, *Caso X e Y v. Italia della Corte europea dei diritti dell'uomo: lo scambio degli embrioni (non) va a Strasbourgo*, in "Forum Costituzionale", 27 November 2014. Available online: http://www.forumcostituzionale.it/wordpress/wp-content/uploads/2014/12/rivera.pdf.

572 Civil Court of Rome, Section 1, 22 April 2015.

Ruling on the question, the Roman judge confirmed the rejection of the appellant's requests, also confirming the content of the previous ruling (8 August) on the basis of the two principle arguments. The Court first of all observed that in the eight months since the birth of the twins the family bond formed between the children and their biological parents – already noted on the occasion of the previous appeal – could only have been strengthened and intensified in the meantime and that therefore it was not in the interest of the children "to prolong the condition of instability and uncertainty of their family situation and of a perspective of severing of the parental relationships already formed between themselves and the opposing couple." [573] In addition to being in clear contrast with the interest of the child, the question of constitutionality presented by the appellant could not – in the opinion of the judge – be raised because it would invoke manipulative events by the Supreme Court in matters "not constitutionally constrained" but reserved to the margin of discretion of the legislator.

The requests of the genetic parents were not accepted even in the ruling issued by the same Roman Court on 29 April 2016, which concluded the course of the first instance in the dramatic events at Ospedale Pertini.[574] In addition to rejecting the request to consider the question of constitutional legitimacy of the rules regarding attribution of status, the judge – once again – rejected the request of the appellants to see themselves recognised as the genetic mother and father referring to the case law and, essentially, on the basis of the following motivations: above all, because the law on matters of filiation imposes the attribution of parenthood to the defendants; and also because the request of the genetic parents aimed to alter the family situation of the minors against their best interest which – the case in hand – must be considered pre-eminent.

3.3.1 *Critical aspects: the best interests of the child and the attribution of legal fatherhood to the biological father*

Although widely shared, the decision of the Roman Court was not considered by all to be the best response that the legislation could offer in a situation of accidental exchange of embryos. With regard to the determination of the *status filiationis* on the maternal side, the prevalence of the biological mother over the genetic one did not arouse particular reactions. Although the court found itself before a co-participation of more than one woman and, therefore, a complex phenomenon with regard to which "it is hard for the law to find fair solutions," [575] the decision to apply the traditional rule *mater semper certa est* found widespread acceptance for reasons that were first of all

573 *Ibidem*, p. 7.

574 For a note on this ruling, see, *inter alia*, M.N. Bugetti, *Fecondazione accidentalmente eterologa e tutela dell'interesse del minore*, in "Famiglia e Diritto", 2016, N. 7, pp. 680-6.

575 Corti, *Due gemelli e quattro genitori interrogano il diritto. (Riflessioni in merito all'erroneo scambio di embrioni: ordinanza del Tribunale di Roma 8 August 2014)*, cit., p. 128.

emotive-relational. In fact, it appears decidedly more traumatic to remove the children from the woman who gave birth to them than from the genetic mother.[576] The preference expressed by the Court is, moreover, also coherent with the guidelines from other jurisdictions which, even before our own, dealt with the questions posed by the practice of surrogacy. No legislation that allows this practice foresees the possibility of forcing the birth mother to give up the child she has borne and hand it over to the intentional mother, even when the latter is genetically linked to the child.

The criticisms of the doctrine have, therefore, concerned other passages of the decision. Amongst the undoubtedly more controversial aspects, there is the attribution of paternity for the social father and the interpretation of the principle of the 'best interests of the child' offered to justify this conclusion. As anticipated in the previous chapter, in fact, the flexibility that is inherent in the concept of 'best interests' means that its content varies according to the interpretation given and it is therefore at the discretion of the judge to decide which aspect should be given priority in the specific case. Therefore, although it is comprehensible that the Roman judge should consider the best interests of the children fundamental, part of the doctrine believes that the reading proposed in the case in question was not the most suitable for fulfilling the best interests of the twins.

As set out above, the court confirmed the force of the traditional rules that govern the attribution of parenthood in our legislation – preserving them from judgements of constitutionality – since they are considered compatible with the interest of the child in the continuity of the family and affective relationships developed with the pair of biological parents. The judge also held that the best interests of the child were the same in relation to both parents. According to a divergent opinion, on the other hand, there are clear elements that cast doubt on the opportunity of a joint negotiation and which, in particular, invite in-depth consideration of the compatibility between the prevalence of social paternity and genetic fatherhood with the interests of the children.

A distinct analysis of maternity and paternity is required due to the primary and unique role that the woman plays in the procreative process and the impossibility, in the case in hand, of identifying affective bonds between the social father and the children. In fact, considering that "only the female sex carries forward the pregnancy and gives birth to the child,"[577] at the time of the decision there was no evident consolidated bond between the social father and the twins, comparable with the one formed between the mother and the children during the gestation. A few days after the birth, the affective relationship between the social father and the twins was still to be constructed. The social father was, in fact, in a similar position to the genetic father, since it was not possible to ascertain an affective bond for either of them that would justify the prevalence of the

576 Cabitza, *Scambio di embrioni: errore medico e scissione delle figure genitoriali*, cit., p. 210; Corti, *Due gemelli e quattro genitori interrogano il diritto. (Riflessioni in merito all'erroneo scambio di embrioni: Civil Court of Rome, 8 August 2014)*, cit., p. 128.

577 H. Atlan, *L'utero artificiale*, Milano, Giuffrè, 2006, p. 75.

fictio iuris over the genetic truth.[578] Although not attributing an absolute value to the genetic truth, this perspective foresees that, in the absence of significant family bonds, priority must be given to the genetic paternity, since this option is functional for the realisation of the best interest of the twins in knowing their genetic origins and constructing a relationship of filiation based on the truth.[579]

In addition to being shared by part of the doctrine, this reading of the 'best interests' is also in harmony with that advanced by the CNB. Unlike the Court, for which the only interest of the minors is that of the stability of their status and the continuity of the family relationships, in the opinion of the CNB, the interest of the minors assumes (at least) two dimensions. In addition to the interest of having two definite parental figures of reference, the CNB states that, "in the context of the rights of the minor, there is the further and vital interest […] for the children to know their origins.[580] Although they have the right to maintain the relationship with the mother who carried them in her womb and gave birth to them, therefore, in the opinion of the CNB, the twins also have the right to know the truth about their conception and their biological lineage and, consequently, it is the duty of the parents who care for them to reveal this truth.[581]

3.3.2 *Critical points: when access rights are not granted*

Independently of the decision regarding the attribution of paternity, another particularly critical point was the exclusion of any form of participation for the genetic parents in the twins' life. On the one hand, some agree with the solution adopted by the judge and say that, although mere compensation is not sufficient, the recognition of access rights for the genetic parents would have been in contrast with the need to safeguard the psychological and physical equilibrium of the children: in fact, the latter would have uncertain parental figures, with obvious negative effects regarding the decisions to be taken for their maturation and development.[582] Amongst the supporters of this position, Bianca – in addition to siding against solutions that, in admitting the multiplication of the parental figures in harmony with the social reality, create a misalignment between the genetic

578 Cabitza, *Scambio di embrioni: errore medico e scissione delle figure genitoriali*, cit., p. 211; Corti, *Due gemelli e quattro genitori interrogano il diritto. (Riflessioni in merito all'erroneo scambio di embrioni: ordinanza del Tribunale di Roma 8 agosto 2014)*, cit., p. 130. Some also sustain that, although the principle according to which the legislator decided to create a system that sacrificed the genetic truth in order to guarantee the stability of the relationship of filiation is comprehensible, in the specific case, it is not possible to speak of a consolidated relationship between the minors and the biological parents, since the decision was taken only a few days after the birth. According to this standpoint, the argument of the best interests of the child presented by the Roman judge is weak, because the babies were extremely young and it was improbable that they had already created a relationship with the biological family sufficient to exclude *tout court* the possibility of removing them.

579 Cabitza, *Scambio di embrioni: errore medico e scissione delle figure genitoriali*, cit., p. 212.

580 Comitato Nazionale per la Bioetica, *Considerazioni bioetiche sullo scambio involontario di embrioni*, cit., p. 11.

581 *Ibidem*, pp. 11-12.

582 Mendola, *Favor minoris e presidio del dato biologico*, cit., p. 565.

and the biological profile – considers that in the specific case, it is necessary to avoid apparently balanced solutions and compromises between the various interests in play, such as the granting of access rights in favour of those who do not appear on the birth certificate as the legal parents.[583] In other words, in the opinion of Bianca, it is necessary to avoid the scientific fact becoming a legal fact," through the recognition of genetic, biological, social and birth mother s and, more generally, of the various subjects who contribute to the procreation.[584]

According to a divergent opinion, however, it is undeniably in the interests of the children to be raised by parents who are united in a strong relationship and, therefore, although the possible choice to attribute legal parenthood to two extraneous subjects may seem risky, it would at least have been possible to allow the genetic parents access rights.[585] More generally, precisely in the light of the changed conception of the family as "the place of affection",[586] the Roman court could have been more courageous and presented a broader solution, thus overcoming the logic of competing rights, as suggested by the CNB.[587]

According to this formulation, in fact, it is only by ensuring that the children form stable relationships with both the parental couples that the best interests of the children will be met, since, in the specific case, this involves both the interest to know one's origins and the interest to maintain significant bonds with those who, playing different roles, took part in the procreative project that led to their birth and whose presence can never be deleted from the life of each person involved. [588] According to the supporters of this position, therefore, the right to know one's origins should not be seen in strictly static terms and, therefore, would not be reduced to a mere right to be informed about one's descent, but would also have a dynamic-relational component that occurs when the individual has the possibility to form and develop relationships with their fellowmen and with the outside world.[589]

To summarise, the choice to grant the status of legal father to the social father in virtue of the legal presumption and the non-recognition of a role – even secondary – for the genetic parents in the life of the twins, show that the judge intended to adhere to the traditional family scheme, seen

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583 Bianca, *Il diritto del minore ad avere due soli genitori: riflessioni a margine della decisione del Tribunale di Roma sull'erroneo scambio di embrioni*, cit., p. 194. M.G. Bugetti, *Scambio di embrioni e attribuzione della genitorialità*, in "Famiglia e Diritto", 2014, N. 1 0, p. 941, is of the same opinion.

584 *Ibidem*, p. 202.

585 Corti, *Due gemelli e quattro genitori interrogano il diritto. (Riflessioni in merito all'erroneo scambio di embrioni: ordinanza del Tribunale di Roma 8 August 2014)*, cit., p. 134.

586 Civil Court of Rome, Section 1, 8 August 2014, p. 5.

587 Corti, *Due gemelli e quattro genitori interrogano il diritto. (Riflessioni in merito all'erroneo scambio di embrioni: ordinanza del Tribunale di Roma 8 August 2014)*, cit., p. 135.

588 *Ibidem.*

589 Scalera, *Mater semper certa est? Considerazioni a margine dell'ordinanza sullo scambio di embrioni*, cit., p. 1119.

as a heterosexual, married or cohabiting couple, who desire their 'own' child, that is the fruit of the genetic heritage of the two components.[590]

The attribution of the legal paternity for the genetic father would, in fact, have led to the cleaving of the unity of the couple who have undertaken the parental project and, therefore, created a 'crossover parenthood'. Even if in a lesser manner, the granting of access rights would have contemplated the participation of 'extraneous third parties' in the life of the twins, to the detriment of the integrity and the solidity of the traditional bi-parental family.

4. Final observations: logics compared

The cases examined in this chapter are a clear example of the unexpected consequences of the used of assisted procreation techniques and show that, also in the presence of legislation that aims to govern these 'new' methods of becoming parents, the phenomena that the law is called upon to deal with, at times, can go beyond the imagination of the legislator. In these cases, the lack of an *ad hoc* legal system is not to be attributed to the rapidity of the medical-scientific evolution, and therefore to the impossibility for the legislator to promptly foresee the emergence of certain scenarios, but rather to a lack of intention to take a firm stance on intricate questions of an ethical-legal nature, giving rules designed to settle disputes regarding the holders of the relationship of filiation in which it seems extremely difficult to find compromise solutions between the various needs, rights and interests in play.

Having ascertained the objective difficulty in regulating the legal consequences of these exchanges through legislation, one alternative – at least theoretically – is the contractual one. One hypothesis advanced by the doctrine consists of the inclusion of a multiple-choice question in the informed consent forms, where the aspiring parents would be called upon to choose how the clinic should behave in the case of error. [591] Nevertheless, this is not realistic since it would only work in the fortunate eventuality that the answers supplied by the adults were compatible. In the face of irreconcilable intentions, in fact, the resolution of the practical effects would, in any case, require the intervention of the courts.

Otherwise, it would be possible to include in the contract between the clinic and the patient a clause that explicitly considers the possibility of exchange and establishes the concrete effects that would follow. The contract could, for example, foresee that, in the case of an error, the woman who gives birth would be considered the mother of the child (children) and her partner (where there is one) would be recognised as the other parent. Under this second scheme, if the parties disagreed

590 Corti, *Due gemelli e quattro genitori interrogano il diritto. (Riflessioni in merito all'erroneo scambio di embrioni: ordinanza del Tribunale di Roma 8 August 2014)*, cit., p. 134.

591 Bender, *"To err is human" ART Mix-Ups: A Labor-Based, Relational Proposal*, cit., p. 460.

with the conditions foreseen by the contract, the parties would have the opportunity to renounce the treatment, even before their genetic material is gathered and/or the embryos are created.

The advantage of adopting a contractual perspective – as shown by these examples – is that the parties are obliged to consider and ponder all the consequences that could derive from the procedures, before undertaking medically assisted procreation. From an external standpoint, the contractual approach would make it possible to decipher the 'true' intentions of the parties, formulated when they are still capable of thinking rationally, without the emotional involvement in a difficult situation. It is, nonetheless, a course that from a practical standpoint, the clinics prefer not to undertake since, clearly, to highlight the undesired effects – relatively rare but very serious – of the practices they offer is not in their interests.

In effect, therefore, the context in which these disputes find a solution is the court. Although the legislative intervention has often been urged, as frequently occurs in the dominion of the 'new families', the judge is forced to bridge a legislative gap by interpretation, and, in this task, the instruments available are often limited and/or inadequate. In fact, the judge is often required to find the solution that best safeguards the interests and the rights of the parties involved – attributing to the interests of the child (children) a pre-eminent position – juggling the norms of current legislation, or turning to the traditional rules for attribution of status and/or rules that, although specifically planned to regulate the new forms of family deriving from the use of ART, do not foresee the hypothesis of error.

As shown in the previous chapter, the law has traditionally anchored the correctness of the *status filiationis* to the two principal rules that attribute family status by effect of certain automatic mechanisms. Maternity is determined as the immediate consequence of the natural event of birth, in keeping with the Latin brocard *mater semper certa est*. The attribution of paternity, instead, generally occurs by effect of the legal presumption (of paternity and conception during the marriage) according to which the husband of the mother is the father of the child (children) conceived during the marriage.

The unsuitability of these rules for establishing legal parenthood of children born from an error derives from the fact that they date from a period prior to the advent of ART and, therefore, reflect the paradigm of the traditional family, according to which – in the eyes of the law – there is no other mother than the one who gave birth and no other paternal figure than the husband of the latter. The automaticity and the rigidity that characterises the discipline of the legal presumptions on matters of filiation do not lend themselves, therefore, to the regulation of much more intricate and complex family relationships, in which the maternal/paternal or simply parental role is played – in

its various components – by a number of parties and, therefore, a number of persons compete for the title of legal mother or legal father.

As mentioned above, the presumption of paternity, in particular, was the expedient adopted by the law to make up for the impossibility of determining with acceptable certainty who the father of a given child was.[592] Nowadays, however, the ambiguity that this presumption was intended to clarify no longer exists, or rather can be resolved thanks to genetic testing that will sufficiently certainly and precisely ascertain whether a man is effectively the biological father of an individual. The medical-scientific development has thus strained the practicality of this presumption, in an increasing number of cases making it a mere legal fiction. Since it is possible to establish the paternity of a minor through simple laboratory tests, it is fair to ask whether and to what extent it is reasonable to continue to refer the definition of *status filiationis* to the presumption of paternity above all when its application leads to results of absolutely certain and evident falsity, as in the cases examined in this chapter.

Even though the more recent directives, specifically designed to deal with new family phenomena, the general principles that regulate assisted procreation – independently of the national variations – are still inadequate for determining the *status filiationis* of those born from an error, since they tend to attribute a decisive weight to the element of consent from the parties which, in the cases examined, is invalidated by the error. Therefore, although in harmony with the renewed definition of the family as the "place of the affections"[593] whatever the genetic truth, the voluntary criterion does not lend itself to the resolution of the cases of exchange when, due to a medical error, none of the intentions expressed by the parties before undergoing assisted procreation procedures were fulfilled.[594] Therefore, even if the situation that originates from an accidental exchange of genetic material the result is, in effect, similar to that of a contract for surrogate motherhood, the two scenarios must be kept distinct since, in the case of the error, the parties did not know each other, had not made any promises and, above all, did not intend to create the situation in which they now find themselves[595]

"In consideration of legislation no longer adequate for resolving the problems that emerge from the development and the applications of the new reproductive technologies,"[596] the judges have the privilege – but also the responsibility – of interpreting and applying the current rules and regulations with a certain margin of flexibility in order to grasp and recognise the diversity with

592 L. Lenti, *La procreazione artificiale. Genoma della persona e attribuzione della paternità*, Padova, Cedam, 1993, p. 261.
593 Civil Court of Rome, Section 1, 8 August 2014, p. 5.
594 Bender, *"To err is human" ART Mix-Ups: A Labor-Based, Relational Proposal*, cit., p. 468.
595 *Ibidem*, p. 464.
596 Comitato Nazionale per la Bioetica, *Considerazioni bioetiche sullo scambio involontario di embrioni*, cit., p. 10.

which interpersonal relationships are expressed in real life. Being an expression of the judge's margin of discretion, this operation may, nonetheless, lead to different or even opposing results. The rulings analysed in this chapter are a clear example.

At one end, there is the decision of the Roman court which, proposing a totally conventional reading of the laws on filiation, confers the status of legal parents to the biological mother and her husband, thus tying the legal parenthood of the children born from an error to the biological fact of the birth and the conjugal relationship, but also to the social relationship that derives from it. At the opposite end, we find the decision of the New York court in the *Perry-Rogers v. Fasano* case where, despite being called upon to rule on the limited question of access rights, the Perry-Rogers family were confirmed as the legal parents, thus identifying the genetic factor as determinant in deciding who is to be considered a parent in the eyes of the law.

Despite the divergent results, both rulings show the inefficiency or even the danger of solutions aligned with the logic of competing rights, which by identifying a loser and a winner, are almost impossible to reconcile with family settings characterised by multiple relationships of various kinds – biological, genetic and social – which intertwine. Both solutions aim, in fact, to preserve the integrity of the traditional model of family, defending it from possible 'third-party' incursions and therefore ignoring feelings and intentions.[597] This approach, which effectively reduces the complex question of the *status filiationis* to a battle between the two parental couples, inevitably relegates the interests of the child involved to a position of secondary importance, while normally they should have a pre-eminent position.

In addition to promoting an approach centred mainly on the needs and the wishes of the adults, the same logic of competing rights also affects the interpretation of the notion of the interests of the child, affecting the content. Although it played a more or less explicit role in all the decisions examined, the principle of the *best interests* was in fact invoked in support of diametrically opposite solutions and this dimension of variability is due, essentially, to the interpretation given by the judge within each individual ruling.[598]

Starting with the American case, the absolute value attributed to the genetic factor and the non-recognition of access rights for the Fasano family indicate a somewhat limited vision of the interest of the child, which only contemplates the genetic truth, neglecting the right to maintain significant relations with the people who had looked after him as their own child. Due to this ruling in fact, Joseph/Akeil has been deprived of the stability and safety of the only parents he knew, taken away from the mother in whose womb he developed, from the man who had assumed the paternal

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597 Corti, *Due gemelli e quattro genitori interrogano il diritto. (Riflessioni in merito all'erroneo scambio di embrioni: ordinanza del Tribunale di Roma 8 August 2014)*, cit., p. 139.

598 On the equivocal nature of the criterion of the 'best interests of the child', see chapter 1.

role and from the brother with whom he shared intrauterine life and the first months after birth, giving priority to genetic consanguinity. [599]

Equally limited, although of a contrasting nature, is the interpretation of the 'best interests' emerging from the Roman ruling which, as illustrated above, (only) takes into consideration the need to guarantee the preservation of the family bonds effectively existing between the twins and the biological parents, to the detriment of the interest of the child to know their origins. Both decisions therefore, thanks to a logic that constructs the genetic parenthood and the social parenthood in antithetic and mutually exclusive terms, are capable of grasping and therefore protecting only one aspect of the interest of the child, that is the one that coincides with the interests of the parental couple declared 'the winner'.

The British judge, on the other hand, is the bearer of a decidedly wider and more pluralistic vision of parenthood that, rather than masking, admits the fragmentation of the paternal figure as the inevitable consequence of the exchange of semen. It is this different starting point that allowed the High Court to reach a solution which, rather than preserving the compactness of the traditional family, removing anything 'extra' and, therefore siding with Mr and Mrs A against Mr and Mrs B, encourages the co-participation in the life of the minor.

The ability of the British judge to overcome the logic of competing rights has positive repercussions also on the notion of 'best interests' invoked and effectively protected by the decision. By accepting the error and, above all, its practical impact on the daily life of the persons involved – *in primis*, the minor – the High Court has, in fact, advanced a pluridimensional view of the interest of the child that includes and emphasises two aspects – apparently contradictory, but in the opinion of the judge, complementary – of the existence of the twins: the genetic truth and the social reality of the family relationships formed so far. Thus showing that the adoption of a logic that takes into account the new family phenomena (whether or not the fruit of an error), aims to reconcile conflicting positions, has the fundamental advantage of leaving room for a more genuine evaluation of the 'best interests' – or, which reflects the circumstances of the case more closely and, therefore less legislative – or at least less directed towards the preservation of the strictly bi-parental family 'at all costs'.

599 Bender, *"To err is human" ART Mix-Ups: A Labor-Based, Relational Proposal*, cit., p. 499.

Part 3

Surrogate Motherhood

Chapter 7

Filiation Following Surrogacy: Critical Aspects

1. Contextualising surrogacy: a variegated practice

With the expression surrogacy or 'surrogate motherhood' we mean the practice by which a woman (known as the surrogate mother or the birth mother) agrees to carry a pregnancy on behalf of others and, after the birth, to renounce her parenthood and deliver the new-born child to those who intend to accept the parental responsibility and raise the child as their own (known as the contracting parties). The reasons that lead heterosexual couples to make use of this practice may involve serious pathologies of the female reproductive system (for example, the absence of a uterus or the presence of malformations of the Fallopian tubes), the incapacity of the woman to produce oocytes following surgical operations, or the risk of transmission of genetic disorders to the foetus.

In addition to being a remedy for heterosexual couples who wish to have a child, surrogacy makes the experience of parenthood accessible to social aggregations that differ from the traditional family model, by which we mean married heterosexual couples. In fact, it allows same-sex couples and singles to pursue a parental project without depending on the compresence of a man and a woman of fertile age and it is independent of technological procedures, being an expression of the self-determination of the aspiring parents.

According to the genetic heritage of the child and the role played by the subjects involved, it is possible to identify the hypothesis of traditional surrogate motherhood, in which the contribution of the surrogate mother is not limited to the 'mere' gestation, but also implies her genetic contribution. Then there is gestational surrogate motherhood, in which the eggs used for the creation of the embryo come from the contracting mother, or from a female donor outside the couple and other than the surrogate mother.

In this last hypothesis – easily the most frequent – the surrogacy foresees IVF, which is the fertilisation of an egg with semen in a laboratory, with the subsequent transfer of the embryo generated into the uterus of the woman. For technical reasons, therefore, this type of surrogacy foresees medical assistance and is carried out – at least in the initial stages – at specialist clinics. Traditional surrogacy, on the other hand, since it does not depend on the genetic contribution of a woman other than the birth mother, involves techniques that are much less complex from a technical standpoint. Vaginal self-insemination – which simply consists of releasing the semen into the vagina – can, in fact, be carried out at home, using simple instructions available in books or on Internet sites destined for aspiring parents and using instruments that can be purchased at any

pharmacy. It is not therefore surprising that, in effect, there are also cases of 'D.I.Y.' surrogacy, carried out at home, without medical assistance.

Another criterion of classification regards the economic aspect of the agreement. If a fee is foreseen for the 'service' rendered that exceeds the reimbursement of medical and hospital fees, or expenses incurred due to the pregnancy, the procedure is considered commercial surrogate motherhood. However, if the woman undertakes the pregnancy with a spirit of solidarity, only in order to help others become parents, the surrogacy will be defined as altruist or solidarity-based.

It is clearly a multi-faceted practice that corresponds to an equally varied regulatory framework. Although the legislative panorama of surrogacy is tendentially inhomogeneous, it is possible to observe three main legislative approaches.

The first is the predisposition of an *ad hoc* discipline by the State. The legal systems that follow this trend recognise surrogacy as a legitimate practice and endeavour to regulate the contractual aspect, determining *ex lege* the essential conditions for the validity of the contract and furnishing guidelines for its fulfilment. However, the category of possible situations foreseen is inevitably a wide and varied, and it is impossible to make further subdivisions.

A first distinction that must be made regards the economic profile of the surrogate motherhood contract. In fact, while a considerable number of countries – Portugal,[600], the United Kingdom, Greece, Holland, Israel, Canada,[601] part of Australia, South Africa and New Zealand, to mention just a few, subordinate the validity of the contract to the agreement to a service free of charge (and therefore for altruistic purposes), there are also numerous countries in which financial gain is an important element of the regulations on surrogacy. In countries such as Russia, India, Ukraine, Georgia and some American states (California, Illinois, Arkansas and Maryland) thanks to the flourishing intermediation agencies, this practice has become big business.

A second difference emerges if we consider the method and the moment in through which the contracting parties acquire parental status regarding the child born. There are in fact legislations that offer a regulation *ex ante* of the practice and, therefore, require the implementation of a series of formalities before the surrogacy is realised, for the agreement to be considered valid and for the

600 Amongst the most recent legislation, is Law (N. 25/2016) which authorises surrogate maternity in Portugal, came into force only a few months ago, thanks to the decree Regulamentar N. 6/2017 dated 31 July 2017. For a brief analysis of the main regulations, see G. Damele, *Primo caso di GPA in Portogallo dopo l'approvazione della legge*, Articolo 29, 3 October 2017. Available online: http://www.articolo29.it/2017/primo-caso-di-gpa-in-Portugal-dopo-lapprovazione-della-legge/.

601 The Assisted Human Reproduction Act 2004 establishes the general principles that can be specified within the competency of each province. Article 6 prohibits the retribution of surrogate mothers and any possible intermediaries. In the provinces of Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Ontario, Prince Edward Island, and Saskatchewan, surrogate maternity is admitted only without a fee, while the Civil Code of Quebec foresees an absolute veto and establishes that such contracts are null and void. For a brief introduction to Canadian law on this matter, the preface by the editor E. Falletti in S. Marchi, *Mio Tuo Suo Loro – Donne che partoriscono per altri*, Rome, Fandango, 2017, pp. 77-79.

parental responsibility to be automatically attributed to the commissioning parents at the time of birth, and legislations that, instead, foresee the transfer of parental status at a later date, *ex post-facto*. One example of the first model is the Greek system, according to which the contracting mother is required to ask for the authorisation of the judge before the fertilised eggs are transferred to the uterus of the surrogate mother and, on the birth, she will automatically be nominated the legal mother of the child (children) following the registration of the ruling that authorised the practice.[602]

However, in the United Kingdom,[603] the registration of the *status filiationis* of the minor born through surrogacy occurs after the birth thanks to a 'parental order', that is a legal ruling that amends the birth certificate and transfers the parental status from the surrogate mother to the commissioning parents.[604] The determination of maternal filiation therefore follows the standard rule of *mater semper certa est*, so that the woman who gives birth acquires the status of legal mother, even when she has not genetic link with the child and does not intend to be considered such. Moreover, the husband of the surrogate mother (where present) is considered the legal father of the child, however, if an application is presented by the contracting parties, the judge can issue a parental order that states that, in the eyes of the law, the child is the son/daughter of the appellants. In practical terms, therefore, by extinguishing the previous *status filiationis* and the parental responsibility and attributing it to the appellants, a parental order is equivalent to a fast-track adoption proceeding.[605]

The transfer of parenthood to the contracting parties, in turn, is subordinate to certain conditions: the application for a parental order must be presented by a two persons who are married, or in a civil union, or cohabiting in a stable and long-lasting manner ("enduring family relationship"),[606] within six months from the birth of the child. At least one of the contracting parties must have a genetic link with the child and both the parties must be of age. The pregnancy can be generated using ART (and therefore not through sexual union). At least six weeks after the birth mother, and her husband if she is married, must give their consent to the transfer of parenthood and

602 Article 1458 Law 3089/2002. For further examples, see L. Brunet *et al.*, *A Comparative Study on the Regime of Surrogacy in EU Member States*, Brussels, Belgium, PE 474.403, European Parliament, 2012, pp. 40 *et seq.*

603 In the UK, regulations on the subject were introduced in 1985 (*Surrogacy Agreements Act*), in response to the media circus surrounding Baby Cotton, referred to in Chapter 8, paragraph 2.1.3. The same mechanism of transfer of parenthood following the birth (by parentage order) is foreseen, for example, by the legislation of Queensland, Australia.

604 This is a system that does not grant any importance to the intentions as such of the parties involved.

605 For a comprehensive analysis of British legislation on the question of surrogate maternity and its evolution, see, for example, D. Gruenbaum, *Foreign Surrogate Motherhood: mater semper certa erat,* in "American Journal of Comparative Law", 60, 2012, N. 2, pp. 483 *et seq.*; M. Crawshaw, E. Blyth and O. van den Akker, *The changing profile of surrogacy in the UK – implications for national and international policy and practice*, in "Journal of Social Welfare and Family Law", 34, 2012, N. 3, pp. 267-277.

606 Prior to the 2008 reform, the HFEA foresaw that only married couples could apply for a parental order. Nowadays, this possibility is extended also to *de facto* couples and to homosexual couples. Single persons, on the contrary, can only obtain the transfer of parenthood through adoption.

the surrogate mother must not receive any monies, except for the reimbursement of any expenses she has incurred. Finally, at least one of the applicants must be domiciled in the United Kingdom, the Channel Islands or the Isle of Man. This last requisite essentially aims to avoid the British courts becoming a destination for 'forum shopping' or 'procreative tourism',[607] that is the practice of going abroad to countries where surrogacy (and other techniques prohibited my national law) are legal, in order to realise a parental project.

The second of the legislative approaches that can be identified consists of the explicit prohibition of surrogate motherhood. Numerous European countries – including Italy, France, Germany, [608] Austria and Switzerland – have opted for this diametrically opposite solution to the precedent by prohibiting recourse to surrogacy and, in some cases, event prosecuting those involved. In the Italian context, for example, the process of gradual dismantling of the Law 40/2004 (which amongst other things has affected the prohibition of heterologous ART) has left intact the prohibition, subject to criminal penalties, of surrogacy foreseen by Article 12, paragraph 6: "anyone […] realises, organises or advertises the commercialisation of gametes or embryos or surrogate motherhood shall be punished with imprisonment for a period between three months and two years and with a fine from €600,000.00 to one million euro." It is, essentially, a question of a paternalistic prohibition, justified by safeguarding the dignity of the woman, even though she freely chooses to be a surrogate mother.[609]

The third and last legislative approach is in reality an omission, a deficit in the legislation that governs the subject. In the legislations that have chosen not to regulate the matter – Sweden, Czech Republic and Belgium (where the topic has been discussed in parliament for years, without reaching a definite result) to give some European examples, but also in Colombia and the Northern Territory in Australia – the practice of surrogacy is neither formally allowed nor prohibited and, given the silence of the legislator, generally only the altruistic form is tolerated. [610]

The categories proposed above, however, is only for organisational purposes. In effect, the fact that the technique in question is explicitly forbidden by the law is not a guarantee that, in practice, it does not take place. The prohibition can be infringed, perhaps thanks to one of those

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607 Procreative tourism can be seen as part of the much wider phenomenon of "circumvention tourism", that is going abroad in order to take part in activities, or make use of services prohibited on national soil. See I. Glenn Cohen, *Circumvention tourism*, in "Cornell Law Review", 97, 2012, pp. 1309-1398.

608 On the legislation regarding surrogacy in German law, see M. Di Masi, *Coppie omosessuali e ricorso alla surrogacy in uno Stato estero: aperture dalla Germania*, in "Genius", 2015, N. 2, pp. 220-1.

609 D. Pulitanò, *Surrogazione di maternità all'estero. Problemi penalistici*, in "Cassazione Penale", 2017, N. 4, p. 1372.

610 Also in Turkey, an *ad hoc* regulation on the matter is lacking and, in effect, the couples who intend to make recourse to surrogacy tend to go abroad, where the practice is legal (in particular to Ukraine, Georgia and Northern Cyprus). It would seem however that a bill is being discussed that would introduce an absolute veto. See: R. Asimovic Akyol, *Turkey to Toughen Laws on Surrogacy*, Al-Monitor, 24 September 2017. Available online: https://www.al-monitor.com/pulse/originals/2017/09/turkey-to-introduce-jail-for-surrogate-mothers.html.

hopeful journeys abroad, where surrogacy is allowed. The overwhelming desire for parenthood and the effective possibility of satisfying it – if not in one's own country, abroad – allows the legislator to cherry pick the areas of procreation to be legitimated or, in any case, not to intervene in areas considered ethically or morally sensitive.

More generally, the statutory and regulatory role of law is called into question by the dominance of a science that – often in union with the powerful logics of the market – commands the topics and identifies the solutions, leaving for the law the function of "mere receptor of the fact in the regulation."[611] Since it is not possible to eliminate a fact, particularly when a human being has been born as a result of it and in the face of the silence or the incompleteness/inadequacy of written law, it has been the task of the interpreter to consider how to manage the situation and its legal effects (even when they infringed an express normative prohibition) finding a suitable solution within the system.

2. *The impact of surrogate motherhood in determining the status filiationis: the multiplication of the parental figures*

The spread of the practice of surrogate motherhood has given rise to questions of such a disparate nature – not only legal, but certainly also philosophical, sociological, ethical and biological – as to require an interdisciplinary approach to the phenomenon.[612] In the legal field (and not only), the extremely problematic nature of this practice is due, *inter alia*, to the separation of the notion of maternity – once unitary – that derives from it and to the linked overturning of the principle of the truth of the birth: the gestational function is, in fact, exercised by a woman who will not be the mother of the child – in either the social or the legal sense of the term.

Establishing who are the parents of the child born through surrogacy often requires delicate choices between the various participants in the procreative process: the commissioning couple, the surrogate mother and, if married, her husband, and any donors of gametes. On the legal plane, the existence of a multiplicity of factually or potentially parental figures is the case of numerous complexities. In fact, except for countries in which there is *ad hoc* legislation[613] the social reality – plural and multiform – that emerges from the surrogacy clashes with the rigidity of a normative framework designed to regulate very different family phenomena and therefore constructed on the

611 G. Baldini, *Biodiritto: tra progresso scientifico, superamento del paradigma naturalistico ed esigenza di nuovi criteri ordinanti,* in Id. (ed.) *Persona e famiglia nell'era del Biodiritto. Verso un diritto comune europeo per la bioetica*, Firenze, Firenze University Press, 2016, p. 3.

612 G. Luccioli, *Questioni eticamente sensibili: quali diritti e quali giudici. La maternità surrogata,* in "Consulta Online", 2017, N. 2, p. 325. Available online: http://www.giurcost.org/studi/luccioli.pdf.

613 In reality, as we will see later, the risk of normative deficits is also expressed in the presence of an *ad hoc* discipline. Also in this case, in fact, the private autonomy can give rise to a phenomenic reality that is much more extensive than that imagined by the legislator.

basis of presuppositions whose validity has been progressively challenged not only by medical-scientific progress, but also by the renewed social vision of who/what constitutes 'a family'.

Amongst the hardest hit consolidated canons of family law is certainly the assumption *mater semper certa est.* The realisation of a surrogate gestational maternity can, in fact, create a situation in which there are potentially three maternal figures: the woman to whom the fertilised egg belongs is the genetic mother; the woman who undertakes the pregnancy can be considered the biological or birth mother ; and the woman whose procreative intention has led to the birth of the child and who intends to assume parental responsibility for the child can be considered the contracting/intentional mother or, following the birth and the creation of an affective bond with the child, the social mother.

The recourse to surrogacy (like techniques of a heterologous nature) has also led to the fragmentation of the notion of paternity, since the paternal status can be traced to three distinct subjects. In the case of a pregnancy generated by the semen of a donor outside the couple and undertaken by a married surrogate mother, it will be possible to identify the genetic father, that is, the man who supplied the semen used for the fertilisation and consequent creation of the embryo. The contracting/intentional father or social father, that is the man who started the procreative project and who, following the birth, cares for the child. Finally, there is the legal father who, by effect of the presumed paternity, coincides with the husband of the surrogate mother.

Moreover, by separating the gestation of the foetus and the biological parenthood and, more generally, the genetic contribution from the social one, medical science and, in particular, surrogacy offer means of generation of life that it is difficult to reconcile with the classic principle of a two-parent family.[614] In reserving the parental status to two parents at most, current law inevitably neglects procreative dynamics and personal relationships that, although considered not worthy of legal recognition, played a decisive role in determining the birth of the child and, in some cases, continue to influence his/her daily life.

Considering the way in which a surrogacy develops and, above all, the underlying intentions, it is evident that the rules and the traditional principles in matters of filiation are not adequate to identify the parents of a child born using these methods. As already mentioned, in fact, the woman who gives birth does not have – at least in principle and/or prior to the birth – the intention of acting as the mother of the child. Independently of the nature of the surrogacy agreement – whether it is commercial or altruistic – the birth mother agrees to undertake the

614 The Canadian province of British Columbia which, following the introduction of the new *Family Law Act* (March 2013), foresees that a child can have up to four legal parents. The first minor who was able to benefit from this reform was *Della Wolf Kangro Wiley Richards*, whose birth certificate shows that she is the daughter of three persons: the biological mother, the partner of the latter and their friend who donated the sperm. See, P. Cassidy, *Canada: Three parents listed on a baby's birth certificate*, in BioNews 742, 17 February 2014. Available online: http://www.bionews.org.uk/page_396795.asp.

pregnancy on behalf of the contracting parent(s) and to hand over the new-born child so that they can care for it and raise it as their own. It is therefore clear that to apply the rule *mater semper certa est* to the procedure of surrogacy does not enact the intentions of the parties involved, since it creates on the legal plane family relationships that do not in fact exist, denying juridical importance to social and concrete relationships that, instead, would benefit from formal protection.

In short, the medical-scientific progress is leading to the gradual modification and overcoming of a historically valid paradigm for legal science, the naturalistic one, imposing on the right to re-conceptualise itself and its operative categories through the realisation of a new model of juridical anthropology.[615] In the face of these new procreative scenarios and the plurality of protagonists who demand safeguards for their rights, the law – written or jurisprudential – must provide new forms of protection and develop new techniques to take into account the many interests and rights in play and the context in which they are operating.[616] Should the traditional tools of the jurist be replaced or is it still possible to use them successfully? What changes, updates, improvements must be made? These are just some of the questions on which the judges – are increasingly, obliged to ponder in order to identify the most suitable techniques for interpreting current legislation efficaciously and efficiently. Where an acceptable degree of correlation between law and society is not guaranteed, it is in fact the task of the legal practitioners to step in, providing where possible, through interpretation, a just balance between the opposing rights and interests that are seldom congruent. On the one hand, the desire for parenthood together with the best interests of the child, which is owed a pre-eminent position with respect to others; and on the other hand, the interest of the State to prevent the human body being a source of profit with obvious repercussions on the dignity of the person.[617] The technique of balancing as a model for the resolution of the conflicts constitutes, in fact, the only way to avoid the dangerous outcomes of the unilateralism and the absolutism of certain values with the consequent exclusion of others.[618]

Even before that, however, it is opportune to reflect on the legal strategies and on the methods of intervention that can confer on the juridical datum the necessary degree of flexibility and capacity for self-adaptation to the constant evolution that follows technical-scientific progress.[619] In a context characterised by ongoing impermanence, trying to regulate the situation

615 G. Baldini, *Biodiritto: tra progresso scientifico, superamento del paradigma naturalistico ed esigenza di nuovi criteri ordinanti*, cit., p. 7.

616 G. Ferrando, *Biotecnologie e diritto*, in Baldini (ed.) *Persona e famiglia nell'era del Biodiritto. Verso un diritto comune europeo per la bioetica*, cit., p. XVIII.

617 A. Ruggeri and v. Salazar, *"Non gli è lecito separarmi da ciò che è mio": riflessioni sulla maternità surrogata alla luce della rivendicazione di Antigone*, in "Consulta Online", 2017, N. 1, p. 138.

618 G. Baldini, *Biodiritto: tra progresso scientifico, superamento del paradigma naturalistico ed esigenza di nuovi criteri ordinanti*, in *Persona e famiglia nell'era del Biodiritto. Verso un diritto comune europeo per la bioetica*, cit., p. 5.

619 *Ibidem*, p. 8.

through rigid laws, which provides for settled cases and selects the interests worthy of protection in a detailed manner, does not represent the most suitable solution. [620] On the contrary, in the light of the sensitive nature of the topics involved and their effects on fundamental questions relating to the individual, a legislative system created on the basis of general values and principles would facilitate the process of adaptation to which the legal norms must necessarily be subjected and would guarantee the effective protection of the interests of the subjects involved.[621] Living proof of the inadequacy and, therefore, the failure of a law that tends to organise the multiplicity of the social reality in general and abstract categories – and of the consequent gap between laws and social awareness – is the process of jurisprudential deconstruction of Law 40/2004.[622]

3. *Surrogate motherhood in the courts*

Vis-à-vis the spread of surrogate motherhood and, in some contexts, the institutionalisation of an active market of procreative services, there is no legal system in which surrogate motherhood is unknown. Whatever the legislative approach of the legal system in question, the judges are always called upon to resolve disputes deriving from a surrogacy agreement, playing – in effect – a supplementary role in an area where the intervention of the legislator – in offering *ad hoc* legislation – is extremely necessary, although unlikely to be sufficient to deal with the variety of scenarios that could in fact occur. Operating in a "pioneering sector of the law" [623] and not being able to count on a definite normative reference system, the judges – who come from various jurisdictions, but also within the same legal system – often reach decisions that are difficult to reconcile, or even contradictory. [624] This is, to some extent an inevitable outcome of the decision to delegate the resolution of the dilemmas deriving from similar practices to the jurisprudence.

The judge is therefore forced to find a solution to the concrete case, in which a minor born through surrogacy already exists. It is precisely the presence of this minor that makes the situation particularly complex. While on the one hand, the children born through surrogacy are innocent bearers of their own needs and interests that the judge must take into account, on the one hand,

620 The literature is vast. Some examples: V. Zagrebelsky, *Codificazione e diritti fondamentali della persona nel contesto europea. La difficile convivenza*, in L. Vacca (ed.), *Il codice civile ha 70 anni ma non li dimostra*, Napoli, Jovene Editore, 2016, pp. 16-25.; S. Rodotà and M. Tallacchini (ed.), *Trattato di biodiritto. Ambito e fonti del biodiritto*, Milano, Giuffrè, 2010, pp. 231 *et seq.*

621 *Ibidem.*

622 A. Bucelli, *Il cammino senza pregiudizi del biodiritto. La costruzione giuridica dei rapporti genitoriali*, in *Persona e famiglia nell'era del Biodiritto. Verso un diritto comune europeo per la bioetica*, cit., p. 74.

623 L. Spina, *Nuove famiglie e circolazione dei nuovi status familiari: le risposte del diritto interno tra interesse del minor ed ordine pubblico*, in *La Famiglia si trasforma. Status familiari costituiti all'estero e loro riconoscimento in Italia, tra ordine pubblico ed interesse del minore*, ed. G. O. Cesaro, P. Lovati and G. Mastrangelo, Milano, Franco Angeli, 2014, p. 136.

624 D. Rosani, *La maternità surrogata in Europa tra interessi del bambino. Corti supreme e silenzio dei legislatori*, in "Rivista di BioDiritto", 2017, N. 1, p. 110.

these needs and interests contrast with rules and principles that sometimes represent the keystones of the legal system, being designed to protect the minors. [625] The laws on matters of international adoption, for example, foresee a rigid course to be followed – which includes, amongst other things, the prior evaluation of suitability for international adoption – precisely in order to avoid the minors involved suffering abuse. In practice, nonetheless, these laws – given the numerous nuances they propose – can, *in primis*, have the effect of non-recognition of a status formed abroad in contrast to national law – which clashes with the best interests of the child, for example hindering him/her from moving freely within, or living in, the country. [626] This is where the judge is often called upon to make a choice between the affective, educational and developmental interests of the child and the laws designed to govern the new family phenomena. [627]

In line with the intentions announced in the first chapter, the pages that follow are intended to further analyse the repercussions of recourse to surrogacy as a means to realise the parental project on the notions of family law. In particular, the disputes that involve, for the purposes of this chapter, the sensitive question of *status filiationis* of the child (children) born through surrogacy, which – rather than being a separate problem – is often managed together with two other aspects: the possible unenforceability of the surrogacy contract and the wardship of the child (children) . In order to make the analysis clearer and more accessible, we propose to organise the case-law in three categories: the first includes the copious jurisprudence arising from recourse to surrogate motherhood abroad (international surrogacy); the second includes cases of domestic surrogacy, that is, realised within the national jurisdiction; finally, the third category includes the cases where a dispute has arisen between the birth mother , who refuses to respect the terms of the agreement and intends to keep the child, and the contracting parties.

Although, as mentioned, neither the adoption of an *ad hoc* rule, nor the introduction of a national prohibition prevents the danger of possible legal wrangles, the division of the jurisprudence proposed seems to suggest a certain correlation between the legislative approach adopted and the disputes that follow contracts for surrogate motherhood in a specific legislation.

The cases in the first group come from jurisdictions in which surrogacy is prohibited by law. The experience that marks them therefore sees a couple of aspiring parents, or a single individual, travel to a country in which the practice in question is legal, in order to enact their procreative project and, on their return to the country of origin, apply for formal recognition of the family bonds formed abroad. In this type of case, therefore, the problematic determination of the *status filiationis*

625 M. Zevola, *Problemi aperti nelle aule di giustizia,* in *La Famiglia si trasforma. Status familiari costituiti all'estero e loro riconoscimento in Italia, tra ordine pubblico ed interesse del minore*, ed. G. O. Cesaro, P. Lovati and G. Mastrangelo, Milano, Franco Angeli, 2014, pp. 21-22.
626 *Ibidem*, p. 22.
627 *Ibidem*, p. 23.

of the child born through surrogacy abroad is due, not only to the absence of a discipline that recognises the practice and manages its legal consequences when they infringe national law, but to a refusal by the Public Records Office, to transcribe the foreign ruling from which the child is certified as the child of the commissioning parents, a refusal frequently justified by the assertion that to register the foreign certificate would be contrary to public policy .

Although, as previously mentioned, it is essentially the existence of a national prohibition that makes the attribution of parenthood (in cases of surrogacy abroad) a question with potentially controversial implications, for the sake of comprehensiveness, it is important to note that legal complications related to the recognition of filiation validly established abroad may arise; although in practice, it is considerably more rare, even in the presence of legislation that allows and regulates surrogacy within the national jurisdiction. In other words, not even the presence of *ad hoc* rules – unless it is unrestricted – is sufficient to prevent procreative tourism and the questions relating to the *status filiationis* that follow.

As an example, we can mention the British case in which an aspiring father who, being unable to apply for a parental order because he was single (a possibility contemplated only for couples under Section 54, Human Fertilisation and Embryology Act 2008, 'HFEA'),[628] had travelled to Illinois in order to conclude a contract for surrogacy under which he would be the sole parent[629]. The High Court ruled that the legislation could not be 'read down' since a more elastic interpretation that included singles amongst the subjects legitimated for a parental order would have been against the intentions of the parliament which, following a process of legislative reform (2008) had decided to maintain the disputed ruling unaltered.[630] For the law of the United Kingdom, therefore, the only person who exercises parental responsibility for the minor is the surrogate mother – who, paradoxically, lives in the United States, does not have any genetic link with Z, nor

628 It is interesting to note that, under the Adoption Act of 1926, single persons have the right to adopt.

629 Further examples of how the parenthood of children born through surrogacy can become problematic despite the presence of an *ad hoc* regulation are represented by the cases in which the application for a parental order is presented after the deadline of six months from the birth, which is established by Section 54(3) HFEA). Particularly important was the ruling of the Family Court (*A & Another v. v. & Another*, Judge Theis, 11 July 2016), called upon to rule on the application for a parental order presented ten years after the birth of the children involved (born respectively in 2002 and 2004, from a surrogate mother, in California) because the commissioning parties were not aware of this requisite. The judge decided that the need to safeguard public policy by respecting the time limit of six months was balanced by the interest of the minors, which was 'a paramount consideration' that the judge had to bear in mind when deciding on an application for a parental order. Given the circumstances, added the judge, there is no doubt that no-one – the surrogate mother, the applicants or the minors – would be harmed if the application were accepted. On the contrary, the lack of legal recognition would be prejudicial for applicants and for the minors, since it would deprive them of the opportunity to formalise their family relationships also in the UK, causing long-term effects for the minors. The full text of the ruling is available online: http://www.familylawweek.co.uk/site.aspx?i=ed162330. Conforming precedent: *X (A Child) (Surrogacy Time Limit)*, UK High Court of Justice, 3 October 2014. Available online: http://www.familylawweek.co.uk/site.aspx?i=ed133396 .

630 *Re Z (A Child: Human Fertilisation and Embryology Act: Parental Order)*, UK High Court of Justice, 7 September 2015. Available online: http://www.familylawweek.co.uk/site.aspx?i=ed146968. For a note on this ruling, see K. Trimmings, *Application for a Parental Order by a Single Commissioning Father Refused by the High Court*, in "Journal of Social Welfare and Family Law", 38, 2016, N. 1, pp. 91-93.

any parental status under Californian law. Z was therefore, temporarily, made a ward of court and placed under the care of his father.

Some months later, however, the father sought a declaration of incompatibility under the Human Rights Act 1998 and the High Court – with the support of the Secretary of State for Health – issued a *declaration of incompatibility*[631] under Section 54 HEFA jointly with Articles 8 and 14 ECHR.[632] In the opinion of the High Court, the claimant had been discriminated against on the basis of his status as a single person and the non-recognition of the relationship of filiation had harmed Z's right to a clear family membership.[633] This declaration, however, does not affect the validity of the parliamentary legislation, which has not so far adopted any measures to remedy the incompatibility. Whatever the outcome of the situation, the simple fact that it occurred shows that, also in the presence of permissive national regulations, the yearning for parenthood outside one's own country may remain a necessity for certain persons (single fathers, in the case in question) and therefore the question relating to the recognition of the filiation established abroad inevitably returns due to the gap between the foreign (more permissive) legislation and the national laws.

The jurisprudence belonging to the second category, on the other hand, originates from domestic surrogacy agreements. These are, therefore, controversies that rather than concerning the question of transcription of foreign certificates, arise when the private agreement has gone beyond what was foreseen and permitted by the national legislator without, however, recourse to so-called procreative tourism. The events considered here come from four different countries: Ireland, United Kingdom, Greece and South Africa.

In the Irish case, the Supreme Court was called upon to regulate the effects on filiation of recourse to surrogacy in the absence of any normative reference on the matter. The British and the Greek courts were asked to define the *status filiationis* of children born following surrogacy agreements reached by aspiring single fathers, a subject who is not permitted access to the practice in Greece and who, in the United Kingdom (as previously mentioned), cannot apply for a parental order. The intervention of the Constitutional Court of South Africa was, instead, brought by a single woman who, despite the legal requisite of a genetic bond between the contracting party and the

631 Section 3(1) Human Rights Act 1998, with which the ECHR was incorporated into British law entrusts the judges with the task of applying and interpreting national legislation in conformity with the rights guaranteed by the ECHR. The declaration of incompatibility is therefore the last resource for a judge when the conflict between national law and ECHR legislation cannot be resolved through interpretation.

632 *Re Z (A Child: Human Fertilisation and Embryology Act: Parental Order) (No 2)*, UK High Court of Justice, 20 May 2016. Available online: http://www.bailii.org/ew/cases/EWHC/Fam/2016/1191.html

633 For a note on the second ruling by the High Court, see A. Blackburn-Starza, *Single father wins surrogacy human rights ruling*, BioNews 852, 23 May 2016. Available online: http://www.bionews.org.uk/page_651129.asp; A. Muzaffer, E. Isaacs QC and N. Gamble, *Single Parent Surrogacy – What the High Court Ruling Really Means*, BioNews 853, 31 May 2016. Available online: http://www.bionews.org.uk/page_654692.asp.

child born, intended to realise her desire for parenthood through a surrogate mother, because she was not capable of producing eggs due to a health problem.

Unlike the events in the first two jurisprudential categories, in which the parties involved are the bearers of a single intention – the recognition of filiation for the contracting parties – the cases in the third category present a further factor of complexity: the presence of a dispute between the surrogate mother on the one hand, and the commissioning parents on the other. In opposition to the desire and the expectations of the latter to raise the child as their own, the surrogate mother (and at times, her husband) choose to ignore the contractual agreements and, consequently, refuse to entrust the child to the contracting parties, or they deny their consent to the transfer of parental responsibility. It is therefore necessary for the courts to rule on the wardship of the minor born through surrogacy.

Chapter 8
Surrogate Motherhood Abroad

1. *The problem of recognising the foreign family status*

Since it is possible for the aspiring parents to realise their parental project in another country, the prohibition or even the criminalisation of certain procreative practices have produced territorial effects, becoming, from a more comprehensive standpoint, ineffective and therefore merely symbolic [634] Therefore, whatever the legislative approach adopted, the judges are regularly called upon to manage the legal consequences of a phenomenon that – although prohibited – leads to the birth of a human being and the formation of a network of family relationships. The search for parenthood abroad thus requires that even the prohibitionist countries determine the *status filiationis* of the minor and regulate the parental responsibility of the child.

Awaiting legislative interventions with a more pragmatic attitude towards this problem, which will therefore eliminate the main reason for aspiring parents to make recourse to this technique abroad,[635] procreative tourism is encouraged by the legislations, such as the Italian one, that preclude access to parenthood for homosexual couples and/or prohibit recourse to procreative techniques permitted abroad. One of the most popular destinations is, undoubtedly, California.[636] Unlike the other American states, which have preferred not to act or to expressly prohibit surrogacy, leaving the judge with the thorny task of managing and resolving the practical cases, California – and Illinois – have introduced legislation that is considered the most 'surrogacy friendly' in the Us and international panoramas, if only because the access requisites are extremely bland. In fact,

634 This vision is not shared by all the doctrine. For example, Niccolai, on the contrary, reveals that – given the Italian context – the prohibition foreseen by Law 40 aims to prevent the creation of a surrogacy market in Italy and, since this market does not exist, we must conclude that the veto has reached its aim. See S. Niccolai, *Alcune note intorno all'estensione, alla fonte e alla ratio del divieto di maternità surrogata in Italy*, in "Genius", 2017, N. 2, p. 54.

635 According to an increasingly shared opinion, the legislations that aim to prevent recourse to a given form of procreation should be replaced by regulations that, with a more pragmatic viewpoint start from the reality of the surrogate maternity market. It is undeniable that, if all countries introduced more permissive legislation, there would be no incentive for the aspiring parents to go abroad for the procedure. See, *inter alia*, B. Van Beers, *Is Europe 'giving in to baby markets?' Reproductive tourism in Europe and the gradual erosion of existing legal limits to reproductive markets*, in "Medical Law Review", 23, 2014, N. 1, p. 103; K. Horsey and S. Sheldon, *Still Hazy after all These Years: The Law Regulating Surrogacy*, in "Medical Law Review", 20, 2012, p. 89; M. Di Masi and M. Virgilio, *La gestazione per altri e il turismo riproduttivo. Tra proibizionismo e desiderio di responsabilità genitoriale*, in "MinoriGiustizia", 2017, N. 1, p. 41.

636 Since there is no federal legislation on the matter, the questions of determination of the *status filiationis*, of the validity and the enforceability of the surrogacy agreements are regulated by the individual states. The American normative framework is therefore somewhat heterogeneous and ranges from total prohibition to acceptance on various levels.

access is permitted for couples – whether married or not – and to singles, whatever their sexual orientation.[637]

Nevertheless, to avail oneself of a surrogate mother in California is quite expensive (at least $80,000). It is not therefore surprising that many aspiring parents have chosen other foreign markets, *in primis*, Thailand, India, Nepal, Cambodia and Mexico, where surrogacy is decidedly more economical. In these countries, the presence of women who are often living in disadvantaged economic-social conditions and are willing to undertake a pregnancy for wealthy couples or singles for a fee and the concomitance of a lack of legislation to safeguard the weaker citizens, rather than allowing profit to dictate the rules of the market, has given rise to a genuine business, which is growing rapidly, and whose social effects are widely debated and controversial.[638]

The attention of society and of the governments was drawn to these circumstances, at times called exploitation, by – amongst others – the case of Baby Gammy, born in 2013 from a Thai surrogate mother and, according to the version reported by the media at that time, rejected – unlike his sister Pipah – by the Australian couple who had commissioned the birth, because he had Down's syndrome. Although a more accurate reconstruction of the facts later confirmed that it was a fake scandal,[639] this and similar stories have, in any case, brought to light the potentially negative implications of a practice – like commercial surrogacy – which is often poorly regulated and has driven the governments to evaluate the introduction of restrictive measures for foreign couples and individuals.

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637 For a comprehensive overview of California legislation, see M. Wells-Greco, *The Status of Children Arising from Inter-Country Surrogacy Arrangements: The Past, the Present, the Future*, The Hague, Eleven International Publishing, 2015, pp. 206-222.

638 On this point, see, for example, K. Orfali and P.A. Chiappori, *Transnational Gestational Surrogacy: Exploitative or Empowering?*, in "The American Journal of Bioethics", 14, 2014, N. 5, pp. 33-50. Despite the risk of excessively simplifying the line of reasoning that marks the debate, on the one hand there are those who consider surrogacy an expression of procreative freedom and of the principle of self-determination and therefore believe that the practice should be legalised inasmuch as it is an extreme affirmation of the freedom of women to make use of their own bodies and its fruits, and to make surrogacy a source of income for women who are otherwise unemployed and do not earn. According to the opposite standpoint, surrogacy is an act of commercialisation of the child, who becomes an object of barter, and of the mother, who is reduced to a mere container for a life destined for others. The supporters of this position therefore state that surrogate maternity, as regulated and practiced in these countries can only be seen as a form of exploitation of other people's poverty, in particular of poor women by couples from wealthy countries. Since the fee is equal to a number of years' wages, it would be very difficult (if not impossible) for these women to refuse such an opportunity, and therefore to make a free choice regarding their bodies. A choice that, in any case, brings with it a series of risks and dangers, above all for their health.

639 In particular, it would seem that the couple wanted to take both children home with them, but the surrogate mother had the impression – perhaps due to their request to abort the 'sick' foetus (to be ascertained) – that the Farnells only wanted the healthy child. The Family Court of Western Australia, called upon to rule on the wardship of Pipah (14 April 2016), excluded that Mr and Mrs Farnell had abandoned Gammy due to his condition and decided that Pipah should continue to live with them, since they were the only family she had known. Available online: http://www.familycourt.wa.gov.au/_files/Publications/2016FCWA17anon.pdf. For a brief account of the event, see, J. Photopoulos, *Judge: 'Baby Gammy' was not abandoned and sister can stay with parents*, BioNews 847, 18 April 2016. Available online: http://www.bionews.org.uk/page_639701.asp.

Driven mainly by the intention to avoid complications at an international level, rather than that of protecting the surrogate mothers from abuse, some of these 'hotspot' countries have remedied the situation by limiting access to certain categories – generally excluding homosexuals – or, even prohibiting recourse to surrogacy by aspiring foreign parents.[640] The introduction of prohibitions in these countries has, in turn, determined an increase in the demand for surrogate mothers in Europe; in particular, in Ukraine and Russia, which, together with Georgia and Poland, represent the only European jurisdictions in which commercial surrogate motherhood, is legal.

By travelling to a country where this practice is expressly permitted and regulated, the commissioning parents reach – more or less easily – their goal. In conformity with the foreign legislation, they are considered the legal parents of the child, to all intents and purposes, either automatically or following approval of the court. The parties involved therefore constitute a valid relationship of filiation abroad and then apply for recognition by their country of origin, or that in which they are domiciled, with the intention of eluding the national prohibition. It is therefore necessary to attribute definite status to a person who, although illegally, has already been born.

The next section discusses one of the greatest obstacles for a couple/individual who makes recourse to surrogacy abroad: the lack of recognition of their parental status with regard to the child, acquired on the basis of foreign legislation. More specifically, the refusal to transcribe the foreign decision – whether it is a birth certificate or a ruling – that shows the parenthood of the contracting parties in the national public records.

If we take, for example the Italian case, the Law 40/2004 – as previously mentioned – prohibits and criminalises surrogacy, but does not foresee any positive regulations to govern the status of the minor, born through this practice abroad and, later brought to Italy by the commissioning parents. Therefore, the jurisprudence must take the decision. Ruling on this question means providing an answer to the following questions. Is it possible to transcribe a foreign birth certificate that indicates the contracting parties as the parents? What is the position of the principle

640 The Indian government, for example, after excluding homosexual couples, has been evaluating the introduction of a *Surrogacy Regulation Bill* which, on the basis of the present version, would only allow altruistic surrogacy and would, in any case, foresee an absolute veto for foreign couples and individuals. See: M. Cook, *Will India Ban Commercial Surrogacy?*, BioEdge, 2 April 2017. Available online: https://www.bioedge.org/bioethics/will-india-ban-commercial-surrogacy/12256; L. Taylor, *Embryos from overseas couples 'stuck' in India*, BioNews 874, 24 October 2016. Available online: http://www.bionews.org.uk/page_716793.asp. A similar bill is currently being discussed by the Cambodian government and, although not yet in force, the possible introduction of a ban has already led to a number of complications. About ten Australian couples who have commissioned surrogate maternity in Cambodia have been detained for months, together with their children born through surrogate maternity. See A. Barker, *'Desperate' Australian couples unable to leave Cambodia with surrogate babies*, ABC News, 22 February 2017. Available online: http://www.abc.net.au/news/2017-02-23/australian-couples-with-surrogate-babies-stuck-in-cambodia/8294810; T. Sidhu, *Cambodia moves to permanently ban commercial surrogacy*, BioNews 915, 29 August 2017. Available online: http://www.bionews.org.uk/page.asp?obj_id=878304. Similar debates are also ongoing in Nepal: A. Ilic, *Nepalese court suspends commercial surrogacy*, BioNews 817, 1 September 2015. Available online: http://www.bionews.org.uk/page_561682.asp; and, in Messico: A. Ochert, *Mexico bans surrogacy for gay couples and foreigners,* BioNews 833, 21 December 2015. Available online: http://www.bionews.org.uk/page_599021.asp.

of international public policy ? How can the best interests of the child be configured, given that it must be paramount, with regard to the *fait accompli* presented in violation of a national prohibition? If the best interests of the child are considered to coincide with the maintenance of the consolidated family relationships, do we exonerate the foreign provision from the assessment of compatibility with the fundamental principles of the national legal system (and therefore regularise a practice that is prohibited by national law?) Are just a few weeks of cohabitation sufficient to consider a family bond, built by circumventing the national legislation, effective and worthy of conservation? To what extend does/must respect for the affective stability be translated into respect for the family situations created by deliberately flouting the law? [641]

2. *The problem of transcription: public policy vs best interests of the child*

In cases of international surrogacy, therefore, the central point of the question presented to the judges is not the validity of the agreement between the contracting parties and the surrogate mother, but rather the recognition of the filiation reached in an another country by the national law. As is known, in Italy and elsewhere, when the judge is called upon to decide regarding the recognition of foreign certificates and rulings on the legal competence of persons, or the existence of family relationships, or rights of personality, one of the evaluations made regards the compatibility of the measure in question with public policy . In other words, before ordering the transcription, it must be ascertained that the effect produced – that is the attribution of a relationship of filiation outside the hypothesis of adoption and ART permitted by national law – is compatible not only with the ethical, economic and political principles of the legislation itself, but also with the obligations deriving from European sources - *in primis*, the European Convention on Human Rights and the EU Charter of Fundamental Rights.

The principal question dealt with by the jurisprudence on surrogacy abroad is, therefore, whether the limit of public policy hinders the recognition by the national jurisdiction – where surrogacy is prohibited – of the relationship of filiation created abroad between the commissioning couple and the child born from this practice. The resolution of the practical case essentially depends on three interlinked factors: the way in which the concept of public policy is organised (with reference to the best interests of the child), the meaning of 'best interests of the child' adopted and, therefore, how the conflict between these two general clauses are set out and managed by the judge.

Here, we can see two contrasting positions. The first, to be found above all in less recent national jurisprudence, although some exceptions remain – sanctions the prevalence of the statutory

641 G. Luccioli, *Questioni eticamente sensibili: quali diritti e quali giudici. La maternità surrogata*, in "Consulta Online", 2017, N. 2, p. 328.

interest in safeguarding public policy over the need to safeguard the best interests of the child born through surrogacy. This position relies on a meaning – if not explicitly, in fact – restricted by public policy and/or adopting a view of the best interests of the child not firmly rooted in the life experience of the individual involved in the event in question, but rather abstract, which leaves room for considerations regarding the protection of children as a legal category. In the name of the 'best interests of children', that is in the abstract interest of the child (who – to use the distinction made by Lenti – contrast with the best interests of the child, that is the interests of the individual minor involved) the decisions belonging to this thread hide fears of contamination of the national legislation and therefore refuse the *fait accompli* in the awareness that accepting it would inevitably implicate the multiplication of similar cases and therefore the non-application of the laws whose *ratio* is precisely the protection of the interests of the child.

From the most recent jurisprudential experience a second position emerges, that opposing the automatic exercise of the need to safeguard public policy , facilitates the recognition of the relationship of filiation between the contracting parties and the child, in order to safeguard the 'best interests of the child', that is the best interests of the child directly involved in the case.[642] In the wake of the ECHR jurisprudence in the cases *Mennesson* and *Labassee*, these rulings tend to 'relativise' the efficacy of international public policy,"[643] reducing the applicative field and therefore making the national legislation more permeable to foreign normative values.

Moving from the indelible nature of the accomplished fact, the judges in support of this approach tend to affirm the need to guarantee legal coverage to a situation that can be traced to the consolidation of the family relationships and the consequent harm for the best interests of the child in the specific case, due to lack of recognition of these bonds. This new tendency aims, therefore, to guarantee the best interests of the child born through surrogacy, whatever the circumstances of the conception and from the form of family into which the child is welcomed. [644]

This case-law therefore sees the principle of the best interests of the child clash with and prevail over the principle of legality, with the consequence – considered by many to be problematic – of rewarding the illegal conduct of the commissioning parents in the name of the need to maintain the *de facto* family situation that was created by circumventing the national law.[645] According to this position, in fact, the self-determining choice of the commissioning parents to avail themselves of the practice in question abroad deserves to be valorised since it corresponds to the interests of the

642 R. Baratta, *Diritti fondamentali e riconoscimento dello status filii in casi di maternità surrogata: la primazia degli interessi del minore*, in "Diritti umani e Diritto internazionale", 10, 2016, N. 2, p. 311.
643 *Ibidem*, p. 319.
644 Masi and Virgilio, *La gestazione per altri e il turismo riproduttivo. Tra proibizionismo e desiderio di responsabilità genitoriale*, cit., p. 45.
645 L. Lenti, *Note critiche in tema di interesse del minore*, in "Rivista di Diritto Civile", 62, 2016, N. 1, p. 87.

child, particularly when one of the two adults is also the genetic parent.[646] They are therefore decisions that, although they take into account the reasons underlying the national prohibition of surrogacy (*in primis*, the need to safeguard the human dignity of the birth mother), are also the bearers of a more pragmatic approach and take into consideration, or rather, adopt as a starting point for their decision-making the birth and therefore the existence of the minor as the holder of fundamental rights.

2.1 *Surrogate motherhood abroad: heterosexual families*

2.1.1 *Refusal to transcribe foreign birth certificates: the prevalence of national interest over the best interests of children*

The previously mentioned ruling N. 24001/2014 of the Italian Court of Cassation (see chapter 1) is an example *par excellence* of the first position mentioned above. In the first case on the subject, the Supreme Court – confirming the rulings of the lower court – recognised the state of abandonment and, consequently, the adoptability, of a minor – without any genetic link to the contracting parties – born through surrogacy in Ukraine. The Court therefore opposed the transcription of the (false) Ukrainian birth certificate, which stated the parenthood of the commissioning couple as detrimental to public policy and, in particular, to the prohibition of surrogacy set out in Law 40/2004. The ruling specified that the compatibility of a foreign certificate with the notion of public policy does not end with the respect for imperative norms, nor with respect for the fundamental principles that inspire the international community – including the best interests of the child – since it must also refer to "personal principles and values, providing they are fundamental and (therefore) cannot be renounced."[647]

In this case, explained the Court of Cassation, the national prohibition must safeguard the human dignity of the gestational woman and the institution of adoption, which is based on precise rules designed to protect the interests of all those involved, *in primis* of the minor.[648] The non-recognition of the Ukrainian certificate was not therefore in contrast with the best interests of the child, who would instead be protected by the choice of the legislator to regularise the realisation of parenthood not based on genetic bonds through adoption, rather than handing it over to private initiative.[649] Therefore, while on the one hand, the Court of Cassation refuses a dualistic interpretation of the notion of public policy – which contrasts with national and international public

646 Masi and Virgilio, *La gestazione per altri e il turismo riproduttivo. Tra proibizionismo e desiderio di responsabilità genitoriale*, cit., p. 46.
647 Italian Court of Cassation, ruling N. 2 4001, 26 September 2014, § 3.1.
648 *Ibidem.*
649 *Ibidem.*

policy – repeating therefore the unitary nature of the concept; on the other hand, the interest of the child involved is not given the pre-eminent role that it is due, inasmuch as the ruling proposes a valuation *a priori* and does not allow the judge any margin of discretion to be exercise in the specific case.

This decision, therefore, accepts the version of the principle of best interests that Lamarque considers typically Italian, giving priority to the need to respect a law designed to safeguard all the minors with respect to the need to take a decision for the good of a given minor notwithstanding the same law.[650] The sense of the best interests of the child that derives from it, therefore, rather than expressing the need for an individualised solution, that takes into account the circumstances and the needs of the individual minor, becomes the speaker for the opposite need: that of identifying an efficacious instrument that protects all the minors who find themselves in a given condition of vulnerability. [651] The principle of the best interests is therefore used not so much as a criterion that guides the margin of discretion of the judge for the resolution of the specific case in a way that differs from the legislative rules and from the legal precedents, so much as "justifying basis of the existence of a rule of law, whose application, however rigid and incompatible with the interests of a particular minor, is, however, proclaimed as an instrument to protect the interests of minors understood as a general and abstract category."[652]

The Court of Cassation, although it had two rulings by the ECHR on the same matter (recognition of the relationship of filiation formed after surrogacy abroad) to hand, considered it opportune to distance itself from the decisions of the European judges, since they were considered not applicable to the situation in question. Lacking any genetic bond between the appellants and the child, the case in question was, in the opinion of the Court, radically different from the *Mennesson* and *Labassee* cases, in which the contracting fathers were the genetic parent of the twins. The European Court, moreover, in the opinion of the Court of Cassation, had found that the margin of discretion recognised to the States on matters of surrogate motherhood had been exceeded only in the lack of recognition of the relationship of filiation with the genetic father.[653] In the absence of a genetic bond, as in the case in question, the national authorities were not obliged to transcribe the foreign certificate, but continued to enjoy a certain margin of discretion.

Even before the Court of Cassation, the Juvenile Court of Campobasso (October 2011 and later, the Appeals Court 13 April 2013) had ruled on an almost identical situation and, following the discovery of the inexistence of the genetic bond between the contracting father and the child born

650 E. Lamarque, *Prima i bambini. Il principio dei 'best interests of the child' nella prospettiva costituzionale*, Milano, Franco Angeli, 2016, p. 17.
651 *Ibidem*, pp. 64-65.
652 Lenti, *Note critiche in tema di interesse del minore*, cit., p. 93.
653 Italian Court of Cassation, ruling N. 2 4001, 26 September 2014, § 3.1.

from a surrogate mother in Russia, had rejected the transcription of the Russian birth certificate in the Italian public records as contrary to public policy . In this case, once again, the judge had ascertained the state of abandonment of the minor and had issued a declaration of adoptability.

It is precisely from this situation – that is the removal of the minor in question from the appellants – that the well-known appeal *Paradiso and Campanelli v. Italy* derives and on which the Grand Chamber of the ECHR has recently ruled, not finding any infringement of Article 8 ECHR. In the opinion of the Grand Chamber, in fact, considering the brevity of their cohabitation, the absence of a genetic link and the uncertainty regarding the legislative framework applicable, the relationship existing between the couple and the minor did not constitute *de facto* family life and therefore Article 8 (infringement of the right to respect for family life) was not applicable. Although it interfered with the parental project of the couple, removing the child was not an infringement of their right to respect for their private life, since it pursued the best public interest to restore the legality infringed and to adopt measures for the protection of the minor. The removal ordered by the national authorities was also supported by sufficient and proportionate reasons. As observed by the Grand Chamber, to prolong the permanence of the minor with the appellants would, in effect, produce a situation in which it would be the passage of time that decided the outcome of the case.

According to the reading of Luccioli, the ruling of the Grand Chamber confirms the correctness of the course taken by the Court of Cassation in the aforementioned ruling, thus representing the most recent manifestation of the first position described above in matters of surrogacy abroad.[654] The importance attributed to the appellants' circumvention of Italian laws on adoption and surrogacy, together with the absence of relationships between the couple and the child that could be traced to the sphere of family life, demonstrates the Court's intention to reject the logic of the accomplished fact and, therefore, the prevalence of the best interests of the child, understood in terms of affective continuity, in the national interest of restoring legality.[655]

As confirmed in doctrine, the result reached by the Grand Chamber is due to the fact that attention was primarily centred on questions of general prevention:[656] "[…] not only (on) the child in the specific case, but rather also (on) children more generally […]";[657] or, to quote Lenti,[658] "not only in the best interests of the child, but also in the best interests of children, that is in the interest

654 G. Luccioli, *Questioni eticamente sensibili: quali diritti e quali giudici. La maternità surrogata*, cit., p. 330.
655 *Ibidem*, p. 331.
656 *Inter alia*, D. Rosani, *La maternità surrogata in Europa tra interessi del bambino. Corti supreme e silenzio dei legislatori*, in "Rivista di BioDiritto", 2017, N. 1, pp. 125-126.
657 *Paradiso and Campanelli v. Italy*, cit., 24 January 2017, § 197 (traduzione di Rosani, *"The best interests of the parents". La maternità surrogata in Europa tra interessi del bambino, Corti supreme e silenzio dei legislatori*, cit., p. 126).
658 Lenti, *Note critiche in tema di interesse del minore*, cit., p. 93. See also L. Lenti, *Best interests of the child o best interest of children*, in "Nuova Giurisprudenza Civile e Commentata", 26, 2010, N. 3, pp. 1157-1165.

of the category of minors born through surrogacy abroad, considered a legitimate aim for public interference and balanced with the private interests, including those of the individual minor involved in the specific case. Once again, therefore, the need that is pre-eminent is that of respecting a law that protects all minors born through surrogacy, notwithstanding that same law, and not necessarily that of identifying a solution that has the foremost aim of the well-being of the minor involved.

The first position also inspired much of the French jurisprudence prior to the ECHR rulings on matters of surrogacy. For example, it is worth mentioning the well-known case *Mennesson* – which then reached the Strasbourg courts. The *Cour de Cassation* established that to enforce the surrogacy agreement validly constituted in conformity with Californian legislation, from which twins (genetically linked to the contracting father) were born and therefore recognise the relationship of filiation between the children and the commissioning parents, would infringe the *ordre public*, since it would be in contrast with "*le principe de l'indisponibilité de l'état des personnes, principe essential du droit français.*"[659] In support of this ruling, the Court further observed that the lack of recognition did not prevent the minors involved from living with the commissioning parents in France, nor did it deprive them of the *status filiationis* they enjoyed in California, thus realising a balance between the needs of public policy and the best interests of the children.

This and other similar decisions have, nevertheless had the further (in addition to the impossibility of obtaining the registration of the foreign birth certificate) problematic consequence of depriving the minors involved of French citizenship.[660] In order to avoid this risk, the Minister Taubira issued a circular letter that ordered the issue of French nationality to minors born through surrogacy abroad.[661] Although this did not oblige the French authorities to recognise the parental status of the commissioning parents, in conformity with the foreign birth certificate, this circular letter was seen by many as the first step towards the legalisation of surrogacy in France.[662]

659 *Cour de Cassation, Civ 1ere*, ruling N. 370, 6 April 2011. Available online: https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/370_6_19628.html. In addition to the *Mennesson* case, on the same day, the *Cour di Cassation* ruled on two other cases of surrogate maternity that took place abroad (rulings N. 369 and 371) and refused the application for the transcription of the foreign certificates on the basis of the same arguments. The rulings of the *Cour de Cassation* dated 13 September 2013 and 19 March 2014 (surrogate maternity in India) also conform to this position.

660 For a more comprehensive panorama of French jurisprudence on this matter, see B. Van Beers, *Is Europe 'giving in to baby markets?' Reproductive tourism in Europe and the gradual erosion of existing legal limits to reproductive markets*, cit., p. 108.

661 Circular letter N. CIV/02/13, 25 January2013. Available online: http://www.revuegeneraledudroit.eu/wp-content/uploads/2013/02/Circulaire-25-janvier-2013.pdf.

662 A similar reaction was seen at the Parliamentary Assembly of the Council of Europe which – on 11 October 2016 – voted against the adoption of a recommendation on 'Children's rights related to surrogacy', based on a report presented by the Belgian MP De Sutter. (As the title suggests, the document aimed to set guidelines for establishing the *status filiationis* of minors born as a result of surrogacy). The decision probably due to fears that the document could promote the legalisation of surrogate maternity in the various countries.

However, its only purpose was to simplify the daily life of these minors – nicknamed "*enfants fantômes de la Republique*" – who lived in France with foreign documents. The limited effects of the circular letter are shown by a ruling of September 2013 when the *Cour de Cassation* confirmed the decision of the judges of the lower court not to transcribe the birth certificate of a minor born in India, emphasising the fact that the birth of the minor was the consequence of an agreement of surrogacy, concluded abroad in order to circumvent the national prohibition, an agreement that was null and void because it was contrary to public policy.[663]

2.1.2 *In favour of the recognition in the best interests of the child, that is the best interests of the individual minor involved*

While the decisions belonging to the first jurisprudential position tend to identify a point of equilibrium between the various interests involved, which lie more on the national side, in the rulings that follow, the point of equilibrium tends to lie on the side of the 'best interests of the child', seen as the interest of the individual minor directly involved in the proceedings. The adoption of a more pragmatic framework, that favours recognition of filiation validly constituted abroad since it corresponds to the best interests of the child involved, is the fruit of the acquired awareness that, by effect of prohibitions, can create family situations that it is difficult to reverse, characterised by affective relationships that often cause trauma and suffering when they are ended.[664]

Typical of this second approach is the motivation adopted by the Appeals Court of Paris – in a ruling later reversed by the *Cour de Cassation* – regarding the application for the transcription of the birth certificates of twins born through surrogacy in California. The children were procreated using the gametes of the contracting father and the birth mother , and the birth certificates carried Mr and Mrs M as the parents: "[…] *la non-transcription des actes de naissance risquant par ailleurs d'avoir des conséquences contraires à l'intérêt supêrieur des enfants qui, au regard du droit français, se verraient priver d'actes d'état civil indiquant leur lien de filiation, y compris à l'égard de leur père biologique.*"[665]

663 *Cour de Cassation*, *Civ 1ere*, ruling N. 1092, 13 September 2013. Available online: https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/1092_13_27172.html

664 A. Ruggeri and v. Salazar, *"Non gli è lecito separarmi da ciò che è mio": riflessioni sulla maternità surrogata alla luce della rivendicazione di Antigone*, in "Consulta Online", 2017, N. 1, p. 142.

665 *Cour d'appel de Paris, 1ere chambre*, 25 October 2007.

Also the *Cour de Cassation*, with a ruling of July 2015, finally accepted this formulation.[666] Prior to this decision, as mentioned above, the children of French citizens born through surrogacy abroad remained in a sort of legal limbo, deprived of a certain and stable family status. In this case, the applicant was a French citizen who had gone to Russia in order to have a child genetically linked to him, through a surrogate mother. In conformity with the Russian legislation, the birth certificate of the minor showed the appellant as the legal father and attributed the maternal status to the birth mother. When he returned to France, the clerk of the public records office, suspecting (quite rightly) that the minor had been born through surrogacy, refused to transcribe the certificate in the French public records.

The Appeals Court – referred to by the appellant given the refusal of the public records office – also justified the non-recognition for reasons of public policy . In contrast to the decision of 2013, referred to above, the *Cour de Cassation* rejected the approach adopted by the lower courts, stating that although the appellant had deliberately circumvented national prohibitions, this was not sufficient reason to deny the family relationships constituted abroad.

The Court established that the birth certificate issued abroad, in conformity with the legislation of that country, should be transcribed unless there were reasons to believe that the document – or parts of it – contained irregular, false or mendacious information. With a particularly brief motivation, the Court therefore concluded that, on the basis of the challenged appeal, since there were no doubts about the genetic link between the appellant and the minor, the certificate should be transcribed. According to the most recent decisions of the *Cour de Cassation*, therefore, the children born through surrogacy abroad have the right to the recognition of their family bond with the genetic parent and consequently to the transcription of the part of their birth certificate that records this relationship.

It is undoubtedly an important step towards the fulfilment of the interests of the child born through surrogacy abroad. There is, nonetheless, a long way to go: as of today, in fact, the legal recognition is guaranteed only to the relationship of filiation between the genetic father and the

666 *Cour de Cassation, Assemblée plénière,* ruling N. 619, 3 July 2015, Available online: https://www.courdecassation.fr/jurisprudence_2/assemblee_pleniere_22/619_3_32230.html. In addition to the jurisprudence of the *Cour de Cassation* that follows, also the *Conseil d'État*, the highest administrative jurisdiction in France, ruled on the situation of minors born through surrogate maternity abroad. In the case brought before it, the French citizen Mme A – commissioning mother – wished to return to France with her son J. born from a surrogate mother in Armenia, but the French embassy in Yerevan opposed the registration of the Armenian birth certificate, which indicated the appellant as the legal mother of J. and refused a passport because it suspected that the child had been born thanks to a surrogacy agreement and that therefore there was no genetic link between the woman and the child. Siding against the refusal of a passport, the *Conseil d'État* stated that, although the circumstances suggest that the birth of J. was the result of a surrogacy agreement, and therefore a null and void contract because it is contrary to public policy , this does not affect the obligation of the authorities to give pre-eminent importance to the best interests of the child on matters that concern him. In the case in question, therefore, the French Foreign Ministry was required to issue a temporary passport that would allow J. to go to France and not to be separated from Mme A, the only person who had cared for him up to that time. Available online: http://arianeinternet.conseil-etat.fr/arianeinternet/getdoc.asp?id=207933&fonds=DCE&item=1.

child. [667] This is what the *Cour de Cassation* established in a series of rulings issued on 5 July does not, *per* se2017.[668]

The central question on which the Court was asked to decide, turned on the recognition of parenthood for the contracting parent who had no genetic link with the child, that is the heterosexual or homosexual spouse of the genetic father. In the case of a heterosexual couple who turned to a surrogate mother in a country where the practice is legal, the Court excluded that the commissioning parents could obtain the integral transcription of the foreign birth certificate observing that, in accordance with Article 27 of the French Civil Code, only foreign certificates that conform to reality can be transcribed. It is therefore impossible, concluded the Court, to transcribe a certificate that indicates as the mother a woman other than the birth mother.

Finally, the *Cour de Cassation* stated that the partial transcription of the certificate (recognising only the genetic filiation) is not – according to the ECHR jurisprudence established in *Mennesson* and *Labassee* – a disproportionate interference with the right to respect for the private and family life of the minor, who can continue to live with his family, obtaining a certificate of French citizenship and, if need be, be adopted by the spouse of the legal father. The French Court has, in effect, stated that the realisation of a relationship of filiation through surrogacy abroad does not, *per se*, create any obstacle to the adoption of the child by the spouse of the genetic father.

It is natural to ask, particularly in the light of the direct references made by the *Cour de Cassation* in its most recent rulings, whether the solution offered by French jurisprudence, that is the partial transcription only in favour of the genetic link with the father, is effectively in line with the decisions of the *Mennesson and Labassee* appeals and, therefore, sufficient to overcome any further judgements of incompatibility. In both cases, the ECHR decided that the lack of transcription of the American sentences declaring the existence and the validity of the relationship of filiation between the twins and the contracting parties was an infringement of Article 8 ECHR, in particular of the respect for the private life of the children. It is not however clear to what extent this conclusion was determined by the presence of a genetic link between the children born and the contracting father.

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667 The Court of Forli (25 October 2011) also decided in this sense with regard to the application for the transcription of a birth certificate of two children born through surrogacy abroad. The judge ordered the recognition of only the bond with the genetic father, rejecting the claim of the commissioning mother, who had no genetic link with the children. In this case, however, the children were newborn and, therefore there was no discernable need to preserve the affective bond with the mother.

668 *Cour de Casssation, Civ. 1ere*, rulings N. 824-825-826-827, 5 July 2017. The text of ruling N. 824 and the links to the following ones are available online: https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/824_05_37263.html. For a summary of the main passages of these rulings see: https://www.courdecassation.fr/IMG///GPA%20faite%20à%20l%20étranger,%20transcription%20et%20adoption%20_communiqué.pdf.

According to a first reading, the European judges declared the incompatibility of the refusal to transcribe the American certificates, insisting on the primary need of the minors to obtain recognition of their status as child with respect to the figure of the genetic father. In keeping with this interpretation, possession of this status, considered by the ECHR an integral part of the child's personal identity, would therefore constitute the fundamental point of the argumentative process. Although the European judges refer to the uncertain situation of legal in which the twins live, the difficulties encountered with regard to their French citizenship and the law of succession, these considerations are only complementary to their reasoning. [669] The passage in which the ECHR concludes that, due to non-recognition of the foreign certificate, the right of the minors to respect for their private lives is significantly compromised since it does not allow them "*établir la substance de son identité*" [670], of which biological filiation is a fundamental element, [671] is particularly important.

On the other hand, there are those who believe, on the basis of a more careful analysis of the ruling, that it is possible to note that a genetic link has not played a decisive role in tracing the two events to Article 8, in particular with regard to private life.[672] According to this reading, in fact, the judges emphasised the genetic parenthood only in one of the last paragraphs, when the decision had already been taken. In particular, in paragraph 100, the Court stated that "*cette analyse prend un relief particulier lorsque, comme en l'espèce, l'un des parents d'intention est également géniteur de l'enfant*".[673] Although explicitly linked to the existence of a genetic bond in this concluding paragraph, the evaluation of contrast with Article 8 had already been amply discussed and motivated in the previous paragraphs, to the point where – in the opinion of some – to consider that genetic bond the essential and mandatory foundation of the violation found in the specific case would seem, if nothing else, reductive.

Traces of this second jurisprudential position in favour of the recognition of foreign filiation can also be found in the Italian context. For example, we can take a now dated decision by the Appeals Court of Bari[674] and a more recent case on which the Juvenile Court di Firenze ruled.[675] The

669 R. Baratta, *Diritti fondamentali e riconoscimento dello status filii in casi di maternità surrogata: la primazia degli interessi del minore*, cit., p. 323.

670 *Mennesson v. France*, cit., § 99.

671 *Ibidem*, §§ 99 and 100.

672 *Inter alia*, Rosani, *La maternità surrogata in Europa tra interessi del bambino. Corti supreme e silenzio dei legislatori*, cit., p. 118.

673 *Mennesson v. France*, cit., § 100.

674 Ruling dated 13 February 2009, Available online: http://www.minoriefamiglia.it/download/ca_bari_13022009.PDF.

675 See also the decision of the Court of Napoli, 1 July 2011, Available online: http://unipd-centrodirittiumani.it/public/docs/TribNapoli_010711.pdf.
Other examples come from the jurisprudence of certain criminal courts, called upon to establish the criminal liability of the commissioning parties for alteration of status. See, for example, the rulings of the Court of Varese (8 October 2014)

Bari judge, distancing himself from previous national jurisprudence, ordered the recognition of two British parental orders (Croydon Family Proceedings Court) which transferred the legal parenthood of two minors, born in the United Kingdom, respectively in 1998 and in 2001 – from the same surrogate mother, to the commissioning parents. In a period prior to the approval of Law 40/2004, the surrogate mother had agreed, free of charge and on two occasions, to undertake a pregnancy generated by the semen of the contracting father and to 'hand over' the children to the couple. While in the United Kingdom, by effect of the parental orders, the minors were considered the children of both the contracting parties, in Italy they were registered at the *anagrafe* (the public records office) only as the children of the husband. After some years, the commissioning couple separated and, in order to achieve the ratification of the separation agreement, which foresaw shared custody, the woman asked for her status as legal mother to be registered in the public records. The clerk of the public records office, refused to recognise the parental orders stating the parenthood of the woman because the surrogacy, in addition to being forbidden by Italian legislation, also represented an offence under Law 40/2004.

The Appeals Court, instead, stated that the parental orders should be automatically recognised in accordance with Article 65 of Law 218/1995 since, in addition to not finding any infringement of Italian public policy , the transcription was to be considered fully conforming to the best interests of the children. In relation to the concept of public policy , the Appeals Court stated that the prohibition of surrogacy foreseen by Law 40/2004 was not sufficient, since a difference between Italian law and foreign law was not sufficient to exclude the transcription of a foreign certificate.[676] The judge further stated that 'contrast with public policy' should be referred not to the abstract formulation of the foreign order, but rather to its effects, that is to the practical use made of it.[677] In this perspective, refusing to recognise the foreign rulings would – in the opinion of the Court – harm the interest of the child, which lay in the maintenance of a legal bond, in addition to

and the Court of Pisa (10 April 2015) which acquitted the couple accused of rendering false declarations in order to alter the civil status of a person, after having registered the birth certificates of their children in Italy, without declaring that they had been born through surrogacy abroad. According to these courts, the right of the child to a certain and stable status must prevail over the traditional rules on status filiationis. It is interesting to note that, in order to support this conclusion, the courts refer to the ECHR decisions *Mennesson* and *Labassee*, from which it is deduced that the method of conception has become irrelevant for the recognition of parenthood. For a brief analysis of the Varese decision, see T. Chortara, S. Penasa, L. Busatta, *The best interests of the child born via cross-border surrogacy. A comparison between Greece and Italy*, in "Rivista di BioDiritto", 2016, N. 1, pp. 199 *et seq.*; T. Trinchera, *Maternità surrogata all'estero e responsabilità penale: il dibattito prosegue con una ruling dated Tribunale di Varese che si adegua ai principi espressi dalla Corte EDU e assolve gli imputati*, in "Diritto Penale Contemporaneo", 17 December 2014. Available online: https://www.penalecontemporaneo.it/d/3546-maternita-surrogata-all-estero-e-responsabilita-penale-il-dibattito-prosegue-con-una-ruling-del-t.

676 Appeals Court Bari, cit., § 1.A, p. 12.

677 *Ibidem.*

the affective bond, that had consolidated through the cohabitation and the care given for ten years, with the woman who had been considered their mother since birth. [678]

In the case of non-recognition, instead, the judge in the separation case would have been forced to revoke the joint wardship and entrust the children either exclusively to the father, or to the father together with the biological mother, who the children had never met and who had expressly declared that she did not intend to care for the children born from the surrogacy agreement. Given the absolute unreasonableness of this last solution, the Court decided that it was necessary to recognise the maternity of the social mother, that is, she who maintains an affective and relational bond with the minors. In addition to corresponding to their pre-eminent interest, the Court considered the recognition of the social maternity as a manifestation of the right to free movement, recognised for all EU citizens. In fact, should the maternal filiation not be recognised also in Italy, the minors would find themselves in the paradoxical situation of being considered the children of a stranger and would not, therefore, be able to live in Italy with the mother who had effectively raised them.[679]

Finally, it is worth mentioning a recent decision of the Juvenile Court of Firenze,[680] ruling on the case of a couple who, after unsuccessfully trying to have children through medically assisted procreation both in Italy and in Spain, had gone to a clinic in Kiev, where surrogacy is consented with at least 50% of the genetic patrimony of one of the parents (in the case in question, of the father). Returning from Ukraine with twins, born from a surrogate mother, the couple lied to the border police at the Fiumicino airport, declaring that the twins were the biological children of both parents. They were then accused of the crime of alteration of status, in accordance with Article 567 of the Italian Criminal Code and the public prosecutor's office at the Juvenile Court of Firenze opened a proceeding to declare the adoptability of the minors, following an infringement of the law on international adoption. This procedure concluded with a dismissal. According to a widespread position in the jurisprudence from the lower courts[681] – authoritatively consolidated by the ruling of the Court of Cassation N. 48696, 11 October 2016[682] – the birth certificates for which transcription was requested were not a 'false' certification since they had been validly issued in accordance with the law of the country in which the children were born.[683]

678 *Ibidem*, p. 13.

679 *Ibidem*, p. 36 *et seq.*

680 Ruling dated 10 February 2016.

681 For similar precedents, see T. Trinchera, *Profili di responsabilità penale in caso di surrogazione di maternità all'estero: tra alterazione di stato e false dichiarazioni al pubblico ufficiale su qualità personali,* in "Rivista Italiana di diritto e procedura penale", 58, 2015, N. 1, pp. 418-439.

682 For a reconstruction of the jurisprudence of the Court of Cassation on this matter, see G. Marra, La rilevanza penale della surrogazione di maternità effettuata all'estero, in "Cassazione Penale", 2017, N. 5, pp. 125-129.

683 For more information on the questions of criminal offences posed by recourse to surrogate maternity abroad in Italian legislation, see D. Pulitanò, *Surrogazione di maternità all'estero. Problemi penalistici*, in "Cassazione Penale",

As noted above, Ukrainian law allows surrogate motherhood providing the children born are genetically linked to at least one of the contracting parties, a condition met in this case, and therefore the contracting parties did not need to enact any deception.

Although the recourse to international surrogacy involved a criminal offence (the crime of alteration of status), this ruling seems extremely interesting, because it takes into account the social evolutions – above all those relating to the configuration of the family relationships – on which it is increasingly necessary for jurisprudence to decide. In particular, a decisive factor was the adhesion of part of the Court of Firenze (and of the Court of Cassation)[684] to the European jurisprudential directives, which taking into account the new forms of procreation and filiation, promote a notion of filiation that does not depend on a genetic factor, but assumes a legal-social connotation and therefore valorises parenthood of a social nature, alongside biological and genetic parenthood.

Citing the ECHR jurisprudence, specifically, this ruling emphasised that the clause of public policy could not be used in an automatic manner, without any regard for the interest of the child (children) involved and the existing parental relationship, whether genetic or not. Although surrogate Law 40/2004 prohibits maternity, the court decided that the woman should be recognised as the 'social mother', since this corresponded to the best interests of the child. In fact, the respect for private life safeguarded by Article 8 ECHR includes the primary interest for the child born through surrogacy to define their human identity, including the *status* of child.

In conclusion, these rulings are tangible proof of the change in the perspective to be seen, above all, in a more cautious and methodical treatment of the clause of public policy and its subordination to the best interests of the child involved.[685] Rather than opposing or refusing *in toto* the practice of surrogacy and all that follows on the legal plane, this 'new' formulation appears to be dictated essentially by practical demands: the recognition of the status of the minor is, in fact, ordered – despite the incompatibility of the foreign ruling with national law – as a measure capable of safeguarding the best interests of the individual minor involved – a principle that increasingly limits the exception of public policy.[686] Consequently, a regime of tolerance not based on the

2017, N. 4, pp. 1364-1373.

684 In this sense, it seems important to note the passage of the ruling N. 4 8696/2016 (§ 4.1), in which the Italian Court of Cassation refers to the well-known ruling N. 1 62/2014 of the Italian Constitutional Court, which eliminates the prohibition of heterologous ART: "the fact of genetic provenance is not an essential requisite of the family itself."

685 In the more restricted Italian panorama, this perspective is clearly in line with the decision of the Court of Cassation in the fundamental ruling N. 1 9599, 21 June 2016 which – independently of the specific case in question – represents a perhaps definite arrival point with regard to the relationship between public policy and the best interests of the child. For an in-depth analysis of the legal principles set out in this ruling, see Chapter 4.

686 D. Gruenbaum, *Foreign Surrogate Motherhood: mater semper certa erat,* in "American Journal of Comparative Law", 60, 2012, N. 2, p. 503.

legitimacy, but rather on the inevitability of this practice and the relative market for procreative services.[687]

Although this approach mainly concerns more recent national threads, it seems interesting to note that its roots can already be found in the ruling handed down in the notorious British case, Baby Cotton, dating from 1985, which was the first decision on the matter to have global significance.[688] The case concerned an American commissioning couple who, through an agency, had contacted a surrogate mother in England. After being inseminated with the semen of the contracting father, she gave birth to a boy. When the couple decided to take Baby Cotton with them to the United States, however, the British authorities were undecided whether to allow expatriation.

The High Court – called upon to decide regarding the wardship of the minor – decided that, although it raised concerns of an ethical-moral nature, the method of conception and the payment of a fee to the birth mother were questions that could not be dealt with in that court, because they were irrelevant for the purposes of the decision. In the opinion of the Court, in fact, it was the well-being of the minor that was the primary consideration; and in this regard, the fact that the commissioning couple had concluded a contract of commercial maternity was not to be considered indicative of their unsuitability to play the parental role. On the contrary, considering their capacity to offer the minor a suitable family arrangement and the birth mother's lack of interest in taking care of Baby Cotton, the High Court ordered wardship in favour of the contracting parties. [689]

Although, in the jurisprudence analysed above, the adoption of a pragmatic approach is justified by the praiseworthy and imperative need to guarantee the pre-eminent protection of the interests of the child, there are some who – emphasising the wider effects of each individual ruling – consider this new tendency problematic, since, also in the face of a prohibition, it would seem sufficient to make recourse to surrogacy abroad where it is legal to see its effects recognised also in

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687 Van Beers, *Is Europe 'giving in to baby markets?' Reproductive tourism in Europe and the gradual erosion of existing legal limits to reproductive markets*, cit., p. 107.

688 *Re C (a Minor) (Wardship: Surrogacy)*, High Court of Justice, ruling dated 1985. It would seem, in fact, that the first dispute on the matter dates from 1978, but was only brought to the attention of the media in 1985, on the occasion of Baby Cotton. In this case, the judge had established that the contract for surrogate maternity was null and void because it was contrary to public policy , but he had recognised right of access for the biological father. On this point see, E.S. Sills and C.M. Healy, *Building Irish families through surrogacy: medical and judicial issues for the advanced reproductive technologies*, in "Reproductive Health", 4, 2008, p. 4.

689 Here are the most important passages from the Baby Cotton case: "*First and foremost, and at the heart of the prerogative jurisdiction in wardship, is what is the best for the child or children concerned. That and nothing else. Plainly, the methods used to produce a child ad this baby has been, and the commercial aspects of it, raise difficult and delicate problems of ethics, morality and social desirability. These problems are under active consideration elsewhere. Are they relevant in arriving at a decision on what and now and, so far as one can tell, in the future is best for this child? If they are relevant, it is incumbent on the court to do its best to evaluate and balance them. In my judgment, however, they are not relevant. The baby is here. All the matter is what is best for her now that she is here and not how she is arrived. If it be said (though it has not been said during these hearings) that because the father and his wife entered into these arrangements it is some indication of their unsuitability as parents, I should reject any such suggestion. If what they did was wrong (and I am not saying that it was) they did it in a total innocence. It follows that the moral, ethical and social considerations are for others and not for this court in its wardship jurisdiction*".

one's country of origin.[690] According to this reading the 'best interests of children' – that is the general, preventive aims pursued by national law – are excessively and unfairly sacrificed to the benefit of the 'best interests of the child' – that is the interests of the child directly involved in the proceedings. The underlying concern is that to relegate to a secondary position the need to guarantee the effective respect of the laws designed to protect the minors and the consequent acceptance of the *fait accompli*, in the name of the concrete interest of the child, can produce effects that go well beyond the single 'procreative shop' examined, such as the proliferation of similar cases and the legitimation of serious illegality, including purchase and sale of minors.

In conclusion therefore, the attitude of those legislations that foresee a prohibitionist regime finally assumes apparently and necessarily contradictory dimensions: if on the one hand, they continue to prohibit the recourse to surrogacy on the national plane, on the other hand, they are not capable of blocking the spread of this practice outside the national boundaries and, therefore, to deny recognition of a status validly formed abroad when a similar decision would be detrimental to the interests of the child. According to the most recent jurisprudential developments, in fact, the surrogacy that has occurred and, in particular, the consequent birth of a human being constitute a legally relevant fact that requires the adoption of a protectionist approach in favour of the weaker subject, that is the child. [691] It is not therefore surprising that the countries where legislation on the matter is particularly restrictive are being gradually forced to accept visions of the family and ways of constituting a family that depart from tradition.[692]

2.2 *Surrogate motherhood abroad: families with same-sex parents*

As emerges from the previous section, recent jurisprudence has been shown to influence the respect of public policy in the interests of the child, ordering the recognition of the relationship of filiation validly formed abroad between the commissioning parents and the child born through surrogacy. It is however important to point out that the cases considered so far all involved heterosexual couples.

In addition to allowing heterosexual couples to access parenthood that is prevented by pathologies of sterility or infertility, surrogacy makes it possible to overcome the biological limits that are otherwise insuperable for same-sex couples. In the face of the impossibility of procreating

690 *Inter alia*, see P. Morozzo della Rocca, *Diritti del minore e circolazione all'estero del suo status familiare: nuove frontiere*, in G.O. Cesaro, P. Lovatti and G. Mastrangelo (ed.*), La Famiglia si Trasforma. Status familiari costituiti all'estero e loro riconoscimento in Italia, tra ordine pubblico e interesse del minore*, Milano, Franco Angeli, 2014, p. 45; D. Pulitanò, *Surrogazione di maternità all'estero. Problemi penalistici*, cit., p. 1371. Although considering it problematic, Pulitanò believes that there are no realistic alternatives.

691 R. Baratta, *Diritti fondamentali e riconoscimento dello status filii in casi di maternità surrogata: la primazia degli interessi del minore*, cit., p. 331.

692 *Ibidem.*

through sexual union, surrogate motherhood is in fact – together with adoption (when it is allowed) – one of the ways in which a male homosexual couple can enact their parental project; and, just as occurs with heterosexual couples, in view of a national prohibition, it is evident that an increasing number of homosexual couples and singles are turning to foreign clinics, in countries where homosexuals are not discriminated or hindered in their fundamental desire to become parents.

It is therefore interesting to see that the jurisprudence has assumed the same tolerant attitude also with regard to applications for the transcription of a foreign ruling that does not carry any indication of the mother, certifying parenthood for two fathers. The capacity of modern reproductive techniques to overcome the limits set by the natural order of things and therefore the disruption of the naturalistic paradigm that derives from it are even more evident, when a homosexual couple pursues the parental project. In other terms, the couples formed by persons of the same sex who 'break away' from the idea of family conceived as 'naturally' founded on matrimonial unions between men and women, in an even more marked manner. [693] The cases of surrogacy that concern same-sex couples therefore deserve some supplementary consideration since, if seen in the light of the traditional family, it is an even more anomalous situation. In fact, these families differ from the mainstream model not only because of the method of conception used, but also because they contrast with the hetero-normative vision of the family, which presupposes the presence of a father and a mother.

Also in the context of homosexual parentage, the question of the transcription of the foreign birth certificate has not so far found a univocal solution. With regard to the most recent developments, however, the gradual recognition of family forms and bonds that do not reflect the traditional canons, described above, seems to have facilitated also homosexuals who wish to become parents. With few exceptions,[694] an assessment that – far from being based on general and abstract considerations – takes into account the peculiarities of the specific case and proposes a solution that makes it possible to preserve the affective continuity established between the children born through surrogacy and the adults involved.

693 A. Lorenzetti, *Coppie same-sex e fecondazione assistita: la progressiva decostruzione del paradigma familiare* in *La procreazione assistita, dieci anni dopo. Evoluzioni e nuove sfide,* ed. M. Azzalini, Ariccia, Aracne, 2015, p. 105.

694 The ruling N. 835/2013 dated 6 February 2014 issued by the *Tribunal Supremo de Madrid* was totally negative. In this case, the transcription in the public records of the birth certificates of two children born in California through surrogacy for a male couple, was declared incompatible with public policy and, in particular with the laws on ART which prohibit surrogacy. It is, as Palmeri observed, a decision with paradoxical effects, since it jeopardises a harmonious family situation and, above all, is not in keeping with the models recognised by Spanish law, where – as is known – same-sex couples are allowed to marry, *de facto* cohabitation is recognised and heterologous ART are permitted. For an in-depth analysis of this event, see G. Palmeri, *Spunti di riflessione su maternità di sostituzione del certificato di nascita a partire dalla sentenza del 6 febbraio 2014, N. 835/2013 del Tribunal Supremo de Madrid (ricorso 245/2012)*, in "Genius", 2015, N. 2, pp. 199-213.

Amongst the most significant rulings in this sense, there is undoubtedly the one issued by the German federal court in December 2014.[695] This decision is rightly considered a vanguard, because it recognises the problems that inevitably arise in a society characterised by a high level of family pluralism,[696] interrupting a trend of jurisprudence – developed by other courts – that considered the public policy infringed by the mere fact that the birth was the result of surrogacy, a practice prohibited by national law.[697] The case concerned a homosexual couple in a civil union who – since it was impossible to realise their parental project (even through adoption) in their country of origin – had gone to California, where they reached a surrogacy agreement, realised thanks to the donation of oocytes (prohibited in Germany) by an anonymous woman and the semen of one of the partners. Once the pregnancy was underway, the genetic father recognised his paternity and a Californian court, on the basis of the consent given by the pregnant woman, had attributed parenthood of the child to be born to the two men. When they returned to Germany, however, the clerk of the public records office refused to transcribe the foreign birth certificate resulting from the legal proceedings and therefore carrying the indication of two fathers, because it was contrary to the public policy.[698]

The German federal court established, instead, that the public policy could not be considered infringed by the mere fact that, in a case of surrogacy, the parental status was attributed to the commissioning parents, when one of them was the genetic father and the surrogate mother had not genetic bond with the child. The Court further stated that, in order to avoid the existence of lopsided legal relationships, valid in one country but not in another, the compatibility of the foreign provision certifying the parenthood of the two men with public policy should be verified in the light of a rigorous evaluation that did not affect the mere fact that the provision had been issued on the basis of foreign legislation not consistent with national law, but rather assessed whether the effect produced by the ruling was contrary to the fundamental values of national public policy .

The Court therefore emphasised the importance of maintaining the reasons surrogacy is prohibited in Germany distinct from the situation in which this practice took place abroad, because, in the second scenario a child has already been born, without any responsibility for their birth – and

695 The ruling (in German) is available online: http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2014&Sort=3&anz=193&pos=1&nr=69759&linked=bes&Blank=1&file=dokument.pdf.

696 M. Di Masi, *Coppie omosessuali e ricorso alla surrogacy in uno Stato estero: aperture dalla Germany*, in "Genius", 2015, N. 2, p. 222.

697 J. von Hein, *German Federal Court of Judge on Surrogacy and German Public Policy*, Conflict of Laws.net, 4 March 2015, p. 5. Available online: http://conflictoflaws.net/2015/german-federal-court-of-justice-on-surrogacy-and-german-public-policy/. This contribution also gives a summary in English of the main passages of the ruling in question.

698 For a more detailed analysis of the case and the arguments presented by the lower courts, see M. Di Masi, *Coppie omosessuali e ricorso alla surrogacy in uno Stato estero: aperture dalla Germania*, cit., pp. 220-1.

it is therefore their well-being as a legal subject with fundamental rights that must be the guiding parameter in resolving specific cases. Overturning the rulings of the lower court judges, the federal court stated that the fact that the child could – in effect – continue to live with the social family was not sufficient: only the legal recognition of the filiation – for both fathers – would guarantee the necessary protection for the existence of the child.[699]

The recognition of the family relationship with both fathers, ordered by the federal court, is therefore the result of a decisional procedure that, although ascertaining the conflict between the legislations in their respective reference values and a difference between the decree of the California court and the national laws on *status filiationis*,[700] considered this divergence justified by the need to safeguard the best interests of the child born through surrogacy. To deprive the minor of the recognition of his family bond with the non-genetic father would be an infringement of his right to a private life, which, as the ECHR decided in the cases *Mennesson* and *Labassee*, also protects the primary interest in defining the essential content of one's personal identity, including the status of child.

In examining the alternatives, the Court further observed that, in addition to not being interested in assuming parental responsibility for the child, the birth mother was not even legally a parent. The attribution of motherhood to the birth mother, which could only be established in conformity with German law, would not have produced any effect in the woman's country of origin, since it contrasted with the decree issued by the American court. On the other hand, adoption, although a valid alternative based on the evaluation of the best interests of the child involved, involves practical difficulties because the applicants already enjoy parental status in California and this would implicate potential risks for the minor. In fact, the intentional parents would be free to change their minds and abandon the child if, for example, it were born with mental or physical defects. The recognition of the relationship of filiation for both the fathers was, therefore, the only solution/scenario that guaranteed the full realisation of the best interests of the child.

It must be observed that, in the complex field of surrogacy, the case brought to the attention of the German federal court emerges thanks to its relatively linear scheme, which is easy to resolve: the surrogate mother was not married at the time of the birth and, therefore, the genetic father was

699 D. Rosani, *La maternità surrogata in Europa tra interessi del bambino. Corti supreme e silenzio dei legislatori*, cit., p. 119.

700 The application of national laws on matters of filiation would lead to a partially different result. Since the birth mother was not married at the time of the birth and the commissioning /genetic father had, with the consent of the latter, recognised his paternity, also the national law would have reserved the status of legal father for the genetic father. As far as the position of the co-father is concerned, the application of the (domestic) rule *mater semper certa est* would have led to the attribution of parental status to the birth mother, in contradiction with the Californian decree.

able to recognise his paternity without difficulty. There was no conflict between the contracting parties and the birth mother, who did not intend to keep the child and the parenthood of the contracting parties had been established by legal proceedings, in which the rights of the minor and of the pregnant woman, especially her voluntary participation, had been taken into consideration. [701] In fact, there only remained the doubt whether the Court would have decided otherwise, if the child had not had genetic links with either of the contracting parties, or if it had been a case of traditional surrogacy, in which the pregnant woman is also the genetic mother of the child. [702]

The position taken in Switzerland is partially different, and is exemplified by a ruling of the Swiss federal tribunal issued on 21 May 2015.[703] Additionally, in this case, a homosexual couple in a civil union had gone to California to reach a surrogacy agreement, realised thanks to the oocyte of an anonymous donor and the gametes of one of the two contracting parties. While in 2014 the administrative tribunal of the canton of San Gallo had ordered the transcription of the Californian birth certificate attesting the parenthood of both men, noting – amongst other things – the need to protect the best interests of the child, the federal tribunal only admitted the recognition of the American certificate for the genetic father, denying the co-father (the partner of the genetic father) the right of recognition of his family bond, validly acquired abroad and the transcription of the certificate in the public records.

Despite the decision of the administrative tribunal, the transcription would in fact be incompatible with Swiss public policy , since surrogacy is prohibited not only by the law on ART, but above all, it is expressly set out in Article 119, paragraph 2 of the Constitution. Although stating that the recognition of the relationship of filiation with both fathers would be in the best interests of the child, the federal court then considered that the possible negative effects of a validation of the practice *ex post* should prevail for the purposes of the decision. To deny the infringement of the public policy and therefore accept a bond created in contrast with national order as a *fait accompli*, in addition to encouraging the phenomenon of procreative tourism and thwarting the national prohibition, would have the serious consequence of debasing the minor to the level of a commodity, and legitimating the sale of the body of the surrogate mother.

In the opinion of the tribunal, the solution adopted – that is the recognition only of the genetic father – would be correct also in the light of the ECHR jurisprudence and of the obligations for Switzerland under the UN Convention on Children's Rights since, in effect, the child could

701 von Hein, *German Federal Court of Judge on Surrogacy and German Public Policy*, cit., p. 3.
702 *Ibidem.*
703 The original ruling and a summary of the main passages are available online: http://www.biodiritto.org/index.php/item/707-surrogata-svizzera. For a brief analysis of the ruling and future prospects see M. Wells-Greco, *Switzerland, inter-country surrogacy and public policy*, BioNews 805, 8 June 2015. Available online: http://www.bionews.org.uk/page_533196.asp.

continue to live with both fathers. In order to avoid the possible prejudice deriving from the fact of having only one parent, added the Tribunal, the registered partner would have a series of powers in the case of the death of the genetic father and the possibility – as foreseen by a bill being discussed by the parliament and approved a few months after the ruling – to undertake stepchild adoption.

The Swiss position therefore adheres to the approach recently confirmed by the French *Cour de Cassation*. As mentioned with reference to the cases of international surrogacy organised by heterosexual couples, in July 2017 the French court emphasised that the transcription of the foreign certificate could only be ordered in favour of the genetic parent. Despite this limitation, the spouse of the genetic father can formalise his family bond with the child through adoption. This alternative, stated the *Cour de Cassation*, is valid also for homosexual couples. The law dated 17 March 2013, which extended the institution of marriage to homosexual couples, makes it possible to establish a relationship of filiation between a minor and two persons of the same sex through adoption, without any restrictions regarding the method of procreation. It will, in any case, remain the duty of the judge to verify the subsistence of the conditions established by the laws on adoption and the compatibility of these measures with the best interests of the child.

Finally, it is worth mentioning the recent decree with which the judge at the Appeals Court of Trento, ordered, for the first time, the recognition of the legal efficacy of the decree issued by a foreign court, which certified the existence of a family bond between two children born through surrogacy abroad and the non-genetic father, in a homosexual relationship with the genetic father. [704] In the case in question, the ruling had been preceded by another decision, with which the foreign court had established that the birth mother was not the parent of the twins and that the father and only parent was the contracting/genetic father. The birth certificates were drawn up and transcribed in the Italian public records on the basis of this first decision. In relation to the second decision – which recognised the co-parenthood and ordered the amendment of the two birth certificates – the clerk of the public records office had rejected the application for transcription as contrary to public policy , also stating that – according to current legislation – the parents must necessarily be of different genders.

The decree of the Appeals Court is one of the first applications of the ruling N. 19599, 21 June 2016 with which the Italian Court of Cassation – as explained in the fourth chapter – established that the birth certificate issued abroad with the indication of two mothers, must be transcribed, since neither the technique used to attain conception, nor the fact the two mothers were a homosexual couple could be considered contrary to international public policy . [705] With the ruling

704 Ruling dated 2 February 2017, Available online: http://www.articolo29.it/wp-content/uploads/2017/02/Ordinanza.pdf.

705 On the basis of the teachings of the Italian Court of Cassation, the Appeals Court Milano (28 October 2016) also ordered the transcription of the birth certificates of twins born through surrogacy in California to a homosexual couple.

in question, this principle, developed in a case of partial heterologous ART, was extended to the context of surrogate motherhood, with a motivation that takes into account the various methods of procreation and filiation currently available, emphasising the family pluralism that derives from it.

By stages, the Appeals Court first emphasised the need to adopt a relatively loose notion of public policy . Referring to the interpretation given by the Supreme Court, the Trentino judge stated that, in order to evaluate the compatibility of the foreign decree with the public policy , the judge is not required to verify whether the measure applies laws on the matter that conform to Italian law, but rather whether they contrast with the needs for protection of the fundamental rights of mankind, as guaranteed by the Italian Constitution and by the principle international documents on the matter. [706] Amongst these principles, continues the Court, the protection of the best interests of the child is of particular importance and, in the case in hand, lies in the right of the twins to preserve their *status filiationis* with regard to both parents.[707] The lack of recognition of the family relationship with the non-genetic father would therefore determine a serious disadvantage for the minors who, in addition to not attaining all the rights that this status grants (including Italian citizenship) would be deprived of a fundamental element of their family identity legitimately acquired abroad.[708]

Again retracing the position assumed by the Court of Cassation, the Trentino judge stated that not even the prohibition of surrogacy foreseen by law N. 40/2004 could justify the refusal to transcribe the foreign certificate, since it does not contain essential principles of the legal system considered mandatory by the ordinary legislator and, consequently, the aforementioned prohibition is not a principle of public policy.[709] More generally, in fact, the law N. 40/2004 is to be considered one of the potential ways of enforcing legislation in an ethically sensitive area, bridging the normative gap that has long characterised this field.

Lastly, the Appeals Court took the opportunity to present some considerations on the notion of parenthood, refusing the pretended exclusivity of the genetic-biological paradigm in the constitution of the legal status of the child. In the opinion of the Court, in addition to traditional biological filiation, "we must consider the importance at normative level of the concept of parental

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Nonetheless, this was a special case, since the twins were conceived using the oocytes of the donor, the same surrogate mother gave birth, but the children had different genetic fathers and the certificates applied for (which were granted by the judge) were to recognise only the relationship of filiation between the child and his biological father. For a note on the decree from the Milano court see, A. Schillaci, *Passo dopo passo, il diritto si avvicina alla vita: la Appeals Court Milano ordina la trascrizione dell'atto di nascita di due gemelli nati grazie alla gestazione per altri*, Articolo 29, 4 January2017. Available online: http://www.articolo29.it/2017/passo-dopo-passo-il-diritto-si-avvicina-alla-vita-la-corte-dappello-di-milano-ordina-la-trascrizione-dellatto-di-nascita-di-due-gemelli-nati-grazie-alla-gestazione-per-altri/; A. Margaria, *Twins but legal strangers: paradoxical but could we have expected more?*, BioNews 888, 13 February 2017. Available online: http://www.bionews.org.uk/page_777615.asp.

706 Appeals Court Trento, ruling dated 2 February 2017, pp. 11-12.

707 *Ibidem*, p. 12.

708 *Ibidem*, p. 13.

709 *Ibidem*, p. 16.

responsibility that manifests itself in the conscious decision to raise and care for the child born […]"[710] which accompanies the favourable consideration by the law of parental projects that go beyond the genetic factor through the regulation of adoption and, finally, the possibility of recourse to the authorised techniques of heterologous fertilisation.

Also in cases of international surrogacy involving homosexual couples, therefore, the recent jurisprudence has authorised the (total or partial) recognition of the relationships of filiation generated through surrogacy abroad, giving a central place to the protection of the interest of each individual born thanks to this practice. On the basis of the paradigmatic cases analysed above, it is therefore possible to exclude that the sexual orientation of the commissioning parents has – explicitly or effectively – led to a discriminatory treatment of their applications for recognition. It also emerged from the jurisprudence concerning heterosexual couples (previous section), that the judges offer the families formed through surrogacy two levels of protection: a lesser and minimal protection, aimed to cover only genetic filiation; and a greater protection that guarantees the recognition of the relationship of filiation with both commissioning parents, whether there is a genetic link or not.

The decision of the German federal court and, lastly, the ruling by the Appeals Court of Trento, which offers the second type of protection, exalt a vision of parenthood that is based only on the intention of the parties to become parents, an intention that must follow a deliberate assumption of responsibility. Although they emphasise the voluntary element, the decisions of the Swiss federal tribunal and the French *Cour de Cassation* – which offer minimum protection – remain convinced that the genetic contribution is a prerequisite for (legitimately) becoming a parent, or rather, for seeing one's parental role recognised by the law.

Chapter 9

Beyond The Prohibition: The Problems Remain

1. *Introduction*

Although the organisation of a prohibitionist regime is – due to the circumventions that encourage disputes between national laws and the divergent reference values derived from them – a

710 *Ibidem*, p. 17.

guarantee that controversies will arise regarding the family relationships of the child born through surrogacy abroad and the commissioning parents, experience teaches us that the determination of the *status filiationis* can assume problematic dimensions even in the face of different legislative attitudes: in the presence of an *ad hoc* discipline that consents and regulates surrogate motherhood, should the specific event go beyond the hypotheses contemplated by the legislator, or in the absence of any law intended to regulate the practice, either in a preclusive way, or in a permissive sense.

Independently of the normative approach characterising a given legislative system, therefore, the possibility that normative gaps appear and that the judge is called upon to bridge them through interpretation remains. Even a permissive legislation contains limitations and every time restrictions or conditions to be met are foreseen so that the agreement is valid and produces the effects desired by the parties, there is the risk of practices enacted ignoring these requisites and, therefore, situations not foreseen by said legislation. Thus, the problem of defining the family status of a minor who is born, not in violation of a prohibition (as in the cases examined in the previous chapter), but following a procreative course that – due to its operative peculiarities and/or the subjects involved – poses questions that the national legislator, although allowing and regulating surrogacy has not taken into consideration.[711]

2. *When the legislator is silent: the ruling of the Irish Supreme Court*

As proof of what we just said, it is worth dedicating some thought to a case of altruist surrogacy on which the Irish Supreme Court ruled in 2014.[712] Ireland, as previously mentioned, belongs to the category of countries in which there are no laws on the question of surrogate motherhood (or, more generally, on ART)[713] although, already in 2005, the Commission on Assisted Human Reproduction – nominated by the government, had called for parliament to intervene.[714] At the centre of the situation are twins, conceived with the gametes of a married

711 Niccolai goes further, stating that the best legislation on surrogacy would not even resolve the problem of procreative tourism. In fact,there could always be the case of a person or a couple who, with the precise intention of avoiding the limits set by national legislation, go abroad and then apply for the recognition of a foreign relationship of filiation. See, Niccolai, *Alcune note intorno all'estensione, alla fonte e alla ratio del divieto di maternità surrogata in Italy*, cit., pp. 54-5.

712 *M.R. and D.R. and ors v. An t-Ard-Chlaraitheoir and ors*, Supreme Court of Ireland, 7 November 2014. Available online: http://www.bailii.org/ie/cases/IESC/2014/S60.html.

713 In the absence of legislation on ART, the guidelines of the Irish Medical Council and the EU legislation on tissues and cells are followed.

714 On matters of surrogacy, the Commission took a particularly advanced position, recommending the omission of any restriction on the basis of the civil status, the gender and the sexual orientation of the commissioning parents. On this point, see S. Sills and C.M. Healy, *Building Irish families through surrogacy: medical and judicial issues for the advanced reproductive technologies*, in "Reproductive Health", 4, 2008, p. 3. On the attempt of the Ministry of Health of the Irish government to introduce legislation on the matter, see F. Duffy, *Legislating for assisted conception in Ireland*, BioNews 793, 9 March 2015. Available online: http://www.bionews.org.uk/page 504778.asp. This attempt took shape at the start of October 2017, when the present Minister of Health (Simon Harris) presented a detailed bill (Assisted Human Reproduction Bill) which, for the first time in Ireland – aims to provide a comprehensive regulation

couple, but born to the woman's sister. On the basis of the surrogacy agreement reached by the genetic parents and the surrogate mother, the children were entrusted to the former immediately after the birth. When the birth certificate was drawn up, however, the clerk of the public records office refused to register the genetic mother as the legal mother of the children, despite the consent of the birth mother. In support of this refusal, the government invoked the principle *mater semper certa est*, which automatically attributes legal maternity to the birth mother.

The question raised by this event is, therefore, the classic issue of surrogacy: who should be considered the mother of the twins when drawing up the birth certificate? The primary caregiver, who is genetically linked to them, or the woman who has undertaken the pregnancy and given birth? In other words, in virtue of which contribution – gestational or genetic-social (supply of the genetic material and, after the birth, care) – can one woman, rather than the other, be considered the legal mother of a given child? To which of the various procreative functions – amongst which the gestation, the birth and the furnishing of the gametes – should be accorded importance for the purpose of determining the maternal filiation?

The appeal presented by the couple was accepted by the High Court, which first observed that in the absence of a national prohibition, the surrogacy agreement reached between the parties could not be considered illegal, because it was not enforceable.[715] Moving to the heart of the question, the ruling effectively denied the previous presumption of maternity, establishing that the genetic mother could appear on the birth certificate in place of the surrogate mother. In support of this conclusion, the High Court adopted two main arguments: the intention expressed by the latter to raise the twins as her own and the pre-eminent role played by the chromosomic DNA in determining the identity and the development of the foetus.

Although epigenetics has emphasised the importance of the mother-child relationship in the intrauterine period, showing that certain phenomena, for example the abuse of drugs during pregnancy, can alter the phenotype (that is the genic expression) although without altering the DNA sequence, in the opinion of the High Court, the influence of these factors and the mutations that derive from them are not so significant that they prevail over the DNA for the purpose of determining the identity of a person. In the words of the judge, "*it is most likely that epigenetics will ever trump the deterministic quality of chromosomal DNA*".[716] This ruling therefore defines a notion of maternity – considered by some to be reductive – that denying any role to gestation and

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on matters of assisted procreation. For a brief comment on the law, see G. Everett, *Ireland to offer state-funded IVF*, BioNews 921, 9 October 2017. Available online: http://www.bionews.org.uk/page_894643.asp; M. Rodgers, *Reform of assisted reproduction in Ireland is long overdue*, BioNews 923, 23 October 2017. Available online: http://www.bionews.org.uk/page 901026.asp.

715 Ruling dated 5 March 2013, Available online: https://ie.vlex.com/vid/m-r-anor-v-an-chlaraitheoir-ors-426431942.

716 *Ibidem*, p. 26.

birth attributes decisive importance to the genetic factor, accompanied by the procreative intention.[717]

Drawing on a different reading of epigenetic knowledge and invoking a more cautious and respectful treatment of the gestational contribution of the surrogate mother, the government appealed against this first decision. The hearing before the Supreme Court also saw the participation – in quality of *amicus curiae* – of the Irish Human Rights Commission. Invoking international instruments, *in primis* the ECHR and the UN Convention on Children's Rights, this Commission found that the Irish authorities, not having regulated or explicitly prohibited surrogacy, could not deny the status of parents to those who had pursued their desire for parenthood making recourse to this technique, or prevent the children born through this practice from becoming (formally) members of the family nucleus of the contracting parties, since such a decision would be detrimental to the right of the children to the certainty of their family status.

Overturning the decision of the High Court, the Supreme Court of Ireland stated that the questions relating to surrogacy and the determination of the *status filiationis* were not of judicial jurisdiction, but legislative. The Court admitted that the rule *mater semper certa est* is evocative of its period: it reflects a different society and is functional to the needs of an era prior to medically assisted procreation.[718]

In fact, this brocard simply recognises the fact that the birth mother is also the mother of the child, whether genetic or gestational, a fact that constituted an undeniable truth until medical science made new forms of procreation available, other that sexual union.[719] Nonetheless, unlike other national legislators, who in the meantime have intervened to regulate the new family phenomena made possible by medical-scientific progress, added the Court, in Ireland, the birth of children through surrogacy continues to be uncontemplated by the law.[720] It is, to quote the metaphor used the by Judge Hardiman "as if the Highway Code had never been updated to include the advent of motor vehicles".[721] The Supreme Court then mentioned the presence of a legislative gap, with particularly problematic results, with regard to the children born through these techniques.

Although the absence of laws in step with the scientific developments in the field of procreation penalises a limited number of persons, said Judge Hardiman, this shortfall affects a

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717 It seems interesting to note that, in another Irish case (which then came before the European Court of Justice), the gestation and the birth represented the legal principle to which the authorities resorted when denying maternity leave to the Irish commissioning mother of a child born through surrogacy in the USA. On the ramifications, at times contradictory, that the notion of maternity can assume also within the same legislation, see K. Christiansen, *Who is the mother? Negotiating identity in an Irish surrogacy case,* in "Medical Health Care and Philosophy", 18, 2015, N. 3, pp. 317-327.

718 *M.R. and D.R. and ors v. An t-Ard-Chlaraitheoir and ors*, Supreme Court of Ireland, § 105.

719 *Ibidem*, § 115.

720 *Ibidem*, § 112.

721 *Ibidem*, ruling of Judge Hardiman, § 4.

particularly intimate sphere of the lives of these persons and, therefore, a reform of this matter is extremely urgent. [722] Since they are not strictly juridical or logical questions but ones that reveal profound ideological values and positions, it is nonetheless the parliament (and not the judges) who must provide a clear and precise regulation in order to guarantee the certainty of the law. The Supreme Court therefore preferred not to venture onto the sensitive terrain of medically assisted procreation, knowing that to validate the ruling of the High Court would have potentially significant repercussions on the wider re-interpretation of the laws on matters of filiation, repercussions that would go well beyond the individual case in question. [723]

Today, in fact, in view of the silence of the legislator, the aspiring parents who realise their procreative project using the semen or the eggs of a donor in Ireland obtain parental status without particular difficulty: the woman in virtue of the birth and the man, inasmuch as he is the spouse of the mother or through recognition of the paternity. [724] If the ruling of the High Court had become a precedent, however, in cases of heterologous ART, the donors could have legitimately claimed the status of parent and been registered as such on the birth certificate. The confirmation of an essentially genetic notion of maternity in the case in hand it would have been possible to justify the lack of attribution of legal parenthood to all those women who, in order to procreate, are forced to make use of donated eggs.

3. Ad hoc regulation: judges deal with behaviour not contemplated by the legislation

The question goes beyond the Irish case, since in every situation where the authorities are called upon to manage the consequences of practices that do not correspond to the normative framework, also in legislative systems that, unlike Ireland, have an *ad hoc*, generally permissive, attitude towards the matter. Three examples follow, from South Africa, the United Kingdom and Greece, whose legislation allows surrogacy – although only in the altruistic form – but constrain the agreements through certain conditions. It is precisely the effect of these conditions that exclude certain persons from the practice (in the case of regulation *ex ante*) or from obtaining parental status with respect to the child (in the case of *ex post-facto* transfer). However, despite these restrictions they present applications or even become parents through surrogacy.

South African legislation, for example, states that: "No surrogate motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by the use

722 *Ibidem.*

723 R. English, *Irish Supreme Court Struggles with Outcome of Surrogacy Agreements*, UK Human Rights Blog, 20 November 2014, p. 3. Available online: https://ukhumanrightsblog.com/2014/11/20/irish-supreme-court-struggles-with-outcome-of-surrogacy-arrangements/.

724 *Ibidem*, p. 4.

of the gametes of both commissioning parents or, if that is not possible due to biological, medical or other valid reasons, the gamete of at least one of the commissioning parents or, where the commissioning parent is a single person, the gamete of that person."[725]

The requisite of a genetic bond between the contracting party (or parties) and the child (children) born, quoted above, has recently been examined by the Constitutional Court which, in September 2017, confirmed its validity.[726] Since the controversy (which instigated the question of constitutionality) arose when the surrogacy contract was being drawn up, the judge did not have the difficult task of providing a solution that took into account, *inter alia*, the existence of a minor born following a variant of surrogacy not contemplated by national legislation. This case, nonetheless, reveals for the purpose of this analysis since it anticipates a procreative scenario that, *rebus sic stantibus*, could actually occur, facing the judge with the need to attribute a definite status to a child born through surrogacy and genetically extraneous to the contracting parties, without being able to count on written laws.

The situation concerned A. B., a divorced woman who, due to sterility, could not produce egg cells. In order to realise her desire for motherhood, the woman turned to surrogacy using semen from a donor and egg cells from a female donor, both anonymous. Once she had found someone who would undertake the pregnancy on her behalf, A. B. discovered that she could not formalise a surrogacy agreement with the woman because, according to the law, the child would not have any genetic link with the contracting mother. The High Court – where A. B. presented her claim – raised the question of constitutional legitimacy, stating that the condition of a genetic link was an infringement of the principle of equality, of the right to reproductive autonomy and of the right to privacy, values of constitutional status. According to the Ministry of Health, however, the condition in question responded to the fundamental need to maintain surrogacy distinct from adoption. If the surrogacy was not limited to cases where at least one of the contracting parties had contributed to the genetic heritage of the child, explained the government, the aspiring parents could easily circumvent the laws on adoption and, therefore, avoid all the evaluations of suitability that this foresees by recourse to surrogacy.

The Constitutional Court decided – with a wide majority (7/4) – to confirm the condition set out in Section 294 of the Children's Act on the grounds of a different motivation: in particular noting that the *ratio* of that rule was to safeguard the interest of the children born through surrogacy to know their genetic parents, since the genetic filiation is an integral component of their right to

725 Section 294, *Children's Ac.*

726 *AB and Surrogacy Advisory Group v. the Minister of Social Development (Center for Child Law as Amicus Curiae)*, Constitutional Court of South Africa N. CCT 115/15, 29 November 2016. Available online: http://www.saflii.org/za/cases/ZACC/2016/43.pdf.

personal identity.[727] According to the Constitutional Court, therefore, the High Court, in stating that the law was unconstitutional, had placed excessive emphasis on the interests of the commissioning parents, to the detriment of the best interests of the child to be born.[728] A. B., added the constitutional judge, could be included amongst the subjects with a right to stipulate a valid surrogacy agreement by forming a relationship with the persons whose gametes would be used to generate the embryo to be implanted in the womb of the surrogate mother, thus respecting the legal conditions.[729] While it is true that the existence of a genetic link between the contracting party/parties and the child (children) born remains a condition for the stipulation of surrogacy agreements in South Africa, it is equally true that the risk that agreements such as the one imagined by A. B. are effectively undertaken and that human beings will be born as a result, with interests and rights to be protected, remains a problem to be faced.

British and Greek jurisprudence both bear witness to the gap that unbridled private initiative can create between society and law, even in the presence of permissive legislation, when we consider the cases of surrogacy realised by aspiring single fathers. As already mentioned in the United Kingdom, the HFEA foresees that a parental order granting parental status to the commissioning parents can only be issued to a couple. Therefore, although the law does not prohibit access to surrogacy for single persons, in effect, the lack of a mechanism (such as the one foreseen for couples) which transfers parental responsibility from the surrogate mother to the contracting party means that the single parent will not be recognised as the sole parental figure.

As previously mentioned, on the occasion of the appeal presented by a single father who had had a child through surrogacy abroad (*Re Z*, see Chapter 7),[730] the High Court formally declared the incompatibility of the present law, "the language of section 54 contemplates that any such order can be made only on the application of "two people […]" with the Human Rights Act, since it discriminates against single parents and their children. Even before *Re Z*, another case – that of Kyle Casson – raised particular interest and received considerable attention from the media since the mother in question was not merely a surrogate mother, but the mother of the commissioning father.[731] Therefore, the grandmother gave birth to the minor at the centre of the case, having been implanted as an embryo created through IVF using the gametes of the contracting father and the oocytes of a donor.

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727 *Ibidem*, § 288.
728 *Ibidem*, § 293.
729 *Ibidem*, § 288.
730 *Re Z (A Child: Human Fertilisation and Embryology Act: Parental Order) (No 2)*, High Court of Justice, 20 May 2016.
731 *Re B v. C (Surrogacy: Adoption),* High Court of Justice, ruling dated 13 February 2015, Available online: http://www.familylawweek.co.uk/site.aspx?i=ed143565.

Kyle Casson – being a single man and therefore not permitted to obtain the status of legal parent through a parental order – was forced to apply for the adoption of his biological child. Although they considered themselves the grandparents to all intents and purposes, in virtue of the principle *mater semper certa est* and the presumption of paternity, the legal parents of the child were in fact Anne-Marie Casson, and her husband. Although British law recognises the right of single persons to adopt, the peculiar circumstances of the case made the task of the judge, called upon to rule on the application for adoption, particularly complex. This application was presented before the birth of the child and, therefore, the practice of surrogacy enacted by the parties appeared to be an 'arranged adoption', which, in the eyes of the law, is a crime. The application of the contracting father was accepted, however, because in addition to responding to the "lifelong welfare needs,"[732] of the minor (the applicant was also the brother of the minor and, precisely because of the kinship, was one of the subjects legitimately permitted to adopt *ex lege*.)[733] Kyle Casson was therefore able to formalise his family bond with the minor born through surrogacy, not as the biological father, but as the brother.

This event highlights above all a characteristic trait of the British approach to surrogacy: the irrelevance of the intentions of the parties. It is clear that if the *status filiationis* of the minor in question had been determined by applying the voluntary criterion, Kyle Casson would have been automatically recognised as the legal father, and therefore not the brother, of the minor. This principle is set out most clearly in Section 27 HFEA 1990, on the basis of which the status of legal mother is due to the surrogate mother, even if she does not intend to being consider such and is genetically extraneous to the child. It is for this reason, as illustrated above, that the respect for the intentions of the parties in the formation of the *status filiationis* presupposes a further step: the application for a parental order, where this is possible.

According to part of the doctrine,[734] this case was particularly typical of the backwardness of British law on matters of surrogate motherhood, which ignores the phenomenon of single-parent

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732 *Ibidem*, § 8.

733 *Re B v C (Surrogacy: Adoption),* High Court of Justice, ruling dated 13 February 2015, Available online: http://www.familylawweek.co.uk/site.aspx?i=ed143565.

734 Of note, amongst others, the writings of K. Horsey. On the case in question, see *A Surrogacy Conundrum that Didn't Need To Be*, BioNews 794, 16 March 2015. Available online: http://www.bionews.org.uk/page_507198.asp. For a more comprehensive review of current legislation, see *Swept under the Carpet: Why Surrogacy Law Needs Urgent Review*, in *Ethics, Law and Society – Volume V*, ed. N. Priaulx and A. Wrigley, Farnham, Ashgate, 2013, pp. 235-255. Horsey is also the author of the report *Surrogacy in the UK: Myth busting and reform* with the Surrogacy UK Working Group on Surrogacy Law Reform has highlighted the problematic aspects of current legislation, urging the intervention of the legislator. The report (November 2015) is available online: http://www.bionews.org.uk/page_588211.asp. The questions raised in the report, and more generally, the need to update the law on surrogate motherhood, were debated in parliament in December 2016. For the parliamentary debate see: https://hansard.parliament.uk/Lords/2016-12-14/debates/391AB95D-1999-4D52-A5D0-C9EF6CF44407/Surrogacy. Horsey is of the same opinion, see R. Carr, *The need for UK surrogacy law reform*, BioNews 808, 29 June 2015. Available online: http://www.bionews.org.uk/page_541008.asp.

families, and therefore its inadequacy to receive and meet their applications for recognition. On this point, it seems interesting to note that, also on the occasion of the recent reforms that led to the introduction of the HFEA 2008, the scenario in which a single person intends to generate a child through surrogacy turned, in fact, on the possibility of extending the right to obtain a parental order – then foreseen only for married couples – also to couples in a civil union and/or in stable and long-term relationships. There remains, therefore, the doubt about which solution would have been reached if there had been no kinship between Kyle Casson and the child born, and therefore the impossibility of recourse to adoption as a remedy for a normative deficit.

A limitation similar to the one in the HFEA is also foreseen by Greek law, which, however – as mentioned in section 2, unlike the United Kingdom and South Africa – offers an *ex ante* regulation of the practice. In accordance with this legislation, in fact, the person who intends to raise the child born through surrogacy is required to apply for authorisation from the judge before the fertilised eggs are transferred to the uterus of the surrogate mother.[735]

The judge to whom the application is presented generally carries out an administrative check, since he/she merely verifies that certain conditions, from which the validity of the surrogacy agreement depend, subsist. [736] Amongst these are the presence of a written agreement between the persons who intend to raise the child, the surrogate mother and, if she is married, her husband, from which the consent of all the parties involved is clear; the absence of a fee (only altruistic agreements are allowed); the impossibility – proven by suitable medical certification – for the contracting mother to reach autonomous gestation and, therefore, to undertake and carry to term a pregnancy; the capacity of the surrogate mother to undertake the pregnancy and the birth; maximum age of 50 years for the contracting mother; residence or domicile in Greece of at least one of the women involved.[737] After the publication of the decision, which is immediately executive, the parties can proceed with the MAP and, on the birth, the woman who has obtained legal authorisation will automatically be registered as the legal mother on the birth certificate and her husband (if there is one) will acquire the status of legal father by effect of presumption of paternity.

Although the Greek legislation is one of the most innovative and comprehensive in the European and even the international panorama, some normative gaps remain (and are, in part,

735 Article 1458, Law 3089/2002.

736 L. Brunet et al., *A Comparative Study on the Regime of Surrogacy in EU Member States*, Brussels, Belgium, PE 474.403, European Parliament, 2012, p. 41. There are, however, situations in which the legal authorisation was motivated by considerations that go beyond the legal requisites and allude, for example, to the reassuring financial situation of the commissioning parties and their ability to raise the child in a positive and serene setting. These are decisions in which, in effect, the 'best interests of the child' were used as a further decisional criterion *vis-à-vis* the request for access to surrogate motherhood. On this point, see, T. Chortara, S. Penasa and L. Busatta, *The Best Interests of the Child Born via Cross-Border Surrogacy. A Comparison Between Greece and Italy*, in "Rivista di BioDiritto", 2016, N. 1, p. 193 *et seq.*

737 This latter requisite is the fruit of a recent reform, introduced with Law N. 4 272/2014, which made the Greek legislation even more permissive. Under the previous laws, both the women had to be domiciled in Greece.

physiological). The law, for example, reserves access to medically assisted procreation for heterosexual couples and single women, not therefore contemplating the hypothesis of homosexual couples or single men making recourse to surrogacy in order to have a child. These situations have, in any case, occurred in practice and it was therefore the task of the judge to manage the consequences on the legal plane. The answer of the Greek jurisprudence to a single man's application for authorisation has not been univocal. In some cases, the response was positive; in others, the judge preferred to keep to a literal interpretation of the laws on the matter of filiation.

A ruling of the Tribunal of Thessaloniki (2009) represents the first jurisprudential thread, to which a single man applied because due to a disorder of the reproductive apparatus, he could not procreate through sexual union. Therefore, this was a case in which, as in the South African case of A. B. there was not yet a minor to be safeguarded. The Tribunal gave a favourable opinion, stating that a denial would infringe the constitutional principle of equality between men and women.[738] Since it was not challenged, this decision is the first, undeniable statement of the right of a single man to become a parent through surrogacy in Greece, providing recourse to this technique is justified for medical reasons and not merely by the absence of a partner of the opposite sex.[739]

The Tribunal of Athens, with ruling N. 2827/2008, also granted authorisation to a single man, affected by azoospermia. In this case, however, the decision was challenged and overturned by the Appeals Court. In the period between the authorisation issued by the Tribunal of Athens and the revocation (Appeals Court N. 3357/2010) twins were born using the oocytes of a donor fertilised with the sperm of a donor. The Appeals Court declared the decree of the lower court null and void, because the judge had made an error in applying the laws on ART, which do not allow a single man to make recourse to this method of procreation.

In the opinion of the Appeals Court, moreover, the difference in treatment lamented by the appellant would be justified by the nature itself of the two sexes, that is the fact that only a woman – being the one who becomes pregnant and gives birth – is capable of procreating 'naturally' and can therefore need to make recourse to a surrogate mother. The exclusion of single men from this practice can therefore be traced to a (rather limited) view of the condition of infertility (reflected in the legislation) seen only as the inability to become pregnant and/or carry through a pregnancy.

Independently of the arguments adopted by the Appeals Court, it was in any case necessary to resolve the sensitive question of the *status filiationis* of the twins who had been born in the meantime. In fact, due to the revocation of the authorisation, the commissioning father no longer

738 Ruling N. 1 3707/2009.

739 A. Tekidou, *La maternità surrogata in Greece: tra normativa e prassi*, in E. Urso (ed.), *Genitori e figli nell'attuale quadro delle relazioni i familiari*, Rome, Aracne (forthcoming). It would therefore seem probable that, the judge would have rejected the application of a homosexual couple (a category also excluded).

acquired the title of legal father and, according to a literal interpretation of the laws on filiation, the only family relationship recognised by law was that between the surrogate mother and the twins, even though there was no genetic link (since the oocytes were donated) nor a social bond (because the woman had not expressed the intention of caring for the twins, who lived with and were cared for by the appellant).[740] Also in this case, therefore, to remedy the (paradoxical) consequences deriving from the application of laws designed to regulate different family phenomena – such as the brocard *mater semper certa est* – the contracting person was forced to apply for adoption.

4. *Final observations: hovering between timidity and initiative*

These cases show that even where the legislator has set out a permissive legal framework, private enterprise knows no limits and, at times, not content with the procreative methods allowed by the legislator, since they do not meet his/her needs, individuals become inventive. The judges – particularly when faced with *de facto* behaviour that has generated a human being – are forced to use current legislation, interpreting and at times forcing the norms – as in the case of Kyle Casson – in order to find a solution that attains the primary objective of guaranteeing the best interests of the child involved and, subordinately, the realisation of the procreative aim of the adults involved.

In the British case, as in the decree of the Athens Appeals Court, the search for a solution that would fit the peculiar circumstances of the specific case have led to 'cherry picking', after which the effects of the laws on medically assisted procreation – found to be unsuited to the resolution of the pending case – were neutralised in the face of the more convenient laws on matters of adoption.

Despite the silence or the delay with which the national legislators come to regulate these new family phenomena, however, not all the judges are ready to accept this responsibility and, therefore, to take this step – which, in a certain sense, involves partiality and selectivity. This is precisely the situation in which the Supreme Court of Ireland found itself when, despite expressing its frustration regarding the anachronism of the laws on filiation, decided not to issue a decree. If on the one hand, this deferent attitude is appreciated for the evident awareness of the extreme sensitiveness and the innumerable ethical-moral repercussions that even a basic question like "who

740 It is interesting to note that, on the birth of the twins and prior to the ruling of the Appeals Court, the man had gone to the public records office to register the children as his own, in conformity with the ruling of the lower court. Since the authorisation did not carry information regarding the mother and not knowing how to proceed, the clerk at the public records office had contacted the Direction of the Public Records Office at the Home Office which, in turn, consulted the State Legal Council on the following question: 'if a single man has been authorised to proceed with medically assisted procreation and, thanks to this practice, twins have been born, who should be considered the mother and the father?' In response to this question, the State Legal Council stated that, regardless of its correctness, the ruling of the Tribunal of Athens had produced a presumption of paternity for a single man. The family relationship that followed could not be dissolved, not even due to a possible review of the ruling of the lower court, because this cancellation would have *ex nunc* efficacy and therefore would not be retroactive. For a more comprehensive analysis of this situation, see Tekidou, *La maternità surrogata in Greece: tra normativa e prassi*, cit.

is the mother of this child?" raises, on the one hand and who – guided by a more pragmatic spirit – interprets this and other similar rulings as a missed opportunity not only to protect the minor, as the weaker subject, but also to accelerate and guide the legislative process.

Chapter 10

Disputes Between the Surrogate Mother and the Commissioning Parents

1. *Introduction*

This section is dedicated to a third type of controversy that could derive from recourse to surrogate motherhood: that which sees the parent/the commissioning couple clash with the surrogate mother, who refuses to fulfil the agreement reached and no longer intends to renounce her parental rights and/or to hand over the child to the other party. [741] The existing jurisprudence shows the presence of an almost uniform trend: the irrelevance of the validity or nullity of the surrogacy contract and, at the same time, the adoption of the criterion of the best interests of the child and, therefore, the identification of the family organisation most suited to realising the best interests of the child involved, in order to resolve the conflict.

Alongside this trend, there is a decidedly minority trend that manages the conflict that has arisen between the surrogate mother and the commissioning parents by adopting the contractual perspective and, therefore, enacting the intentions expressed by the parties when the surrogacy agreement was reached. The well-known ruling in *Johnson v. Calvert*, issued by the Supreme Court of California in 1993 is, even today, representative of the approach characterising Californian jurisprudence and constitutes the most typical example of this second position that, independently of the genetic heritage of the minor, orders wardship in favour of the contracting party/parties.

2. *The centrality of the 'best interests of the child'*

In the cases that follow, the most pressing question to which the judge must give an answer concerns the wardship of the child involved. In most jurisprudence, as already mentioned, this determination occurs only on the basis of the parameter of the best interests of the child. The question of wardship tends, therefore, to be examined independently with respect to two other profiles – that of *status filiationis* and the validity of the contract – which, although closely linked, develop on very different planes.

741 These conflicts can even arise during the pregnancy, that is before the child is born. An example is the American case – taken up by the newspapers at the end of 2015 – where the commissioning father asked the surrogate mother (Ms Melissa Cook) pregnant with triplets, to selectively abort one of the children for purely economic reasons and against her will. On this question see See A. Blackburn-Starza, *US surrogate takes wardship case to appeal*, BioNews 853, 31 May 2016. Available online ; http://www.bionews.org.uk/page_654659.asp; M. Yarwood, *Surrogate carrying triplets brings lawsuit to prevent being sued for failing to abort*, BioNews 834, 11 January2016. Available online: http://www.bionews.org.uk/page_603504.asp. Or the case concerning a Canadian surrogate mother who opposed the request to abort presented by the commissioning couple after genetic tests showed (with a high degree of probability) that the child would be affected by Down's Syndrome. See, N. Hyder, *Couple request surrogate mum to abort over disability*, BioNews 579, 11 October 2010, online: http://www.bionews.org.uk/page 71982.asp.

Typical of this separation at an analytical level is the well-known ruling of the Supreme Court of New Jersey in *Re Baby M* (from the name Melissa attributed to the minor involved). in this case – having recognised the nullity of the contract – the judges invalidated both the extinction of the rights due to the surrogate mother as the birth mother and the adoption of the minor (ordered by the judge of the lower court) in favour of the wife of the contracting father, reattributing parental rights to the surrogate mother but, since this responded to the best interests of the child, ordering Melissa to be taken into the wardship of the contracting father. [742]

Melissa was born following a surrogacy agreement reached between Mr Stern (contracting father) and Mrs Whitehead (surrogate mother) under which the woman agreed to undergo artificial fertilisation using the semen of the man and, on the birth, to renounce the wardship of the child in his favour. The 'delivery' of the new-born child occurred in a situation of extreme emotional tension, in which the surrogate mother – although respecting the terms of the agreement – told the commissioning parents that she found it enormously difficult to abandon Baby M. A few days later, during a visit, the Sterns – concerned about the woman's mental health – promised that she could spend a week alone with Baby M., however, Mrs Whitehead, instead of returning after a week, fled to Florida, taking the child with her.

Once they were traced, the child was taken into the care of the Florida authorities who, in conformity with a previous order by the Court of New Jersey, temporarily entrusted her to the genetic father. In view of Mrs Whitehead's persistent refusal to give up her rights over the child, Mr Stern sued, stating that the agreement they had reached was legal and asking for it to be specifically executed. In conformity with the agreement reached with Mrs Whitehead, the commissioning couple asked that the rights of the surrogate mother should be declared extinct and that Mrs Stern should be allowed to adopt the minor; in other words, that Melissa should become their daughter with full legal effect.

Before analysing the ruling of the Supreme Court, it is important to say that, in the mid-eighties, in New Jersey and more generally, in the USA, there were no specific laws on surrogate motherhood.[743] Nonetheless, some states extended the prohibition of sale of new-born children and the payment of any fee in connection with an adoption to the situation of surrogacy.[744] Even so, in practice agencies sprang up and recruited women through advertising campaigns and offered these services for payment. In order to avoid the legal prohibitions, these agencies made no mention of

742 In *Re Baby M*, Superior Court of New Jersey, ruling dated 3 February 1988. The text (in Italian) is available in *Foro Italiano*, 1989, pp. 293-310.

743 Bills in favour and against the legitimacy of the practice were, however, discussed. For details see, S. Azzali, *La maternità surrogata: in margine al caso Baby M.*, in *La procreazione artificiale e tra etica e diritto*, ed. G. Ferrando, Milano, CEDAM, 1989, pp. 125-126.

744 *Ibidem*, p. 126.

adoption: the birth mother applied for her parental responsibility towards the child to be suspended and the minor was therefore entrusted to the genetic father and his wife, who later presented an application for adoption.[745] This behaviour, in addition to not infringing the law, did not present practical problems, unless one of the parties refused to respect the agreement, as occurred in the case of *Baby M.*

Although distinguished by its innovative considerations on the validity of the surrogacy contract and the fact that it dedicated much of its reasoning precisely to examining this question, the Supreme Court has stated that the nature of the contract was not relevant to the resolution of the specific case, which depended exclusively on the identification of the best interest of Melissa. Thus, the solution advanced by the Court prescinds from the categories of contract law and, therefore, from the formulation of the action brought by Mr and Mrs Stern, who asked the judge to convict the woman for not respecting the contract and refusing to hand over the child, who was under the terms of the contract, their daughter.[746]

With regard to the nature of the agreement, which represented the main point of discord between the decision in question and the ruling of the lower court,[747] the Supreme Court decided that contracts for surrogate motherhood are an instrument of 'baby selling' and are therefore to be considered in contrast with the laws on adoption, for a number of reasons: the fee; the obligatory nature of the contract – that is the irrevocable nature of the commitment to hand over the child assumed by the birth mother prior to the birth, or even prior to conception; and finally, the obligation of the pregnant woman not to oppose the ceasing of her parental rights, consenting that the child be entrusted to the commissioning couple.

The invalidity of the surrogacy contract is even more evident – explained the Court – if its aims and its means are examined in the light of the directives of public policy . From this standpoint, the most serious flaw of the contract lies in the total neglect of the real interests of Baby M. The contract, in fact, determined the separation of the minor from one of the two natural parents, in contrast with the conviction that, where possible, it is opportune for the minor to grow up with and remain with both natural parents. The contract also involved the prevalence *a priori* – that is without any evaluation of the adequacy of the commissioning couple for the parental role and the

745 *Ibidem.*

746 A. Bucelli, *Il cammino senza pregiudizi del biodiritto. La costruzione giuridica dei rapporti genitoriali*, in *Persona e famiglia nell'era del Biodiritto. Verso un diritto comune europeo per la bioetica*, ed. G. Baldini, Firenze, Firenze University Press, 2016 cit., pp. 68-69.

747 The *Superior Court of New Jersey* (31 March 1987) – the judge of the lower court had recognised the legal effect of the agreement between the commissioning father and the surrogate mother, on the basis of the following motivation: in addition to being an agreement freely reached by the parties, it did not involve the purchase of a child, but rather a personal service and therefore, did not infringe public policy. For a note on the ruling of the lower court, see . Ponzanelli, *Il caso Baby M., la "surrogate mother" e il diritto Italiano*, in Foro Italiano , 1988, pp. 98-103.

suitability of Mrs Stern for the role of adoptive mother – of the genetic father (and his family) and, therefore, the permanent separation of the child from the woman who had given birth to her. In addition to being in immediate contrast with state legislation, therefore, the clauses of the surrogate motherhood contact were – in the opinion of the Supreme Court – also detrimental to the public policy and, considering their importance, determined the invalidity of the entire contract.

Having clarified the reasons for the nullity of the contract that, however, had no fundamental impact on the outcome of the dispute, the Supreme Court dedicated its reasoning to the most important task: identifying the family context most suitable for fully realising the best interest and the well-being of Melissa. Once the family in which she was to live had been decided, it was necessary to guarantee that the minor had "stable and definite" parents, even at the cost of excluding one of the genetic parents from exercising parental responsibility.[748] On this point, nevertheless, instead of elaborating its considerations, the Supreme Court decided it was opportune to rely on the precise analysis carried out by the lower court, therefore confirming wardship for Mr Stern. In support of its evaluation, the Court observed that, in addition to having strongly desired her birth, Mr and Mrs Stern had all the qualities necessary to assure Melissa a serene and balanced childhood: in particular, they had shown themselves to be capable of recognising and meeting her physical and emotional needs and explaining the circumstances of her birth with adequate emotional support and the least confusion possible.

The Supreme Court therefore became the bearer of a pragmatic approach that recognises the existence of surrogate motherhood (although it was only the dawn of the phenomenon) and, above all, the consequent need to protect the weaker subject, that is the minor. This ruling was, in fact, an expression of the conviction that, independently of the admissibility of the surrogacy agreement, it is in any case necessary to protect the child, in virtue of his/her particularly vulnerable situation, and that this need can/must be met by identifying the most suitable family to meet his/her interests. It is therefore evident that in *Baby M*, the contractual plane was kept distinct from that of protection of the minor and it was precisely thanks to this separation that the Court was able to make an evaluation regarding which parent and family offered most guarantees for the correct development of the child's personality.[749]

Also in the first Australian case in this field, *Re Evelyn*, the judges – identifying the surrogate mother and her husband as the most suitable family to meet the needs of the minor – resolved the question of wardship by adopting the best interests of the child as the sole criterion

748 A. Miranda, *Diritti dei genitori ed interessi del minore nel caso In Re Baby M*, in "Il Diritto di Famiglia e delle Persone", 16, 1987, N. 3 -4, p. 1515-1563.

749 R. Clarizia, *Inseminazione aritificialee, contratto di sostituzione di maternità, interesse del minore*, in Foro Italiano, 1989, p. 298.

and, therefore, regardless of the nullity of the surrogacy agreement.[750] In this case, the child was born following an altruistic agreement, under which Mrs S. agreed to assisted fertilisation with the semen of Mr Q., the man in the commissioning couple, and to hand over the child, renouncing any rights over her.

The legal wrangle between the two families arose when Mrs S. changed her mind and, in contrast with the initial agreement, decided to play an active role in the life of her daughter, together with her husband. Although the child had been living with Mr and Mrs Q. for two years, the Court felt that the long-term advantages for Evelyn if she was transferred to the S. family would be greater than the short-term disadvantages of a change of residence. Having examined all the circumstances of the case, the Court therefore ordered that wardship of Evelyn should be given to Mr and Mrs S., since this solution would best protect the interests of the child. In consideration of the fact that Evelyn had until that time lived with the commissioning parents, they were granted access rights.[751]

The same reasoning, totally founded on the concrete fact and the need to protect the interests of the child is also to be found in British jurisprudence. The first decision of this type to be found is the case *Re P*, in which the birth mother refused to deliver the child to the commissioning parents, and in violation of the surrogacy agreement, she had reached with them, intended to claim full wardship of the child she had given birth to. In support of her decision to ignore the agreement between the parties and therefore accept the appeal of the surrogate mother, the Court of Appeal state that, "*in this and in any other wardship dispute, the welfare of the children, or child, concerned is the first and the paramount consideration which the court must, by statute, take into account and this is what I do*".[752]

This position has been constantly held until now. Proof lies in a fairly recent case, which involved a gestational surrogacy agreement between a male homosexual couple (A and B), who wished to have a child and a woman (X), who initially agreed to undertake a pregnancy on their behalf and to hand over the child to which she gave birth.[753] The parties became acquainted through a Facebook page, managed by W, and designed to facilitate encounters between commissioning parents and potential surrogate mothers. During a brief meeting that took place at a service station, A, B and X signed a form downloaded from the web that committed the couple to the payment of £9,000 in expenses.

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750 *Re Evelyn*, Family Court of Australia, ruling dated 29 July 1998. Available online: http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FamCA/1998/2379.html.

751 For an in-depth study of the content and the implications of this decision in Australian law, see M. Otlowski, *Re Evelyn – Reflections on Australia's first litigated surrogacy case*, in "Medical Law Review", 7, 1999, pp. 38-57.

752 *Re P (Minors) (Wardship Surrogacy)*, High Court of Justice, ruling dated 12 March 1987.

753 *Re Z (surrogacy Agreements: Child Arrangement Orders)*, High Court of Justice, ruling dated 30 June 2016. Available online: http://www.bailii.org/ew/cases/EWFC/HCJ/2016/34.html.

The embryos – the fruit of A's semen and the oocytes of an anonymous donor – were implanted in the uterus of X at a clinic in Cyprus, previously contacted by the couple for the creation and preservation of the embryos. A few months into the pregnancy (twins), however, X began to have doubts about continuing the agreement, in particular about her intention to renounce the children she was bearing. Following a miscarriage of one of the two foetuses, the woman – with the support of W – lied about the health of the second foetus. The contracting parties, convinced that the miscarriage had affected both foetuses, became aware of the imminent birth of Z just before the event and, since it was impossible to reach an agreement with the woman, took the case to court in order to obtain a prenatal declaration of parenthood and, after the birth, the wardship of Z.

Before delving into the merits of the decision, it is important to remember that, in the United Kingdom, surrogate motherhood is legal providing it is pursued for altruistic purposes. Surrogacy contracts cannot, however, be specifically enforced and, by law, the parents of the child born are the surrogate mother and, if married, her husband. As mentioned above, in fact, parenthood can only be attributed to the contracting parties after the birth and through a parental order and one of the conditions foreseen by the HFEA for issuing this order is the free and unconditional consent of the birth mother.

In the case in question, it is clear that this requisite was not met.[754] In the opinion of the High Court, therefore, the only criterion for the judge was the well-being of Z and this evaluation justified assigning wardship to X.[755] Although both families were capable of meeting the physical needs of Z, the High Court (Justice Russell) established that the most suitable solution to guarantee the best interests of the child was for him to remain with the birth mother, with whom he had formed a close bond.[756] In addition to the solid affective bond, X was in a better position – compared with the claimants – to respond to the emotional needs of Z, because she was gifted with an instinct that allowed her to promptly understand his needs and console him.[757]

Apart from the ability of X, the real difference between the two family situations – the claimants on the one hand, X and her husband on the other – derived from the behaviour of A, B

754 *Ibidem*, § 84.

755 *Ibidem*, § 85.

756 *Ibidem*, § 110.

757 *Ibidem*. In its reasoning, the High Court also expressed a critical opinion of the circumstances in which the agreement was reached. The surrogate mother was in an extremely vulnerable position, in fact, she was just twenty, married and the mother of a child of six, with learning difficulties that raised doubts about her ability to understand the terms of the contract, and limited financial resources. The parties only met on two occasions, at the service station to sign the contract and at the clinic in Cyprus where – according to the judges – the woman was not included in the conversations with the medical personnel and therefore felt isolated, without the possibility of contacting her family, because she had no credit on her mobile phone. The journey to Cyprus – in the reconstruction given by the High Court – had therefore had a significantly negative impact on the woman. She felt 'uncomfortable' and 'used' by the commissioning parties, but was reluctant to express her feelings for fear of upsetting and vexing the couple. A and B, on their part, had shown no empathy for X: the language they used reflected a mercenary logic and their attitude was, to say the least ("exploitative", § 55).

and X prior to the birth, behaviour which – although now past – suggested the way both parties would behave in the future *vis-à-vis* the growth of the minor and the potential role played by the other party in his life[758] According to the Court, while X and her husband had accepted the fact that Z had two families and four parents, the behaviour of A and B, on the contrary, showed that they were incapable of accepting the bond that Z had formed with his mother and, therefore, the importance of promoting its continuity.[759]

The High Court (and later the Appeals Court, which confirmed the ruling of the lower court)[760] decided that X and her husband offered a better/ideal setting for the growth and development of Z, also in consideration of their evident ability to assume a cooperative attitude towards the claimants and, therefore, to allow Z to form a positive relationship with A and B, in order to develop a wider sense of his identity. [761] Not even the presence of a genetic bond between Z and the two other children of the claimants – born from a different surrogate mother, but with the same genetic heritage as Z – could, therefore, justify removing Z from a "warm, happy and loving home" and the serious prejudice that such a measure would necessarily cause.[762]

Finally, always bearing in mind the best interests of the child, the Court decided to attribute parental responsibility – to P, the husband of X – who as the birth mother and therefore the legal mother, automatically held it, because Z had lived with him from the time of birth. [763] In addition to the practical advantages, assigning legal importance to the parental role of P was – in the opinion of the Court – important for the emotional development, now and in the future, of Z. Although the parental function of P was formalised, A, as the genetic father – maintained his parental responsibility and both the contracting parties were granted access rights.

The same logic of the best interests of the child informed the reasoning of the High Court, called upon to resolve an 'anomalous' dispute in which the surrogate mother and her partner – after delivering the children to the commissioning couple – opposed the issue of a parental order, not because they intended to play and active role in the life of the twins (A and B, genetically linked to the contracting parties) but because, according to E, the commissioning couple had shown no interest in her, particularly when she had had health problems during the pregnancy.[764]

758 *Re Z (surrogacy agreements: Child arrangement orders)*, cit., § 29.
759 *Ibidem*, §§ 107-109.
760 *Re M (Child)*, Court of Appeal, ruling dated 6 April 2017. Available online: http://www.bailii.org/ew/cases/EWCA/Civ/2017/228.html.
761 *Re Z (surrogacy agreements: Child arrangement orders)*, cit., § 117.
762 *Ibidem*, § 114.
763 *Ibidem*, § 127.
764 High Court of Justice, ruling dated 25 October 2016. Available online: http://www.familylawweek.co.uk/site.aspx?i=ed167456. A similar case occurred in Queensland Australia. In this case, the conflict between the surrogate mother and the commissioning parents arose mainly for financial reasons. The Family Court called upon to decide on the wardship of the child established that it was in the best interests of the child to remain with the commissioning couple, excluding any participation of the surrogate mother in the life of the boy and

Although postponing the judgement (in the hope that after a while E would see the situation from the standpoint of the minors) the High Court emphasised the legal limbo in which the minors lived due to the lack of consent and the evident incompatibility of this condition with their well-being. In virtue of the application of the traditional laws on filiation (since it was impossible to apply the laws on medically assisted procreation), in fact, A and B continued to live with the commissioning parents, their biological and social (but not legal) parents, while the surrogate mother and her husband, who had no genetic link to the children and, even more importantly, did not intend to play the parental role, were considered their parents in the eyes of the law. Not even adoption was a possible remedy since the minors were the biological children of the commissioning couple.[765] The issue of parental orders in favour of the commissioning couple was therefore – in the opinion of the Court – the only solution that accurately reflected their identity as children born through surrogate motherhood.[766]

The same interpretative approach guided the resolution of disputes that arose between the gestational mother and the commissioning couple following informal agreements which, being reached outside the formulas foreseen by the law, are often a source of misunderstandings and can easily break down, shifting the responsibility for deciding on the wardship of the minor involved to the judges.[767] Evidence of this is the British case known as *H v. S (Surrogacy Agreement)*[768] – in

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basing its reasoning on the unreliability of the woman who, wishing to punish the commissioning couple for a presumed delay in the payments, had been inconstant and hostile. On this situation see M. Yarwood, *Australian surrogate banned from child's life after bitter legal feud*, BioNews 923, 23 October 2017. Available online: http://www.bionews.org.uk/page.asp?obj_id=900013&PPID=900903&sid=782.

765 *Re AB (Surrogacy Consent)*, cit., § 29.

766 *Ibidem*, § 30. As stated by Natalie Gamble (a British lawyer in the field of bioethics) this law confirms the inadequacy of present legislation to protect the minors born from this technique. Although in most cases the parties respect the agreement reached initially, the law does not allow the courts sufficient flexibility when the situation changes and consequently the well-being of the minors is at risk. At present, in fact, the judges have no way to overcome the veto of the women, whatever the circumstances and the best interests of the child. The present system, explains Gamble, in addition to not protecting the interests of the commissioning parties and the children born through this practice, does not even make it possible to safeguard the position of the surrogate mother herself when the commissioning parties do not respect the agreement, refusing to reimburse the expenses incurred during the pregnancy or changing their minds and refusing parental responsibility for the child. On this point, see *UK surrogate vetoes legal parenthood for biological parents despite having no wish to be involved in children's lives*, Natalia Gamble Associates Blog, 30 October 2016. Available online: http://www.nataliegambleassociates.co.uk/blog/2016/10/30/uk-surrogate-vetoes-legal-parenthood-for-biological-parents-even-though-she-has-no-wish-to-be-involved-in-the-lives-of-the-twins-she-carried/.

767 In addition to the case *H v. S* (analysed in the following lines), other DIY surrogacy agreements include *CW v NT and Another*, High Court of Justice, ruling dated 21 January 2011. Available online: http://www.familylawweek.co.uk/site.aspx?i=ed79071; *J.P. v. L.P. and Others*, High Court of Justice, ruling dated 5 March 2014. Available online: http://www.familylawweek.co.uk/site.aspx?i=ed128259; and finally, *X (A Child) No 1 and No 2*, High Court of Justice, decisions dated 8 and 11 November 2016. In the latter case, the judge refused the application for wardship presented by the surrogate mother (who was also the genetic mother) but she was given access rights. For a summary of the event and the links to the texts of the two rulings see A. Blackburn-Starza, *Surrogate awarded supervised contact with* child, BioNews 879, 28 November 2016. Available online: http://www.bionews.org.uk/page_745305.asp.

768 High Court of Justice, ruling dated 30 April 2015. Available online: http://www.familylawweek.co.uk/site.aspx?i=ed144664.

which a woman (S), after realising self-insemination using the semen of a member of the commissioning couple (H), gave birth to M, about whose destiny the parties disagreed. According to H and B, the homosexual commissioning couple, the agreement reached with S foresaw that she would "play a role" [769] in the life of the child, but H and B would be the only parents. S, on the contrary, refused to consent to the issue of a parental order, stating that she had never agreed to act as a surrogate mother; in particular, according to her version of the facts, B had been excluded from the parental project, H had acted as the semen donor and she was to play the role of main parent and main caretaker for M.

Once again, since the rules of the HFEA were inapplicable because the woman denied her consent,[770] the High Court decided regarding the wardship of M only on the principle of the 'best interests of the child'. Thus, in answer to the question "in which home is she most likely to mature into a happy and balanced adult and to achieve her fullest potential as a human?"[771] The behaviour of S – as a mother, but above all respondent in the case, carried decisive weight. In particular, the fact that the woman had attempted in every way to discredit H and B, using homophobic and offensive language, had 'used' the child's need to be breastfed for the sole purpose of hindering the hearing and had constantly tried to reduce contact between H and his daughter constituted, in the opinion of the High Court, important reasons for concern.[772]

On the contrary, H had shown empathy and understanding towards S, without ever suggesting that she should be excluded from the life of M, on the contrary, he made special effort to guarantee her a role in the child's upbringing. Although taking into consideration the fact that M had spent most of her life with S and that, therefore, moving the child might cause distress, the High Court concluded that H – and not S – was the parent most capable of meeting the present and future needs of the child.[773]

In the decisions examined, the nature of the agreement and, therefore, its possible enforcement, was not taken into consideration, even marginally. The decision on the wardship of the minor born following a surrogacy agreement is based exclusively on the need to guarantee fulfilment of the best interests of the child involved. The High Court in *H v S* recognises this explicitly, "it is not the function of this court to decide on the nature of the agreement between H, B and S and then either enforce it or put it in place. It is the function of this court to decide what best serves the interests and welfare of this child throughout his childhood".[774]

769 *Ibidem*, § 1.
770 *Ibidem*, § 3.
771 *Ibidem*, § 7.
772 *Ibidem*, §§ 93-94.
773 *Ibidem*, §§ 116-117.
774 *Ibidem*, § 125.

Animated by a pragmatic spirit, this jurisprudential thread therefore moves from the premise that the reality of parenthood that differs from traditional schemes cannot be disowned and that, therefore, it is preferable to guarantee all those who have contributed to the procreative process some role in the life of the minor, often by recognising contact rights.[775] It is not therefore surprising that, for the purposes of custody, the choice tends to fall on the person/couple who have shown themselves to be most aware of the importance for the minor of growing up in a context that reflects the reality of their conception and that, therefore takes into account and recognises, as far as possible, the plurality of the parties and the intricate procreative dynamics without which the minor themselves would not have been born. In other words, the person/couple who has shown less hostility towards the other party and is, therefore, more disposed to allow the minor to develop positive relationships with other parental figures.

3. The importance of the (in)validity of the contract

Although – as already mentioned – the cases above represent the most widespread jurisprudential trajectory, decisions in which the question of the validity of the contract has influenced the other two aspects – the wardship and the *status filiationis* – are not lacking. Amongst the most significant is the decision issued by the Supreme Court of California in the case *Johnson v Calvert*.[776] This ruling had international effects because it represented the first case in which the Supreme Court had declared a surrogacy agreement enforceable against the wishes of the surrogate birth mother.[777] Unlike the case *Baby M*, in which the surrogate mother had also supplied the oocyte, Christopher had been procreated with the gametes of the commissioning parents, Mr and Mrs Calvert.[778]

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775 I. Corti, *La maternità per sostituzione*, Milano, Giuffrè, 2000, p. 164.

776 *Johnson v. Calvert*, Supreme Court of California, ruling dated 20 May 1993. Available online: https://law.justia.com/cases/california/supreme-court/4th/5/84.html. In the case *Re Marriage Buzzanca* (Californian Court of Appeal, 1998), the precedent in *Calvert* was extended to the situation in which there are no genetic links between the commissioning parties and the child: the judge therefore established that the intention is sufficient to recognise the commissioning parties as legal parents, also in the absence of genetic links. Lastly, the position inaugurated in *Calvert* was applied in the case of *Re Baby S* (High Court of Pennsylvania, 23 November 2015), which attracted the attention of the media because the claimant – Sherri Shepherd – was a television actress well known in the United States. The commissioning parents had separated shortly before the surrogate mother gave birth to Baby S and the commissioning mother (Sherri Shepherd) had refused to sign the pre-birth order that attributed the legal motherhood of the future child to her. In her defence, Sherri Shepherd claimed that, until that moment, Pennsylvania legislation had not considered surrogacy agreements binding and enforceable and that therefore the agreement she had reached with the surrogate mother should be considered null and void because it was contrary to public policy. The High Court rejected both the arguments presented by the woman and confirmed the status of legal mother for the appellant observing that, "The child would not have been born but for Appellant's actions and express agreement to be the child's legal mother" (p. 17). For a brief account of the event, see, v. McDonagh, *US Tv star must remain legal parent to child born via surrogacy*, BioNews 830, 30 November 2015. Available online: http://www.bionews.org.uk/page_591283.asp

777 D. Morgan, *A Surrogacy Issue: Who is the Other Mother?*, in "International Journal of Law, Policy and the Family", 8, 1994, p. 393.

778 The ovaries of Mrs Calvert, in fact, although she could not conceive following a hysterectomy, were whole and functional and, therefore, it had been possible to take an egg and fertilise it *in vitro* with the sperm of the husband.

During the pregnancy, the relationship between Mrs Calvert and the surrogate mother, Mrs Johnson, had deteriorated; despite the friction, Mrs Johnson had delivered Christopher to the commissioning couple, asking however to spend three hours a day with him. Given the refusal of the Calverts, the woman had undertaken legal proceedings with the aim of having the contract declared null and void and obtaining the wardship of the minor. The Supreme Court of California was called upon to resolve the three-fold problem: the determination of the maternity in the scenario in which there are two potential maternal figures (the genetic mother and the gestational/biological mother); the nature of the surrogacy contract; the rights due to the birth mother.[779]

In relation to the first aspect, the Court found that, although Californian law recognised both the birth and the genetic link as means for determining motherhood, the same law foresaw that maternal status could only be attributed to one woman.[780] It was therefore necessary for the judges to decide who should be considered the 'mother' in the eyes of the law – the birth mother or she who had supplied the genetic material.

The choice fell on Mrs Calvert, in virtue not only of her genetic link with the child (at least explicitly) but also because of her parental project, which was the reason for the surrogacy agreement with Mrs Johnson. To use the words of the Court, when it is not the same person who undertakes both the maternal functions (supplying the genetic material and undertaking the pregnancy) "she who intended to procreate the child – that is, she who intended to bring about the birth of a child that she intended to raise as her own – is the natural mother under California law."[781]

According to the interpretation of the Court, therefore the so-called "intellectual conception,"[782] that is the Calvert's original intention to conceive, was decisive in the subsequent assignment of maternity. The commissioning couple, argued the Court, desired the birth of the minor and, for this purpose, took all the necessary steps to realise an IVF; therefore, without their procreative intent, the child would not have been born.[783] Although the contribution of the surrogate mother was essential, it is also true that Mrs Johnson would not have had the opportunity to undertake the pregnancy and give birth if, prior to the transfer of the embryo to her uterus, she had expressed the intention of being the mother of the child.[784]

The pregnancy and the birth, therefore, although fundamental, assumed an executive and therefore subordinate value. There was no reason – in the opinion of the Court – to state that the

779 G. Ponzanelli, *California e 'vecchia' Europa: il caso del contratto di maternità surrogata*, in Foro Italiano , 1989, p. 338.
780 *Johnson v. Calvert*, cit., § 1b.
781 *Ibidem*, § 1c.
782 E.S. Sills and C.M. Healy, *Building Irish families through surrogacy: medical and judicial issues for the advanced reproductive technologies*, in "Reproductive Health", 2008, p. 5.
783 *Johnson v. Calvert*, cit., § 1c.
784 *Ibidem.*

subsequent change of heart of the surrogate mother should influence the determination of maternity in favour of the contracting mother.[785] In support of the voluntary criterion, the Court further emphasised the (presumed) compatibility with the need to enact the best interests of the child: in particular, according to the doctrine, it is highly improbable that the interests of the child will be contrary to those of the adults who have chosen to bring him/her into the world.[786]

With regard to the second question, the Court established that the surrogacy contract was not contrary to public policy, nor did it involve a preventive and illegal waiver of her parental rights for the birth mother. In particular, the judges felt that the agreement between Mr and Mrs Calvert and Mrs Johnson was not in contrast with the prohibition – established by the Californian criminal code – of payment for the adoption of minors, since the payments made by the Calverts were to recompense the surrogate mother for the services rendered in the gestation of the foetus and did not therefore represent a fee for renouncing her parental rights (which, moreover, did not exist in the opinion of the Court).

Finally, in relation to the rights of the surrogate mother, the Court felt that the woman and spontaneously reached a surrogacy agreement and was not exercising her right to procreative freedom; she was simply agreeing to provide a service that was necessary and fundamental, "without any expectation with regard to the possibility of raising the child as her own".[787] Consequently, no contact rights were granted to Mrs Johnson.

Returning for a moment to the case *Baby M*, both the American decisions established that the minor born through surrogacy should be assigned to the contracting parties, setting aside the fact that the gestational mother had changed her mind regarding her role in the life of the child, but through different legal procedures. In *Baby M*, it was the best interest of Melissa that determined the outcome of the case: the search for a family situation that would best satisfy the needs of the minor played a central part.[788] The Supreme Court of California, instead, chose to follow the "private ordering model", that is the non-interference of the State in strictly private matters. [789]

In the decision *Calvert c Johnson*, in fact, in addition to attributing decisive importance to the intentions expressed by the parties when they reached the agreement, the majority explicitly opposed the hypothesis – asserted by the dissenting judge – to establish the criterion of the best interests of the child as a guiding parameter for identifying who was the most suitable person to take social and legal responsibility for the child, since the application of this test would legitimate

785 *Ibidem.*

786 *Ibidem.* The Court refers in particular to M. Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, in "Wisconsin Law Review", 1990, p. 397.

787 *Johnson v. Calvert*, cit., § 4.

788 Clarizia, *Inseminazione assistita, contratto di sostituzione di maternità, interesse del minore*, cit., p. 298.

789 Miranda, *Diritti dei genitori ed interessi del minore nel caso In Re Baby M*, cit., p. 1557.

state interference in questions that pertain to the private lives of the adults involved.[790] Finally, it is possible to presume that the choice of the Californian judge to adopt the voluntarist criterion, especially when the dispute sees a single woman opposed to a married heterosexual couple, derives also from the will of the court to create family relationships that conform as far as possible to the traditional family based on marriage, which has historically – and particularly during the nineteen nineties – enjoyed privileged status on the legal plane.[791]

4. *Final observations: logics compared*

In conclusion, *vis-à-vis* the friction between the gestational mother and the commissioning couple, it is possible to see two opposing jurisprudential positions that resolve the disputes in two different ways: the best interests of the child involve and the intentions expressed by the parties at the time of signing the agreement. These two positions, although opposite from the methodological standpoint, do not necessarily lead to antithetical conclusions.

The approach in *Calvert*, on the one hand, leads to a predetermined result: the attribution of the parental status and the wardship of the child born through surrogacyin favour of the contracting parties, in conformity with the intention of the parties underlying the agreement. Instead, adopting the best interests of the child as the guiding principle, reflects an empirical-inductive approach that, thanks to the fluidity inherent in the criterion of best interests, can lead to diametrically opposed decisions or, in any case, far from the contractual provisions.[792]

While the typically Californian formulation is therefore dominant with a high degree of certainty, that which characterises the majority of the jurisprudence (rulings in *Baby M*, *Re Evelyn* and the British cases analysed above) is, on the other hand, a sign of the changeability and the adaptability of the circumstances of the effective situation.

It is therefore interesting to see which position – between the two set out above – will be taken up by the Supreme Court of Iowa, currently called upon to resolve a dispute that has arisen following a commercial surrogacy agreement, in which the surrogate mother absconded[793], after declaring that she no longer trusted the contracting parties. As soon as the contracting parties were made aware of the birth (and the complications, including the death of one of the babies), the commissioning couple applied to be recognised as the legal parents and to obtain wardship, in

790 Morgan, *A Surrogacy Issue: Who is the Other Mother?*, cit., p. 386.
791 *Ibidem*, p. 393.
792 G. Ponzanelli, *Ancora sul caso Baby M.: l'illegittimità dei contratti di "sostituzione di maternità"*, in Foro Italiano, 1988, p. 297.
793 For a brief account of the case pending before the Supreme Court of Iowa, see J. Jindrich, *Parents Explain 'Heartbreaking' Surrogacy Case, Headed to the Supreme Court*, WQAD NEWS 8, 23 June 2017. Available online: http://wqad.com/2017/06/22/parents-speak-out-about-landmark-surrogacy-case-headed-to-iowa-supreme-court/.

accordance with the agreement. When their application was upheld by the Linn County District Court, the surrogate mother appealed, claiming the non-enforceability of the surrogacy contract and that therefore she was the legal mother, inasmuch as she was the birth mother. It would therefore be up to the Supreme Court, in the absence of normative references on surrogacy, to decide to settle the dispute in accordance with the intentions expressed by the parties at the time of signing the contract or, alternatively, in light of the best interests of the child involved.

Conclusions

1. *The inevitable jurisprudential 'stand-in arrangements'*

The jurisprudence analysed in this volume highlights the fact that the irrepressible desire to become parents and, therefore, the private enterprise in the procreative field is extremely difficult to harness. This is also because the developments in the medical field, and above all, the market of procreative services existing in certain countries, are now capable of answering the most varied needs, of not only traditional aspiring families – that is married heterosexual couples – but also singles and homosexual couples. The events examined in the previous chapters are, moreover, proof of how the spread of assisted procreation techniques, that were once unimaginable, have had important effects on the concept of parenthood itself, demanding a critical rethinking that comes to terms with its unity and therefore with the various ways in which this can be broken down. [794] The effective reality shows us, in fact, that, in relation to the same procreative event, it is now possible to identify more than one parental figure, both on the paternal side and on the maternal one.

Despite their total awareness that the feasibility of new procreative methods has overtaken the natural (and heterosexual) paradigm on which the system of the right to filiation was traditionally based, some legislators have preferred not to venture into tortuous processes of re-elaboration of the notions of family and parenthood, conscious above all of the value, ethical and cultural implications of any position they might take and at times fearful of the potential outcomes of parenthood at all cost. Without going too far (in time and space) the difficult course that led to the approval of Law N. 76 in May 2016 and the content of the legislation currently in force are the umpteenth proof of the Italian legislator's lack of intention to offer a clear and precise answer to the requests for protection and recognition that inevitably emerge from recourse to medically assisted procreation and, more generally, of the modern-day availability of new ways of forming a family that prescind from a partner of the opposite sex.

The same gap between reality and the written law can be seen in the question of surrogate motherhood; in fact, although the written law (Law N. 40/2004) seems to have resolved the question of the validity of the surrogacy contracts, declaring them *a priori* to be illegal, the question of the determination of the *status filiationis* of children born through this practice (generally abroad in countries where the law is more permissive) remains open, as can be seen from the numerous applications for the transcription of foreign birth certificates. Similarly, despite the strict subjective

794 M.G. Cabitza, *Scambio di embrioni: errore medico e scissione delle figure genitoriali*, in "Rivista di BioDiritto", 2014, N. 2, p. 198.

conditions foreseen by Law 40/2004, the jurisprudence that follows it continues to face the need to grant recognition to the status and to the personal situations of children born thanks to procreative procedures that are not permitted by national law and their intentional and, at times *de facto* parents.[795]

Vis-à-vis the increasingly numerous ways of forming a relationship of filiation, the jurist is increasingly called upon to play a 'reordering role'[796] with respect to the complexity of the phenomenon, giving a correct collocation to the practical situations that arise in the social reality of ART. More specifically, when the normative shortcomings are bridged by private initiative, on the legal plane, this difficult task falls to the judge who cannot escape the responsibility of deciding on the concrete case, therefore regulating the human relationships that have been created and clarifying the family status of the child was, in any case, already born.

This is precisely what has happened and continues to happen in Italian legislation, above all in relation to the phenomenon of same-sex parenthood. In the face of a law that has conceived the civil union as a relationship between partners for whom it is not possible to produce children, the task of guaranteeing the right of the minor to the stability and certainty of their bond with the person who, together with the biological or gestational parent, plays a parental role has fallen once again to the jurisprudence.

In conclusion, therefore, the inevitability of the jurisprudential substitution in the context of the 'new families' can be attributed not only to the tardiness and inertia of the legislator, but also to the peculiarity of the legislative technique utilised. In fact, even where there are regulations on the matter, often the inflexibility and the obsession for details that combined with the absence or scarcity of general clauses, tend to mark the method of intervention chosen by the legislator clash with the fluidity and the multiform nature of the social reality, producing a lack of protection that only jurisprudential law gifted with very different characteristics of form and content can remedy.[797]

2. Pragmatism prevails

Being aware that thanks to procreative tourism, but also thanks to the possibilities offered by science for aspiring parents to satisfy their procreative ambitions in their own country, despite the fact that they do not have the requisites, the legal limitations have become inefficacious or even counter-productive and, therefore, faced with a social reality that has forcefully imposed itself on the law or on the normative silence, the attitude of the national courts has been marked by a

795 B. Pezzini, *Introduzione*, in Genius, 2017, N. 2, p. 8.

796 Bianca, *Il diritto del minore ad avere due soli genitori: riflessioni a margine della decisione del Tribunale di Roma sull'erroneo scambio di embrioni*, cit., p. 193.

797 V. Zagrebelsky, *Codificazione e diritti fondamentali della persona nel contesto europea. La difficile convivenza*, in L. Vacca (ed.), *Il codice civile ha 70 anni ma non li dimostra*, Napoli, Jovene, 2016, pp. 15-24.

growing pragmatism. In the legal praxis, restrictive and prohibitionist frameworks are gradually giving way to a *laissez-faire* approach.

This new attitude accepts, above all, the existence and the spread of a vast range of procreative techniques and, specifically, the fact that is effectively true following recourse to medically assisted procreation – that is the birth of a child.

We can see at least three main elements that have played a decisive role in the development and progressive consolidation of the jurisprudential trend describe above: the best interests of the child, the clause of public policy and, finally the jurisprudence of the ECHR. Although closely linked, we have dedicated some considerations to each of these aspects in the paragraphs that follow.

2.1 *The principle of the 'best interests of the child'*

Although there are some exceptions, the most recent jurisprudence on the question of *status filiationis* or the wardship of children born thanks to medically assisted procreative procedures, in addition to appearing indifferent with regard to the methods of procreation used, tends to photograph the real situation of the child involved: his/her life experience up to that time and therefore the family context that has welcomed him/her from the first days of life, but at the same time, also that which would best meet his/her future needs.[798] The minimum common denominator of these decisions is therefore the irrelevance of the nature of the horizontal relationship existing between the parents. The focus is, in fact, centred on the position of the child in order to guarantee respect for his/her best interest.[799]

In addition to a tendency to restrict the application of the limit of international public policy as an exception to the recognition of legal relationships validly constituted abroad (to which we will refer in the next paragraph), this new interpretative approach is mainly due to the attribution of the role of guiding criterion for the resolution of the concrete case in favour of the principle of the best interests of the child effectively involved in the individual situation.[800] In the jurisprudence examined, the interests of the child tend to materialise in a clear family membership, considered decisive for the serene development of his/her personality.[801] More specifically, there are essentially two aspects that are considered worthy of protection in order to realise the best interests of the

798 It is, in fact, a choice that although it takes into account past events, is projected towards the future. See L. Lenti, *Note critiche in tema di interesse del minore*, cit., p. 88.

799 A. Nocco, *Il diritto a essere figlio di due mamme: come la Cedu aiuta i giudici a (in)seguire le trasformazioni della famiglia*, in "Minorigiustizia", 2015, N. 2, p. 133.

800 R. Baratta, *Diritti fondamentali e riconoscimento dello status filii in casi di maternità surrogata: la primazia degli interessi del minore*, cit., p. 311.

801 D. Rosani, *La maternità surrogata in Europa tra interessi del bambino. Corti supreme e silenzio dei legislatori*, cit., p. 116.

child: firstly the preservation of consolidated affective bonds and secondly, the genetic component of the personal identity.[802]

The first parameter is held in particular consideration in the decisions in favour of adoption in special cases by the same-sex partner of the genetic parent, to whom the primary value of the conservation of the *status quo* is attributed, that is to say, the family situation in which the child has grown up. A common denominator of these rulings is therefore the awareness that the concept of filiation no longer refers exclusively to a bond of a genetic nature, but assumes a legal-relational dimension in virtue of which also a parental relationship based on affectivity is considered worthy of recognition and protection.[803]

In the jurisprudence regarding the recognition of foreign certificates, above all following surrogacy abroad, in addition to the need to avoid lopsided legal relationships, considered "the ultimate shame of private international law"[804], the second parameter of personal identity also comes into play. In similar circumstances, in fact, the pre-eminence of the best interests of the child implies – generally speaking – the order to transcribe the foreign certificate in order to guarantee the continuity of the family status acquired abroad, at least with regard to the genetic parent (providing they intend to accept parental responsibility) in the light of the (proclaimed) particular importance that the genetic heritage assumes for the purpose of forming the personal identity of the child.

As stated by Baratta, therefore, the national jurisprudence on surrogacy tends to develop and "runs along the unitary thread of safeguarding the rights of the minor", who is the most vulnerable figure in the situation.[805] The pragmatic attitude described above thus pursues the intention of protection for the child directly involved in the proceedings. Thanks to the considerable acceptance of the voluntary factor – that is the intention and the wish to become parents – that occurs in the regulation of filiation in the various legal systems, the same protective logic brings advantages, although with a lesser degree of protection, also to the adults – *in primis*, the genetic parent – who intends to raise the minor born thanks to medically assisted procreative procedures and to assume parental responsibility towards him.

The rights of the child, however, do not always coincide with those of the adults involved. The pre-eminence reserved for the best interests of the child involved can therefore lead to the sacrifice of the fundamental rights of the other participants in the procreative process. In the case of conflict between the surrogate mother and the commissioning parents, for example, it is clear that

802 S. Stefanelli, *Status, discendenza ed affettività nella filiazione omogenitoriale*, in "Famiglia e diritto", 2017, N. 1, p. 92.

803 G. Palmeri, *Le ragioni della trascrivibilità del certificato di nascita redatto all'estero a favore di una coppia same sex*, in "La Nuova Giurisprudenza Civile e Commerciale", 2017, N. 3, p. 371.

804 O. Kahn-Freund, *General Problems of Private International Law*, in "Recueil des Cours", 143, 1974, p. 140.

805 R. Baratta, *Diritti fondamentali e riconoscimento dello status filii in casi di maternità surrogata: la primazia degli interessi del minore*, cit., p. 327.

the position of one of the families and their desire for parenthood will be automatically set aside, or, legal terms, the right to respect for their private and family life will be seriously impaired. In an even clearer and more problematic manner, the jurisprudence deriving from the recourse to surrogacy abroad highlights the recurrent scenario in which the best interests of the child clash with the national interest in guaranteeing respect for the law – for example laws on matters of adoption – whose *ratio* is, paradoxically, the protection of the minors seen as a legal category (*best interests of children*).

The critical attitude adopted by part of the doctrine therefore seems comprehensible. In addition to criticising the partiality of this approach, based exclusively on the need to safeguard the best interests of the child, it leverages the wider implications, that is the nullification and impairment that derives from the general preventive aims pursued by said legislation. At the same time, however, in the absence of clear and adequate normative references for managing the practice in question and, consequently, the chaotic momentum of the situation to be untangled by interpretation, it appears reasonable to identify the best interests of the child as the starting point, since to do otherwise would mean accepting the possibility that the minor be 'punished' for the procreative choices made by others and made possible by the immense power of a medical science that seems to exercise a monopoly in the reproductive field.[806] Even though this implies a potentially high cost – considered by some to be excessive – therefore the construction by the jurisprudence of a "barrier against paternalistic forcing"[807] – that is against ideological positions that reflect the absolute supremacy of the traditional family, in order to protect the interests of the child, who is the most important but also the weakest of the interests in play, is a path that *rebus sic stantibus*, has no valid alternatives.

2.2 *The public policy clause*

Closely linked to the pre-eminence accorded to the best interests of the child involved, is the extension of the notion of public policy accompanied by the watering down of this general clause with respect to the recognition of the family status validly constituted abroad. Typical of this is the ruling of the Italian Court of Cassation N. 19599 dated 21 June 2016 which, in addition to constituting the expression of one of the more advanced positions reached by our jurisprudence on the matter of public policy vs the best interests of the child, reflects the prevalent jurisprudential attitude outside the national borders.

Confirming the obsolescence of a vision that opposes national and international public policy this ruling eloquently states the need to interpret and construct the notion of public policy in

806 *Ibidem*, p. 328.

807 D. Pulitanò, *Surrogazione di maternità all'estero. Problemi penalistici*, in Cassazione Penale, 2017, N. 4, cit., p. 1373.

inclusive terms in order to guarantee the effective respect for the rights of the person, *in primis*, those of the minor. According to the judges, in fact, the mere fact that the child was born using a technique or practice that is prohibited or not foreseen by the legislator does not lead to the incompatibility of the foreign certificate with public policy, since it is necessary to consider the best interests of the child, which consists in maintaining the *status filiationis* legitimately acquired abroad and, unlike Law N. 40 and the brocard *mater semper certa est*, constitutes a principle of primary constitutional significance.

Also in the light of the wider jurisprudential framework illustrated in this volume, the methodological approach advanced by the Court of Cassation firmly expresses the opinion that, in the absence of conflicting interests and needs of equal standing, the fundamental rights must prevail and must be guaranteed the utmost importance.[808] The affirmation of these rights – to which the decision entrusts the role of benchmark regarding the existence of an infringement of public policy – in turn demands a profound re-reading of the institutions and the canons on which the law of filiation is based, together with the cardinal values and principles established at constitutional level both nationally and internationally.[809]

As a result of this interpretative perspective, the judge required to rule on the compatibility of the foreign certificate with the public policy will therefore be forced to reconstruct a system capable of guaranteeing effective protection of the fundamental rights of the persons involved, respecting the essential and inviolable values or principles of national law. From the standpoint of the role played, the clause of public policy – as set out in the majority of the jurisprudence – has therefore undergone a radical transformation: far from operating as a mere value judgement[810] and, in practice, as an obstacle to the entry of family relationships generated by the exercise of the fundamental rights of the person (nevertheless, respecting the foreign order, in its new form), this clause becomes functional for the enactment of the same fundamental rights in the phase of coordination between the various legal systems. [811]

2.3 *The jurisprudence of the ECHR*

The imprint of the ECHR and the Strasbourg Court's revision and interpretation of family matters clearly emerges from the considerations above. From a methodological standpoint, in fact,

808 G. Palmeri, *Spunti di riflessione su maternità di sostituzione del certificato di nascita a partire dalla sentenza 6 febbraio 2014, N. 835/2013 del Tribunal Supremo de Madrid (ricorso 245/2012)*, in "Genius", 2015, N. 2, p. 212-213.
809 G. Palmeri, *Le ragioni della trascrivibilità del certificato di nascita redatto all'estero a favore di una coppia same sex*, cit., p. 372.
810 L. Marzialetti, *Le sentenze straniere di stepchild adoption omogenitoriale. Il discrimine tra automaticità del riconoscimento e giudizio di delibazione*, in "La Nuova Giurisprudenza Civile Commentata", 2016, N. 9, p. 1180.
811 G. Palmeri, *Spunti di riflessione su maternità di sostituzione del certificato di nascita a partire dalla ruling 6 February 2014, N. 835/2013 del Tribunal Supremo de Madrid (ricorso 245/2012)*, cit., p. 213.

the Strasbourg Court is a source of jurisprudential law that, although it is valid only for the case in hand, in effect tends to assume a more general value.[812] Also in virtue of the effect attributed to its precedents,[813] the *ratio decidendi* of the ECHR are generally extended to all similar cases, both in the appeals that reach Strasbourg and in the proceedings pending before the national judges. [814]

In practice, amongst the main points of contact, there is above all the presupposition that animates the majority of the national jurisprudence, that is a renewed understanding of the concept of family, seen as the family situation effectively experienced by the individuals involved, which leads to a plurality of family models and of entitlements to filiation. In fact, it seems impossible to deny the full correspondence between the definition of family set out by the Italian Court of Cassation, understood as, "community of affections, centred on the effective relationships that are formed between its components"[815] and the condition of *de facto* family life that the judges of Strasbourg have always considered the basis for the recognition of protection under Article 8 ECHR.

A second aspect on which a fruitful dialogue between judges has developed concerns the principle of non-discrimination, which has played a fundamental role in making room for the experience of same-sex parentage in legal systems – such as the Italian one – where written law continues to ignore its presence, continuing the gap between what is technically possible and increasingly socially acceptable, on the one hand, and what is illegal on the other. The potential anti-discriminatory role played by the ECHtR, however, has not yet reached its maximum extension. As of today, in fact, not all the distinctions based on sexual orientation are to be considered unreasonable and therefore an infringement of Article 14 ECHR. As can be seen from the European jurisprudence on the matter of co-parental adoption, in fact, when the *comparator* is a married heterosexual couple (and not simply cohabiting) to reserve different treatment for a same-sex couple is justified (and therefore overcomes the conventionality check) in the light of the (presumed) special status that the institute of marriage maintains in today's society.

A further point of synergy between the ECHR and the national courts concerns the pre-eminence of the best interests of the child. There are, in fact, many occasions on which the national courts have employed the principle of the best interests of the child to support the right to personal

812 V. Zagrebelsky, *Codificazione e diritti fondamentali della persona nel contesto europea. La difficile convivenza*, cit., p. 20.

813 See, *inter alia*, *Goodwin v. United Kingdom*, appeal N. 2 8957/95, 11 July 2002, §§ 74-93; *Vilho Eskelinen v. Finland*, appeal N. 63235/00, ruling dated 19 April 2007, §§ 43-64; *Demir & Baykara v. Turkey*, appeal N. 3 4503/97, ruling dated 12 November 2008, §§ 140-154.

814 V. Zagrebelsky, *Codificazione e diritti fondamentali della persona nel contesto europea. La difficile convivenza*, cit., p. 20.

815 Italian Court of Cassation, ruling N. 1 9599, 21 June 2016, § 12.1.

identity or the right of the child involved to the continuity of the bonds effectively formed with his/her parents, thus drawing on the most recent ECHR jurisprudence. [816]

Nevertheless, the European influence is not always a source of clarity and uniformity of results, above all in the presence of a clause – such as that of the best interests of the child – which, due to its deliberately vague nature, leaves space for and even legitimates assessments that point in opposite directions.

Again on the matter of 'best interests' therefore, a last aspect of sharing between the two jurisprudential regimes (ECHR and national) concerns the ambivalence of this principle: in particular, its interpretation and application for the purpose of protecting the interests of the child seen as a general and abstract category, on the one hand, or that of the individual minor involved in the case in question, on the other. This duality of meaning was recalled by the ruling of the Grand Chamber in the case *Paradiso and Campanelli v. Italy* which, in keeping with the non-existence of a *de facto* family life noted by the judges themselves, saw the need to restore legality and therefore to respect the national laws for protection of children – on the basis of which the Italian authorities had ordered the minor to be removed – decisive, not finding any infringement of Article 8 ECHR. Although it is the cause of uncertainty and therefore of frustration (above all in doctrine) it is wise to recall that it is precisely the fluidity inherent in this principle that has, over the centuries, allowed the judges to 'modernise' – if only gradually – the legal definition of family, freeing it from prejudices based, for example, on the traditional separation of the roles of care between men and women or, on the presumed superiority of marriage as the ideal place to raise children.

816 See Chapter 2, § 3.