



Diversity of Family Life in the EU: Case-Law Related to Recognition of Parenthood

Presentation at the Public Hearing

‘Recognition of Parenthood in the EU’

Legal Affairs Committee, European Parliament



ISSUES TO BE EXPLORED IN THIS PRESENTATION

What is a 'family'?

Types of families

The nuclear family

Alternative families

The problem of non-recognition of alternative families
in cross-border situations

How have the European supranational courts (ECJ &
ECtHR) responded to the problem of non-recognition of
alternative families in a cross-border context?

What needs to be done

WHAT IS A 'FAMILY'?

A fundamental group in society which is universally acknowledged as deserving of (legal) protection

No official or universal definition: it means different things to different people and meets different needs for different people



The Prevalence of the Nuclear Family Model



Alternative Families

THE PROBLEM OF NON-RECOGNITION OF ALTERNATIVE FAMILIES IN A CROSS-BORDER CONTEXT

- **EU – no competence** to make legislation in the area of family law (apart from when it comes to family law issues with cross-border implications): falls on **EU Member States** to **determine whether a group of persons constitutes, for the purposes of national law, a family**
- **Great divergence among EU Member States** regarding the recognition of alternative families as ‘families’ (esp. rainbow families and families comprised of surrogate-born children with their intended parents)
- This divergence means that **certain families which are legally recognised as ‘families’ in one EU Member State may no longer be legally recognised as a ‘family’ when they move to another EU Member State**
- The non-recognition of alternative families creates **legal uncertainty** and a number of **practical difficulties** which can have severe consequences for children and their families:
 - child may be rendered stateless;
 - parent(s) may be unable to consent to a medical procedure for the child, to open a bank account for the child, to travel with the child, to register the child in school;
 - child will not be considered legally related to the family of origin of one or both parents;
 - the child and the parents may not be able to exercise EU free movement rights together (if one of the family members is a TCN).

ALTERNATIVE FAMILIES IN ECJ CASE-LAW

Clarifications:

- Biological connection not important
- Reconstituted families (*Baumbast* (2002)) – now reflected in Dir. 2004/38
- Adopted children (*SM* (2019))
- Rainbow families (*V.M.A.* (2021))
- Surrogacy (no free movement case-law – *CD v ST* (2014) & *Z v A Government Department* (2014))

Lack of clarification:

- Surrogate-born children & intended parents in free movement cases
- Rainbow families and their cross-border recognition for purposes other than family reunification

ALTERNATIVE FAMILIES IN ECtHR CASE-LAW

Clarifications:

- Who can found a family and how is up to the States to regulate, provided they do not discriminate on the Art. 14 ECHR grounds (*EB v France* (2008))
- Biological connection not important for establishing ‘family life’ for purposes of Art. 8 ECHR (*J.R.M. v the Netherlands* (1993))
- The best interests of the child require that the parent-child relationship between a child and his/her adoptive parent(s) established abroad must be maintained and be legally recognised in the State of residence of the child and the adoptive parent(s) (*Wagner v Luxembourg* (2007))
- Surrogacy: States must legally recognise the parent-child relationship between the child and the intended parent who is biologically-linked to the child, as this has been legally established in the country of birth of the child (*Menesson v France* (2014)); States must also provide the possibility of legal recognition of the parent-child relationship established abroad between the child and the intended parent who is not biologically-connected to the child (*ECtHR Advisory Opinion* (2019))

Lack of clarification:

- Rainbow families and their cross-border legal recognition (pending cases)
- Families consisting of more than two adults who together parent a child – do they constitute a ‘family’ for the purposes of Art. 8 ECHR?



WHAT NEEDS TO BE DONE

- Alternative families **have always existed**; and whether they are legally regulated or not – and whether they are legally recognised or not – such families **will continue to exist**.
- **Children** who live outside the traditional nuclear family **must not be marginalised and must not be excluded** from any of the entitlements and rights they derive from European law. They **must not be penalised** because their family does not fit the nuclear family ideal.
- EU cannot require MSs in purely internal situations to allow their own nationals to create alternative families and to legally recognise such families ab initio.
- However, **the EU can require the cross-border legal recognition of alternative families** through a) EU legislation b) court decisions & soft-law measures which require the **cross-border legal continuity of the parent-child relationship for all families**

'[...] the law cannot cut itself off from society as it actually is, and must not fail to adjust to it as quickly as possible. Otherwise it risks imposing outdated views and taking on a static role. In so far as the law seeks to regulate relations in society, it must on the contrary keep up with social change, and must therefore be capable of regulating new situations brought to light by social change and advances in society.'

AG Tesouro in *P v S and Cornwall County Council* (1995)

Thank you!