



Brussels, 28th of August 2023

PARENTHOOD RECOGNITION in the EU

NELFA's position on the current legislative proposal – approved by the Board in August 2023.

POSITION OVERVIEW

The Network of European LGBTIQ* Families Associations, NELFA, is very pleased with the legislative proposal on the cross-border recognition of parenthood within the EU.

We see the need to protect every child – especially in cross-border situations – regardless of the conditions on how it has been conceived, and regardless of the gender, sexual orientation, and partnership status of its (biological and non-biological) parent(s).

We are in line with the recommendations Prof. Alina Tryfonidou has made in her analysis of the proposal for the PETI Committee ([LINK](#)), especially on the issuance of guidelines and training of legal practitioners and the *non-exclusion of surrogate-born children*.

We agree with the need to clarify the wording and difference of “*recognition*” and/or “*establishment*” of parenthood to discover the technical requirements in cross-border cases.

We agree on the decision of the EU Commission to take Art. 81 (3) as the legal basis of the proposal instead of Art. 21. We acknowledge that in *V.M.A. and Others vs. Bulgaria*, the important freedom of movement argument does not solve the problems of many families. The required issuance of a travel document is not enough. There is a need to ensure the continuation of the children’s legal ties to (both of) its parents under national law.

We see the need to reassure that *the legislative proposal on mutual recognition of parenthood does not interfere with national (substantive) family laws* which remain untouched. The Member States just need to recognise familial ties that were already legally established in another Member State (by rule of law, court proceedings, adoption...).

IMPORTANT NOTE

For NELFA it is very relevant to state that the proposal is a ***child-focused instrument***. The aim is *not* to introduce marriage equality, same-sex adoption, or multi-parenting at national level, but to *protect children, their identity, and their relationships to their primary carers*.

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CONCERNING SURROGACY

NELFA is aware of the strong opposition against surrogacy and the calls on corresponding amendments to the proposal. However, **we think it is necessary to protect every child**. You cannot blame a child for its parents' decision on how to become parents. Here, we can cite the recent ECtHR judgment in *D.B. and Others vs. Switzerland* (November 2022): *“From the standpoint of the Convention, the potentially objectionable conduct of the parents had to be put to one side so as to enable the pursuit of the best interests of the child. [...] The child should not be made to bear the adverse consequences of his parents' choice, regrettable though it had been.”* The Court stated that the best interests of the child entailed *“the possibility for the child to live and develop in a stable environment. For that reason, the child's right to respect for private life required that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended parent.”* In addition, the judgment says that *“the interests of the child could not depend on the parent's sexual orientation alone”*. This broadens the scope of the *Advisory Opinion* from April 2019 and extends its application to situations involving children with two parents of the same sex.

We find similar arguments in a case concerning a different-sex couple in *K.K. and Others vs. Denmark* (March 2023) after a commercial surrogacy arrangement in Ukraine. The intended mother was granted shared custody, but an adoption was refused by the authorities. Again, the focus was on the rights of the child... and not of the parent: *“The fact remains, though, that besides adoption, domestic law does not provide for other possibilities of recognition of a legal parent-child relationship with the intended mother. Accordingly, as pointed out by the applicants, when they were refused adoption, they were de facto refused being recognised as having a legal parent-child relationship. Such lack of recognition per se had a negative impact on the children's right to respect for their private life”*. (§ 72)

The Commission itself confirms that Member States are already “obliged” (or at least strongly recommended) to **ensure that children born through surrogacy** (in third countries) continue to be recognised in the State of residence of the family as the children of their (intended) parents, as the parent-child relationship was established in the country of birth of the children. According to the ECtHR case-law, Article 8 of the European Convention on Human Rights requires that *“domestic law provide a possibility of recognition of the legal relationship between a child born through surrogacy arrangement abroad and the intended father where he is the biological father”* (§ 35). Concerning the intended parent (in the Advisory Opinion it is the *“intended mother”*), the Court clarifies that *“the non-recognition in domestic law of the relationship between the child and the intended mother is disadvantageous to the child, as it places him or her in a position of legal uncertainty regarding his or her identity within society”* (§ 40). The Court points out that there are “fundamental components” that do not necessarily weigh in favour of a legal parent-child relationship with the intended mother (parent) such as the possibility of knowing one's origins (§ 41). However, it ends with the summary, that *“in view of the [...] fact that the child's best*



interests also entail the legal identification of the persons responsible for raising him or her, [...] and ensuring his or her welfare, as well as the possibility for the child to live and develop in a stable environment, the Court considers that the general and absolute impossibility of obtaining recognition of the relationship between a child born through surrogacy arrangement entered into abroad and the intended mother is incompatible with the child's best interests" (§ 42). A direct recognition of the birth certificate legally established abroad was not necessary. Another means (adoption) may be used - "prompt" and "effective".

CONCERNING THE "PUBLIC ORDER"

Member States have also mentioned concerns that the legislative proposal on parenthood touches their "national identity", "traditional values", and the (national) "public order". However, the proposal will only help to ensure that children *can continue* their (legal) relationship with their parents which was established legally in another Member State.

This entails of course a certain mutual trust and the aim at finding the common denominator. This should be - at first - the **best interests of the child**.

Therefore, NELFA endorses the recommendation (see Alina Tryfonidou's analysis, p. 9) to **interpret the public policy exception** which is mentioned in the proposal **restrictively**. We take note that the recognition of parenthood (for example joint adoption rights for same-sex partners) and Assisted Reproductive Techniques (ART) are still difficult and controversial topics in some countries. However, the continuation of familial ties of children (legally established in another EU Member State) should be always paramount. We encourage sceptics to orient themselves towards ECtHR jurisprudence. Here, we find some relevant explanations regarding same-sex parenting and the "public order". In the decision on *Fedotova and Others vs. Russia* (13 July 2021), we can read: "*It would be incompatible with the underlying values of the Convention, as an instrument of the public order, if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority*" (§ 52). The corresponding press release summarises: "*The Court had repeatedly held that although individual interests must on occasion be subordinated to those of a group, democracy did not simply mean that the views of a majority always had to prevail: a balance had to be achieved which ensured the fair treatment of people from minorities and avoided any abuse of a dominant position.*" Even though the case is related to the *legal recognition of same-sex partnerships*, NELFA thinks that the same arguments should apply to the recognition same-sex (respectively LGBTIQ*) parenthood incl. ART: "*There was no basis in the Court's view for considering that affording legal recognition and protection to same-sex couples in a stable and committed relationship could in itself harm families constituted in the traditional way or compromise their future or integrity. Indeed, the recognition of same-sex couples did not in*

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any way prevent different-sex couples from marrying or founding a family corresponding to their conception of that term. More broadly, securing rights to same-sex couples did not in itself entail weakening the rights secured to other people or other couples.” In the final [decision of the Grand Chamber](#) in the case (17 January 2023), it is finally mentioned that: *“allowing same-sex couples to be granted legal recognition and protection undeniably [...] promotes their inclusion in society, regardless of sexual orientation. The Court emphasises that a democratic society within the meaning of the Convention rejects any stigmatisation based on sexual orientation [...]. It is built on the equal dignity of individuals and is sustained by diversity, which it perceives not as a threat but as a source of enrichment”* (§ 180). Replace “couples” with “families” and it still makes sense. The legislative proposal might entail the recognition of same-sex families but – to make it clear again – only regarding those who were legally established in another country. Member states are not obliged to make any amendments in their national legislation. The margin of appreciation for the public order argument should be narrow because families consisting of children and (LGBTIQ*) parents cannot be a *threat* to society. In our opinion, the threat is to leave children and their parents in legal limbo or even to allow statelessness just because of missing tools to recognise parenthood in situations involving families that do not conform to the traditional ‘nuclear family’ model or just because of a government’s or a society’s open disapproval or simple ignorance regarding certain families (often fueled with hate speech, prejudices, and scapegoating). The Council of Europe’s [Resolution 2239](#) (2018), entitled “private and family life: achieving equality regardless of sexual orientation”, states: *“The Assembly emphasises that intolerance that may exist in society towards people’s sexual orientation or gender identity can never be used as a justification for perpetuating discriminatory treatment, as this serves, unacceptably, to legitimise violations of human rights. States must, on the contrary, work vigorously to combat the prejudice that enables such discrimination to persist, in order to fulfil their responsibility to protect and promote the human rights of all those within their jurisdiction and to eliminate discrimination on all grounds, including sexual orientation or gender identity.”* (§ 5). These explanations essentially include national sensibilities regarding ART (for couples and/or single persons) as well (see Resolution 2239, § 4.5.).

NELFA acknowledges that Ireland’s Minister of Justice is considering refraining from exercising Ireland’s power to opt-in to the proposal because of “[particular concerns](#)”. NELFA sees here a concern that is raised in many different countries and not only regarding cross-border situations. We agree with a general demand to give children access to information on their genetic origins as suggested in the [draft recommendation](#) of the Council of Europe (20 February 2019). Some EU Member States like Ireland establish parenthood for non-biological (female) parents only if a specific assisted reproductive technique is chosen and specific circumstances are covered (in Ireland, there is an obligation to use sperm from an Irish donor and the treatment must be in a domestic clinic). The same applied to Sweden for many years. Since 2005, it was possible for lesbian couples to become the joint legal parents of a child after an assisted insemination in a domestic clinic. Whenever they chose a clinic abroad, a direct recognition was not possible. The non-biological parent had to undergo a step-child



adoption procedure. NELFA can understand that such measures constitute part of an effort to ensure there is some control in relation to ART treatments, in particular to safeguard the right of the child to know its origins and we agree with the basic interest to do so (for example to have information on possible genetic diseases). However, we want to emphasise that a legal parent-child-relation should not depend on the knowledge of these origins. Whenever the (same-sex) parent has had ART (or home insemination) with an anonymous donor (which is still mandatory or at least possible in some EU Member States), this information cannot be always revealed (even though some countries require access to corresponding details for children of a certain age). In fact, this might violate the children's right to know its origins, but Member States should still seek for parenthood recognition because it would be another (additional) infringement of children's rights not to allow the recognition of the familial ties between the child and those persons who are its stable primary carers. Currently, the different approaches to ART cause many cross-border problems for (same-sex) families.

We would like to mention **Sweden as a best practice example**, because the country changed its [legislation](#) in summer 2022. Even if couples search for ART abroad, they will be directly recognised as parents to their child in their home country without a step-child adoption procedure (which constitutes a possible risk for the welfare of the child if it is lengthy and stressful as it is a legal process, and the outcome is uncertain).

In rainbow families, there might be an additional element of possible discrimination for children because of the obviousness of non-biological parents (for example, by entries in birth certificates such as “mother 1” and “mother 2”). In those cases, the familial ties are challenged by simple visibility. In most cases involving different-sex parents, the presumption of parenthood (including the presumption of biological ties) protects the couples from further scrutiny – accepting a possible lack of “proofed” biological identity. NELFA advocates for a moderate approach in this matter. We do not seek to have everyone prove their biological parenthood, but rather to ensure that, in the best interests of the child, the apparent absence of such information is not interpreted to the detriment of the legal parent-child relationship.

CONCERNING THE “CERTIFICATE ON PARENTHOOD”

NELFA is aware of the complexity of the proposal and the probable workload for civil servants to deal with the provisions. This is why we agree with the recommendation to set up guidelines for the competent authorities how to recognise parenthood established in another Member State and to train the staff involved. The issuance of a “European Certificate of Parenthood” might be not relevant if the rules on mutual recognition will be easy to understand and to implement. However, we think that such a Certificate would enable civil servants to have all the relevant information in one document.

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FINAL NOTE

NELFA wants to improve the rights of children in cross-border situations.

Our Network considers that the interests of all EU Member States searching for adequate solutions regarding the cross-border recognition of parenthood should be taken into account and a compromise reached which will safeguard those interests while ensuring that the fundamental rights of the child and their best interests are fully respected and protected.

It is about the well-being of (our) children.

About NELFA:

NELFA is the European platform of LGBTIQ* families associations, bringing together LGBTIQ* parents and parents-to-be from all over Europe. NELFA currently (August 2023) represents 47 organisations in 34 European countries with more than 25,000 members. NELFA is a member of ILGA-Europe, Transgender Europe and COFACE Families Europe. Website: <http://www.nelfa.org>. Newsletter: <http://nelfa.org/press/newsletter/>.