

## A child of two mothers: what about the father? Italian overview

*Gianluca Montanari Vergallo*

Department of Anatomical, Histological, Medicolegal and Orthopaedic Sciences, Section of Legal Medicine, “Sapienza” University of Rome, Rome, Italy

**Summary.** Surrogacy techniques allow for the birth of children who are then raised by parents who may have no genetic or biological connection with them at all. Italian legislation on medically assisted procreation bans such practices, under national criminal codes, and yet the intended parents’ ability to legally register children born abroad via surrogacy has not been affected by such legislation. Italian jurisprudence has acknowledged the parental status of same-sex couples, following the same path outlined by the European Court of Human Rights. The paper’s author elaborates on court decision n. 145/2018, from the Naples Court of Appeals, which has stated that surrogacy children may be connected to their intended parents merely by virtue of “mental” elements, based on affection, harmony and listening enjoyed by the child within the family setting. The author is critical of that view, in light of conflicting research findings on children growing up in same-sex families. In that regard, the author argues that even though homosexual couples may well turn out to be good parents, families made up of fathers and mothers still constitute the best scenario for the children, from a social perspective. It is however necessary for lawmakers to step in and better regulate an utterly sensitive area of law, one that might engender adverse repercussions on the children’s well-being, in terms of growth and psychological development, following their becoming part of homosexual families. ([www.actabiomedica.it](http://www.actabiomedica.it))

**Key words:** artificial reproduction, natural motherhood, parental relationships, surrogacy contract, surrogate motherhood, adoption

### Introduction: A few preliminary remarks

The issue of surrogacy is arguably one of the most controversial to have come to the fore over the past years (1); such a procedure enables those with sterility and infertility issues, which have always been rife among heterosexual couples, to achieve pregnancy even when they cannot resort to homologous/heterologous fertilization and experience practical or procedural difficulties when trying to adopt a child, mostly because law no. 183/1984 sets an age limit for prospective parents as well as the number of children declared abandoned and therefore available for adoption.

Surrogacy has been resorted to even by same-sex

couples wishing to have children. Surrogate motherhood is an ancient practice, even mentioned in the Holy Bible (Genesi, 30,3) (2). The new aspect, however, is that it has been medicalized, given how it is achieved through medically assisted procreation procedures. The widespread use of such techniques has over time brought about a commercial trend relative to the practice itself, with the creation of a new “market”, ranging from the creation of more and more dedicated clinics to the provision of legal counselling when drawing up contracts to be submitted to those couples interested in availing themselves of the procedures. Estimates set the value of the global “reproductive market” in excess of 6 billion dollars a year (3).

## European landscape

There is a wide ranging variety of different national regulations on surrogacy across the world. In Europe, there seems to be a climate of hostility to the practice, especially when it entails a contract that is basically commercial in nature. The European Parliament, via resolution no. 2009, on 13<sup>th</sup> December 2016, decried surrogacy (4, 5). On 2<sup>nd</sup> February 2016, human rights organizations in Paris, along with politicians and scientists, have signed the charter of Paris, calling on European nations to respect the international conventions for the protection of human rights that they have ratified and to oppose firmly any form of legalization of surrogate motherhood at a national or international level.

Each and every European Union member state has passed various laws of its own, often conflicting from one another. Austria and Germany have banned it altogether. Norway, on the other hand, has passed no law specifically targeting surrogacy, yet the gestational surrogate mother may not receive donor oocytes. Switzerland specifically forbids surrogate motherhood. France has made it legal to donate oocytes, at the same time banning gestational surrogacy, criminally prosecuting both surrogate mothers and intended parents. Lastly, Spain has outlawed surrogacy and all contracts related to it are deemed null and void, whether financial compensation may be thereby included or not (6). Britain, via the 16<sup>th</sup> July 1985 "Report of the Committee of Inquiry into Human Fertilization and Embryology" acknowledges the value of surrogacy as a means to solve sterility and infertility issues. The Surrogacy Arrangements Act allows for the elaboration of surrogacy agreements, provided that they be of the altruistic type and that parties in the deal are the intended parents and the voluntary surrogate mother; it also entails criminal liability arising from any form of commercial or brokering activities. In Italy, law no. 40/2004 makes surrogacy illegal, under article 12, viewing the practice as a breach of public order, carrying criminal sanctions (7). On account of that ban, several couples, in an effort to get around the ban, resort to surrogacy abroad, in nations where it is indeed legal, bringing the newborn child back to Italy and trying to legally register him or her as their own. Law n.40/2004 does not deal

with the legal soundness of surrogacy procedures that take place abroad, at the request of Italian citizens, and says nothing as to the feasibility of legally registering the children thus born. Still, the courts have stepped in to fill that vacuum, producing rulings that come across as confused and contradictory. In some instances, the mother who had declared the child born via surrogacy as her own has been sentenced for false statement, and with the cancellation of her name from the birth certificate (Brescia Courthouse, 26<sup>th</sup> November 2013). In other cases, the judges decided to record in the civil status registry came with the replacement of the intended mother's name with the name of the woman who had born the child (Bari court of appeals, 13<sup>th</sup> February 2009). Most recent legal trends and court decisions make it possible for birth certificates of children born abroad via surrogacy to be legally registered, owing to the lack of specific legislation on the subject (Civil Supreme Court, 20<sup>th</sup> September 2016, no. 19599).

## Biological truth as opposed to social-affective truth

The issue of whether the family status of children born via surrogacy ought to be acknowledged is closely related to the legality of adoption by same-sex couples. Debate is ongoing on that utterly sensitive issue, one that is rife with complexities from the doctrinaire and legal perspectives. In order for the rights of surrogacy children to be properly enforced, European judges have referenced the principle enshrined in the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance and in article 24 of the Charter of Fundamental Rights of the European Union, which states «In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration». According to the judges, the child's best interests are to be intended in an evolutionary fashion, i.e. not necessarily in traditional family setting with clearly defined parental roles, but rather as the interest in maintaining the personal interrelationships established abroad through the adoption by the intended parents. According to the Court, the notion of family life may comprise that develop-

ing in a homosexual relationship (8), hence sharing the biological origins of the children is no longer to be considered to be a necessary requirement (9). Modern assisted reproduction techniques have made it possible to acquire parenthood at will, and for children to be regarded as someone's offspring by virtue of an affective, mental, harmony-based connection with their homosexual intended parents, experienced by the children in the family setting, no more based on having been conceived and born from a heterosexual, traditional couple. The bond between children and their parents thus goes beyond the natural, biological tie, thus creating the "social parent" figures, in addition to biological ones. Indeed, a child's birth, his or her physical production do not represent grounds to turn the biological parents into real parents. Birth and being born are physical events, which are expected to turn a parental relationship into a social fact (10, 11).

### **Establishment of parental relationships of children born through surrogacy within the Italian legal framework**

European courts have granted a somewhat wide margin of appreciation to member states, while urging them to uphold the parental relationships of surrogacy children, especially in cases where one of the intended parents coincides with the biological one. Any failure to acknowledge such prerogatives would run afoul of article 8 of the European Convention on Human Rights, from the standpoint of one's individual rights, enjoyed by the children, to personal identity and to respect for their private life (10, 11). In order to comply with the ECHD's recommendations, the Italian judiciary has widely interpreted the principle of "adoption in particular circumstances" (article 44, letter d, law no. 184/1983), dictating that even singles or same-sex couples be granted the right to adopt a minor, provided that pre-adoption be impossible due to, for instance, the lack of a requirement such as abandonment of the minor (Rome juvenile court, 30<sup>th</sup> July 2014). The Italian magistrates have argued that the peculiar status of such adoptions warrants the legality of the child being adopted by the parent's partner as well. Such a prospect would be in the child's best interest, who has grown up

and taken care of by both partners forming the couple. The judges argue that failing to legally acknowledge such a relationship would conflict with the child's best interest. Hence, at the same time, the courts provide protection for those parental relationships that are not based on biological ties, but rather grounded in consent, thus prioritizing the *favor affectionis* (favor affection) over *favor veritatis* (favor the truth).

The Italian Constitutional Court has borne out the view according to which surrogacy «is a blot on the dignity of women and deeply undermines human relationships» (Constitutional Court, 18<sup>th</sup> December 2017, no. 272). Nonetheless, it has also stated that one's origins should not be limited to and determined by genetic connections, but rather it should take on legal and social meaning. Hence, beyond the biological relations between parents and children, in cases of those born via assisted reproduction techniques (whether by homologous or heterologous fertilization), the parental bond may outweigh the biological one. It is incumbent upon the courts to strike the right "balance" between genetic and parental connections, and such a balance must dovetail with the children's best interests.

As a matter of fact, the guiding principle needs to be the minor's best interests, rather than the parents' (whether biological or intended ones).

A set of criteria may serve as a beacon light in order to guide those consequential decisions: 1) the length of the parental relationship that has been established, 2) the methodology of conception and gestation, 3) the availability of legal means in order to give rise to a legal connection between children and intended parents.

Ruling no. 145/2018, from the Naples Court of Appeals, appears to be particularly significant in that regard (12). The facts: a same-sex couple made up of two women, both with a solid professional background (an entrepreneur and an attorney), affluent (they had just bought the house where they resided), got married in Spain and entered into a civil union in Italy, pursuant to law no. 76/2016. They then decided to enlarge their family by means of heterologous fertilization, undergone by one of the two women. A child was born, who was raised by his two "moms". The partner who shared no biological tie with the child attempted to have her family connection with the child legally sanc-

tioned, and applied to the juvenile court of Naples, in order to officially adopt him (through stepchild adoption), in pursuance of art. 44, lett. d), law no. 184/1983. The Naples court, however, turned down her application, because even though the child's biological mother had consented to her partner adopting him, she had not waived her exclusive parental responsibilities towards the child. The records in fact reflected both women's intention to exercise full parental prerogatives. The court of appeals overturned the ruling, since the "intended" parent, the one who has consented to the medically assisted procreation procedure, thus determining the child's birth, is to be viewed as a parent, even in absence of genetic ties. Intended parents, in fact, may not withdraw their consent and shirk the responsibilities that they have acquired. The courts reasoning goes that the biological mother's partner is not some sort of "third parent", but rather a second parent: she has taken up that role by granting her consent to the heterologous MAP procedure that her partner had undergone.

The court concluded that the child's best interest was to live with and be brought up by his two mothers, and argued that the following criteria had been met:

1. A steady affective relationship had been formed between the two women who had then gone on to plan their family, sharing the parenthood-centered project. The women's respective families had accepted the child.
2. The women were economically dependable, owned the house where they lived and underwritten a life insurance policy with their child as beneficiary.
3. The child had settled well in a school already attended by the twin daughters of two mothers.
4. Law enforcement agencies had checked and vouched for their good conduct.
5. Social services officials, in their report on the case, remarked that the two women "in a thoughtful and timely fashion, had explained to their child that he was conceived through the seed of a kind and generous gentleman, which had joined the egg in his mom's belly. Such explanations had obviously been well understood and elaborated by the child, who, as of today, does not look troubled or unsettled in saying:

"I have two moms, I have no dad, but plenty of friends, uncles and aunts that I can rely on and play with".

Going over that narrative, one may well conclude that the child's life is uneventful and trouble-free. The judges have therefore ruled that the child's best interest is well served by living with his two mothers. I disagree with that conclusion for the following reasons. The judges write: the child (who is now in elementary school) has struck social workers as being "well groomed and neat, sociable ... he addresses his parents as "mamma" and "mammona" ("mommy" and "big mama"), he hugs them both, smiling, on occasions, he has been observed to use different tones of voice according to which mother he was addressing, and at any rate, he seems well aware of the different roles held by each one of his mothers within the family setting (13).

Therefore, the child is aware of the different situation that he is in compared to his peers, he is conscious of the different roles played by his two mothers: he draws that distinction by addressing them as "mamma" and "mammona", as observed before, and his tone of voice varies according to which one of his mothers he is talking to. In light of those considerations, one should ask: is it really in the child's best interest to be raised by two women?

## Discussion

Current scientific literature centered on homosexual parenting is split in two strands: the psychoanalytic doctrine revolving around the Freudian oedipal triangle (father, mother and child), according to which it is essential for proper child development to be able to identify fatherly and motherly figures within the family (14). As Eugenio Borgna contends, child identity develops through an identification process that involves both their psyche and their parents' sexualized bodies. Children recognize themselves and envision their future reflecting in and relating to male and female traits belonging to a father and a mother, whether they be biological or foster parents. Should such sexual diversification no longer be there, the child's very well-being would be in jeopardy. Children have a remarkable ability to adapt; however, they lead better lives

when they have a chance to live through their childhood with their biological fathers and mothers, as it is reflected in available scientific research studies on the subject. Children undoubtedly need a mother and a father, two clearly defined and distinct polarities, sexually defined as well, in accordance with nature (15). At the other end of the spectrum lies the theory that good parenting is unrelated to the parents' sexual orientation, rather on the climate and attention they devote to their children, which sets good families apart from bad, dysfunctional ones. The implication is that the right "mental pairing" outweighs sexuality, and paternal and maternal functions are somehow interchangeable, and can be exercised irrespective of any reference to the sexualized body (16). Such a theory holds that parenthood is not bound to biological factors, but rather to the mindset, and could therefore be termed "mentalization" of parenthood (17). The issue raised by such a theoretical framework is no longer whether same-sex couples are indeed capable of effectively bring up children, but rather how they can rear them. In that sense, homosexuality is a condition that does not foreclose the ability to discharge parental functions and duties (18). The numerous studies that have been conducted on the topic produced conflicting findings. The reason for such discrepancies might be that different research studies do not take into account the same factors: the couple's socioeconomic background and level of education, for instance. Other studies were flawed in that they were too small-scale to be statistically significant.

Some studies seem to point to the alleged tendency of children raised in same-sex-parented families toward depression, ill-health, unemployment, infidelity, drug and alcohol abuse, sexual self-victimhood and unhappy childhood memories (19). Other reviews have concluded that the same-sex parented children analyzed in those studies grew up and did as well emotionally, socially and educationally as their peers raised by heterosexual couples. The very same researchers, however, concede that in drawing up the research, factors such as socioeconomic extraction and the educational levels of couples and children were not accounted for (20).

The above mentioned theory seems to fuel the conviction that having children is to be considered a right. However, even the desire to have a child, as commend-

able and deserving as it may be, cannot necessarily be viewed as a right. Children do not and cannot constitute a "right", no one can stake a claim to parenthood because children are not objects to flaunt: they are gifts bestowed upon their parents by life. The word "parent" translates into "he/she who has generated" in many languages (in Italian, *genitore*). Every human being is generated from male and female gametes, with no exception possible. Men and women are biological fathers and mothers: they convey their genetic backgrounds into their children's bodies, and that includes physical characteristics and temperamental inclinations that will accompany them for all their lives. No child, therefore, can be born from a couple of women or men. For that reason, although I am aware that gay couples can raise and take care of children just as well, or even better than heterosexual couples, I still believe that "acting as parents" is different from "being parents". A family with small children is different from one with grown-up children. Being reared in a family devoid of fatherly or motherly figures could ultimately be harmful to minors, because the natural bond is inextinguishable (21).

### A few closing remarks

Surrogacy entails the commodification of women's bodies, who are bound by a contract to hand over the babies that they kept in their wombs for nine months and born. Many nowadays discuss surrogacy and the pain and anguish experienced by those who cannot have children. Few however seem to wonder what a surrogate mother must feel when she is required to relinquish her newborn child and hand him or her over to a couple of strangers, a baby that is her biological child, and what consequences the children may experience when they find out about the biological mothers that nourished them for nine months and that should have been the ones who would never betray them, and yet forsook them at birth.

The debate centered on the legal standing and validity of surrogacy agreements is particularly passionate worldwide. It is undeniable the most heart-felt issue is providing protection to children born through surrogacy, often circumventing bans and restrictions codified in national laws.

I do agree with the studies that have concluded that the condition that best serves the children in their personal development is when biological and social truths coincide: that is a family where fathers and mothers are integrated with each other in a harmonious climate, for their children's sake. In my view, children raised in same-sex-parented families serve the couple's interest in "completing" their union through the child. In actuality, such a child is the "choice" of two adults who have him born and already orphaned of one parent. When topics of such great social relevance are discussed, which affect the right of children to grow up in a safe and protected environment, the rights of adult couples or partners are trumped. First and foremost, there are the children's best interests. For the time being, we cannot rely on a large enough number of research studies that could enable us to conclude that growing up in same-sex-parented families may cause psychological damage in children. Nevertheless, that is not tantamount to concluding that growing up in such families is as positive an experience for children as growing up in heterosexual-parented families (22).

In a stance characterized by caution, along the lines of the precautionary rule (23), the risk of trauma for children cannot be ruled out. A social and political reflection needs to be made, in order to prevent *de facto* situations from escalating, leading to a normalization of surrogacy, despite its exploitation of women's bodies and the its leading to births of children in a condition of diversity, compared to others. In order to make opposition to this practice effective, international agreements ought to be made, aimed at dissuading and deterring citizens of nations that ban surrogacy from traveling to countries where it is legal and punishing brokering activities.

As for children already born through surrogacy, a procedure ought to be outlined for the purpose of recognizing such children, which has to be compliant with the rules of children's rights enforcement, particularly article 7 of the United Nations Convention on the Rights of the Child, which entitles children to get to know the women who bore them after nine months in their wombs (24).

Lastly, innovative legal solutions are urgently needed that will take into account the blatant evolution undergone by families over time, and acknowl-

edge that at this juncture, lawmakers should start a discussion on how to consider such changes in the realm of adoptions as well, making adoption-related procedures easier.

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Correspondence:

Gianluca Montanari Vergallo,

Section of Legal Medicine, "Sapienza" University of Rome,  
Viale Regina Elena, 336 - 00161 Rome, Italy

Fax 0664465419

E-mail: [l.montanarivergallo@libero.it](mailto:l.montanarivergallo@libero.it)