Difficulties of recognition in Greece of parentage links created in foreign legal orders following recourse to techniques of medically assisted reproduction

Medically assisted reproduction has over the last years revolutionised well-established perceptions on the regulation of parentage. The foundations on which law has organized the parental link have changed radically. A number of legislators have extended the socio-affective criteria as a foundation for parentage. Thus, it has been permitted to create a parentage link in favour of two women who jointly have access to a technique of medically assisted reproduction (e.g. Sweden, Belgium, Spain). Surrogacy (e.g. UK, Greece) has shattered certainties as to the parental bond of the mother, and has enabled the creation of a parental bond in favour of two men (e.g. UK). Finally, it has become possible to have a child conceived and born after the death of its genetically linked parents, and in such cases it has been deemed as opportune to have a parentage link established with the person who has given its consent to the process prior to its death (e.g. Greece).

Nonetheless, the aforementioned techniques and judgements are not accepted everywhere. Considerable differences persist in legislations not only as to the regulation of the access to those techniques but also in regard to the regulation of parental bonds which can be established. For instance, the Greek legislature has allowed surrogacy and post mortem artificial fertilization, but excludes access to medically assisted reproduction for same-sex couples and prohibits the establishment

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of any kind of parentage in their favour. Despite this approach it cannot be ruled out that the Greek legal order will need to evaluate such parentage links legally created in foreign countries. Indeed, domestic courts have recently had to answer the question of whether parentage links legally created in third countries can be recognised, even though their establishment is inconceivable in the Greek legal order and even if they sometimes are the result of access to techniques forbidden by Greek legislation.

We will present, primarily, the answers which have been given, displaying some reasonable – at least at first sight – arguments which have supported the refusal of recognition (I), then we will explain why this refusal is the result of a methodologically wrong use of the public policy mechanism, which neglects to take into consideration basic substantive rules (II).

I. An at first sight legally justified refusal of recognition of parentage links

Our analysis will consider two cases which have been adjudicated by the Greek courts and are directly or indirectly connected to the new forms of parentage which can be created as a result of access to medically assisted reproduction. The first case involved a woman who had access to a surrogacy in Russia with the genetic material of her deceased son and the ensuing creation of a parentage link through adoption of the children that have been born (A). The second case concerns the establishment of a parentage in favour of two men through an adoption which took place in Belgium (B).

A. Recourse of a woman to surrogacy abroad with the genetic material of her deceased son and recognition of the parentage links created through adoption in Greece

This case surprises with its particularity. It concerns a woman, with a permanent residence in Greece, who after her son had an accident, managed – although illegally – to have his genetic material extracted and travel to Russia, where through the assistance of two surrogate mothers she has had four children. Subsequently, she tried to have a parentage link created in Greece, but without

2 Court of first instance of Thessaloniki 7013/2013, EfAD 2013/340, observations Kalliroi D. Pantelidou, Arm. 2013, 1291(in Greek), comment by Apostolos Anthimos. See also the contributions in this volume by: Dimitra Papadopoulou, “Surrogate Motherhood and post mortem fertilization in the judicial practice”. Athina Kotzampasi, “Links of blood and links of love: children in the borderline between natural and sociological parentage”. 
success. Hence, she returned to Russia where her application to have an adoption granted has been accepted. Following that, she requested the recognition of the Russian adoption decision before the Greek courts.

The one-member Court of first instance of Thessaloniki has refused the recognition on the grounds that the foreign decision was contrary to public policy. The Court has raised, among other issues, the fact that the surrogacy procedure which took place abroad, the post mortem fertilization and the adoption were conducted according to Russian rules, which are different to the corresponding requirements imposed by Greek law. The contrariety with Greek legal framework consisted in that there was no medical necessity for the surrogacy, that the intended mother was 58 years old (whereas Art. 4 § 1 of law 3305/2005 allows women up to 50 years old to have access), the extraction of the genetic material was made without the consent of the deceased, and there was no judicial authorisation to proceed to an insemination. The above considerations have supported an argument of circumvention (fraude à la loi) of the Greek legislation, an argument which at first sight seems reasonable since the interested person has travelled to Russia precisely because she could not have access to a surrogacy in Greece. The Court concludes asserting that «...the solution granted by the foreign decision develops in the Greek territory legal consequences which are in conflict with fundamental principles which are dominant in Greece and reflect social, religious, moral and other commonly accepted perceptions, which govern and regulate in a permanent way the social relations in Greece and constitute the barrier to the application in the forum of rules of a foreign law, which can create a distortion in the rhythm of life which is dominant in the country, [...] in that case, it is beyond doubt that what is at stake is the coherence of family law and more generally private law, as a self-contained system of value judgments, since we are led to the paradox of recognising as a mother of children the biological grandmother – whereas neither the conditions of adoption or those of recourse to medically assisted reproduction according Greek law have being respected ».

B. Adoption by male same-sex couple in a foreign country and its recognition in Greece
The second case is not directly connected to a technique of medically assisted reproduction. It concerns two men, who by virtue of judicial decision in Belgium had adopted a child who does not seem to have been born as a result of a medically assisted reproduction technique. Nevertheless, the decision has been chosen as the creation of such parentage links will often be the result of recourse to such techniques. In that case, one of the men of Greek origin but Belgian nationality has applied for the recognition of the Belgian decision before the one-member Court of first instance of Athens. The recognition has been denied on the ground that the foreign decision was contrary to public policy. More precisely, the Court has maintained that: «The creation of a model of same-sex family constitutes a factual situation contrary to the predominant values and perceptions which govern the life and the way of living in the Greek society [...], which does not dispose of any adequate legal framework for managing such model and is not sufficiently progressive to tolerate it. Its diversity on the other side could end up against the child, who will be the target of devaluing comments from the broader social circle.»

II. A finally unwise appeal to public policy as a basis for the refusal of recognition of the parentage links

Our disagreement with the judgments is based on two concerns. First, they deviate from a consistent application of the principles of private international law methodology for recourse to the mechanism of public policy (A). Second, they entail insufficient consideration of crucial elements of substantive law (B).

A. An incorrect from the point of view of private international law method of evaluation of the public policy mechanism

In founding their refusal of recognition on the ground of public policy, the courts of Athens and Thessaloniki already seem to ignore the basic principles which govern recourse to this mechanism. Public policy in the Greek and foreign legal

\(^3\) Court of first instance of Athens 2129/2011 not published. I would like to thank M. Pantelis Ravdas, lawyer at the Bar Association of Athens for kindly sharing the basic information of this decision. See the comment on this decision of Vaiouli M., Pouri P., Piskopani A.-M. and Ravdas P. in Chronicles of Private Law, 03/2015, (to be published- in Greek). See also in this volume Eleni Rethymiotaki, «Reproductive technology and homosexual family: the role of family law». 
theory of private international law has the character of an exception\(^4\). For this reason its use should be the object of a specific justification.

In examining the conditions required for the public policy exception to be triggered, the judge must proceed to an appreciation adapted to the circumstances of the case at hand. Thus, «the unusual character or the difference of provisions applied in a foreign decision by a foreign judicial organ in comparison with the domestic rules that would govern the same issues, does not necessarily constitute a contradiction to public policy»\(^5\).

Contrary to the aforementioned principles, the judges in the two decisions under review proceed to a general appreciation of the terms of contradiction, without elaborating on the reasons why the recognition of those decisions collide with fundamental principles of the Greek legal order. Especially in the first decision\(^6\), the circumstances might scare. Nonetheless, it is difficult to see how such a rare decision, unlikely to set any precedent and limited to the facts, would if recognised- undermine the standards of living of the country and subvert the coherence of Greek family law considered as a system of value judgments. Besides, the assertion that the conditions of the Greek law have not been respected is ineffective. The regulation of the medically assisted reproduction has a territorial character in the sense that it regulates only techniques which take place in Greece. Furthermore, it cannot be deduced from any provision or from the system of provisions on medically assisted reproduction that it is prohibited for persons who have a link with the Greek legal order to have recourse to a medically assisted reproduction technique under different terms in a third country. Further, it should be noted that circumstances which have led to this decision could easily be avoided in the future – especially as to the illegal extraction of the genetic material of the deceased – by means of a stricter control of centres of medically assisted reproduction by the National Authority on Medically Assisted Reproduction.


\(^5\) Evangelos Vassilakakis, Grammatikaki-Alexiou Anastasia, Papassiopi-Passia Zoé, Private International Law, 4\(^{th}\) ed., Thessaloniki, p. 400.

\(^6\) In favour of the recognition of the Russian decision see Grammatikaki-Alexiou in her oral presentation in this congress. See footnote 12.
In addition, a crucial element for the evaluation of the contradiction to the public policy must be the consideration of the proximity or of the connection of the legal relationship under scrutiny to the legal order of the judge of the forum, but also with the legal order of the judge who created the parentage link. Of course in the first case it appears that the woman had her domicile in Greece. Nonetheless, it should not be neglected that, in cases of surrogacy, the woman who assumes the role to gestate plays a central role in the whole procedure. Therefore, the fact that the two surrogates have their domicile in Russia reveals a significant link with the Russian legal order and thus renders reasonable the application of the Russian law on the regulation of the parentage of those children. Finally, it must be added that the children will never be in the position to establish a parentage link with the two surrogates, because of the _res judicata_ of the Russian decision.

Respectively, the case with the Belgian decision has not examined the relation of the two men with the Belgian legal order, which allows an adoption for same-sex couples. A strong link, as for instance in case where the men might have had a permanent residence to Belgium, would have led to the conclusion that contradiction with Greek public policy was not, in the case at hand, so manifest or repugnant as to justify refusal of recognition\(^7\).

**B. The insufficient consideration of crucial parameters of substantive law**

Except for the aforementioned observations, a criticism of the legal correctness of the decisions lies in that judges did not took sufficiently into consideration basic aspects of positive law. In that sense we have to note in relation to the first case that the Greek courts have not excluded the establishment of a parentage through adoption in other cases where the conditions of access to surrogacy have been violated within Greece\(^8\).

In relation to the second case, invoking the negative impact of the social circle on children who grow up in families with two members of same-sex is not only contestable _per se_, since it is not founded any scientific finding or research, but also

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\(^7\) A close link or the proximity of a relation containing foreign elements with a legal order constitutes in private international law a basic parameter not only for the determination of the law that should govern it but also for the evaluation of the contradiction of a foreign decision to the public policy. See e.g. _Vincent Heuzé, Pierre Mayer_, Droit international privé, 11\(^{th}\) ed., 2014,p. 269, no 378.

\(^8\) In that sense see multi-member Court of first instance of Hania 122/2008, data base Nomos. multi-member Court of first instance of Hania 20/09.10.2008 (not published-in Greek). See comments by _Panou Chrysa_ on the first decision in _Révue Héllenique de Droit International_, 2009, p. 297.
ineffective. It is obvious that if children of same-sex families become a target of a discriminatory treatment then this is not due to the recognition of the legal link with their parents, but due to the fact that they live within such a family. As to that point, it must be stressed that, even if our legal order does not recognise legally a parental bond in favour of two persons of same sex, they cannot intervene so as to remove the parental responsibility from a same-sex couple because of the protection of family life in our Constitution (Article 21 §1) as well Article 8 of ECHR.

Moreover, judges in both aforementioned cases have not taken sufficient consideration of the best interests of the children, as imposed by Article 3§1 of the international Convention of New York on the Rights of the Child. Such an evaluation would have led us to the conclusion that the rights of the children are undermined because of the failure to have their parentage recognised. In both cases children will be deprived of succession rights. On the second case they will most probably be excluded as well from Greek citizenship. Especially in the surrogacy case, the non-recognitions of the Russian certificates of personal status will render difficult the proof of even a distant connection with the predeceased genetically connected person. Besides, should the reasoning of the court be followed to its logical end with regard to the predeceased, the Greek legal order could not recognise a family link with him because the post mortem fertilization has also taken place in violation of the Greek legislation.

Finally, the Courts do not take explicitly into consideration the right to family life protected under the ECHR and the case law in cases Wagner, Negrepontis and Mennesson (Article 8 ECHR). The lack of recognition will create serious problems in the de facto created family life, since the adoptive parents will not be able to appear before national authorities for a number of serious issues of the life of children that require the consent of the persons who are normally vested with parental responsibility.

The refusal of the Courts to recognise those decisions reveals the difficulty to grasp the international dimension of the problems. It is beyond doubt that the Greek courts will face similar issues in the future and for this reason it seems to us

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9 ECHR, 28 June 2007, Wagner v. Luxembourg, appl. no. 76240/01.
10 ECHR, 5 December 2013, Negrepontis Yiannissis v. Greece, appl. no. 56759/08.
11 ECHR, 26 June 2014, Mennesson v. France, appl. no. 65192/11.
12 See in the present volume Anastasia Grammatikaki-Alexiou, “Cross-border medically assisted reproduction: Which are the challenges Conflict of Laws is facing?”, who presents a case involving a
opportune that the judges try to understand the logic of the solution of the foreign judge during the evaluation of the compatibility of foreign decisions with public policy, even if such solution might be unknown to the Greek legal order. Thus, the principle must be in favour of the recognition of parentage links under review which are created legally in a foreign legal order with which they present a strong connection. This recognition should not be interpreted as an approval of a practice or of an institution which exists in another legal order. The legislator will need to regulate the new factual circumstances and situations adopting or not new institutions. The judge on his side should not, due to the fears that unknown situations generate, hide behind the argument of the public policy contributing to the accumulation of problems. One would reasonably raise the question whether the judges of a country, which has been condemned by the Court of Strasbourg for not extending the civil partnership to same-sex couples and has not yet adapted its legislation to the requirements of the European Convention on Human Rights, can recognise legal relations that Greek law does not. A tentative answer could be that the judges should consider themselves free (and thus responsible) to judge without being influenced by the conservative opinions that characterise significant part of Greek society.

female same-sex couple composed by a Greek and an English woman who live permanently in Spain. The two women had recourse to medically assisted reproduction and a child was born. The Greek authorities had to examine the parentage issue incidentally when the two women asked for the issuance of a passport. The request was urgent because the child had to be submitted to a medical intervention. Finally, the Greek authorities have bypassed the parentage issue by mentioning only the Greek woman as mother of the child and issued the travel documents for the child.