Chapter 16
Same-Sex Families Across Borders

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Abstract The chapter examines the impact of the transnational movement of same-sex families on private international law mechanisms at the national level. The chapter approaches this topic by using a fundamental right standard evaluation. Every time a same-sex family moves from a country to another, in fact, it triggers the protection of fundamental rights in terms of the right to respect of private and family life, the freedom of marriage and the protection of the children's best interest. By investigating the extension of these rights, continuous references to case-law are made to support the existence of said standard.

16.1 Introduction

There is perhaps no more conflictual issue in contemporary society than same-sex marriage. States deeply differ in the level and intensity of recognition of same-sex unions, "vary[ing] from almost equivalent to marriage to giving relatively limited rights."[1] States also differ in the legal treatment and recognition of gay parenting.[2] In this respect, the possibilities for registered partners to undergo medically assisted

[1] *Schalk & Kopf v. Austria*, n. 30141/04, judgment of 24th June 2010, paras 27–30 (concluding that "[a]ccording to the information available to the Court, the vast majority of the [European] States concerned have introduced the relevant legislation in the last decade"). On same-sex couples under the ECHR see the chapters by Crisafulli and Pustorino in this volume.

[2] The expression 'gay parenting' is actually multifaceted. There are actually two macro-categories of gay parenting (1) the families composed by children and their parents who came out before or after breaking up with and divorcing from a different-sex spouse; (2) the families formed *ab initio* by same-sex parents and their children through joint adoption, medically assisted procreation or surrogate motherhood.

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insemination or to foster or adopt children vary greatly from one country to another.[3]

All such differences entail extremely heavy consequences on the transnational movement of families. When a family moves to a country that is "still stuck on the image of the two-heterosexual-parent-nuclear-family of the late nineteenth century,"[4] the latter's courts will most likely declare the same-sex unions established abroad be null and void in all instances. Situations of this kind, which are not merely theoretical but come out of current practice, incidentally impact the legal *status* of same-sex parents vis-à-vis their children. This chapter aims at analyzing the private international law aspects of same-sex parental issues, a topic that, surprisingly, has been mostly ignored.[5] This chapter tries to make a point against non-recognition that typically follows a same-sex family's contact with countries that do not recognize same-sex marriage and unions. In developing such a point, it uses international law norms, general legal principles, and common sense in favor of the permanence of same-sex families' legal *status* beyond national borders. It consists of three Sections; one is dedicated to the general aspects of the topic (Sect. 16.2); the subsequent one examines the conflict-of-law issues (Sect. 16.3); a short conclusion finally follows.

16.2 Same-Sex Families in a Transnational Context

There are three ways for a same-sex couple to access parenthood. First, certain States allow registered partners to retrieve medically assisted procreation ("MAP").[6] MAPs, which put at the center of the picture not the sexual intercourse, but rather the procreational project, aim at responding to the interest of the couple to become parents.[7] Second, in some States and under certain circumstances, married

[3] *Schalk & Kopf v. Austria*, para. 33.

[4] Schwenzer (2007), p. 147.

[5] Scholars have explored this topic only recently. *See* Grammaticaki-Alexiou (1999), p. 1113 (noting that "extremely little attention has been paid to the problems created by reproductive technologies in a world where the everyday private life of individuals, due to their mobility, may be linked with more than one jurisdiction"). For further remarks on the topic see Winkler (2011), pp. 115–120.

[6] The term refer to "a range of procedures that vary in complexity [that] have one thing in common: [they do] not include reproduction through sexual intercourse." Knaplund (2012), p. 903. On the legal issues arising out of MAP see Shapo (2006), p. 468.

[7] See Hurwitz (2000), p. 128 (noting that "surrogacy allows the fracturing of the intention to become a mother from the biological aspects of mothering: the gestational and sometimes genetic aspects"). See also Herring (2010), p. 368, pointing out that "[t]he mother is the woman who gives birth to the child even if she became pregnant using donated eggs. So even though the woman does not have a genetic link to the child, the fact she has carried the child through pregnancy and given birth entitles her to be the mother." Moreover, "[o]vulation, gestation, birth, and lactation matter, [. . .h]owever, just as their absence does not deprive someone of the status of 'mother,' their

or registered same-sex couples can adopt a child (joint adoption). In this case, adoption realizes the child's interest to have a family. Third, a limited number of States regulates surrogacy (or surrogate motherhood), a special MAP technique through which a couple entrusts a woman to carry and give birth to a child under the agreement that the child will be subsequently delivered to the commissioning couple, whose members will in turn become legally parents following an appropriate court order.[8] Surrogacy realizes both the couple's interest to become parents and the child's interest to have a family, precisely the commissioning one.

Cast in a multi-jurisdictional context, all those techniques raise several private international law issues. First, the main question regarding MAPs is the recognition of second-parenthood on the non-biological mother. In fact, while most national regulations that recognize same-sex marriage and unions provide the non-biological mother with the benefit of "spousal presumption," moving to another country might cause her legal relationship with the child to dissolve. Second, the main conflict-of-law problem of foreign joint same-sex adoption concerns its recognition, which would permit both same-sex parents to be legally acknowledged as the child's parents in a State that rejects same-sex adoptions. Finally, surrogacy stimulates a debate about whether to favor the planned parenthood in place of the *mater semper certa* principle and, as a result, to assign the child to the family that really wants her, rather than to the parturient and her husband.

The phenomenon generated by such a collision of jurisdictions was characteristically named by Andrew Koppelman, a prominent scholar that investigated this issue, a "blanket rule of non-recognition."[9] According to this rule, any obligation created by a same-sex marriage would evaporate the instant the affected party set foot within the border of such a State.[10] Put differently, "[c]rossing the border [. . .] can mean the difference between losing and retaining custody or being able to adopt as a gay or lesbian couple".[11] Koppelman also correctly observed that "events of this kind are not far-fetched [and] occur with some regularity."[12] One could also predict that cases like this would exponentially multiply in the future along with the current increase of transnational movement of families and, in parallel, the progressive recognition of same-sex couples in more and more countries.

The blanket rule deserves the strongest criticisms for at least four reasons. First, methodologically speaking there is a patent misunderstanding in considering the issue at stake. In fact, the question does not regard the relationship of the parents between them, but rather their respective relationship with the child, the former

presence does not *make* someone a mother." Rosenblum (2012), p. 71. In general, see Zgonjanin (2005).

[8] Under a surrogacy contract, "a woman agrees to bear and give birth to a child so that another person or couple may raise it as legal parent(s)." Gruenbaum (2012), p. 479.

[9] See Koppelman (2006), p. 70.

[10] *Ibidem*.

[11] Polikoff (2001) p. 153. In addition, *see* Anderson (2006), p. 1.

[12] Koppelman (2006), pp. 73–74.

operating merely as an incident or a preliminary question in respect of the latter.[13] In solving such preliminary question, one should wonder whether, even if the State does not recognize same-sex marriage or unions, there appear any reason why the child should be deprived of one parent just because the couple is formed by two people of the same gender. Therefore, no surprise if some courts tend to confuse these two planes, as the practical operation of the blanket rule of non-recognition clearly demonstrates.

Second, the rule is contrary to the preminent interest of the child. If the child has two parents in one State, misrecognition of same-sex parenthood in another State would amount to a "limping situation" which inherently harms the child in her daily relationship with the society, as she would have different parents in different countries.[14] In this respect,

> [c]hildren receive a wide array of emotional and financial protections based on the existence of a legally recognized parent–child relationship. [. . .] As a result, if a court refused to enforce an out-of-state order recognizing a person as a legal parent, the child may be completely cut off from one of the only two parents she has even known. It is not hard to imagine how harmful this would be to the individual child involved.[15]

Third, the rule entails a discrimination based on sexual orientation. Treating the child as legally bound to one parent only would constitute a discrimination as much as the same rights and obligations are normally recognized by local courts to straight parents. Moreover, as a general principle, children may not be discriminated against based on their parents' *status*, which implicitly includes sexual orientation.[16] In fact, States have a duty to combat and monitor any form of discrimination for children that have been born "in circumstances that deviate

[13] Such a decision would actually precede any principal judgment on the claimed rights. On the debate on the preliminary questions concerning same-sex unions, see Boschiero (2007), pp. 62–70. In fact, "[i]n the majority of cases, the dispute concerns one of these incidents, rather than the validity of marriage for all purposes. The validity of marriage is simply a preliminary or 'incidental' question, whose answer may—or may not—determine the answer to the principal question of whether the claimed incident exists." Actually, "[t]he decision of whether or which incidents to accord depends on the strength of the forum's public policy with regard to the particular incident, the nature and the context of the particular issue, and, of course, the equities of each case." Symeonides (2008), pp. 236–237.

[14] The European Court of Human Rights examined the consequence of limping situations in *Wagner and J.M.W.L. v. Luxembourg*, n. 76240/01, judgment of 28th June 2007, para. 110.

[15] Joslin (2009), p. 590. In addition, "[a] child could be permanently stripped from receiving motional support from a person who, not only was relied upon by the child as a parent, but who also had been adjudicated to be a parent by a court of another state."

[16] In fact, under the Convention on the Rights of the Child, which has been signed by 140 States, States Parties are obliged to "take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members." Convention on the Rights of the Child, Signed in New York on 20th November 1989 and entered into force on 2nd September 1990, 1577 U.N.T.S. 3 (1999), Art. 2(2).

from traditional values."[17] From this standpoint, non-recognition of parent *status* performed abroad entails a violation of both the parents and children's rights, and this would be contrary to the principle of non-discrimination.

Finally, the blanket rule represents an illegitimate intrusion in family life. In particular, lesbian couples with children have a right to respect of their family life, free from the State's illegitimate interference. Such an intrusion needs to be justified under strict reasons, which in this case do not exist at all.[18]

The following paragraph describes in depth the three issues above, trying to focus on the need to reject the blanket rule of non-recognition in respect of each of them. The main vehicle exploited by local courts to enforce such a rule is public policy. Generally, the non-recognition occurs because courts confront the domestic legal system with the foreign one, and makes the former prevail over the latter. We will propose a solution that looks beyond this self-limited approach and tries to take into consideration all aspects involved.

16.3 Crossing the Border: Conflict-of-Law Aspects of Same-Sex Families

16.3.1 Access to Medically Assisted Procreation

A quick comparative overview of MAP regulations throughout the world confirms that domestic legislators are influenced by culture, religion, history and politics, and that, as a result, their regulations vary deeply depending on the interaction of all such factors.[19] This is true, in particular, for same-sex couples.

States that recognize to same-sex couples the right to marry or establish a civil partnership also grant them, with various declinations, the right to access MAP in order to ensure their procreative autonomy.[20] Also, they tend to entitle the

[17] Convention on the Rights of the Child, General Comment No. 7 (2005), CRC/C/GC/7/Rev. 1 (20th September 2006), para. 12.

[18] Under the case-law of the European Court of Human Rights the relationship between same-sex parents and their child is protected under the right to respect of family life. See *Gas and Dubois v. France*, n. 25951/07, judgment of 12th March 2012), para. 37 (holding that "examination of the applicants' specific case leads to the conclusion that they have a 'family life' within the meaning of Article 8 of the Convention"). See once again the chapter by Crisafulli in this volume.

[19] See Knoppers and LeBris (1991), p. 333 (noting that this is an area "in which countries, due to cultural, social, economic and religious differences have little or no common ground").

[20] For a comparative analysis of national regulations that recognize to gay and lesbians access to MAP, see Wardle (2006), pp. 424–431 (comparing the various national laws on the matter). Moreover, "[o]nce it is recognized that both married and unmarried persons have a liberty right to reproduce, including the right to use different ART combinations when infertile or when necessary to ensure a healthy offspring, there is no compelling reason for denying that right to persons because of their sexual orientation." Robertson (2004), p. 330.

non-biological mother to a "spousal presumption" very similar to the marital one.[21] In Queensland (Australia), for example, *de facto* or registered same-sex partner of the woman who underwent a MAP procedure is presumed to be the "parent" of the child, and such presumption is irrefutable.[22] Vermont (US) follows a similar rule.[23]

Typical multi-jurisdictional cases of MAP involve a breaking-up lesbian couple or its sudden dissolution for one partner's death. Would the non-biological mother in the former case enjoy custody and visitation right to the child? What happens to the child in the latter? In both incidents, would the child be considered as having two parents according to the law of the place of marriage or birth, or will she have one parent only, and therefore remain without life support and assistance forever?[24]

The *Miller–Jenkins* litigation in the U.S. is illustrative in this respect. Lisa Miller and Janet Jenkins entered into a civil union under the laws of Vermont.[25] They soon

[21] The application of the presumption of fatherhood to same-sex couples requires a neutral approach as to the gender of the biological mother's partner. From this standpoint, "[w]ithout a gender-blind (or sexual-orientation-blind) presumption, the lesbian spouse who becomes pregnant by an anonymous donor is the only legal parent to that child, depriving the child of having two legal parents, even if the non-biological spouse is ready, willing, and able to care for and support that child." Lopez (2011), p. 913. Advocates against same-sex marriage stress the importance of marital presumption in different-sex couples, like the New York Supreme Court did in *Hernandez v. Robles*, 805 N.Y.S.2d 354 (8th December 2005), aff'd, 855 N.E. 2d 1 (App. N.Y., dec. 6th July 2006), according to which (at 360) marriage "provides a basis for the legal and factual assumption that a man is the father of his wife's child via the legal presumption of paternity plus the marital expectations of monogamy and fidelity."

[22] In this respect, sect. 19C(3) of the *Status of Children Act 1978*, amended in 2010, establishes that "[t]he woman's de facto partner is presumed, for all purposes, to be a parent of any child born as a result of the pregnancy." This Section applies also to children born before 2010. In this event, parenthood results from joint application to the Registry of Births, Deaths and Marriages.

[23] In this respect, for instance, Vermont's law on civil unions, enacted in 1999, established that "[t]he rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage." *An Act Relating to Civil Unions*, 15 Vt. Stat. Ann. § 1204(f) (1999). For an analysis of the consequences of legal recognition of same-sex marriage from the standpoint of gay parenting, see McGuire (2004).

[24] For some cases, see Joslin (2005), pp. 689–690. Clearly, in a State both parents are legally the child's parents for the sole fact of being parties to the procreational project, to the extent that this is recognized by the law. National regulations of same-sex marriage and unions tend to provide for a spousal presumption in lesbian couples. Therefore, lesbian couples who have married or entered into a civil partnership under the laws of such State would preserve the horizontal "alliance" between them and the vertical effect on the child, who will be linked to each of them and, at the same time, to both. The aspect of parenthood relating to the "alliance" is highlighted by Cadoret (2008), pp. 48–50 (discussing the opportunity of recognizing the non-biological parent from a perspective of the alliance in the family).

[25] Vermont enacted a law on civil unions in 1999 after a ruling of the State Supreme Court in *Baker v. Vermont*, 744 A.2d 864 (Vt., dec. on 20th December 1999). See *An Act Relating to Civil Unions*, 15 Vt. Stat. Ann. 1204 (1999). Ten years later, the State legislature passed a law on same-sex marriage, overriding the Governor's veto through qualified majority.

moved to Virginia where, through MAP, Lisa gave birth to a child, Isabella. Back to Vermont, in 2003 they broke up[26] and began litigating their separation before Vermont courts, which awarded custody to Lisa and visitation to Janet.[27] Subsequently, Lisa fled to Virginia with Isabella, seeking a declaration from local court that their union was null and void under Virginia law—which categorically refused to recognize same-sex unions—and that, as a result, Janet was not entitled to any visitation or custody right towards Isabella.[28] Vermont and Virginia courts confronted on the issue and, although Lisa and Isabella are currently untraceable, eventually Janet won her legal battle in both States.[29] Even transplanted out of U.S. context, the case epitomizes how transnational movement of same-sex families could result in a loss of parental bond and rights, especially for the non-biological parent.[30]

The *Miller–Jenkins* litigation is a good case of the perverse effects of the blanket rule of non-recognition. Relating to that, recognizing the result of a foreign MAP implies local courts to defer to the planned aspect of procreation over the gestational one in a situation that is actually centered on the former—an implication that sounds neither revolutionary nor actually shocking.

Moreover, nothing prevents domestic court to consider that, when a lesbian couple decided to access MAP in a foreign country, it did it in light of a procreational project which was consensually planned and deliberated by both women together. Therefore, the non-biological mother may reasonably expect that the partner would not withdraw the project at will, based on the misrecognition

[26] The divorce of same-sex couples has evident transnational implications, for seldom States that do not recognize same-sex marriage are asked to pronounce divorce. On this problem, *see* Oppenheimer (2011), p. 78 (noting that "same-sex divorce is just beginning to receive attention in the popular press").

[27] For a summary of the case, *see* Symeonides (2007), pp. 302–303.

[28] See Dye (2007).

[29] See in this respect *Miller-Jenkins v. Miller-Jenkins*, 180 Vt. 441, 465 (Vt. Sup. Ct., dec. 4th August 2006) (holding that Janet is Isabella's parent because, "first and foremost, [. . .] Janet and Lisa were in a valid legal union at the time of the child's birth, [. . .i]t was the expectation and intent of both Lisa anche Janet that Janet would be [Isabella]'s parent, Janet participated in the decision that Lisa would be artificially inseminated to bear a child and participated actively in the prenatal care and birth. Both Lisa and Jane treated Janet as [Isabella]'s parent during the time they resided together, and Lisa identified Janet as a parent of [Isabella]") with *Miller Jenkins v. Miller-Jenkins*, 49 Va. App. 88 (App. Va., dec. 28th November 2006) (rejecting Lisa's claim that Virginia law prohibited recognition of Janet as a parent in light of Virginia's refusal of recognizing same-sex couples).

[30] This is a quite different phenomenon than forum shopping for straight couples, where the race to foreign courts usually aims at seeking more favorable conditions in custody and visitation. Here, instead, the defendant is allegedly denied her *status* as a parent, based upon the union's gender qualification. Actually, unlike previous cases, where parents "sought the court of a second state to issue a more favorable allocation of custody and visitation, [i]n this new wave of same-sex parent cases, the litigants seek to persuade a court to declare that a person previously held to be a parent by the court of another state is, in face, not a parent at all". See Joslin (2009), p. 565.

of the union by the *forum*'s courts.[31] In some case-law, a shared home and shared expenses and contributions during pregnancy and thereafter were considered relevant elements in support of an estoppel-like argument against the biological parent's claim of exclusivity in the exercise of parental rights.[32] Good faith in the couple's life and leading decisions should matter in cases like these, especially when it is the biological mother who tries to challenge the partner's *status* in order to obtain a privileged position in the child's custody or visitation.

From this standpoint, it is also noteworthy that national laws providing access to MAP to straight couples only, usually establish that the husband or partner who consented to the MAP cannot subsequently challenge the paternity of the child. Indeed, this seems a common principle among national regulations. Once the law of the *forum* contemplates such an absolute presumption of fatherhood, deciding that the non-biological partner in a same-sex union is not entitled to the same consideration represents not only an unjustified discrimination based on sexual orientation, but also a completely illogical step. As a result, there seem to be no obstacle in applying the same principle to lesbian couples with children as well. Such an estoppel-like argument could lead domestic judges towards a set of rulings which is consistent both with the child's interest to have two parents and with the parents' interest to preserve their union when they confront odd situations like breaking-up or death. The blanket rule of non-recognition clearly does not fit this picture.

16.3.2 Joint Adoption by Same-Sex Couples

In certain countries same-sex couples can adopt.[33] When they move to other States, however, the blanket rule of non-recognition normally cuts the family bond and denies the parents their legal *status* as adopters vis-à-vis the child.

It is the case of Italy. In 2006, in fact, an Italian court denied the recognition of a child adoption by a gay couple performed in California.[34] As a justification, the court admitted that to establish a parental relationship between the minor and two

[31] By this argument, one can use "estoppel to argue that the child's biological mother is estopped from denying the former partner's parental status." Shapo (2006), p. 470. See also O'Bryan (2010), p. 1133 (noting that certain domestic courts "found that the biological parent had ceded over a measure of parental authority and autonomy to the non biological parent and that the non biological parent had a strong parent–child bond with the children"). See also Saladino (2011), p. 4 (arguing in favor of voluntary acknowledgment of paternity to lesbian co-parents).

[32] Larson (2010), p. 880.

[33] While a human right to adopt does not exist in general, same-sex couples may present themselves with the competent authorities to receive entitlement in this respect. In the European context, same-sex couples can adopt in Belgium, United Kingdom, Spain, Denmark, Iceland and Sweden. See Kipiani (2012), para. 36.

[34] Tribunale dei Minori di Brescia, 26th September 2006, No. 2/2006, 74.

same-sex parents collides with "[the nation's] ethical and social fundamental principles".[35]

The same approach was adopted—actually not without hesitation—by the French Supreme Court, that ruled on the matter in 2012. In a single decision incorporating two lawsuits, one pertaining to an English and a French gay men residing in the UK and the other regarding two French–Canadian men residing in Canada, the Court stated that, while the fact of reserving adoption to married couples does not trigger a public policy exception, on the other hand it is contrary to public policy that the transcription of the foreign judgment on the French civil *status* registries would imply that the child was registered as born by two parents of the same sex.[36] In other words, the requirement of gender difference must be considered a "fundamental principle of French law" and, therefore, foreign adoptions by same-sex couples are contrary to French public policy.[37] This recent decision contradicts a previous judgment of 2010, where the same chamber of the same Court, annulling a ruling of the Court of Appeals of Paris, held that the *adoption simple* by the female partner of the biological mother was not contrary to French public policy.[38] The contradiction lies in the different treatment of very similar situations, where the only material variance between the two cases is represented by the effects of the adoption, which does not cut the links with the previous family in case of *adoption simple*, as opposed to *adoption plénière* (full adoption), where such links are definitely cut off.[39]

The practical consequences of the refusal of transcription are hardly negligible, especially for the child. First, she would have two different personal *status* in two countries, having two parents in Canada or the UK and being an orphan in France. Second, if litigation arises domestically, French courts will be unable to grant him/her maintenance or alimony rights vis-à-vis the members of the couple.

[35] *Ibidem*.

[36] Cass. Civ., Ch. Ire, 7th June 2012, No. 755 and No. 756 (11-30,261 and 11-30,262), *reversing* CA Paris, 24th February 2011. As the Court simply put it, Art. 346 of the French *Code Civil*, establishing that "[n]o person can be adopted by two people if they are not married," "does not consecrate an essential principle of private law." *Ibidem*.

[37] In particular, "[i]t is because [French] filiation law requires that the child has a maternal and a paternal link that the transcription of the [foreign] judgment of *adoption plénière*, which corresponds to a birth certificate, is prohibited." Azincourt (2012), p. 1314.

[38] Cass. Civ., Ch. Ire, 8th July 2010, No. 791 (08-21,740), according to which "the denial of *exequatur* of a foreign decision, based on contrariety to French international public policy, requires it include provisions that conflict with essential principles of French law; this is not the case concerning the decision that the parental authority be shared between the child's mother and the adopting woman."

[39] Likewise Neirinck (2012), p. 1, noting that "the reasoning, which is identical in both rulings, is material and supports the different treatment applied between the simple adoption judgment and the full adoption one."

Finally, the same child would be an alien in France, thus be treated as such in all respects. One could barely see how this interference in the family life could be legitimate in light of any goal that domestic courts are pursuing in resorting to fundamental principles of French law. Moreover,

> it is not certain that the application of fundamental principles of French law in the context of public policy exception would resist the impact of [human rights law].[40]

Fortunately, these negative implications have been considered by the French *Assemblée Nationale*, which legislated on same-sex marriage in May 2013.[41] Prospectively, and in a sense suitably, the enactment of same-sex marriage in France would likely impact the concept of French international public policy, and then solve the issue in favor of the child. This last consideration seems to require, on a more general standing, that recognition of same-sex couples' right to marry would have positive effects on the consolidation of same-sex family, and damage none.

16.3.3 Surrogate Motherhood

Except for a few countries, "[t]he sole procedure that has elicited almost uniform disapproval is that of surrogate motherhood."[42] In Europe, only the UK and Ukraine permit surrogacy agreements and enforce them. In particular, in the former a distinctive regulation establishes strict conditions for the validity of surrogacy agreements and mandates local courts to scrutinize whether such conditions have been met. If it is so, the court would issue a parental order and establish filiation on the commissioning couple, through a regime that "attempts to perpetuate an ideal family form".[43] After the introduction of the Civil Partnership Act in 2005, surrogacy was made available to same-sex couples.[44] As to Ukraine, a one-shot norm of its family law assigns parenthood to the commissioning couple.[45] Outside Europe,

[40] Moissinac Massenat (2012), p. 5.

[41] Loi du 17 May 2013 ouvrant le mariage aux couples de personnes de meme sexe, n. 2013-404, JO 18th May 2013. On the development of this bill, especially concerning the aspects relating to filiation (MAP and adoption), see Hauser (2012).

[42] Venturatos Lorio (1999), p. 263.

[43] Probert (2004), p. 277.

[44] Under Section 54(2)(b) of the *Human Fertilisation and Embryology Act 2008*, 2008 c. 22, amending the previous regulation of 1985, the applicants for a parental order regarding a child born through surrogacy "must be [. . .] civil partners of each other, or [] two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other." For an critical overview of the law, see Anderson (2010), at 37.

[45] See Art. 123(2) of the Family Code of Ukraine, which states that "[i]n case of implantation of embryo, which was conceived by spouses, in a body of another woman, the parents of the child are considered the spouses."

apart from China, India and Thailand, one common venue for surrogacy is the US,[46] where the picture is actually multicolored.[47]

In the last two decades, the demand of surrogacy by couples residing in countries where it is illegal created a transnational surrogacy market.[48] Surrogacy-friendly countries became the destination of the so-called "procreative tourism"—an expression which is probably misleading, as here the "tourism" is neither voluntary nor pleasant. Many same-sex couples, both lesbian and gay, seek fertilization and surrogacy in said countries, where commercial agencies exist to assist them in the process. The primary reason for such a procreative traveling is that their own country does not grant them access to surrogacy, prohibits it or limits it to such conditions which render it either economically expensive or psychologically burdensome. Once back in their own countries after completion, said couples claim recognition of the child's double-parenthood.

A typical illustration of the problems arising out of foreign surrogacy comes from the *In re X* case, decided by the High Court of England and Wales in 2008.[49] A British different-sex couple attempted to procreate through surrogacy in Ukraine. The twin children that resulted were born in Ukraine but they were not Ukrainian, as under local family law their gestational mother and her husband were not legally the parents. On the other hand, UK law provided for transfer of parenthood in favor of the commissioning couple only after the issuing of appropriate parental order by the court, so in light of UK law, and until then, the twins' parents were the Ukrainian couple, while the UK couple could not claim any right over them. In addition, UK law limits the validity and enforceability of surrogacy agreements to the requirement that no payment was made in favor of the surrogate mother. Apparently, the commissioning parents had instead paid a price to the Ukrainian mother and her husband. While the parental order should not be granted, the interaction of the two countries' conflict-of-law rules generated a perverse consequence, that the babies were "stateless and parentless."[50] The English judge, quite unsatisfied by the method and yet obliged to protect the interests of the twins, granted the parental order, noting nevertheless that

[46] In fact, "India seems to be actively vying to be the international surrogacy capital. In 2002, India became the first country to explicitly allow commercial surrogact. The Indian government provides tax breaks to hospitals treating international patients. India has state of the art medical facilities and technical capabilities, combined with lower costs than fertility tourists may experience in their home country." See Mohapatra (2012), p. 193.

[47] Davis (2012), p. 123.

[48] See Brugger (2011), p. 668 (noting that "[t]he decision to go abroad to these reproductive services often is triggered by substantive differences in national laws," while "[t]he trend towards surrogacy tourism in a few favorable—and inexpensive—parts of the worlds, has raised concerns about the need to develop and implement measures on a global level").

[49] *In re X and Y* (*Children*) (*Parental Order*: *Foreign Surrogacy*), [2008] EWHC 3030 (Fam), [2009] Fam 71 (9th December 2008).

[50] *Ibidem*, p. 75 (noting that "[t]he effect of all this was of course that these children were effectively legal orphans and, more seriously, stateless").

> I feel bound to observe that I find this process of authorization most uncomfortable. What the court is required to do is to balance two competing and potentially irreconcilably conflicting concepts. Parliament is clearly entitled to legislate against commercial surrogacy and is clearly entitled to expect that the courts should implement that policy consideration in its decisions. Yet it is also recognized that as the full rigour of that policy consideration will bear on one wholly unequipped to comprehend it let alone deal with its consequences (i.e., the child concerned) that rigour must be mitigated by the application of a consideration of that child's welfare.[51]

In re X reveals how conflict of laws may generate limping situations that impact the child in its daily life and fundamental rights. Here, even in absence of an intervention by national legislators, a problem remains if different private international law regulations are not coordinated, or if international law remains silent on the topic. Furthermore, one should move beyond the transnational or the commercial aspects of the case, and focus on the family formation element. Clearly, "[f]amily and commerce mix in many different ways"[52] but, not surprising yet, insufficient attention has been given to the former. It might happen, abstractly speaking, that a reflection on the family formation issues of surrogacy, combined with the need to establish a certain filiation bond in respect of the child, would lead to a solution that, as a general principle, uphold the validity of the surrogacy agreement and declare the commissioning couple to be the child's legal parents.

A hot topic in international surrogacy is doubtlessly public policy. Under a public policy exception, countries that prohibit surrogacy as a matter of domestic law would be tempted to deny effect to a foreign parental order, because it would amount to a recognition of the surrogacy performed abroad. The question, however, is very narrow, as

> the point is obviously not the force of the norm as a matter of domestic law, but rather whether the prohibition of surrogacy agreements reflects so fundamental a principle within a legal system that it is encompassed by the narrow circle of international ordre public. This is a difficult issue.[53]

Public order was the subject of a decision rendered by an Italian court in 2009, where an English-Italian mother, who filed for divorce, sought recognition in Italy of two parental orders released by English courts in her favor in 1998 and 2000.[54] Initially, the government reasoned that the orders could not be recognized in light of public policy. However, the court rejected such a defence and responded that the recognition of the parental orders was mandated by the need

> to protect the vested rights of filiation, as [surrogacy] must be considered as a mere incident, deprived of material consequences [. . .] as now what is really essential is to continue to grant [the children] the parents that they has since their birth.[55]

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[51] *Ibidem*, p. 81.

[52] Ikemoto (2009), p. 278.

[53] Gruenbaum (2012), p. 495.

[54] Corte d'Appello di Bari, 13th February 2009, *I.M. v. G.A.J.R.*, Famiglia e minori, No. 5/2009, 50. For some comments, *see* Campiglio (2009) and Baruffi (2009).

[55] *Ibidem*, p. 54.

The case concerned a family with a long and well-established bond between the parents and the children. However, the ruling seems to express a more general principle, signally that the public policies surrounding the prohibition of surrogacy agreements in the *forum*, whatever reason supports it, should step back and let the principle of the best interest of the child to operate in the spot.[56] Therefore, the *In re X* court was right in stating that

> it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order.[57]

It is therefore not surprising at all that this case was lately certified as a precedent, indeed as a leading case for future decisions in parental proceedings concerning a foreign surrogacy. As a consequence of *In re X*, parenthood was granted even if the domestic requirement had not been strictly observed by the applicants.[58] As everyone can see, the blanket rule of non-recognition is completely inadequate to solve litigation of this kind in a way that sounds just and fair for all the subjects involved.

16.4 Conclusion

In a modest attempt this chapter tried to examine how the global movement of same-sex families impact individual rights and responsibilities. Interestingly, private international law can play an important role in regulating and settling the litigation coming out from it. As mentioned at the beginning of this chapter, it also makes the point that same-sex families deserve recognition even outside the

[56] Accordingly, "[t]he Italian court concluded that the prohibition of surrogacy under Italian law was not per se an indicator that the recognition would be against Italian (international) public policy." Gruenbaum (2012), p. 497.

[57] *Supra*, note 49, at 81. It followed that "[i]f public policy is truly to be upheld, it would need to be enforced at a much earlier stage than the final hearing of a Section 30 application. In relation to adoption this has been substantially addressed by rules surrounding the bringing of the child into the country [. . .]. The point of admission to this country is in some ways the final opportunity in reality to prevent the effective implementation of a commercial surrogacy agreement. It is, of course, not for the court to suggest how (or even whether) action should be taken, I merely feel constrained to point out the problem." *Ibidem*. Actually, "[a]s it is necessary for the child to be living with the applicants, it is rarely the case that the removal of the child from its settled home will promote its welfare." Anderson (2010), p. 40.

[58] For an application of *In re X*, reference could be made to *In re IJ* (*a child*) (*Overseas Surrogacy*: *Parental Order*), [2011] EWHC 921 (Fam), [2011] All ER (D) 241 (Apr) (19th April 2011), maintaining that, in light of *In re X*, "it was crystal clear that the best interests of IJ required the making of the Parental Order sought by the applicants;" *In re L* (*a child*) (*Surrogacy*: *Parental Order*), [2010] EWHC 3146 (Fam) (8th December 2010), noting that "The effect of that must be to weight the balance between public policy considerations and welfare (as considered in *Re X and Y*) decisively in favour of welfare."

country where their procreational project was founded, i.e. in countries that do not actually recognize same-sex marriage and unions.

What emerges from this analysis is what a few decades ago Horatia Muir Watt called "the seditious function of comparative law".[59] In fact,

> comparison is engaged against dogmatism, against the stereotypes, against ethnocentrism, i.e., against the diffuse belief (regardless of the nation concerned) that national categories and concepts are the only one conceivable.[60]

Comparison with other countries' legal system and social structures stresses not only the common aspects, but also the differences of approaches to same-sex families, and ultimately imposes scholars to evaluate the justifications which lay behind certain regulations. After due reflection, in fact, it seems difficult to find a policy supporting the disruption of same-sex families for the only reason of the passing of a physical border. This is perhaps the most simple principle which could lead domestic judge to solve complex cases involving same-sex families in a way that resembles justice most.

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[59] Muir Watt (2000).

[60] *Ibidem*, p. 506.

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