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Research Article

LEGAL CONTROVERSIES IN CROSS-BORDER SURROGACY: A CENTRAL EUROPEAN PERSPECTIVE ON THE RECOGNITION OF LEGAL PARENTHOOD THROUGH SURROGACY ESTABLISHED ABROAD

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ABSTRACT

Background: *This paper explores the legal field of surrogacy from a Central European perspective, focusing on how countries such as Austria, Germany, and Switzerland address the recognition of parental status established abroad. While the prevailing attitude among Central European states is to prohibit surrogacy within their national laws, there is an increasing tendency to bypass these bans by seeking surrogacy services abroad. This phenomenon, termed reproductive tourism, raises complex legal questions about the recognition of foreign parental status determinations.*

Methods: *The methods used include a comprehensive review of international and autonomous national legal rules as well as a comparative analysis of case law from Central European courts regarding cross-border surrogacy and parenthood recognition. The study examines legal controversies employing Austrian family law as an example to assess highly topical issues arising from surrogacy. It incorporates data from various legal sources, including the Austrian Constitutional Court, the German Federal Court of Justice, the Swiss Federal Supreme Court, and the European Court of Human Rights.*

Results and conclusions: *The findings reveal significant differences between Austria, Germany, and Switzerland regarding the recognition of parental status established by way of surrogacy abroad. While supreme court decisions in these countries tend to prioritise the best interests of the child – often recognising foreign surrogacy arrangements to avoid leaving children without legal parents – their judicial approaches differ considerably.*

The Austrian Constitutional Court adopts a more inclusive approach by accepting foreign determinations from any authority, such as birth certificates, under the concept of automatic recognition. In contrast, the German and Swiss supreme courts acknowledge only formal court

decisions. For cross-border surrogacy cases that do not fulfil this requirement, these countries apply the national law of the child's habitual residence or, as a fallback, the law of the intended parents' country of origin. Since both German and Swiss law categorically forbid surrogacy, only the genetic father is typically recognised, while the intended mother is directed to adoption. This aligns with the opinion of the ECtHR, which still considers the method of establishing parenthood to be within the sovereignty of a state. This article advocates for a balanced approach that respects both the legal principles of national states and the fundamental rights of children born through an arrangement with a surrogate mother in another country.

1 INTRODUCTION

When a woman agrees to give birth under the explicit understanding that she will not be the child's legal mother, we enter the complex field of surrogacy.[1] To gain a more in-depth understanding of surrogacy, it is essential to consider it from various perspectives.

From a medical standpoint, surrogacy can be classified into two types: gestational surrogacy and traditional surrogacy. Gestational surrogacy involves implanting a fertilised ovum, typically derived from the intended mother, potentially involving gametes from third parties, into the surrogate. In this case, the surrogate carries the embryo but has no genetic link to the child, assuming the embryo is created with the intended parents or donors' genetic material.[2] In contrast, traditional surrogacy uses the surrogate's egg, fertilised by sperm from the intended father or a third party, thus maintaining a genetic connection between the surrogate and the child.[3]

From a legal point of view, surrogacy must be categorised based on its motivation: altruistic surrogacy involves no compensation to the surrogate beyond the necessary pregnancy-related expenses, such as medical treatments or maternity clothes, which the intended parents pay. This type of surrogacy is primarily driven by the surrogate's desire to help childless couples. Controversially, commercial surrogacy involves compensating the

1 Austrian literature on surrogacy (by publication date), i.a.: Lukas Klever, 'Die grenzüberschreitende Leihmutterschaft im österreichischen Recht – Kollisionsrecht und verfahrensrechtliche Anerkennung' in Edwin Gitschthaler, Joachim Pierer und Brigitta Zöchling-Jud (hrsg), *Festschrift Constanze Fischer-Czermak* (Manz 2024) 317; Thomas Schoditsch, 'Leihmutterschaft in Österreich? Über die Möglichkeit dessen, was nicht sein darf' [2024] EF-Z 3; Elmar Buchstätter, *Kindeswohl und Elternschaft: Schwerpunkt Eltern-Kind-Zuordnung in alternativen und grenzüberschreitenden Familien* (Jan Sramek Verlag 2023) 72-89; Bea Verschraegen, 'Leihmutterschaft - Zum Recht auf Elternschaft' (2019) 4 iFamZ 266; Fraunlob, 'Mater semper certa est? Eine Untersuchung des österreichischen Leihmutterschaftsrechts de lege lata et ferenda' (diss, Universität Salzburg 2018); Philip Czech, *Fortpflanzungsfreiheit: Das Recht auf selbstbestimmte Reproduktion in der Europäischen Menschenrechtskonvention* (Jan Sramek Verlag 2015).

2 Michelle Cottier, 'Die instrumentalisierte Frau: Rechtliche Konstruktionen der Leihmutterschaft' (2016) 2 Juridikum 190.

3 Alexandra Goeldel, *Leihmutterschaft – eine rechtsvergleichende Studie* (Peter Lang Verlag 1994) 1 et seq.

surrogate for her time and efforts, including any suffering or pain endured during pregnancy. Here, the surrogate acts as a reproductive service provider, with her primary focus often being on her monetary gain rather than the alleviation of the intended parents' childlessness. The financial costs of the medical process are typically covered by the intended parents in both scenarios.[4]

Surrogacy is a widely debated and controversial procedure from an international perspective. Most EU member states,[5] along with Switzerland,[6] hold conservative positions and prohibit all forms of surrogacy.[7] However, some countries explicitly permit or at least tolerate surrogacy arrangements, with motivations ranging from altruistic to commercial. Inter alia, surrogacy is available in parts of the US, Canada, Brazil, Argentina, Hong Kong, select Australian states, South Africa, Israel, Georgia, Ukraine, Russia, India, Greece, Romania, and the United Kingdom.[8]

National prohibitions on surrogacy have contributed to a rising phenomenon known as reproductive tourism.[9] Parents who are intending to have a child, but are excluded from reproductive medicine under their national law, often circumvent these restrictions by pursuing surrogacy abroad. When they return home with a child born through this arrangement, the situation is referred to as "cross-border surrogacy". This raises a second question: how should children stemming from a surrogacy arrangement be treated in terms of their status in a country that prohibits surrogacy if the parenthood of the intended parents is already legally recognised in another country?[10]

4 Buchstätter (n 1) 76.

5 Amalia Rigon and Céline Chateau, 'Regulation of International Surrogacy Arrangements - State of Play' (*European Parliament*, 30 August 2016) <https://www.europarl.europa.eu/thinktank/en/document/IPOL_BRI(2016)571368> accessed 26 April 2024. For Germany, e.g., see the prohibition of surrogacy in: German Act for Protection of Embryos of 13 December 1990 'Gesetz zum Schutz von Embryonen (Embryonenschutzgesetz - ESchG)' [1990] BGBI I 69/2746, s 1(1); German Adoption Mediation Act of 2 July 1976 'Gesetz über die Vermittlung und Begleitung der Adoption und über das Verbot der Vermittlung von Ersatzmüttern (Adoptionsvermittlungsgesetz - AdVermiG)' [2021] BGBI I 36/2019, s 14(b).

6 Switzerland has anchored the prohibition of surrogacy even at constitutional level, see: Federal Constitution of the Swiss Confederation of 18 April 1999 'Bundesverfassung der Schweizerischen Eidgenossenschaft' art 119(2)(d) <https://www.fedlex.admin.ch/eli/cc/1999/404/de> accessed 26 April 2024; Swiss Federal Law on Medically Assisted Reproduction of 18 December 1998 'Bundesgesetz über die medizinisch unterstützte Fortpflanzung (Fortpflanzungsmedizingesetz, FMedG)' art 31 <https://www.fedlex.admin.ch/eli/cc/2000/554/de> accessed 26 April 2024.

7 Stefan Arnold, 'Fortpflanzungstourismus und Leihmutterschaft im Spiegel des deutschen und österreichischen internationalen Privat- und Verfahrensrechts' in Stefan Arnold, Erwin Bernat und Christian Kopetzki (hrsg), *Das Recht der Fortpflanzungsmedizin 2015: Analyse und Kritik* (Manz 2016) 130.

8 A comprehensive international overview of key surrogacy laws can be found in Verschraegen (n 1) 267; for insights into recent developments in Portuguese law, refer to Ana Conde and others, 'Surrogacy in Portugal: Drawing Insights from International Practices' (2024) 35 Revista Jurídica Portucalense 175, doi:10.34625/issn.2183-2705(35)2024.ic-09.

9 See below V.

10 In detail: Buchstätter (n 1) 124-58.

It is important to note that EU member states, particularly those with conservative values, are increasingly adopting restrictive positions on cross-border surrogacy. For example, the Spanish Supreme Court recently noted a contradiction in Spanish surrogacy laws: although surrogacy is banned, it is freely advertised, and surrogacy-born children are routinely accepted into families. The court clarified that such children would only be legally recognised by way of adoption.[11] In right-wing conservative Italy, there are even proposals to criminalise the use of surrogate motherhood abroad.[12]

2 SURROGACY ARRANGEMENTS UNDER AUSTRIAN LAW

After extensive political and ethical debates, the 1992 Austrian Reproductive Medicine Act[13] was enacted. At that time, the regulations were particularly severe, prohibiting even procedures such as egg donation and in vitro fertilisation using donor sperm. The utilisation of the few approved methods was tightly controlled by several restrictive conditions, including the explicit exclusion of homosexual couples.[14]

In a landmark decision, the Austrian Constitutional Court[15] lifted the prohibition on reproductive medicine for female same-sex partners in 2013, triggering a comprehensive revision of the legislation. The 2015 amendment of the Reproductive Medicine Act[16] significantly liberalised and broadened access to reproductive medicine, permitting the same-sex partner of the biological mother to establish legal parenthood by descent.[17] However, access remained restricted for male homosexual couples and women unable to give birth due to physical dysfunction, as these cases still necessitate the biological

11 Case 907/2021 Judgment 277/2022 (Spanish Supreme Court, First Chamber (Civil), 31 March 2022) <https://vlex.es/vid/899711887> accessed 26 April 2024.

12 Christian Network Europe, 'Italian Surrogacy Debate Turns Heated with International Ban Coming Closer' (*CNE.news*, 22 March 2023) <https://cne.news/article/2770-italian-surrogacy-debate-turns-heated-with-international-ban-coming-closer> accessed 26 April 2024.

13 Austrian Reproductive Medicine Act of 1 July 1992 'Fortpflanzungsmedizingesetz (FMedG)' [1992] BGBI 105/275; Federal law consolidated: Complete legal provision for the Reproductive Medicine Act (version 14 August 2018) <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10003046> accessed 26 April 2024.

14 Martina Erlebach, '§ 1 FMedG' in Magdalena Flatscher-Thöni und Caroline Voithofer (hrsg), *FMedG und IVF-Fonds-Gesetz: Fortpflanzungsmedizingesetz und In-vitro-Fertilisation-Fonds-Gesetz* (Verlag Österreich 2019) mn 2; Monika Hinteregger, *Familienrecht* (9 aufl, Verlag Österreich 2019) 191.

15 Decision G 16/2013, G 44/2013 (Austrian Constitutional Court, 10 December 2013) <https://www.vfgh.gv.at/downloads/VfGH_G_16-2013_G_44-2013_Fortpflanzungsmedizing.pdf> accessed 26 April 2024.

16 Austrian Reproductive Medicine Act - Amendment 2015 'Fortpflanzungsmedizinrechts-Änderungsgesetz 2015 – FMedRÄG 2015' [2015] BGBI I 35/1.

17 Marianne Roth, *Außerstreitverfahrensrecht* (7 aufl, Jan Sramek Verlag 2023) 60; Constanze Fischer-Czermak, '§ 144 ABGB' in Andreas Kletečka und Martin Schauer (hrsg), *ABGB-ON Kommentar zum Allgemeinen bürgerlichen Gesetzbuch* (vers 1.05, Manz 2018) mn 4/1.

involvement of a surrogate mother.[18] Despite intense political debate, the surrogacy ban was maintained in the 2015 amendment[19] due to the societal need to protect the physical integrity of potential surrogate mothers and to prevent the exploitation of women, particularly those in financial need or under psychological stress.[20] The Bioethics Commission endorsed these restrictions, highlighting the risk of women being coerced into agreements contrary to their best interests.[21]

In addition to mitigating the risk of exploitation faced by potential surrogate mothers, the Austrian ban on surrogacy is highly motivated by considerations concerning the rights of the child involved. First and foremost, the child's right to ascertain his/her biological lineage is fundamental. This right is protected by Article 8 of the ECHR, as well as Article 7 of the UN CRC, and is recognised under Section 16 of the General Civil Code at the national level.[22] Moreover, every child has the right to consistent personal contact with both parents. This is another fundamental aspect of the parent-child relationship, protected by Article 8 of the ECHR and Article 2(1) of the Austrian Federal Constitutional Law on Children's Rights.[23] Also, the right to contact constitutes a significant element of the child's best interests as defined under Section 138 no. 9 of the General Civil Code. It is considered essential for the child's health and psychological development. However, this right cannot be fully realised in surrogacy arrangements: the surrogate mother usually does not have an

18 Michael Mayrhofer, '§ 2 FMedG' in Matthias Neumayr, Reinhard Resch und Felix Wallner (hrsg), *Gmundner Kommentar zum Gesundheitsrecht* (Manz 2016) mn 6; Christiane Wendehorst, 'Neuerungen im österreichischen Fortpflanzungsmedizinrecht durch das FMedRÄG 2015' (2015) 1 iFamZ 2015 4; Explanatory notes to the Governmental Proposals, 445 of the Addenda to the Stenographic Protocol of the National Council, XXV GP.

19 I.a., see: Arnold (n 7) 145 et seq; Joachim Pierer, 'Abstammung' in Astrid Deixler-Hübner (hrsg), *Handbuch Familienrecht* (2 aufl, Linde 2020) 237; Caroline Voithofer und Magdalena Flatscher-Thöni, 'VfGH vereinfacht Zugang zur Fortpflanzungsmedizin: Was passiert, wenn nichts passiert?' (2014) 2 iFamZ 55; Maria Eder-Rieder, 'Medizinisch unterstützte Fortpflanzung nach dem FMedRÄG 2015 Neuerungen und Erweiterungen' (2016) 58 EF-Z 130.

20 Explanatory notes to the Governmental Proposals, 216 of the Addenda to the Stenographic Protocol of the National Council, XXVIII GP, 11.

21 Austrian Bioethics Commission, 'Statement on the draft of a federal law that amends the Reproductive Medicine Act, the General Civil Code and the Genetic Engineering Act (Reproductive Medicine Law Amendment Act 2015 - FMedRÄG 2015)' 3 <https://www.bundeskanzleramt.gv.at/dam/jcr:ecbae513-5ea7-4c76-867e-6316bff33baf/FMedRAEG_2015.pdf> accessed 26 April 2024.

22 Council of Europe, *European Convention on Human Rights* (ECHR 2013) <https://www.echr.coe.int/documents/d/echr/convention_eng> accessed 26 April 2024; Convention on the Rights of the Child (adopted 20 November 1989 UNGA Res 44/25) <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child> accessed 26 April 2024; Austrian General Civil Code of 1 June 1811 'Allgemeines bürgerliches Gesetzbuch für die gesammten deutschen Erbländer der Oesterreichischen Monarchie' [1811] JGS 946; Federal law consolidated: Complete legal provisions for the General Civil Code (version 17 April 2024) <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622> accessed 26 April 2024.

23 Austrian Federal Constitutional Law on Children's Rights of 20 January 2011 'Bundesverfassungsgesetz über die Rechte von Kindern' [2011] BGBl I 4/1.

interest in maintaining a personal relationship with the child, and the intended parents may similarly be disinclined to facilitate such contact. Ethical and moral considerations, particularly regarding the developing bond between the mother and child during pregnancy, further underscore the rationale for upholding the ban.[24]

The Austrian prohibition of surrogacy originates from an overall view of several laws addressing the involved complex bioethical issues:[25]

- Firstly, Austrian law of descent traditionally adheres to the Roman legal principle *"mater semper certa est"* ("the mother is always certain").[26] This principle asserts that maternity is legally established by the act of birth alone, making a genetic link between the mother and child unnecessary for legal recognition.[27] The regulation provides an early, clear, and securely determinable legal assignment of the child, thus supporting both the welfare of the vulnerable newborn and the protection of the psychosocial relationship that develops during pregnancy. By anchoring legal motherhood in the act of birth, the law ensures that legal motherhood cannot be contested, even if the child was conceived through medically assisted fertilisation using a donated egg.[28] Unlike fatherhood, the status of the mother is generally not open to negotiation, and the biological mother cannot relinquish her legal parenthood in favour of another person.[29]
- Secondly, surrogacy is prohibited under Section 3(1) of the Reproductive Medicine Act, which stipulates that primarily the oocytes of the intended parents must be used. Gametes from a third party may only be used ultima ratio, specifically when the woman for whom pregnancy is intended is reproductively incapable. This is typically not the case with a surrogate mother.[30]

24 Buchstätter (n 1) 164 et seq.

25 Martina Erlebach, 'Die Samen- und Eizellspende im FMedG', in Peter Barth und Martina Erlebach (hrsg), *Handbuch des neuen Fortpflanzungsmedizinrechts* (Linde 2015) 228; Brigitta Lurger, 'Das Internationale Privatrecht der medizinisch unterstützten Fortpflanzung' in Magdalena Flatscher-Thöni und Caroline Voithofer (hrsg), *FMedG und IVF-Fonds-Gesetz: Fortpflanzungsmedizingesetz und In-vitro-Fertilisation-Fonds-Gesetz* (Verlag Österreich 2019) mn 26; Constanze Fischer-Czermak, '§ 143 ABGB' in Andreas Kletečka und Martin Schauer (hrsg), *ABGB-ON Kommentar zum Allgemeinen bürgerlichen Gesetzbuch* (vers 1.05, Manz 2018); Gerhard Hopf, 'Fortpflanzungsmedizinrecht neu' (2014) 23/24 ÖJZ 1037.

26 Austrian General Civil Code (n 22) s 143.

27 Roth (n 17) 60; Susanne Beck, *Kindschaftsrecht* (EF-Buch, 3 aufl, Manz 2021) mn 22; Michael Stormann, '§ 143 b) ABGB' in Michael Schwimann und Georg E Kodek (hrsg), *ABGB Praxiskommentar*, bd 1: §§ 1–284 ABGB (5 aufl, LexisNexis 2020) mn 2; Rudolf Welser und Andreas Kletečka, *Bürgerliches Recht,* 1 bd: Allgemeiner Teil, Sachenrecht, Familienrecht (15 aufl, Manz 2018) mn 1684.

28 Pierer (n 19) 253; Stormann (n 27) mn 3.

29 Anchoring legal motherhood in the act of childbirth particularly serves as a status-legal safeguard for the Austrian ban on surrogacy. This ensures that the woman who gives birth is legally recognized as the mother, regardless of any genetic relation to the child, reinforcing the prohibition against surrogacy arrangements in Austria. See: Beck (n 27) mn 22.

30 Austrian Reproductive Medicine Act (n 13) s 3(3).

- Furthermore, the Austrian Reproductive Medicine Act contains a comprehensive prohibition of commercialisation: the transfer of semen or oocytes for medically assisted reproduction in the context of a remunerated transaction is prohibited, whereby the term "remunerated" is defined by an expense allowance that exceeds the proven cash expenses in connection with the medical treatment.[31] Violating Section 16(2)(3) of the Reproductive Medicine Act, which includes engaging in surrogacy, commits an administrative offence punishable by a fine of up to EUR 50,000 or, in the event of uncollectibility, imprisonment of up to 14 days (Section 22[1][4] of the Reproductive Medicine Act).
- Finally, the procurement of surrogacy is deemed immoral and, therefore, renders the underlying contract null and void pursuant to Section 879(2)(1a) of the General Civil Code.[32]

If a surrogacy arrangement occurs in Austria, the legal situation is the following: The treating physician faces administrative penalties under Section 3(1) in conjunction with Section 23(1)(1) of the Reproductive Medicine Act for violating the surrogacy ban. According to Section 879(1) of the General Civil Code, the surrogacy contract is null and void. Despite the invalidity of the surrogacy contract, the birth will still be recorded in the Austrian civil status register, as mandated by Section 35(1) of the Austrian Civil Status Act[33], which requires the registration of every child born in Austria.

In such a scenario, the surrogate mother, as the biological mother, is recorded as the legal mother in the civil status documents. Consequently, the intended mother has no legal relationship with the child. Any attempt to transfer legal parenthood from the surrogate to the intended mother would require adoption or foster care proceedings. However, these legal instruments would not completely sever the surrogate mother's legal ties to the child, which is typically the goal in surrogacy cases.[34]

31 ibid, s 16(1).

32 Wolfgang Kolmasch, '§ 879 ABGB', in Michael Schwimann und Matthias Neumayr (hrsg), *ABGB Taschenkommentar: mit EheG, EPG, KSchG, ASVG, EKHG und IPRG* (5 aufl, LexisNexis 2020) mn 7; Eder-Rieder (n 19) 130.

33 Austrian Civil Status Act of 11 January 2013 'Bundesgesetz über die Regelung des Personenstandswesens (Personenstandsgesetz 2013 - PStG 2013)' [2013] BGBl I 16/1; Federal law consolidated: Complete legal provisions for the Civil Status Act 2013 (version 30 December 2023) <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20008228> accessed 26 April 2024.

34 In the event of adoption, some property-relations between a child and their biological parent are maintained, see: Austrian General Civil Code (n 22) s 197[2]. In the literature, e.g., see: Johann Höllwerth, '§ 197 ABGB', in Michael Schwimann und Georg E Kodek (hrsg), *ABGB Praxiskommentar*, bd 1: §§ 1–284 ABGB (5 aufl, LexisNexis 2020) mn 6; Thomas Schoditsch, *Gleichheit und Diversität im Familienrecht* (Manz 2020) 25.

3 LEGAL PARENTHOOD THROUGH CROSS-BORDER SURROGACY

3.1. Recognition of foreign status decisions in Austria

Few international treaties address status law, and those that do have no significant impact on determining legal cross-border parent-child relationships.[35] Similarly, at the European level, status questions are explicitly excluded from the scope of the Brussels IIb Regulation.[36] Although the European Commission has recently proposed a regulation to harmonise the legal aspects of parenthood across member states,[37] it remains uncertain whether this regulation will gain the necessary approval.[38] Thus, for the time being, the procedure for establishing and contesting parenthood involving a foreign element must be assessed under autonomous national law, which requires the clarification of international jurisdiction and applicable substantive law.

If, however, a foreign final decision already exists, the focus shifts to whether this decision has legal effect at home, requiring an assessment of its compatibility with domestic law. This situation frequently arises in cross-border surrogacy cases. When the intended parents return to their home country, they often present a foreign birth certificate or a foreign court decision that has already established their parental status.

Under Austrian civil procedure law, the recognition of foreign legal decisions, including those related to surrogacy and parental rights, is subject to specific conditions. These conditions aim to ensure that the foreign decision meets the necessary standards of legality, fairness, and consistency with public policy in Austria. The decision must not

35 From an Austrian perspective, there are relevant treaties: Convention on Legitimation by Subsequent Marriage of 23 March 1976 'Übereinkommen über die Legitimation durch nachfolgende Ehe' [1976] BGBl 29/102; State Treaty between the Republic of Austria and the Republic of Poland on Mutual Relations in Civil Matters and on Documents of 25 January 1973 'Vertrag zwischen der Republik Österreich und der Volksrepublik Polen über die wechselseitigen Beziehung in bürgerlichen Rechtssachen und über Urkundenwesen' [1974] BGBl 30/79; Treaty of Friendship and Residence between the Republic of Austria and the Empire of Iran of 9 September 1959 'Freundschafts- und Niederlassungsvertrag zwischen der Republik Österreich und dem Kaiserreich Iran' [1966] BGBl 18/45. Article 10(3) leg cit refers to the entirety of private international law in matrimonial and parentage matters, thereby encompassing status questions.

36 Council Regulation (EU) 2019/1111 of 25 June 2019 on Jurisdiction, the Recognition and Enforcement of Decisions in Matrimonial Matters and the Matters of Parental Responsibility, and on International Child Abduction (Recast) [2019] OJ L 178/1, art 1, para 4.

37 See: Proposal for a Council Regulation of 7 December 2022 on Jurisdiction, Applicable Law, Recognition of Decisions and Acceptance of Authentic Instruments in Matters of Parenthood and on the Creation of a European Certificate of Parenthood, COM (2022) 695 final <https://eur-lex.europa.eu/
legal-content/EN/TXT/?uri=CELEX:52022PC0695> accessed 26 April 2024.

38 Claudia Rudolf, 'Vorschlag einer EU-Verordnung für das Internationale Abstammungsrecht' [2023] EF-Z 153; Buchstätter (n 1) 130.

contradict fundamental principles of Austrian law, especially those concerning the rights and welfare of the child.[39]

The term "decision" in Section 91a(1) of the Austrian Non-Contentious Proceedings Act is interpreted broadly; it does not refer exclusively to sovereign decisions by courts but includes any document prepared with the participation of an authority.[40] Hence, a certification or authentication is sufficient to recognise a foreign birth certificate or an extract from the civil status register conducted under the rules of Section 91a of the Non-Contentious Proceedings Act. Austrian case law[41] has even recognised the incidental determination of paternity in a foreign court order as a valid decision on parentage.[42] However, the foreign administrative document must be legally binding and valid in its country of origin to be recognised in Austria.[43]

The recognition process relies on the "extension of effects theory", which states that the effects of a foreign decision in its original country shall be mirrored in the country where recognition is sought.[44] According to the Austrian autonomous interpretation, the extension of effects is limited in two ways: firstly, a recognised foreign decision cannot exert greater effects than it would in the issuing state; secondly, it cannot have more effects than a domestic decision in the recognising state. Additionally, the effects of the decision recognised must be comprehensible within the framework of Austrian law.[45]

The foreign decision thus has the same effect in Austria as it does in the country of origin. The contents of the decision must be entered into the civil status register. If a person meets

39 See: Austrian Non-Contentious Proceedings Act of 'Bundesgesetz über das gerichtliche Verfahren in Rechtsangelegenheiten außer Streitsachen (Außerstreitgesetz – AußStrG)' [2003] BGBl I 111/1551, s 91a(2)(1); Federal law consolidated: Complete legal provision for Non-Contentious Law (version 19 July 2023) <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20003047> accessed 26 April 2024.

40 Explanatory notes to the Individual Request, 673/A of the addenda to the stenographic protocol of the national council, XXIV GP, 31.

41 E.g., Decision 2 Ob 238/13h (Austrian Supreme Court, 27 November 2014) <https://rdb.manz.at/document/ris.just.JJT_20141127_OGH0002_0020OB00238_13H0000_000> accessed 26 April 2024.

42 Astrid Deixler-Hübner, '§ 97 AußStrG', in Walter H Rechberger und Thomas Klicka (hrsg), *AußStrG Außerstreitgesetz* (3 aufl, Verlag Österreich 2020) mn 2; Wolfgang Kolmasch, 'Anerkennung einer ausländischen Abstammungsentscheidung' (2017) 7 Zak 132; Lydia Fuchs, '§ 97–100 AußStrG', in Edwin Gitschthaler und Johann Höllwerth (hrsg), *AußStrG Kommentar zum Außerstreitgesetz,* bd 1: JN & AußStrG (2 aufl, Manz 2019) mn 4; Decision 6 Ob 142/18b (Austrian Supreme Court, 20 December 2018) <https://rdb.manz.at/document/ris.just.JJT_20181220_OGH0002_0060OB00142_18B0000_000> accessed 26 April 2024.

43 Michael Vidmar, '§ 91a AußStrG' in Birgit Schneider und Stephan Verweijen (hrsg), *AußStrG Kommentar* (Linde 2018) mn 6.

44 Marco Nademleinsky und Matthias Neumayr, *Internationales Familienrecht* (EF-Buch, 3 aufl, Manz 2022) mn 06.34; Matthias Neumayr, '§ 97 AußStrG' in Alfred Burgstaller und andere (hrsg), *Internationales Zivilverfahrensrecht* (LexisNexis 2020) mn 17.

45 Bettina Nunner-Krautgasser, 'Die Anerkennung ausländischer Entscheidungen - Dogmatische Grundfragen' (2009) 18 ÖJZ 800; Fuchs (n 42) mn 11.

the criteria set out in Section 35(2) of the Civil Status Act, he or she has the claim that his or her status be recorded without having to prove legal interest in the case.[46]

Recognition of a decision can only be refused under the strict conditions outlined in Section 91a(2) of the Non-Contentious Proceedings Act, specifically if the decision contradicts the public policy of the Austrian legal system, particularly concerning the best interests of the child or if one of the parties was not given the right to be heard in the origin state, or if the decision conflicts with a national or previously recognised decision, or if the deciding authority in the state of origin lacked international jurisdiction.[47] Further review of the content of the foreign decision is excluded.[48]

In summary, for a foreign surrogacy-related decision to be recognised in Austria, it must be legally valid in the country where it was issued and must have been made by a competent authority according to the legal procedures of that country. Moreover, it must be ensured that all parties involved had a fair opportunity to be heard during the proceedings, and the child's best interests were a primary consideration. If these criteria are met, the foreign decision may be recognised in Austria, thus allowing the intended parents to be recognised as the legal parents.

3.2. Surrogacy cases before Central European Supreme Courts

1. Austrian Constitutional Court

The Austrian Constitutional Court has addressed cross-border surrogacy in two pivotal cases. In each instance, the legal parenthood of the intended parents was initially recognised under the jurisdiction of the country where the child was born. However, Austrian authorities initially refused to acknowledge this status. The lower courts, assuming a violation of Austrian *ordre public,* noted that this was a circumvention of the national prohibition on surrogacy. As a result, they ruled that, according to Austrian law, the surrogate mother must be considered the legal mother of the child.

In 2011, the Austrian Constitutional Court examined a case involving a child born in the State of Georgia (US) by way of surrogacy. This child was initially granted Austrian citizenship, listing an Austrian woman and her Italian husband as the legal parents. However, the Federal Ministry of the Interior challenged this decision, arguing that the American court's determination of legal parenthood contravened Austrian *ordre public* because Austrian law does not recognise the intended mother as the legal mother if she did not physically give birth to the child.

46 Norbert Kutscher und Thomas Wildpert, *PStG Personenstandsrecht* (2 aufl, Manz 2019) § 35, mn 2.
47 Nademleinsky und Neumayr (n 44) mn 01.65.
48 Susanne Beck, 'Prüfung der Anerkennungsfähigkeit ausländischer Abstammungsentscheidungen - ein Leitfaden' (2018) 2 iFamZ 93; Astrid Deixler-Hübner, '§ 91a AußStrG', in Walter H Rechberger und Thomas Klicka (hrsg), *AußStrG Außerstreitgesetz* (3 aufl, Verlag Österreich 2020) mn 3.

The Constitutional Court, however, ruled that the parentage laws of the child's birthplace hold international validity, overriding any conflicts of law. The Court affirmed that Georgia's surrogacy regulations apply universally within Georgian jurisdiction, irrespective of the parties' nationality and that Austrian domestic laws are confined to Austrian territory. Additionally, the Court examined the application of the *ordre public* exception under Section 91a(2)(1) of the Austrian Non-Contentious Proceedings Act. It determined that the prohibition of surrogacy does not constitute a core principle of the Austrian legal system.

The Court argued that denying legal recognition to the intended parents would contravene the child's best interests by effectively leaving the child without a legally recognised mother. Ultimately, the Constitutional Court underscored that the paramount consideration of the child's best interests is a cornerstone of constitutional law and a fundamental value within the Austrian legal framework. Therefore, it concluded that the intended parents should be legally acknowledged as the child's parents under Austrian law.[49]

One year later, the Austrian Constitutional Court dealt with a similar case involving an Austrian couple listed as the legal parents of twins on a Ukrainian birth certificate despite the children being biologically descended from the surrogate mother. Austrian authorities denied citizenship to the twins, arguing that the documents lacked the necessary details for determining parentage domestically and that the surrogacy contract violated Austrian *ordre public*. It held that if the parenthood of the intended parents was established by a legal act involving official or judicial actions, such parenthood should be recognised by the authorities according to Section 91a of the Austrian Non-Contentious Proceedings Act, based on the principle of effect extension. Thus, the documents issued in Ukraine in accordance with Ukrainian law were deemed authoritative. The court argued that questioning the parentage certified by Ukrainian authorities would be detrimental to the child's best interests.[50]

These decisions indicate that the Constitutional Court recognises the legal situation created by foreign legal acts concerning children born by foreign surrogate mothers rather than determining the applicable substantive law through conflict-of-law connections. Moreover, the court's decision was influenced by Article 8 of the ECHR, which prioritises the child's best interests, stating that non-recognition would unlawfully restrict the child's right to private life and identity.

2. German Federal Court of Justice

The German Federal Court of Justice addresses surrogacy cases based on the intended parents' proof of legal parenthood through a recognisable foreign decision. If such proof exists, legal parenthood is affirmed; otherwise, it is denied.

49 Decision B 13/11 (Austrian Constitutional Court, 14 December 2011) <https://www.vfgh.gv.at/downloads/VfGH_B_13-11_Staatsbuergerschaft_Leihmutter.pdf> accessed 26 April 2024.

50 Decision B 99/12 (Austrian Constitutional Court, 11 October 2012) <https://rdb.manz.at/document/ris.vfght.JFT_09878989_12B00099_00> accessed 26 April 2024.

In Germany, foreign decisions are generally recognised by extension of effects without a special procedure.[51] However, the Federal Court of Justice strongly prefers that primarily "judicial" decisions undergo this procedural recognition, emphasising the necessity of a formal judicial basis for recognising foreign rulings. Unlike in Austria, where the mere involvement of an authority is sufficient for recognition, the German interpretation requires that the decision "functionally" correspond to a judicial decision. This means it must be based on a binding clarification of a legal issue after thoroughly examining the facts. Moreover, some German legal experts call for the deciding authority to have jurisdiction over judicial tasks, emphasising the importance of the judicial character in the decision-making process. Hence, there is no automatic recognition of a foreign birth certificate in Germany, and the assessment of legal parenthood remains the prerogative of the German courts.[52]

Under conflict-of-law rules, the determination of parentage is based on the child's habitual residence or, secondarily, on the personal statute of the parents, typically making German substantive law applicable in cross-border surrogacy cases.[53] As per Section 1591 of the German Civil Code,[54] only the biological mother is recognised as the legal mother. Thus, in cases of surrogacy involving a foreign surrogate mother, the surrogate continues to be regarded as the legal mother in Germany. The Federal Court of Justice has affirmed this view in several decisions, including a recent case involving Ukrainian surrogacy. While the genetic father was recognised as the legal father, the intended German mother was directed to the adoption process for legal recognition.[55] This position also raises questions regarding compatibility with the case law of the ECtHR,[56] which deems the rejection of a legal parent-child relationship – especially when there is a genetic link to at least the father – as an unjustified interference with Article 8 of the ECHR. German courts, however, justify their opinion by arguing that establishing legal motherhood by way of adoption is sufficient when

51 German Law on the Procedure in Family Matters and in Matters of Non-contentious Jurisdiction of 17 December 2008 'Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (FamFG)' [2008] BGBl I 61/2586, s 108(1), in the version of 21 February 2024, BGBl I 2024/54 <https://www.gesetze-im-internet.de/famfg/BJNR258700008.html?BJNR258700008BJNG000900000> accessed 26 April 2024.

52 Kai Schulte-Bunert und Gerd Weinreich (hrsg), FamFG: Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit: Kommentar (7 aufl, Hermann Luchterhand Verlag 2023) § 108, mn 22.

53 Introductory Act to the German Civil Code of 18 August 1896 'Einführungsgesetz zum Bürgerlichen Gesetzbuche' [1994] BGBl I 63/2494, art 19(1), in the version of 11 December 2023, BGBl I 2023/354 <https://www.gesetze-im-internet.de/bgbeg/BJNR006049896.html> accessed 26 April 2024.

54 German Civil Code of 18 August 1896 'Bürgerliches Gesetzbuch (BGB)' [2003] BGBl I 21/738, in the version of 22 December 2023, BGBl I 2023/411 <https://www.gesetze-im-internet.de/bgb/BJNR001950896.html> accessed 26 April 2024.

55 Decision XII ZB 530/17 (German Federal Court of Justice, 20 March 2019) <https://openjur.de/u/2171543.html> accessed 26 April 2024.

56 See below, especially the comments on: *Labassee v France* App no 65941/11 (ECtHR, 26 June 2014) <https://hudoc.echr.coe.int/eng?i=001-145180> accessed 26 April 2024.

legal paternity is recognised, ensuring the child's clear legal identity and entitlement to claims against the father.[57]

Contrasting with the aforementioned decisions, the Federal Court of Justice ruled differently in two cases involving surrogacy in the US, where American courts had determined the legal parenthood of the children to the intended parents before their birth.[58] In these instances, the Federal Court of Justice recognised the foreign court decisions as valid, obviating the need for a conflict-of-law connection and substantive examination under German law. Non-recognition could only be considered under strict refusal grounds. In alignment with the Austrian Constitutional Court, the Federal Supreme Court did not view the German prohibition of surrogacy as a matter relevant to *ordre public,*[59] thus allowing both intended parents to be registered as legal parents.[60]

3. Swiss Federal Supreme Court

In a recent decision, the Swiss Federal Supreme Court addressed a cross-border surrogacy case involving a Swiss citizen (the intended mother) and her Turkish spouse who had used surrogacy services in Georgia. Following the surrogacy, they sought to register the Swiss citizen as the legal mother in Switzerland. The Swiss Federal Supreme Court's ruling paralleled the approach taken by the German Federal Court. In its judgment, the court determined that the certification of legal parenthood issued by the Georgian registry office did not constitute a recognisable decision capable of extending its effects to Switzerland through automatic recognition. Instead, the court held that the substantive assessment of legal parenthood should be conducted according to Swiss law due to the relevant conflict-of-law connections. Under Swiss law, the father was recognised as the legal parent because of his biological connection to the child. However, the intended mother, who had no biological link to the child, was not recognised as the legal parent. Consequently, she was directed to pursue the legal route of adoption to establish her parental rights.[61]

57 Decision XII ZB 530/17 (n 55), confirming the opinion of the previous instance, Decision 15 W 413/16 (Higher Regional Court of Hamm, 26 September 2017) <https://openjur.de/u/2172508.html> accessed 26 April 2024.

58 In the first case (2014), the intended parents were homosexual life partners with German citizenship who claimed surrogacy in California using the sperm of one partne, see: Decision XII ZB 463/13 (German Federal Court of Justice, 10 December 2014) <https://openjur.de/u/752745.html> accessed 26 April 2024. In the second case (2018), the intended parents were an opposite-sex German couple who attended surrogacy in Colorado using the sperm of the man, see: Decision XII ZB 231/18 (German Federal Court of Justice, 10 October 2018) <https://openjur.de/u/2115372.html> accessed 26 April 2024.

59 But see: Decision B 13/11 (n 49).

60 For a different view, Ursula Rölke, 'Leihmutterschaft und Kinderrechte – eine Bestandsaufnahme' (2021) 7 NDV 357.

61 Decision 5A_545/2020 (Swiss Federal Supreme Court, 7 February 2022) <https://www.servat.unibe.ch/dfr/bger/2022/220207_5A_545-2020.html> accessed 26 April 2024.

3.3. Case law of the European Court of Human Rights

According to the case law of the ECtHR concerning the recognition of parent-child relationships established abroad through surrogacy, the parental status acquired abroad – whether through a court judgment or an administrative act – falls under the protection of Article 8 of the ECHR.[62] This protection applies particularly when the intended father is biologically related to the child through sperm donation, and the parenthood of the intended parents has been lawfully and in good faith established under a foreign legal system.[63] If the surrogacy occurs in a foreign jurisdiction and the child is legally handed over to the intended parents, the recognising state should not deny recognition of the parent-child relationship with the biologically connected intended father.[64]

There must also be a way for the genetically unrelated intended mother to legally establish a parent-child relationship. In this case, however, it is sufficient if the option of adoption is available. The inability to acquire parental status under the legal system or public policy of the recognising state does not justify its denial.[65] Article 8 of the ECHR aims to modify the application of international private law by recognising the state to the extent that non-recognition would constitute an unlawful infringement on the child's right to respect for his or her private life. Nevertheless, the ECtHR acknowledges the sovereignty of states in continuing to prohibit surrogacy in their domestic laws.[66]

62 *Labassee v France* (n 56); *Mennesson v France* App no 65192/11 (ECtHR, 26 June 2014) <https://hudoc.echr.coe.int/eng?i=001-145389> accessed 26 April 2024; *Paradiso and Campanelli v Italy* App no 25358/12 (ECtHR, 24 January 2017) <https://hudoc.echr.coe.int/fre?i=001-170359> accessed 26 April 2024.

63 In contrast to the cases against France, the criterion of genetic paternity was not satisfied in the case against Italy, which led the ECtHR to issue a negative decision.

64 However, according to the opinion of the German Federal Court of Justice and Swiss Federal Supreme Court, this does not apply to a biologically unrelated mother.

65 Most recently: *DB and Others v Switzerland* App nos 58817/15, 58252/15 (ECtHR, 22 November 2022) <https://hudoc.echr.coe.int/eng?i=001-220955> accessed 26 April 2024; *KK and Others v Denmark* App no 25212/21 (ECtHR, 6 December 2022) <https://hudoc.echr.coe.int/fre?i=001-221261> accessed 26 April 2024.

66 Further literature on the aforementioned ECtHR cases, e.g. Philip Czech, 'Verweigerung der Adoption von im Ausland von Leihmutter geborenen Kindern durch die Wunschmutter' (2022) 542 NLMR 221; Erwin Bernat, 'Zur Reichweite des Art 8 EMRK betreffend die Anerkennungsfähigkeit ausländischer Statusentscheidungen nach Leihmutterschaft' (2023) 2 RdM 71; Rudolf Thienel, 'Ausgewählte Rechtsprechung des EGMR 2022' (2023) 37 ÖJZ 783; Katarina Trimmings, 'Surrogacy Arrangements and the Best Interests of the Child: The Case Law of the European Court of Human Rights' in Elisabetta Bergamini and Chiara Ragni (eds), *Fundamental Rights and Best Interests of the Child in Transnational Families* (Intersentia 2019) 207 et seq; Pietro Franzina, 'Some Remarks on the Relevance of Article 8 of the ECHR to the Recognition of Family Status Judicially Created Abroad' (2011) 5 Diritti Umani e Diritto Internazionale 609 et seq.

3.4. The current situation in Austria

For the time being, there are no statistics on personal status cases differentiating by the ground for registration.[67] Moreover, the principle of publicity requires that only second and higher-instance court decisions be made publicly available. The publication of first-instance court decisions depends on available staffing. Hence, accessibility to court decisions in parentage cases is very limited.[68] However, one judgment from a Tyrolean district court has aligned with the Constitutional Court's decisions on cross-border surrogacy. The court recognised a Ukrainian birth certificate that established legal parenthood by identifying an Austrian couple as the legal parents of a child born by a surrogate mother in Ukraine.[69]

Despite the limited availability of official records, there is a significant interest among Austrians in pursuing surrogacy abroad. Specialised Austrian law firms report that they legally assist and represent between 60 and 80 couples each year in arrangements with foreign surrogate mothers. Given the existing possibilities for circumvention, it is expected that individuals will continue to utilise these options to navigate domestic restrictions.

The 2013 Citizenship Amendment Act[70] potentially impacts surrogacy tourism. The revised Section 7 of the Citizenship Act[71] stipulates that a child can only receive Austrian citizenship by birth if the mother is an Austrian citizen as defined in Section 143 of the General Civil Code, emphasising biological motherhood over intended motherhood for citizenship eligibility. However, Section 7(3) of the Citizenship Act offers a provision for granting Austrian citizenship to children born abroad if the legal mother or father, as recognised by the birth country's law, are Austrian citizens. This clause primarily addresses situations where the child would otherwise be stateless, which is not the case in most cross-border

67 Former Ministry of the Interior Nehammer, Response to a parliamentary inquiry (Ecker and others no 7603/J), in Correspondence of the National Council no 7464, 28 September 2021; Former Ministry of Labor, Family and Youth Aschbacher, Response to a parliamentary inquiry (Ecker and others), in Correspondence of the National Council no 547, 10 March 2020.

68 The Austrian online case law database currently contains only a handful of decisions issued by district courts. Wolfgang Fellner und Gerhard Nogratnig, *RStDG, GOG und StAG II5* (Manz 2021) § 48a GOG, mn 3.

69 Decision 2 FAM 54/19z (District Court of Tyrol, 21 November 2019) [2020] EF-Z 22 <http://www.nademleinsky.at/pdf/news-18.pdf> accessed 26 April 2024. Also see: Marco Nademleinsky, Anerkennung ukrainischer Leihmutterschaft' [2020] EF-Z 45; Marco Nademleinsky, Mythos ukrainische Geburtsurkunde' [2021] EF-Z 47.

70 Amendment to the Austrian Citizenship Act 1985 of 2013 'Änderung des Staatsbürgerschaftsgesetzes 1985' [2013] BGBl I 136/1.

71 Austrian Citizenship Act of 19 July 1985 'Bundesgesetz über die österreichische Staatsbürgerschaft (Staatsbürgerschaftsgesetz 1985 - StbG)' [1985] BGBl 134/311; Federal law consolidated: Complete legislation for the Citizenship Act 1985 (version of 30 December 2022) <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10005579&FassungVom=2013-03-31> accessed 26 April 2024.

surrogacy cases.[72] Children of foreign surrogate mothers might face challenges obtaining Austrian citizenship by birth if born in countries that adhere to the principle of birthplace citizenship *(ius soli)*. If the genetic father is absent or does not acknowledge paternity within eight weeks of birth, and only the intended mother is an Austrian citizen, the child may not be eligible for Austrian citizenship.[73] Given the Austrian Constitutional Court's acknowledgement of the child's right to citizenship as part of family life protection, as supported by ECtHR case law, a strict interpretation of Austrian citizenship laws that results in denying citizenship to such children could be deemed unconstitutional.[74]

Although the Austrian Constitutional Court does not see a constitutional mandate to maintain the prohibition of surrogacy on a domestic level,[75] the Austrian political approach appears restrained. The current government's legislative program suggests only selective modifications in family law.[76] Despite calls from the Ministry of Justice for stronger legislative action against the commercialisation of surrogacy, current parliamentary reports reveal no immediate plans to enshrine a surrogacy ban at the constitutional level, emphasising its importance in public policy discussions.[77]

4 CONCLUSION

The Austrian legal framework continues to define legal motherhood strictly in biological terms, thereby effectively excluding women unable to conceive due to medical conditions and male homosexual couples from accessing reproductive medicine and establishing legal parenthood. This situation arises because both scenarios necessitate surrogacy, which is prohibited under national law. The rationale for this prohibition includes preventing children from becoming subjects of compulsory surrender and protecting women from the exploitation of their reproductive capabilities.

The Bioethics Commission supports the ban on surrogacy primarily to protect women who might otherwise agree to surrogacy in financial need or psychological stress. This concern holds especially for commercial surrogacy arrangements where the surrogate mother

72 Explanatory notes to the Governmental Proposals, 2303 of the addenda to the stenographic protocol of the national council, XXIV GP.

73 Cf the facts of Austrian Constitutional Court, Decision B 13/11 (n 49): the intended father was an Italian citizen.

74 See: *Genovese v Malta* App no 53124/09 (ECtHR, 11 October 2011) <https://hudoc.echr.coe.int/eng?i=001-106785> accessed 26 April 2024.

75 Decision B 13/11 (n 49) para 24.

76 See: Republik Österreich, *Aus Verantwortung für Österreich: Regierungsprogramm 2020–2024* (Bundeskanzleramt Österreich 2020) 24 <https://www.bundeskanzleramt.gv.at/bundeskanzleramt/die-bundesregierung/regierungsdokumente.html> accessed 26 April 2024.

77 Ministry of Justice Zadić, Response to a parliamentary inquiry (Ecker and others no 547/J-NR/2020), in Correspondence of the National Council no 573, 10 March 2020.

receives compensation beyond actual expenses. However, altruistic surrogacy – where the surrogate is reimbursed only for pregnancy-related expenses and acts from a purely intrinsic motivation to help childless couples – might be considered. In this model, the surrogate retains the right to decide on the surrender of the child, ensuring that her decision is free from coercion and the child is not treated as an object of transaction.

Nonetheless, a comprehensive evaluation must also consider the child's best interests. Developmental psychology suggests that the prenatal mother-child bond is crucial, and its disruption post-birth could lead to adverse developmental outcomes. Moreover, surrogacy might infringe upon a child's right to know their biological origins. Surrogacy inherently involves the separation of the child from the biological mother, affecting both the surrogate and the intended parents.

While Austria strictly controls surrogacy within its borders, it generally recognises parental rights established abroad without necessitating a formal procedure, provided that foreign legal decisions do not contravene significant procedural principles or Austrian public order. According to the Austrian Constitutional Court, the best interests of the child should override the national prohibition against surrogacy in cases involving international elements. Thus, legal parenthood established abroad through surrogacy can be acknowledged in Austria if foreign documentation, such as a birth certificate, identifies the intended parents as the legal parents. Nevertheless, the ruling of both the German Federal Court of Justice and the Swiss Federal Supreme Court contrast sharply with Austrian case law, as they deny recognition of legal parenthood for surrogacy conducted in jurisdictions like Ukraine and Georgia, where the official documentation does not meet the required standards of a decisive legal ruling. These courts require a substantive legal assessment based on the child's habitual residence or the personal status of the intended parents, leading to recognition of the genetic father but requiring the intended mother to pursue adoption.

While Austria's liberal view on recognising foreign parental rights is commendable for its efficiency and child-centric focus, it also inadvertently promotes reproductive tourism by allowing circumvention of domestic legal restrictions by resorting to more permissive legal systems abroad. This phenomenon underlines the complexity of integrating international reproductive rights into national legal frameworks and the ongoing challenges in balancing ethical, legal, and social considerations.

REFERENCES

1. Arnold S, 'Fortpflanzungstourismus und Leihmutterschaft im Spiegel des deutschen und österreichischen internationalen Privat- und Verfahrensrechts' in Arnold S, Bernat E und Kopetzki C (hrsg), *Das Recht der Fortpflanzungsmedizin 2015: Analyse und Kritik* (Manz 2016) 125.
2. Beck S, *Kindschaftsrecht* (EF-Buch, 3 aufl, Manz 2021).

3. Beck S, 'Prüfung der Anerkennungsfähigkeit ausländischer Abstammungsentscheidungen - ein Leitfaden' (2018) 2 iFamZ 93.
4. Bernat E, 'Zur Reichweite des Art 8 EMRK betreffend die Anerkennungsfähigkeit ausländischer Statusentscheidungen nach Leihmutterschaft' (2023) 2 RdM 71.
5. Buchstätter E, *Kindeswohl und Elternschaft: Schwerpunkt Eltern-Kind-Zuordnung in alternativen und grenzüberschreitenden Familien* (Jan Sramek Verlag 2023).
6. Conde A and others, 'Surrogacy in Portugal: Drawing Insights from International Practices' (2024) 35 Revista Jurídica Portucalense 175, doi:10.34625/issn.2183-2705(35)2024.ic-09.
7. Cottier M, 'Die instrumentalisierte Frau: Rechtliche Konstruktionen der Leihmutterschaft' (2016) 2 Juridikum 188.
8. Czech P, *Fortpflanzungsfreiheit: Das Recht auf selbstbestimmte Reproduktion in der Europäischen Menschenrechtskonvention* (Jan Sramek Verlag 2015).
9. Czech P, 'Verweigerung der Adoption von im Ausland von Leihmutter geborenen Kindern durch die Wunschmutter' (2022) 542 NLMR 221.
10. Deixler-Hübner A, '§ 91a AußStrG', in Rechberger WH und Klicka T (hrsg), *AußStrG Außerstreitgesetz* (3 aufl, Verlag Österreich 2020).
11. Deixler-Hübner A, '§ 97 AußStrG', in Rechberger WH und Klicka T (hrsg), *AußStrG Außerstreitgesetz* (3 aufl, Verlag Österreich 2020).
12. Eder-Rieder M, 'Medizinisch unterstützte Fortpflanzung nach dem FMedRÄG 2015 Neuerungen und Erweiterungen' (2016) 58 EF-Z 127.
13. Erlebach M, '§ 1 FMedG' in Flatscher-Thöni M und Voithofer C (hrsg), *FMedG und IVF-Fonds-Gesetz: Fortpflanzungsmedizingesetz und In-vitro-Fertilisation-Fonds-Gesetz* (Verlag Österreich 2019).
14. Erlebach M, 'Die Samen- und Eizellspende im FMedG', in Barth P und Erlebach M (hrsg), *Handbuch des neuen Fortpflanzungsmedizinrechts* (Linde 2015) 213.
15. Fellner W und Nogratnig G, *RStDG, GOG und StAG II5* (Manz 2021).
16. Fischer-Czermak C, '§ 143 ABGB' in Kletečka A und Schauer M (hrsg), *ABGB-ON Kommentar zum Allgemeinen bürgerlichen Gesetzbuch* (vers 1.05, Manz 2018).
17. Fischer-Czermak C, '§ 144 ABGB' in Kletečka A und Schauer M (hrsg), *ABGB-ON Kommentar zum Allgemeinen bürgerlichen Gesetzbuch* (vers 1.05, Manz 2018).
18. Franzina P, 'Some Remarks on the Relevance of Article 8 of the ECHR to the Recognition of Family Status Judicially Created Abroad' (2011) 5 Diritti Umani e Diritto Internazionale 609.
19. Fraunlob, 'Mater semper certa est? Eine Untersuchung des österreichischen Leihmutterschaftsrechts de lege lata et ferenda' (diss, Universität Salzburg 2018).

20. Fuchs L, '§ 97–100 AußStrG', in Gitschthaler E und Höllwerth J (hrsg), *AußStrG Kommentar zum Außerstreitgesetz,* bd 1: JN & AußStrG (2 aufl, Manz 2019).

21. Goeldel A, *Leihmutterschaft – eine rechtsvergleichende Studie* (Recht und Medizin, bd 29, Peter Lang Verlag 1994).

22. Hinteregger M, *Familienrecht* (9 aufl, Verlag Österreich 2019).

23. Höllwerth J, '§ 197 ABGB', in Schwimann M und Kodek GE (hrsg), *ABGB Praxiskommentar*, bd 1: §§ 1–284 ABGB (5 aufl, LexisNexis 2020) 826.

24. Hopf G, 'Fortpflanzungsmedizinrecht neu' (2014) 23/24 ÖJZ 1037.

25. Klever L, 'Die grenzüberschreitende Leihmutterschaft im österreichischen Recht – Kollisionsrecht und verfahrensrechtliche Anerkennung' in Gitschthaler E, Pierer J und Zöchling-Jud B (hrsg), *Festschrift Constanze Fischer-Czermak* (Manz 2024) 317.

26. Kolmasch W, 'Anerkennung einer ausländischen Abstammungsentscheidung' (2017) 7 Zak 132.

27. Kolmasch W, '§ 879 ABGB', in Schwimann M und Neumayr M (hrsg), *ABGB Taschenkommentar: mit EheG, EPG, KSchG, ASVG, EKHG und IPRG* (5 aufl, LexisNexis 2020).

28. Kutscher N und Wildpert T, *PStG Personenstandsrecht* (2 aufl, Manz 2019) § 35.

29. Lurger B, 'Das Internationale Privatrecht der medizinisch unterstützten Fortpflanzung' in Flatscher-Thöni M und Voithofer C (hrsg), *FMedG und IVF-Fonds-Gesetz: Fortpflanzungsmedizingesetz und In-vitro-Fertilisation-Fonds-Gesetz* (Verlag Österreich 2019).

30. Mayrhofer M, '§ 2 FMedG' in Neumayr M, Resch R und Wallner F (hrsg), *Gmundner Kommentar zum Gesundheitsrecht* (Manz 2016).

31. Nademleinsky M, Anerkennung ukrainischer Leihmutterschaft' [2020] EF-Z 45.

32. Nademleinsky M, Mythos ukrainische Geburtsurkunde' [2021] EF-Z 47.

33. Nademleinsky M und Neumayr M, *Internationales Familienrecht* (EF-Buch, 3 aufl, Manz 2022).

34. Neumayr M, '§ 97 AußStrG' in Burgstaller A und andere (hrsg), *Internationales Zivilverfahrensrecht* (LexisNexis 2020).

35. Nunner-Krautgasser B, 'Die Anerkennung ausländischer Entscheidungen - Dogmatische Grundfragen' (2009) 18 ÖJZ 793.

36. Pierer J, 'Abstammung' in Deixler-Hübner A (hrsg), *Handbuch Familienrecht* (2 aufl, Linde 2020) 231.

37. Rigon A and Chateau C, 'Regulation of International Surrogacy Arrangements - State of Play' (*European Parliament*, 30 August 2016) <https://www.europarl.europa.eu/thinktank/en/document/IPOL_BRI(2016)571368> accessed 26 April 2024.

38. Rölke U, 'Leihmutterschaft und Kinderrechte – eine Bestandsaufnahme' (2021) 7 NDV 357.

39. Roth M, *Außerstreitverfahrensrecht* (7 aufl, Jan Sramek Verlag 2023).

40. Rudolf C, 'Vorschlag einer EU-Verordnung für das Internationale Abstammungsrecht' [2023] EF-Z 153.

41. Schoditsch T, 'Leihmutterschaft in Österreich? Über die Möglichkeit dessen, was nicht sein darf' [2024] EF-Z 3.

42. Schoditsch T, *Gleichheit und Diversität im Familienrecht* (Manz 2020).

43. Schulte-Bunert K und Weinreich G (hrsg), *FamFG: Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit: Kommentar* (7 aufl, Hermann Luchterhand Verlag 2023).

44. Stormann M '§ 143 b) ABGB' in Schwimann M und Kodek GE (hrsg), *ABGB Praxiskommentar*, bd 1: §§ 1–284 ABGB (5 aufl, LexisNexis 2020) 416.

45. Thienel R, 'Ausgewählte Rechtsprechung des EGMR 2022' (2023) 37 ÖJZ 783.

46. Trimmings K, 'Surrogacy Arrangements and the Best Interests of the Child: The Case Law of the European Court of Human Rights' in Bergamini E and Ragni C (eds), *Fundamental Rights and Best Interests of the Child in Transnational Families* (Intersentia 2019) 187.

47. Verschraegen B, 'Leihmutterschaft - Zum Recht auf Elternschaft' (2019) 4 iFamZ 266.

48. Vidmar M, '§ 91a AußStrG' in Schneider B und Verweijen S (hrsg), *AußStrG Kommentar* (Linde 2018) 750.

49. Voithofer C und Flatscher-Thöni M, 'VfGH vereinfacht Zugang zur Fortpflanzungsmedizin: Was passiert, wenn nichts passiert?' (2014) 2 iFamZ 54.

50. Welser R und Kletečka A, *Bürgerliches Recht,* 1 bd: Allgemeiner Teil, Sachenrecht, Familienrecht (15 aufl, Manz 2018).

51. Wendehorst C, 'Neuerungen im österreichischen Fortpflanzungsmedizinrecht durch das FMedRÄG 2015' (2015) 1 iFamZ 4.

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RIGHTS AND PERMISSIONS

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ЮРИДИЧНІ КОЛІЗІЇ В СФЕРІ ТРАНСКОРДОННОГО СУРОГАТНОГО МАТЕРИНСТВА: ЦЕНТРАЛЬНОЄВРОПЕЙСЬКИЙ ПОГЛЯД НА ВИЗНАННЯ ЗАКОННОГО БАТЬКІВСТВА ЧЕРЕЗ СУРОГАТНЕ МАТЕРИНСТВО

Ельмар Бухштеттер* та Маріанна Рот

АНОТАЦІЯ

Вступ. *У цій статті досліджується правове поле сурогатного материнства з погляду Центральної Європи, зокрема розглядається те, яким чином такі країни, як Австрія, Німеччина та Швейцарія, вирішують питання визнання батьківства, встановленого за кордоном. Хоча в більшості центральноєвропейських держав сурогатне материнство заборонено на національному рівні, спостерігається зростання тенденції обходити ці заборони, звертаючись до послуг сурогатного материнства за кордоном. Це явище, відоме як репродуктивний туризм, піднімає складні правові питання щодо визнання статусу батьків за кордоном.*

Методи. *Методи дослідження налічують всебічний огляд міжнародних та автономних національних правових норм, а також порівняльний аналіз судової практики центральноєвропейських судів щодо транскордонного сурогатного материнства та визнання батьківства. У дослідженні розглядаються правові колізії на прикладі австрійського сімейного права для оцінки актуальних питань, що виникають у зв'язку із сурогатним материнством. У роботі використано дані з різних правових джерел, зокрема з Конституційного суду Австрії, Федерального суду Німеччини, Федерального Верховного суду Швейцарії та Європейського суду з прав людини.*

Результати та висновки. *У результаті було виявлено значні відмінності між позиціями Австрії, Німеччини та Швейцарії щодо визнання батьківства, набутого шляхом сурогатного материнства за кордоном. Хоча рішення верховних судів в цих країнах, як правило, ухвалюють з огляду на інтереси дитини – часто визнаючи іноземні домовленості про сурогатне материнство, щоб діти не залишилися без законних батьків – їхні судові підходи значно відрізняються. Конституційний суд Австрії дотримується більш інклюзивного підходу, він зважає на іноземні рішення будь-яких органів, наприклад, свідоцтва про народження, на основі концепції автоматичного визнання. Натомість верховні суди Німеччини та Швейцарії визнають лише офіційні судові рішення. Для випадків транскордонного сурогатного материнства, які не відповідають цій вимозі, ці країни застосовують національне законодавство постійного місця проживання дитини або, як запасний варіант, законодавство країни походження передбачуваних батьків. Оскільки закони Німеччини та Швейцарії категорично забороняють сурогатне материнство, зазвичай визнається лише генетичний батько, тоді як біологічна мати має пройти процедуру усиновлення.*

Це збігається з думкою ЄСПЛ, який все ще надає перевагу способу встановлення батьківства в межах суверенітету держави. У цій статті розглядається збалансований підхід, який поважає як правові принципи національних держав, так і основні права дітей, народжених через домовленості із сурогатною матір'ю в іншій країні.

Ключові слова: *сурогатне материнство, іноземний статус, транскордонне батьківство, процедура визнання.*