

NOT ALL SURROGACY & RAINBOWS: BARRIERS TO GAY MEN SEEKING TO BECOME PARENTS THROUGH SURROGACY WITHIN THE EUROPEAN UNION

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permit commercial surrogacy, gay men who wish to be genetically related to their child must pursue surrogacy abroad. The European Parliament (Parliament) has expressly condemned commercial surrogacy, and all EU States forbid surrogacy arrangements in which the surrogate mother is compensated for her services. To support the prohibition of commercial surrogacy, Parliament and EU States claim the practice is inherently exploitative, specifically targets poor, vulnerable women, and leaves surrogate mothers both physically and psychologically damaged. Nevertheless, many nations outside of the EU have a growing surrogacy industry that caters to Union citizens and other procreative tourists. Although the EU's ban on commercial surrogacy has meant that both straight and gay citizens must travel internationally to pursue surrogacy, the ban has primarily and disproportionately burdened male couples. For example, while several countries within Europe, but outside of the EU, permit surrogacy for heterosexual couples, the majority forbid same-sex couples from participation. Therefore, options for male couples are often limited to significantly more expensive surrogacy programs, such as those in the United States, or risky and unregulated programs in developing countries.⁷

Male couples who do engage in commercial surrogacy abroad are also not guaranteed the same legal rights as heterosexual couples upon returning to the EU. Many EU States will only consider the genetically related father to be the child's legal parent and make it difficult or impossible for the non-

II. SURROGACY POLICY WITHIN THE EU DISPROPORTIONATELY AFFECTS MALE, SAME-SEX COUPLES

The EU and most Member States have always condemned commercial surrogacy.¹¹ Though this position has prevented all Union citizens from engaging in commercial surrogacy within the EU, it has had a less than uniform effect with regard to international surrogacy arrangements. Specifically, the EU's prohibition on commercial surrogacy unevenly burdens gay men and same-sex male couples who wish to have biological children.¹² While both male couples and those facing reproductive issues must pursue surrogacy abroad if they want biological children, only male couples experience significant obstacles as a result of this choice. Even though LGBT individuals are protected against discrimination by EU treaties and laws,¹³ their familial rights are still restricted in many Member States.¹⁴ Because certain States have chosen to provide minimal protections for LGBT individuals, male couples who have had children by surrogacy often face blatant homophobia and difficulties establishing their parental rights.¹⁵ Although recent decisions on transnational surrogacy by the European Court of Human Rights and the European Court of Justice have helped to lessen this discriminatory treatment [()Tj 2.3 (h)10[-(t)-4.6 w -3.8i-1.7 -3.8v4.6 (h)10p2.4 (c

due to inconsistent policy and legal barriers, biological children are frequently out of reach for gay men and male co

heterosexual couples do not experience the same issues when establishing parentage. Assisted reproductive technologies, such as In Vitro Fertilization (IVF), allow a woman's eggs and a man's sperm to be manipulated outside of the body and the resulting embryo to be implanted in the surrogate's uterus.²⁹ In the most common scenario, both members of a heterosexual couple will have biological links to the surrogate child, so laws that require a genetic link do not affect them.³⁰ Thus, policies that withhold parental rights from the non-genetically related parent primarily

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eighteen of fortythree EU states provide methods, such as separate adoption, for male couples to obtain equal rights as parents.⁴⁹ A small number of EU countries will recognize joint parenthood from the child's birth, but this primarily applies to female couples who have given birth within the EU.⁵⁰ Even where second parent adoption is permitted for male couples, it is frequently a burdensome and lengthy process.⁵¹ Adoption can be expensive and often requires the procurement of attorneys to show the non-genetically related parent is capable of being a competent parent.⁵² This can be a humiliating experience, considering both partners, as with heterosexual couples, have raised their children born by surrogacy since birth.⁵³

Moreover, EU States that decline to provide a mechanism that would allow nongenetically related fathers to gain parentage often use indirect or flagrant homophobia to justify their policies. In Italy, for instance, the Court of Cassation has ruled that only the biological father of twins born through international surrogacy would be listed as their legal parent.⁵⁴ In its opinion, the Court indicated that its decision was "intended to protect the dignity of pregnant women and the institution of adoption."⁵⁵ The Court's statement is somewhat confounding, considering Italy generally restricts adoption to married, heterosexual couples. Even if male couples could legally adopt in Italy, this reasoning ignores that gay men, like those with infertility, have no special duty to adopt. Some countries, such as Hungary, are more blatant in their discrimination against same-sex couples and their ability to be parents. Recently, Hungary amended its constitution to provide that only traditional, heterosexual couples and their children could be defined as a

because “[o]nly a mother and a father can be ~~parent~~ under Polish law.⁵⁷ Other EU States, such as Bulgaria, Greece, Romania, and the Czech Republic do not even allow gay marriage, much less recognize the parentage of same sex couples.

C. Barriers to Free Movement

The right to free movement is a fundamental principle of EU law and underpins the right of persons to move and reside freely within the territory of the Member States.⁵⁸ When a family exercises its free movement rights by moving or travelling to another EU Member State, the host State will recognize the parents’ marriage certificate and their children’s birth certificates.⁵⁹ However, traditionally, the right to free movement has been based on the assumption that a Union citizen and their partner are heterosexual.⁶⁰ As a result, if one EU State’s law does not allow ~~same~~

CJEU demanded that Bulgaria grant citizenship to a child whose birth certificate listed two mothers as the child's legal parents.⁶⁵ Even though one mother was a Bulgarian national, the government refused to register the child or issue her a passport.⁶⁶ While the child was born in Spain, since neither of her parents were Spanish citizens and Spanish citizenship depends on parentage, the child was essentially left stateless.⁶⁷ CJEU provided that Bulgaria's failure to issue the child a passport violated the rights of the child and her parents to freely move within the EU.⁶⁸ Though States could continue to choose whether to legalize same-sex marriage or adoption within their borders, the CJEU stated they must recognize a person's civil status from another State to comply with EU law.⁶⁹ The CJEU's ruling not only advances the rights of LGBT individuals within Europe, but appears to clarify the ambiguity left by *Mennesson* to the status of non-genetically related fathers. However, though CJEU judgments are intended to be automatically recognized in all EU States, doubts remain on whether the EU can successfully enforce the ruling.⁷⁰

The EU has yet to enforce a 2018 CJEU decision in regard to EU States' recognition of same-sex unions and the right to cohabit.⁷¹ In *Coman and Others v. General Inspectorate for Immigration and Ministry of the Interior*, the CJEU released a judgement providinglye2262 (t)t prooeasedrmmmog85 (f)-3.99 7 (r

convince themselves the pregnancy is only a commercial transaction.⁹⁴ A study commissioned by the European Parliament, researchers claimed that in many cases, surrogate mothers refused to give up the child because of "important biological bonds that developed during pregnancy."⁹⁵ Moreover, though the child is transferred from the surrogate mother to the intended parents shortly after birth, some also worry that this detachment will have negative effects on the child's development. It has been surmised that the child would subconsciously suffer from feelings of abandonment that would later manifest in adolescence as feelings of despair, anxiety, and insecurity.⁹⁶

However, the perception that women are incapable of ignoring their "maternal instincts" and that surrogate children are emotionally stunted from the "trauma" of separation is based on unsubstantiated beliefs about motherhood. Empirical research consistently shows that surrogate mothers do not experience emotional instability during or after the pregnancy, and that detachment from the child is reported relatively rarely.⁹⁷

OUTSIDE ITS BORDERS TO COUNTRIES WITH LITTLE TO NO

“children’s identity within French society,¹⁰⁸ and that denying this right was detrimental to their best interests. Because all states that are parties to the European Convention generally conform to the judgements of the ECtHR,¹⁰⁹ member nations will be obligated to recognize surrogate children that are born abroad. While the interests of children certainly exceed member nations’ interest in punishing their parents, this decision has the unintended effect of contributing to the industry that the European Parliament condemns.¹¹⁰

Although some Union citizens work with surrogacy agencies in the U.S., many choose to employ surrogates in poorer countries where women have little protections. Before India prohibited foreigners from using Indian surrogates, the country was a popular commercial surrogacy destination for those travelling outside Europe.¹¹¹ While surrogacy in the U.S. runs upwards of \$90,000 USD,

Even though surrogacy in India is no longer available to Union citizens,¹¹⁷ India's surrogacy industry is representative of how poor, marginalized women can be left vulnerable by procreative tourism.

Presently, Union citizens in search of surrogacy arrangements frequently choose to work with a surrogate in Ukraine. At an average of \$50,000 USD, surrogacy in Ukraine is considerably cheaper than it is in the U.S.,¹¹⁸ and a much closer destination for commissioning parents travelling from the EU. Sadly, like India, limited regulation has left surrogate mothers within Ukraine susceptible to coercion, exploitation, and greater risk of physical and psychological injury.¹¹⁹ In Ukraine, what little surrogacy regulation exists principally concerns itself with the rights of the intended parents and offers minimal protections for the surrogate mother.¹²⁰ This lack of oversight is likely the reason surrogate mothers within Ukraine have reported unsafe living environments, poor healthcare during and post pregnancy,¹²⁰ and significant underpayment.¹²¹ Many Ukrainian women come from rural villages and become surrogates due to financial pressure, engaging in surrogacy so they can provide for their families.¹²² Unfortunately, surrogate mothers often do not achieve financial stability, considering surrogacy agencies pay surrogates only a fraction of the fee paid by the commissioning parents.¹²³ Despite pressure from the European

Examines Medical & Legal Basis for Gestational Surrogacy, WILL CORNELL MED. (Mar. 19, 2020) ("Interestingly, all [Indian surrogates] underwent caesarian sections for reasons not explained, putting women at risk for infections, operative complications, and longer recovery times.").

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Parliament, Ukrainian lawmakers are resistant to impose any regulations upon surrogacy agencies because the surrogacy industry brings \$1.5 billion USD annually.¹²⁴ Considering that Ukraine is one of Europe's poorest nations,¹²⁵ it appears unlikely Ukraine will take any ~~act~~ restrict its surrogacy industry, especially as the market continues to rise.

Though the European Union certainly does not support the mistreatment of surrogate mothers, its surrogacy ban has assisted in the growth of the international surrogacy industry. While some poorer countries, such as India and Thailand, have recently prohibited foreigners from participating in their surrogacy programs,¹²⁶ other nations have quickly taken their places on the global market. Due to rising rates of infertility and the inability of many same sex couples to naturally conceive, it is unlikely the EU's disapproval of the industry will stop its growth. However, allowing some form of commercial surrogacy in the EU would be a significant step towards ending any exploitation of surrogates that occurs abroad. It is unrealistic to believe that Union citizens would stop entering into transnational arrangements if commercial surrogacy is legalized. However, it is reasonable to expect that a majority of Union citizens would prefer to enter a surrogacy arrangement at home. Therefore, it would seem that .9 (r)88.3 (t)-4t6o59(a)-1.6 (nge)9i.3 (t)-4.7 (y 1.7 (c)c -2.3 ()11-2.3 (0.9 (l)-1o6 (ni)-4.6

commercial surrogacy has pushed EU citizens to pursue surrogacy abroad,