



Spotlight on Parliaments in Europe

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The citizenship of children born to surrogates

On 4th June 2018, the German Bundestag submitted a request to the ECPRD (request 3802) concerning the naturalisation of children born to surrogates. The request questioned, pursuant to nationality laws on citizenship by birth (*ius sanguinis*), who is the mother of a child born to a surrogate – the genetic mother or the woman who gave birth to it. From the 24 replies (including 19 of the 28 member states and third countries such as Georgia, the US and Israel), the majority of countries responded in a uniform manner, in favour of the gestational mother. Although genetic motherhood is absent in the majority of the states, there are limited circumstances in which genetic motherhood (and ultimately, their citizenship) exists or may be granted by the state, before or after the birth. The present document aims to provide a summary of the responses of the National Parliaments/Chambers.

I. Absence of genetic motherhood in the responding states

As abovementioned, the most common response was that the mother of a surrogate child is the woman who gave birth to the child and not the genetic mother. As a result, citizenship derives from the gestational mother (surrogate) and/or father. The request concerns citizenship with reference to the mother. However, it is important to note that, subject to nationality law, citizenship may derive from the father, and in some instances, dual nationality is permitted (e.g. Czech Republic). See the table below for references to the relevant nationality legal provisions.

Although the request did not concern the legality of surrogacy in each of the states, it is interesting to note that many of the states in this category mentioned that they prohibited or did not pertain specific provisions on the practice. Nevertheless, the EU member states take a quasi-shared approach.

The requesting state, **Germany** affirmed that in determining the acquisition of German citizenship by *ius sanguinis* with reference to the mother, the mother of a child is the woman who gave birth to it. Consequently, it is the status of the surrogate that counts. It seems that this response provided a model answer for the majority of the states. For example, both **Swedish** and **Slovakian**¹ law stipulate that the mother of a child is the woman who gave birth to him/her. In addition, a case in the **Irish** Supreme Court² led to the introduction of an Act in order to confirm that the birth mother is the mother of the child, and to provide certainty to surrogates in their situation. Notably, following condemnation by the European Court of Human Rights,³ **France** has a nuanced stance on this matter. The French Supreme Court (*Cour de Cassation*) held that while the ban on surrogacy and birth certificate authenticity rules prevent the registration of the intended/ genetic mother, legal relations may be established via adoption. The exclusion of the biological mother was not seen as a breach of article 8 of the Convention (right to private family life) on the basis that the aim of the relevant law was to protect the interests of the mother and child, and to discourage the prohibited practice.

Similarly, when determining citizenship, the following countries have also declared primacy of the gestational mother: **Austria**, **Croatia**,⁴ **Czech Republic**, **Estonia**, **Finland**, **Hungary**⁵, **Luxembourg**, **Poland**, **Portugal**, **Spain**, **Latvia** and **Lithuania**.⁶ Although the Luxembourg's

¹ The relevant article goes on to say “all (surrogacy) agreements contrary to this provision are null and void.”

² M.R. and D.R v An t-Ard-Chláraitheoir [2014] IESC 60 (7.11.14). Moreover, the court held that the definition of a mother, whether she is “genetic” or “gestational” for the purpose of registration laws, was a matter for parliament to clarify.

³ Cases: Mennesson (n° 65192/11) and Labassée (n° 65941/11)

⁴ Article 31 (2) of the Act on medically assisted procreation forbids surrogacy.

⁵ Interestingly, surrogate motherhood is not defined in Hungarian law.

⁶ According to Article 11 of the Law on Assisted Reproduction, surrogacy agreements are deemed null and void.

prohibition of surrogacy has been maintained, there is a parliamentary bill (n°6568), which proposes the introduction of a parenthood certificate, enabling genetic parents to be considered as legal parents. In the case of Portugal, the law on surrogacy 25/2016 recently introduced the practice under limited circumstances. For example, surrogate motherhood is only permitted in the absence of a uterus or in case of uterus lesion or illness that prevents pregnancy in an absolute and definitive way. In Latvia, surrogacy is illegal, however medical impregnation is allowed. In addition, Section 14 of the Sexual and Reproductive Health Law 2002 states that potential parents may only obtain information regarding a gamete donor's genetic / anthropometric data.

II. Limited exceptions where genetic mother is granted, citizenship may follow

On the other hand, there are specific circumstances in which a few states' legislation or the courts have the discretion to sanction parental status of the biological mother, before or after the birth of the child. However, an array of conditions must be fulfilled, and genetic parenthood may not necessarily lead to citizenship. Nevertheless, these exceptions demonstrate that not only are there deviations from the mainstream rule that citizenship derives from the person that gave birth to the child, but that some states are receptive to surrogacy as a strictly regulated practice, with potentially important links to their nationality law regimes.

Under **Georgian** legislation, the mother of a surrogate child is the genetic mother, if there is a written agreement, *before* the birth, between the couple to undertake the relevant responsibilities and the surrogate, to surrender her maternal rights. Conversely, the child's right to citizenship is restricted as naturalisation is only recognised if "neither of his/her parents recognizes this person as its citizen." Comparably, in **Greece**, surrogacy takes place following a judicial permit⁷, and the applicant is deemed to be the mother of the child. According to Article 1458 of the Greek Civil Code says: "The judicial permit is provided after an application by the woman that intends to have a child, as long as it is proven that it is medically impossible for her to bear a child, and that the woman willing to bear the child, regarding the condition of her health, is suitable for bearing a child (via artificial insemination)". Interestingly, the surrogate or intended mother may file a "maternity lawsuit" to overturn this presumption of motherhood. A permanent or temporary residence in Greece is also an obligation.

Furthermore, **U.S.** law recognizes that a child's citizenship generally is dependent on the location of the child's birth, rather than the parent's citizenship. Any child born in the United States automatically is a U.S. citizen. Exceptions include US-born children born of foreign diplomats. (Consequently, the citizenship of surrogate children may be a moot point if the surrogate is in the US during the pregnancy). As there are no federal statutes on surrogacy, state laws on the matter vary. That being said, mechanisms including pre-birth orders exist in order to permit genetic motherhood of surrogate children.⁸

Finally, parental orders (judicial permits obtained *after* the birth of the child, approving guardianship of the genetic mother or couple) are used as a means of creating a legal relationship between the biological mother and child, and occasionally, citizenship. In **Israel**, the intended parents have seven days after the birth to obtain a parenting order from the court. Assuming responsibility of the child means that the child is eligible for Israeli citizenship. Likewise, though **British** law (the law of England and Wales) generally stipulates that the surrogate is to be treated as the mother of the child, a couple may be treated as the legal parents of the child if they acquire a favourable parental order. There are many burdensome conditions that need to be fulfilled, including: the surrogate fell pregnant as a result of by artificial insemination, the couple must have a sufficient enduring family relationship and be permanent UK residents, the application must be made within 6 months of child being born, and no money, other than reasonable expenses, must have been paid to the surrogate. Consequently, if one of the successful applicants is British, citizenship is automatically granted to the child.⁹

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⁸ Cf. <https://www.creativefamilyconnections.com/us-surrogacy-law-map/>

⁹ An order made before 6 April 2010 will not have any automatic nationality consequences for the child, but may justify registration under section 3(1) of the British Nationality Act 1981.

Comparative table on the citizenship of children born to surrogates

Member State	Determining factor is the status of the surrogate/ gestational mother	Determining factor is the status of the genetic mother	Relevant Law (where available)
Germany (requested)	✓	✗	Section 4 (1), Nationality Act and Section 1591 of the Civil Code
Austria	✓	✗	Section 7(1), Federal Act on Austrian Citizenship 1985 and Section 143 of the Austrian Civil Code
Croatia	✓	✗	Article 4, Law on Croatian Citizenship 1991, Article 58 of the Family Act 103/2015 and Article 31(2), Act on medically assisted procreation 86/2012.
Czech Republic	✓	✗	Article 775 of Czech Civil Code (no. 89/2012), Articles 4 and 5 of the Act on Nationality (no. 186/2013)
Estonia	✓	✗	Section 8 of the Constitution of the Republic of Estonia, Section 83 of the Family Law Act.
Finland	✓	✗	Section 9 Nationality Act (16.5.2003/359) and Section 2, Maternity Act (253/2018) (in force 04/19)
France	✓	✗	Articles 16-7, 18 and 47 of the Civil Code, Cases of the Cour de Cassation (dated 3 July 2015 and 5 July 2017) and ECHR cases <i>Mennesson</i> (n° 65192/11) and <i>Labassée</i> (n° 65941/11)
Georgia	-	✓	Law of Georgia on Health Care, Constitution of Georgia and the Law of Georgia on citizenship
Greece	-	✓	Articles 1458 and 1464 of the Greek Civil Code
Hungary	✓	✗	Section 4:115 (1), Act V of the 2013 Civil Code, Article G, Fundamental Law of Hungary 2011
Ireland	✓	✗	Irish Nationality and Citizenship Act 1956, Children and Family Relationships Act 2015, Case: <i>M.R. and D.R v An t-Ard-Chláraitheoir</i> [2014] IESC 60 (7.11.14)
Israel	✓	✓	Chapter 3, Agreements to Carry a Fetus Law (Agreement Approval and Status of the Infant), 1996
Latvia	✓	✗	Section 14, Sexual and Reproductive Health Law 2002 and Section 2 of the Citizenship Law 1994
Lithuania	✓	✗	Article 3.139 of the Lithuanian Civil Code
Luxembourg	✓	✗	Article 1, Law concerning the Luxembourg citizenship, 8 March 2017, Articles 319 and 334 of the Civil Code and Parliamentary bill n°6568 (parenthood certificate)
Poland	✓	✗	Article 61 of the Family and Guardianship Code 1964 (682/2017), Article 14 of the Polish Citizenship Act (1462/2017)
Portugal	✓	✗	Article 1796 of the Portuguese Civil Code
Slovakia	✓	✗	Section 5, Act on Citizenship of the Slovak Republic and Section 82, Law no. 36/2005 Coll. on the Family
Spain	✓	✗	Spanish Civil Code
Sweden	✓	✗	Section 2, Swedish Citizenship Act (2001:82), Chapter 1, Section 7 of the Children and Parents Code (1949:381)
UK	✓	✓	Human Fertilisation and Embryology Act 1990, Section 54, Human Fertilisation and Embryology Act 2008 and Section 3(1), British Nationality Act 1981.
US	✗	✓	US Code, Title 8 on Aliens and Nationality