Commentary

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The best interest of children born through medically assisted procreation procedures as construed in 2021 Italian Constitutional Court rulings 32 and 33

S. Marinelli[1], A. Del Rio[2], G. Gullo[3]

[1] School of Law, Università Politecnica delle Marche, Ancona, Italy; [2] Department of Anatomical, Histological, Forensic, and Orthopedic Sciences, Sapienza University of Rome, Rome, Italy; [3] IVF Unit AOOR Villa Sofia Cervello, University of Palermo, Italy

Abstract

The authors have set out to briefly analyze the 2021 Constitutional Court rulings n.32 and 33, regarding the situation of children born in, or otherwise being raised by, same-sex couples. Such judgments address the problem by taking into account the fundamental principle of the child's best interests. This article is meant to highlight the issues that may arise if such interests were to be translated into specific law provisions or safeguards for the children's sake. Moreover, the authors aimed to focus on the valuable elements laid out in the Court rulings, while also highlighting the more critical and controversial elements therein. ***Clin Ter 2022; 173 (1):46-49. doi: 10.7417/CT.2022.2390***

Key words: *Medically-assisted procreation (MAP), surrogacy, same-sex parenting, fertility tourism, legal vacuum*

Introduction

The issue of same-sex parenting has repeatedly come to the fore over the years, largely because of social pressure by civil and homosexual rights advocates, and has long been in the legislative agenda as well. The piece of legislation on civil unions enacted 5 years ago, law n.76 / 2016, has not regulated same-sex parenting. That legal vacuum has led to several rulings by the Joint Sections of Italian Supreme Court of Cassation, and, in 2021 the Constitutional Court as well. Such decisions have opened up new scenarios around this issue.

Such Constitutional Court rulings have focused not so much on the parental ambitions of homosexual couples, but rather on the status to be recognized to those children who, by birth or adoption, find themselves in such family settings. As it is well-known, Italian statutes ban same-sex parenting, even for couples who have entered into civil unions. Hence, such couples are banned from applying for adoption, or using medically assisted procreation techniques, including of course surrogacy, which is explicitly prohibited by Italian law for heterosexual couples as well (1). Infertility is in fact a profoundly painful element (2) in the lives of thousands of couples who then decide to pursue other option such as "procreative tourism". In fact, the restrictions currently in place in Italy and elsewhere all across Europe , however, have not prevented homosexual and heterosexual couples from pursuing other options to achieve parenthood, by traveling abroad and undergoing procreative techniques prohibited in Italy. After achieving their objective, thus becoming "intended parents", these couples come back to Italy with the children and stake their parental claims by applying for the recognition and the legal registration of the children themselves. This is an element of great importance on which constitutional jurisprudence focuses in order to properly assess the personal, social and legal conditions of children placed in a same-sex household. The above referenced Constitutional Court rulings do however leave some questions unanswered, as well as some unresolved ambiguities, on which we feel it is worth offering a few remarks.

The protection of the minor's best interest and how it relates to same-sex parenting, parental aspirations and the issues resulting from the relationship crisis scenario in homosexual couples: the Constitutional Court sets forth its orientation

In its 2021 ruling no. 32, the Italian Constitutional Court addresses the problem relating to the interests of two girls born as a result of the choice of a couple of women to pursue MAP abroad, as part of a homosexual union (3). The girls had lived with both women, their intended parents, since birth. Later on however, following the end of the women's relationship, the so-called intentional mother (i.e. non-biological) filed an application seeking to be recognized as the legal parent of the girls, which the biological mother opposed. The intentional mother turned to the Court of Padua, which raised the question of the constitutional legitimacy of Articles 8 and 9 of the l. n. 40 of 2004 and art. 250 c.c. for alleged violation of articles 2, 3 and 30 and 117 of the Constitution, also in relation to the New York Convention on the Rights of the Child of 1989 and the European Convention on Human Rights (ECHR). The peculiarity of this case compared to others examined by the Constitutional Court in 2020 is that it cannot be resolved by resorting to

Correspondence: Alessandro Del Rio. Fax 00390961883118. E-mail: alessandrodelrio70@gmail.com

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"adoption in particular cases" provisions, since the two women had separated and the biological mother steadfastly refused to give the her consent to go that way. Such a scenario risks jeopardizing the rights of the minors involved. They in fact can continue the family relationship with their biological parent only, precisely because they cannot be legally recognized by the other intentional parent, despite her having shared the procreative project from the start. This development leads to a scenario that can seriously threaten the pre-eminent interests of the minors involved, through no fault of their own (4). The constitutional judges identify the interests of the minors as the cornerstone which needs to be prioritized.

The Court's reasoning in judgment no. 32/2021, point no. 2. is the following: jurisprudence has ascribed importance to social parenting when it did not coincide with biological parenting in order to preserve the child's acquired parental bond, by guaranteeing them a social, relational family identity, even if that may conflict with the "biological truth" of procreation. From this perspective, the Constitutional Court stressed the need to protect the best interests of the child, which consists above all of "growing up in a family and (...) maintaining meaningful relationships with relatives" (art. 315-bis of the Italian Civil Code), "maintaining a well-balanced and continuous relationship with both parents, (...) to receive care, proper upbringing, education and moral assistance from both "(art. 337-ter of the Italian Civil Code). The European Court of Human Rights (ECtHR) has also ruled that the best interest of the child is to maintain steady ties with the family and continuous contact with those who fulfill the parental functions, regardless of the biological bond (5).

The situation involving minors born through MAP procedures in homosexual couples clashes with the fact that such practices are illegal in Italy, as a result of a specific legislative choice. Nevertheless, the Italian Constitutional Court itself has acknowledged that MAP techniques are legally available in other countries, which have not put in place similar prohibitions for homosexual couples. Therefore, according to the judges, if the parental relationship has already become a well-established reality, the legal recognition procedures must be "implemented in a timely and effective manner". It is in fact essential to ensure the protection of emotional and family ties, even if not biological, and the legal recognition of such bonds for children born from MAP by two women, for the purpose of assisting the children in the construction of their personal identities (6, 7). That being said, the Constitutional Court has pointed out that the current legal framework fails to protect the best interests of the child. It is for this very reason that the judges have urged lawmakers to intervene.

The best interest of the child as the centerpiece of ruling n. 33/2021

In the 2021 ruling n. 33, the constitutional judges have examined the case centered around the interests of a child born as a result of the initiative of two Italian men who entered into a civil union in Italy after marrying in Canada. They later pursued a MAP path in Canada through surrogacy, by using the sperm of one of the two partners (8). When the child was born, the Canadian authorities only registered in the birth certificate the father who had provided the gametes as the parent. Subsequently, however, granting the appeal of the two men, the Supreme Court of British Columbia declared that both applicants were to be considered parents of the child, thus allowing the birth certificate to be amended accordingly. The couple therefore asked the Italian civil registry officials to amend the child's birth certificate in Italy as well, based of the decision of the foreign court. After their request was denied, the two men turned to the Venice Court of Appeal, which recognized the effectiveness and validity in Italy of the aforementioned provision issued by Canadian authorities. The state attorney then challenged that decision before the Supreme Court. The latter, in light of the restrictive orientation taken in this regard by the United Sections with sentence n. 12193 of 2019, referred the matter to the Constitutional Court. The constitutional judges pointed out that the restrictive stance expressed by the United Sections on the subject of surrogacy is in line with Constitutional Court ruling no. 272/2017, which highlighted how such a practice intolerably offends the dignity of women, deeply undermines human relationships, and entails a serious risk of exploitation of socially and financially vulnerable women (9). However, the Court also stressed that the central issue concerns the interests of the child born through surrogacy. According to the Court, there is no doubt that the interest of a child who has been cared for and raised since birth by a couple who shared the decision to bring them into the world is to obtain not only social, but also legal recognition of such well-established family ties, which already connect them day by day to both intended parents. The Court went on to argue that an alleged "right to parenthood" for those who take care of the child is not in question: the priority is the interest of the children, which can be effectively upheld only by legally recognizing the parental bond with both members of the couple who wanted their birth and raised them ever since (Constitutional Court, sentence no. 33/2021, point no. 5.4 d).

The Constitutional Court has thus asserted the fundamental principle of the primary interest of the child, while specifying that such primacy means that the interest of the child is highly relevant, but is not absolutely and unconditionally predominant over any other interest that may be equally affected. From such a perspective, therefore, the interests of the minor must be balanced, in light of the proportionality standard, against the legitimate goal of disincentivizing the use of surrogacy, banned by the Italian legislature. For this reason, the United Sections of the Supreme Court did not allow the transposition of the foreign birth certificate indicating the "intentional father" as the child's second parent. In order to safeguard the minor's interest, however, the Constitutional Court highlighted that the protection of the minor must be ensured with an effective and prompt adoption procedure acknowledging the soundness of the parental bond between the intentional father and the child, once proven that such a connection matches the child's best interest. The Court also pointed out how "adoption in special cases" cannot provide entirely adequate protection in that regard. The Constitutional Court maintained that it is the duty of the legislators to strike a tenable balance between the legitimate purpose of discouraging the use of surrogacy

abroad and the essential need to ensure that the children's rights are upheld, thus bringing closure to the current state of affairs, in which inadequate safeguards endanger the children's interests.

The judges also suggested that in the absence of a legislative intervention, the Court could pronounce sentences of clearly regulatory nature, not unlike what happened in the end-of-life Cappato case. (10)

Closing remarks

It is worth bearing in mind that the Italian legal system sets several differences between married couples and homosexual ones, hence it is necessary to consider the issues arising from of any possible form of discrimination that could harm children being raised by homosexual parents. In fact, any discrimination in treatment between children inserted in traditional family settings and those who, not by their own choice, were born in a homosexual family is unacceptable. It is therefore necessary to guarantee that all minors can exercise the same fundamental rights, i.e. to grow up in a family, to have emotional stability, solid family ties, moral and material assistance, maintenance of the parental status, right to a name and personal identity. Only by ensuring these rights can the children's best interest be fully realized, regardless of the sexual orientation of their parents and as a result of the family context in which the children find themselves and which they have not chosen. Having established this principle, there are still many difficulties in achieving it. In order to uphold the best interest of the child, it is necessary to consider there are two elements that diverge from each other at the same time. On the one hand there is a set of rigorous and mandatory rules, enshrined in the Italian Constitution and in the civil code. On the other hand, it is the very notion of best interest which requires a degree of flexibility, because the officials and judges who for various reasons are called to evaluate what is better for the minor, have to weigh the peculiarities and contingencies of each individual case, and then identify and enforce each time the most suitable response for the personal and moral development of the specific child whose interest they must uphold.

The Constitutional Court itself admits that the minor's interest cannot be an absolute principle, because it cannot be viewed as automatically prevailing over any other counter-interest at stake. In fact, all the fundamental rights enshrined in the Constitution must be mutually integrated, and it is not possible to identify any one of them that has absolute primacy over the others. The most daunting challenge is trying to strike a reasonable balance between the absolute need to discourage and punish the practice of surrogacy and the necessary protection of the children born as a result of the family project of the "intended parents" who travel abroad to enter into surrogacy agreements and then introduce the children thus born into the Italian legal system by claiming their legal parenthood, regardless of the national ban currently in force. In such instances, the recent 2021 ruling no. 33 reaffirms the legitimacy of the stance taken by the United Sections of the Supreme Court, i.e. not allowing the legal registration of the birth certificates of children born through surrogacy abroad, while at the same time urging an intervention aimed at protecting the rights of such children, which could be achieved through an "effective and swift adoption procedure". It is therefore quite clear that albeit worthy of protection, the interest of the child must be balanced and weighed against other interests that may arise in any given scenario. The Court has also urged the legislature to intervene, but has chosen to limit its exhortation to stressing the need to safeguard the "steadiness" of emotional and family ties "and to preserve those stable emotional ties" that have arisen. It does not, and cannot, urge lawmakers to legislate on the parental prospects of homosexual couples, because only the legislative power, expression of the will of the community, can make such choices. The interest of the minor, however, is not fulfilled by granting the parental claims of homosexual couples, because the Italian Constitution outlines a family model based on heterosexual unions (Article 29), and therefore homosexual unions, albeit deserving of dignity and protection, they cannot be equated with the family model enshrined in the Constitution itself. Still, in order to make sure that the interests of the minors and their upbringing in a homosexual household actually coincide, it is necessary to evaluate the ability of the homosexual couple to fulfill their parental functions in the best possible way. It is also necessary to assess the fitness of would-be parents who, while aware of the legal ban on same-sex parenting, have deliberately chosen not to abide by it. The authors believe that is an important element to consider, because the parental function is realized not only through the creation of a new life, but also - and perhaps primarily - in the raising of the child into a fully-fledged member of society and in the duty to educate them. Therefore, the parental suitability of two individuals who do not feel it is their duty to follow the laws could be legitimately called into question. Surely, it will not be easy to for legislators to draw up a set of standards for evaluating the parental suitability of a homosexual couple, given their choice to circumvent the legal restrictions in their home country by traveling abroad. Such standards will have to be must be as thorough as possible, since they will be used by the social welfare institutions and the judiciary to make decisions about the cases that will be assigned to them. Therefore, allowing a minor to grow up in a homosexual setting does not seem a foregone conclusion that can be automatically granted. In the event that a homosexual couple is not suitable to raise the child, an adoption process could be initiated.

From the complex issues briefly outlined herein, it seems clear that the Constitutional Court leaves the burdensome duty to balance rights and interests of the different parties involved to the legislator, and that will be far from simple.

Conflict of interest: The authors declare that there is no conflict of interest regarding this manuscript.

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