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# The law governing parenthood: are you my father?

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# Parenthood Proposal (PP)

Chapter 1: Subject matter, scope and definitions

Chapter 2: Jurisdiction

Chapter 3: **Applicable law**

Chapter 4: Recognition

Section 1: General provisions on recognition (recognition of a court decision)

Section 2: Procedure for refusal of recognition

Section 3: Authentic instrument with binding legal effect

Section 4: Other provisions

Chapter 5: Authentic instruments with no binding legal effect

Chapter 6: European Certificate of Parenthood

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# Parenthood Proposal (PP)

**The Marburg Group's comments  
on the Parenthood Proposal:**  
under: <https://www.marburg-group.de>

Members of the working group:  
Christine Budzikiewicz (Marburg)  
Konrad Duden (Leipzig)  
Anatol Dutta (Munich)  
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and Claudia Mayer (Regensburg)

# Characteristic features of Chapter on Applicable Law

- Special focus on Union-wide recognition of **co-motherhood** (where validly established under the law of a Member State)
- Attempt to solve most questions of applicable law with **one article** (Art. 17(1) and (2) PP) **only**

## Article 17 PP – Applicable law

- (1) The law applicable to the *establishment of parenthood* shall be the law of the State of the **habitual residence of the person giving birth at the time of birth** or, where the habitual residence of the person giving birth at the time of birth cannot be determined, the law of the State of birth of the child.
- (2) Notwithstanding paragraph 1, where the applicable law pursuant to paragraph 1 results in the *establishment of parenthood as regards only one parent*, the law of the State of nationality of that parent or of the second parent, or the law of the State of birth of the child, may apply to the establishment of parenthood as regards the second parent.

# Definitions

Art. 4 No. 3 PP: For the purposes of this Regulation, the following definitions apply: ... **'establishment of parenthood'** means the determination in law of the relationship between a child and each parent, including the establishment of parenthood following a **claim contesting** a parenthood established previously.

# Article 17 PP – Applicable law

- (1) The law applicable to the establishment of parenthood shall be the law of the State of the **habitual residence** of the **person giving birth** at the **time of birth** or, where the habitual residence of the person giving birth at the time of birth cannot be determined, the law of the State of birth of the child.
- (2) ...

# Convincing standard solution or incomplete provision?

- Habitual residence of the birth mother (Art. 17(1) PP) **as an appropriate connecting factor?**
  - Habitual residence of infants may be **more difficult** to determine than habitual residents of adults
  - Appropriate (= surrogacy-friendly) solution in the case of **surrogacy** abroad (for example, German intended parents commission a surrogate mother in Georgia (Eastern Europe), receive the child in Georgia, and travel with it back to Germany a few days after the birth)
  - For **registrars**, as a rule, application of their own law



# Convincing standard solution or incomplete provision?

- Central problem: connecting factor (= habitual residence of the birth mother) **is unchangeable**
- Inappropriate results if the habitual residence of mother and child **shift later** (example: An unmarried German woman lives in France, where her child is born, moves to Germany 3 years later, there a German wants to acknowledge paternity ... later a party wants to contest this paternity ... )
  - Art. 17(1) PP suitable only for determining the applicable law at the time of birth (very often a key moment for establishing parenthood)

# Article 17 PP – Applicable law

(1) ...

(2) Notwithstanding paragraph 1, where the applicable law pursuant to paragraph 1 results in the establishment of parenthood **as regards only one parent**, the law of the State of nationality of **that parent** or of the second parent, or the law of the State of birth of the child, **may apply to the establishment of parenthood as regards the second parent.**

# Purpose of the subsidiary rule: Art. 17(2) PP

- In the focus of the regulation: **co-motherhood** ...
  - Example: A Spanish woman, married to a German woman, both living in Germany, perform medically assisted fertilization in Germany using sperm donation and the Spanish spouse gives birth to a child.
  - Art. 17(1) PP: German law: no co-motherhood
  - Art. 17(2) PP: Spanish law: co-motherhood possible

# Article 17 PP – Applicable law

(1) ...

(2) Notwithstanding paragraph 1, where the applicable law pursuant to paragraph 1 results in the establishment of parenthood as regards only **one parent**, the law of the State of nationality of **that parent** or of the second parent, or the law of the State of birth of the child, may apply to the establishment of parenthood as regards the second parent.

# Purpose of the subsidiary rule: Art. 17(2) PP

- Applicability in **scenarios for which it was not intended?**
  - Example: A German woman living in Germany gives birth to a child in May 2023; she has been divorced from her Polish husband since April 2023. 6 months after the birth of the child, her new German partner wants to recognize the child.
  - Art. 17(1) PP: German law: mother (§ 1591 BGB) and initially no father (§ 1592 BGB) → way clear for recognition by German partner
  - Possible interpretation of Art. 17(2) PP: Polish law: assignment to ex-husband according to the (internationally widespread) so-called 300 days rule → no recognition by German partner possible (before paternity of Polish ex-husband has not been successfully contested): **does Art. 17(2) PP also apply to such a case?**

# Article 17 PP – Applicable law

(1) ...

(2) Notwithstanding paragraph 1, where the applicable law pursuant to paragraph 1 results in the establishment of parenthood as regards **only one parent**, the law of the State of nationality of that parent or **of the second parent**, or the law of the State of birth of the child, may apply to the establishment of parenthood as regards the second parent.

# Article 17 PP – Applicable law

(1) ...

(2) Notwithstanding paragraph 1, where the applicable law pursuant to paragraph 1 results in the establishment of parenthood as regards only one parent, the law of the State of nationality of that parent or of the second parent, or the law of the State of birth of the child, **may** apply to the establishment of parenthood as regards the second parent.

# What about adoptions?

Art. 3(2)(e) PP: Proposal does not apply to “**intercountry adoptions**”

According to Recital 27, this refers to international adoptions within the meaning of Art. 2 Hague Convention (= connected with a change of habitual residence).

- Recital 26 clarifies that “**domestic adoptions**” are covered by the scope of the Regulation (considered relevant [only]: rules on recognition)
- Problem: There is a **third category of adoptions** (= with an international element but not fulfilling the conditions of the Hague Adoption Convention): Example: Adoption of a French child (living in Germany) by a German couple in Germany: here the question of applicable law arises ...



# Alternative proposals

## **Article 17 - Establishment of parenthood**

- (1) The law applicable to the establishment of parenthood **at the time of birth** shall be the law of the State of the habitual residence of the person giving birth at the time of birth or, where the habitual residence of the person giving birth at the time of birth cannot be determined, the law of the State of birth of the child.

# Alternative proposals

## **Article 17 - Establishment of parenthood**

(2) *The law applicable to the establishment of parenthood **after the time of birth** shall be the law of the State of the **habitual residence of the child** at the time when parenthood is established or, where the habitual residence of the child cannot be determined, in relation to each parent the law of the State of this parent`s habitual residence at the time when parenthood is established. Where the habitual residence of a parent cannot be determined, the law of the State of his or her nationality shall apply.*

# Alternative proposals

## **Article 17 - Establishment of parenthood**

(3) *As far as the law applicable according to paragraph 1 or paragraph 2 restricts the possibility to establish parenthood **based on the parents` sex** or excludes the establishment of parenthood for **children born out of wedlock** parenthood can be established according to*

- a) the law of the habitual residence of the parent affected by the restriction, or*
- b) the law of the State of nationality of the parent affected by the restriction or*
- c) the law of the State of birth of the child.*

# Alternative proposals

## **Article 17a – Termination of parenthood**

*The law applicable to the termination of parenthood shall be*

- a) the law under which parenthood was established according to Art. 17, or*
- b) the law of the State of the habitual residence of the child at the time of termination of parenthood.*

# Alternative proposals

## **Article 18a – Adoption**

*In matters of adoption, the courts competent under Chapter II shall apply the law of the forum. In all other cases, adoption shall be governed by the law of the country in which the person to be adopted has his or her habitual residence at the time of adoption.*

# Alternative proposals

## **Article 22a – Overriding mandatory provisions**

- (1) Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its social and political organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to parenthood under this Regulation.*
- (2) Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.*

***Thank you very much for your attention!***