**CHILDREN’S RIGHT AND SURROGACY**

**Call for Input – Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children Including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material: Safeguards for the Protection of the Rights of Children Born from Surrogacy Arrangements**

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**For a full discussion, see:** <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5540169/>

1. **The Right to Know Origins and Surrogacy**

**The Law**

* The Committee on the Rights of the Child have been clear that a child has the right to know their biological origins and has been critical of States which preclude access to such information in the context of anonymous births and adoption.[[1]](#footnote-1)
* The European Court of Human Rights has recognised the importance of the child’s right to know their origins. While recognising that the right must be balanced against the rights of others,[[2]](#footnote-2) the Court has held that children have a ‘vital interest, protected by the Convention, in receiving the information necessary to uncover the truth about an important aspect of their personal identity’.[[3]](#footnote-3)
* The Court has also recognised that ‘[b]irth, and in particular the circumstances in which a child is born, forms part of a child’s, and subsequently the adult’s, private life as protected by Article 8 of the Convention’.[[4]](#footnote-4)

**Proposals**

* **A way of recording the details of a child’s birth through surrogacy should be introduced**. For example, Irish proposals propose a ‘National Surrogacy Register’ to keep records of every surrogacy arrangement, including the identity of the surrogate, intending parents and any relevant donor. [[5]](#footnote-5)
* **Such information should also indicate whether or not the surrogate woman contributed her egg.** This is important to equalize the legal position with those who are born through gamete donation in line with the non-discrimination principle under Article 2 UNCRC.
* **Disclosure should be mandatory**. This means that information about one’s birth through surrogacy and/or gamete donation should be recorded on a child’s birth certificate or through some other means. Children should not have to rely on their parents to tell them of the manner of their birth.
* It is argued by some that non-biological parents of a child may have a fundamental interest to protect their familial, social and psychological ties to the child and they should have control over whether or not they tell their child about the manner of their birth through surrogacy and/or gamete donation,
* However, I argue that it is **not justifiable that parental rights to autonomy or privacy should be used to ground a claim that there is a right to deceive others about their genetic or gestational origins.**
* Here, **the weightier interest is the person’s right to know their origins.** Freeman argues that the right to know one’s *genetic* origins is ‘…an organising framework for holding together our past and our present and it provides some anticipated shape to future life’.[[6]](#footnote-6)
* I also argue that the idea that children will be harmed from finding out can be addressed. It is generally agreed that **the earlier children are told about their origins, the better this is for children,** since the information becomes part of their identity from an early age that the possibility of disruption to their security and sense of self is minimised.[[7]](#footnote-7)
* **Laws which state that children should only be able to access identifying information about donors or surrogates at age 18 should be abolished**. This is not in line with a children’s rights approach. It only recognises *adults’* right to know their origins. Children must also be recognised as agents who can make sense of their social relationships them in line with their evolving capacities.
* **Identifying information about surrogates and/or donors should be made available to children throughout their childhood.**[[8]](#footnote-8) This could be shared with the children if they wish with the support of their parents. Children could decide in line with their own values the significance to attach to genetic and gestational ties.

1. **Pre-Approval of Intending Parents as the Legal Parents**

**Lessening the Likelihood of Dispute**

* A system where the intending parents are approved before the birth of the child is beneficial for children, as it lessens the possibility of a dispute.
* This is because parties agree the terms of the agreement and there is counselling. There is often assessment of all the parties to ensure they understand their responsibilities. There is more of a focus on informed consent. If there are concerns about capacity, capacity tests can be carried out.
* First, a dispute between parties during the first few weeks or months of a child’s life may impact negatively on children in their very early days. I argue that any reform of the law should be designed so as to avoid a child’s early life being negatively affected by disputes and onerous court procedures. Article 6(2) of the UNCRC is of particular relevance here as it directs States Parties to ‘ensure to the maximum extent possible the survival and development of the child’. The Committee also notes that ‘[y]oung children’s earliest years are the foundation for their physical and mental health, emotional security, cultural and personal identity, and developing competencies’.[[9]](#footnote-9) In particular, the Committee states that children’s wellbeing and development ‘are dependent on and built around close relationships’.[[10]](#footnote-10)
* Second, for older children, finding out that they were the subject of a disputed surrogacy arrangement could have a psychological impact. It could be distressing for children to learn details about a surrogate mother who did not want to relinquish them or to learn about intending parents who did not wish to receive them into their care.
* For these reasons, a pre-approval system which seeks to guard against disputes is preferable.

**Medical Decision-Making**

* The present framework for surrogacy in the United Kingdom does not enable those who intend to raise the child (intending parents) to become the child’s legal parents until 6 weeks after birth. Intending parents become the legal parents through a parental order (PO).[[11]](#footnote-11) It should also be noted that a PO can take up to a number of months, even if the process is started after the 6-week required period.
* This is a problem for medical decision-making.
* Healthcare professionals must obtain informed consent from those with parental responsibility before carrying out medical or surgical procedures with children. These could include vaccinations, screening or enrolment in clinical trials.
* Until a PO is granted, decision-making power for the child in relation to medical treatment, for example, lies with the surrogate and her partner (if she has one), even if she has handed over the child.
* Although it might be extremely unlikely that intending parents would not be involved in decision-making, it is unsatisfactory that they have no legal right to be involved in medical decisions.
* The potential involvement of up to four parties in medical decision-making for the child might give rise to disagreement.[[12]](#footnote-12)
* In addition, if the baby in question had serious life-limiting conditions and the question of discontinuation of life-sustaining treatment arose, it is most fitting that the intending parents would be consulted and involved by the healthcare practitioners and the Court, if a case were initiated.
* Therefore, a process whereby those who intend to care for the child are parents from the moment of birth is beneficial for children. It would mean that it is less likely tha there would be delay or dispute in gaining consent for medical treatment, which cannot be said to serve the best interests of the child (Article 3).
* **Introducing a system of pre-approval of intending parents as the legal parents before the birth of the child does not mean that the surrogate mother cannot contest the parenthood of the intending parents**. Proposals in the UK suggest that even in a system of pre-approval, the surrogate should be able to register an objection if there are changed circumstances and/or risks to the child, which would trigger a full rehearing regarding legal parenthood.[[13]](#footnote-13)

**Involvement of Children in Surrogacy Pre-Approval Processes**

* If a system of pre-approval is introduced, any existing children of the surrogate and of the intending parents should be involved in the discussions during the pre-approval of the agreement in line with their evolving capacities.
* Such children could have their views taken into account about contact with children born through surrogacy, which, for example, in traditional surrogacy, will be their half-siblings.
* Any existing children should also be involved in counselling arrangements in line with their age and maturity in order to
  + provide them with information about the process
  + address any possible concerns the child may have on experiencing their mother carrying and then relinquishing a child.
* This is in line with Article 12 which protects the right of children to express their views freely in all matters affecting them, while also requiring States Parties to give those views due weight in accordance with the age and maturity of the child.

1. The Committee has urged States Parties to ensure that adopted children can access information about the identity of their biological parents and to eliminate anonymous birth. See K. Wade, “The Legal Regulation of Surrogacy in the UK: A Children’s Rights Perspective” (2017) 29(2) *Child and Family Law Quarterly*113 at 123-124. [↑](#footnote-ref-1)
2. See *Odièvre v France* (Application No 42326/98) (2003) 38 EHRR 871. It was held that the law permitting anonymous birth pursued the legitimate aims of avoiding abortions and the abandonment of children. [↑](#footnote-ref-2)
3. *Mikulic v Croatia* (Application No 52176/99) (2002) 11 BHRC 689, at para 64. [↑](#footnote-ref-3)
4. *Odièvre v France* (Application No 42326/98) (2003) 38 EHRR 871, at para 29 (emphasis added). [↑](#footnote-ref-4)
5. Head 50(3), *General Scheme of the Assisted Reproduction Bill 2017*. [↑](#footnote-ref-5)
6. M. Freeman, ‘The New Birth Right?’ (1996) 4 *The International Journal of Children’s Rights* 273 1996, 276 at 290. [↑](#footnote-ref-6)
7. See generally L. Blake, *et al,* ‘Thoughts and Feelings About the Donor: A Family Perspective’ in S. Golombok et al (eds), Regulating Reproductive Donation (Cambridge University Press, 2016), 293 at 296. [↑](#footnote-ref-7)
8. K. Wade, “The Legal Regulation of Surrogacy in the UK: A Children’s Rights Perspective” (2017) 29(2) *Child and Family Law Quarterly*113. [↑](#footnote-ref-8)
9. Committee on the Rights of the Child, *General Comment No. 7 (2005): Implementing Child Rights in Early Childhood*,(CRC/C/GC/7/Rev. 1), at para 6(e) [↑](#footnote-ref-9)
10. Ibid,at para 8. [↑](#footnote-ref-10)
11. S. 54, *Human Fertilisation and Embryology Act 2008.*  [↑](#footnote-ref-11)
12. Re J (Specific Issue Orders: Muslim Upbringing and Circumcision) [1999] 2 FLR 678, and Re S (Specific Issue Order: Religion: Circumcision) [2004] EWHC 1282 (Fam), [2005] 1 FLR 236, in relation to disputes over vaccinations, see *Re C (Welfare of the Child: Immunisation)* [2003] 2 FLR 1054; [2003] 2 FLR 1095, CA, *LCC v A, B, C and D [2011] EWHC 4033* and *F v F [2013] EWHC 2683 (Fam).* [↑](#footnote-ref-12)
13. M. Brazier and S. Waxman, “Reforming the law Regulating Surrogacy: Extending the Family” (2016) 4(3) *Journal of Medical Law and Ethics* 159 at 175. See also N Gamble, ‘A better framework for United Kingdom surrogacy?’ in S Golombok et al(eds), *Regulating Reproductive Donation* (Cambridge University Press, 2016). See also Law Commission of England and Wales and the Scottish law Commission, *Building Families Through Surrogacy: A New Law* (Law Commission Consultation Paper 244/Scottish Law Commission Discussion Paper 167, 2019) at 162. [↑](#footnote-ref-13)