



The Redefinition of Legal Parenthood in the Era of New Assisted Reproduction Technologies

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Abstract

Biological paradigms (gestation and genetic) are still entrenched in the law as the main factors for allocating parenthood, despite the social and legal changes in family formation and the increasing use of assisted human reproduction (AHR).

Technologies that are lingering in the horizon such as partial ectogenesis, in vitro derived gametes and genome editing, promise to erode the current paradigms for vesting legal parenthood. Accordingly, the current literature on the topic has proposed the intentional paradigm as a more reliable model to designate legal parenthood in AHR. However, the progressive increase in the use of AHR, and the predictable evolution of the technologies involved in the near future, might require the reformulation of the paradigms to arrive at a more effective way to designate legal parents in a scenario of collaborative procreation.

The thesis starts by examining the link between parenthood and children's rights. Then it moves on to the analysis of legal parenthood in New Zealand's law to suggest a model for allocating parenthood in surrogacy cases in New Zealand. The model draws from comparative legislation and literature on the topic, and bears in mind children's rights.

Moving on from there, the thesis embarks on the exploration of specific assisted reproduction technologies (ARTs), such as posthumous reproduction and mitochondrial modification, and a brief consideration of other technologies, to come to the realization that a suitable allocation of parenthood might have recourse to private law. Finally, a reformulation of the paradigm is suggested based on contract law and property rights under the name of the 'bio-accord' model. This model rests on the idea that it is the control over the reproductive process that renders it feasible to rely on contract law, whilst detachment of procreative material from the body indicates the need to be protected through property rights.

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As anyone who has ever undertaken to write a doctoral thesis can attest, it is a monumental task that absorbs a huge amount of time and effort by the doctoral candidate. The present thesis has not been an exception to that general rule. However, as is commonly the case for monumental tasks, many other people have contributed, to a greater or lesser degree, to the final outcome. I would here like to dedicate a few words to those people, without whose intervention it is unlikely that the thesis would have been written.

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List of Acronyms and Abbreviations

ACART: Advisory Committee on Artificial Reproductive Technologies

ABA: The American Bar Association Model Act Governing Assisted Reproductive Technology

AID: Artificial insemination

AHR: artificial Human reproduction

ART: Assisted Reproductive Technologies

COCA: Care of Children Act 2004

DNA: Deoxyribonucleic acid

ECART: Ethics Committee on Artificial Reproductive Technologies

ECHR: European Convention on Human Rights and Fundamental Freedoms

ECtHR: European Court of Human Rights (Strasbourg Court)

HART: Human Assisted Reproductive Technology Act 2004

HFEA: Human Fertilization and Embryology Act (England)

HFEAth: Human Fertilization and Embryology Authority (England)

HCCH: Hague Convention on International Private Law

HRA: Human Rights Act 1998 (England)

MRT: Mitochondrial Replacement Therapy.

MtDNA: Mitochondrial DNA

IVF: In vitro fertilization.

SoCA: Status of Children Act 1969

US: United States of America

UN: United Nations

UNHCR: United Nations High Commission for Refugees.

UK: United Kingdom

UNCROC: United Nations Convention on the Rights of the Child 1989

UPA: The Uniform Parentage Act

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Introduction

Ever since the human race has existed, male and female adults have procreated offspring. For all of the thousands of millennia of human existence up until very recent times, procreation of children has only been achieved through sexual intercourse between a male and a female, who then become, respectively, the father and mother – the parents – of the resulting child. In all such cases the child thus conceived is genetically and biologically related to the two parents who together procreated it. There was never any uncertainty at all as to motherhood, since the woman who gives birth to the child was indisputably the gestational and genetic mother, while fatherhood was conferred based on the relationship with the child's mother. Those cases of procreation are referred to as 'traditional' conception of children.

However, recent developments in assisted human reproduction have disrupted the traditional parental roles. For many years now it is no longer necessary for there to be an act of sexual intercourse for a pregnancy to occur (e.g. artificial insemination). No longer can we be assured that the woman who gestates and gives birth to a child is in fact the genetic mother (e.g. surrogacy). Nor is it true that the male whose genetic material contributes to the conception of the child is in fact the most appropriate person to act as the father (e.g. anonymous donor gametes). Indeed, it is no longer even true that conception of a child is limited to the participation of only one female and one male – three or more individuals are frequently involved in the conception (e.g. surrogacy, mitochondrial modification, donor gametes), and there is even scope for foreseeable situations in the future in which anywhere between only one and many genetic contributors can be involved in the procreation of a single child (e.g. in-vitro derived gametes). Remarkably, it is possible to conceive children after death (posthumous reproduction), and it is foreseeable that in the future there is a complete lack of a gestational role altogether (ectogenesis). In theory, and only thinking about assisted reproduction technologies (ARTs) that are currently in use, up to seven different people may have a claim/obligation of parenthood in the conception of a single child – (1) the intending father, (2) the intending mother, (3) a male donor, (4) a female donor, (5) a mitochondrial donor, (6) a surrogate mother, and (7) the surrogate mother's partner. It is not difficult to see that new ARTs have a profound effect upon the very concept of parenthood, and on the designation of particular individuals to the roles of parents.

New technologies are changing the way humanity have reproduced for centuries to the point that the end of sex for reproduction has been predicted.¹ Social changes in the structure of the family to include single parents and acceptance of marriage between same sex couples have added to the challenges of different scenarios to the heteronormative family in which parenthood was defined and allocated.

In 2016 the first healthy baby born using mitochondrial modification therapy (MRT), or the so-called 'three parents baby', was born in Mexico where researchers of the New Hope Fertility Center in New York carried out the procedure.² A second baby was reported to have been born on the fifth of January 2017 in Ukraine. In this case it was a female.³

¹ Henry T Greely "The End of Sex and the Future of Human Reproduction" (Cambridge, MA: Harvard University Press, 2016). As reviewed by Bernard M. Dickens (2017) 43(1) *Population and Development Review* 165–181.

² J Zhang et al. "First Live Birth Using Human Oocytes Reconstituted by Spindle Nuclear Transfer for Mitochondrial DNA Mutation Causing Leigh Syndrome" (2016) 106(3) *Fertility and Sterility* e375 - e376.

³ A Coghlan "First Baby Born Using Three-Parent Technique to Treat Infertility" (Jan. 18, 2017) *New Scientist*.

In 2018, the first baby twins whose genes had been edited⁴ were born in China. The experiment was reported by He Jiankui in the Summit on Human Genome Editing, organised by the US National Academy of Sciences, the US National Academy of Medicine, the Royal Society of the United Kingdom, and the Academy of Sciences of Hong Kong.⁵ As a consequence, in 2019 The World Health Organisation (WHO) has set up a group of experts to work out a framework to consider, and likely regulate, somatic and germlines edition of genes.⁶ The significance of these technologies lies in the ability to bypass genetically inheritable illnesses that would otherwise affect future generations, allowing procreation of healthy offspring. It is also possible to alter genes for enhancement purposes, although there are ethical and moral concerns regarding this procedure.⁷

Likewise, in 2017 the creation of a bio-bag recreating a womb environment, and the successful development and healthy life of then pre-term immature lambs is converting partial ectogenesis into a short term reality.⁸ It has been predicted that once the device is refined, it will be able to be used in human pre-neonates.⁹ This new development has incited the debate concerning ectogenesis.

The present thesis discusses and analyses the concept of parenthood in the framework of assisted human reproduction (AHR), considering which among the adults participating in the conception, pregnancy and birth should be considered to be the legal parents of the resulting child. This is a vexed question that is complicated by the differences in the details of how each of the different ARTs are carried out. But there is an underlying premise that links all of the analysis, and that unifies to a certain extent all of the possible ARTs – the concept that the principal beneficiary of the parental roles is the child him or herself. With this in mind, any particular role – gestational or genetic – should not automatically define a parental role, but rather parenthood should be considered only in relation to the welfare of the child. The central tenet of the thesis is that it is a fundamental right of a child to have parents at birth.

The welfare of the child is fostered and advanced when legal parenthood is vested in people who are willing to raise the child and assume the responsibilities of parenthood. In natural reproduction, usually the parents are eager to assume the duty of care towards the child, yet reproduction by sex is also an instinctive activity that can result in unwanted parenthood, rather than a desire to procreate. However, AHR has the advantage that instinct does not play a role in the desire to become parents. It is a thoughtful and rational decision by willing parents to put into motion all the means necessary to become parent/s according to their circumstances.

There are three accepted models of parenthood, namely the gestational model (in which the woman who gestates and gives birth to the child and her partner are recognised as the legal parents), the genetic model (in which the persons whose genetic material have combined to conceive the child are recognised as the legal parents), and the intentional model (in which the persons who organise the conception, and who plan to raise and care for the child are recognised as the legal parents). Under

⁴ Gene editing, or genome editing, is “the practice of making targeted interventions at the molecular level of DNA or RNA function, deliberately to alter the structural or functional characteristics of biological entities.” See Nuffield Council on Bioethics (2016) “Genome Editing: An Ethical Review” <<http://nuffieldbioethics.org>>.

⁵ The National Academies of Science, Engineering and Medicine “Global Discussion: Proceedings of a Workshop in Brief” (2019) <<http://nap.edu/25343>>.

⁶ <www.who.int/ethics/topics/human-genome-editing/en/>.

⁷ Nuffield Council on Bioethics *Genome Editing and Human Reproduction: Social and Ethical Issues* (London: Nuffield Council on Bioethics, 2018). The foreword establishes two ethical principles that gene editing should fulfil “the principle of the welfare of the future person and the principle of social justice and solidarity.”

⁸ EA Partridge et al. “An Extra-Uterine System to Physiologically Support the Extreme Premature Lamb” (2017) 8 *Nature communications* 15112.

⁹ CT Roberts “Biomedical Research: Premature Lambs Grown in a Bag” (2017) 546(7656) *Nature* 45.

traditional conception, the same two individuals, one man and one woman, are identified as the parents under all three models. But each of the ARTs breaks, in some way, that situation – perhaps the gestational and the genetic roles are carried out by different women, or the genetic roles are carried out by more than just two people, or the intentional role is separated from both the gestational and the genetic roles. Any number of permutations around the different roles is theoretically possible, which leads to a rather complex set of feasible situations that all have somewhat different ramifications for each of the three models of parenthood.

Clearly, the increasing use of AHR for conception of children, and the likely continuation of their development and use into the future, provokes a large variety of legal issues and conundrums, at the forefront of which is the question of determination of legal parenthood. The task of the present thesis is to provide a thorough examination of each ART, including some that are foreseeable but not currently in use, and to consider the current determination of parenthood in each case as well as the most appropriate determination from the perspective of children's rights.

1.1 The different technologies concerning conception, and their implications for parenthood

The application of the different models of parenthood to determine parentage in cases of AHR is the principal focal point of the present thesis. First and foremost, the models are applied to surrogate conception in order to work out which model is most suitable for surrogacy arrangements. The thesis analyses the legal implications that stem from the adoption of each model with particular emphasis on gestational surrogacy contracts. The thesis also examines the applicability of the models to current and foreseeable future developments in assisted reproduction, such as mitochondrial modification, posthumous reproduction and in vitro derived gametes. Using the last of these technologies, the creation of children with several biological contributors will be possible in the future, and this possibility would disrupt the concept of parentage completely. These new techniques will generate new social, ethical and moral concerns, which are not addressed in this thesis.

The thesis proposes a hybrid model for the allocation of parenthood in assisted reproduction based on contract law and property rights. The model is the result of the realisation of the increasingly complex environment in which assisted reproduction is taking place due to technological innovations and developments in genetics and embryology. New possibilities offered by new technologies, such as mitochondrial modification in vitro derived gametes or partial ectogenesis are rendering the three paradigms – the genetic, gestational and intentional paradigms – unfit for purpose. The hybrid model is considered in view of the fragmentation of the biological roles implied in assisted reproduction and the separation of gametes from one or both of the genetic contributors. The proposition derives from an examination of current case law which confers property rights in gametes once the procreative material is stored for later use. The theory of property rights is also used by legislators and the judiciary to decide controversies between procreators regarding embryos stored for later use, or super-plus embryos as a result of in vitro fertilization procedures.

Property rights in the human body has always been a controversial issue, however the disconnect between procreative material and the original owner from whom it was detached adds a new dimension to the issue. It has created the necessity to legally protect procreative material which is stored, modified and treated once outside of the human body from which it originates. Entitlement to procreative material ought to be a condition to use it. In addition, the fragmentation of the roles implied in procreation, or even the fragmentation of the biological paradigms themselves, mean that the genetic and gestational paradigms might designate several persons as procreators and can create

an environment of increasing disputes over parenthood. This fact, together with the recognition that contract law is an appropriate legal theory that has already been used to resolve the disposition of embryos and gametes, leads the thesis to adopt the hybrid model under the term 'bio-accord'. This designation has been selected because 'bio' refers to the procreative material in general, either natural gametes or artificial as in in-vitro derived gametes. 'Accord' refers to an agreement – it denotes the contract or arrangement that needs to be signed between the procreators in order to allocate parenthood.

1.2 Outline of issues to be discussed

In this section I give a more detailed account of the principal concepts and ideas that are used in the thesis to address the above research questions.

1.2.1 Determination of parenthood

The term 'legal parenthood' refers to the determination of the assigning of parents to a child, with the purpose of deriving certain legal effects such as rights, obligations and duties of the parents and the child. Legal history has shown that biological parenthood has not always been the determinative factor for assigning parenthood. For instance, children born out of wedlock were once considered *res nullius* without parents and therefore without rights.¹⁰ Children born from a single mother could not be inscribed as the mother's child. Before it was superseded, Article 334.8 of the French Civil Code asserted that establishment of legal maternity in a case of a single mother is done by express acknowledgment of maternity. The French legal system even guaranteed anonymity to birth mothers to facilitate their pregnancies when they did not want to assume maternity but rather to give the baby to adoption.¹¹

In the past, filiation has been based on genetics, but also it has been grounded on social relationships to guarantee the protection of children as is corroborated by the marital presumption of paternity or adoption. The marital presumption gives priority to the social role of paternity over the biological role, disregarding the biological connexion unless the person in question challenges the paternity, during a certain time, which in most of the cases is restricted in order to introduce certainty into the relationship. Therefore, fatherhood was always based on a social role rather than on biology, although it is also true that until modern times it was almost impossible to disavow paternity due to lack of evidence. On the contrary, maternity was certain and irrefutable by the fact of giving birth.

Even when the child's biological connection is not split among several contributors, biology and legal parenthood do not always coincide, even in natural reproduction. Reduced to basic principles, parenthood is a legal issue depending on the states' policies underlying the society's moral or social values.¹² For instance, in the case of *Marckx v. Belgium*,¹³ a judgment of the European Court of Human Rights (ECtHR) forced a change in the state policy and terminated the distinction between legitimate

¹⁰ W Blackstone, W. *Commentaries on the Laws of England: In Four Books* (Callaghan, Oxford, 1879) <<http://lonang.com/library/reference/blackstone-commentaries-law-england/>>. See also RF Storrow "The Phantom Children of the Republic: International Surrogacy and the New Illegitimacy" (2012) 20(3) *American University Journal of Gender, Social Policy, and the Law* 561.

¹¹ Article 341.1 of the French Civil Code sets out: "After a child's birth, his mother may request that the secrecy as to her admittance and identity be preserved."

¹² MP Byrn and JV Ives "Which Came First, the Parent or the Child?" (2010) 62(2) *Rutgers Law Review* 305-342.

¹³ Case of *Marckx v. Belgium*, no. 6833/74, 13 June 1979, at [55].

and illegitimate children. Under Belgian law at the time of the case, a single woman who gave birth to a child needed to adopt her own child in order to give him or her all rights in matter of inheritance.

The determination of legal parenthood in assisted reproduction questions some of the legal assumptions taken into consideration by the law to determine parentage in natural reproduction. For instance, children born as a result of mitochondrial modification have genetic material from two women and a man.

1.2.2 *The welfare of children*

Fundamental to the thesis is a consideration of children's rights and the impact that parenthood has on the fulfilment of those rights.

The United Nation's Convention on the Rights of the Child (UNCROC),¹⁴ which has been almost unanimously ratified by the international community,¹⁵ sets out children's rights and the states' obligation to respect those rights and to ensure the protection of children. Article 3 of the UNCROC establishes that: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."¹⁶ In view of the general mandate to reflect the best interests of the child in all decisions concerning children, the best interests of the child ought to be the driving principle to implement decisions or policies related to determination of parentage.

Children's rights then set the framework for considering the determination of legal parentage in cases of human assisted reproduction, introducing certain legal restrictions in state policies, at least in countries signatories of the UNCROC. According to the United Nations commentary on the best interests of the child, governments are obliged to assess the best interests of the child in any policy affecting children through a mechanism called CRIA. The Committee asserted that the assessment must be grounded on the principles of the Convention and it must lie within the framework of the Convention and its protocol.¹⁷ If this duty is fulfilled, some of the current restrictions concerning the rights of children born through assisted human reproduction might be modified for the sake of children's best interests.

The best interests of the child have been applied in the jurisprudence of the ECtHR concerning surrogacy cases, and namely the recognition of foreign birth certificates by national authorities. The jurisprudence of the ECtHR points out in particular the unfair situation faced by children born as a result of cross-borders surrogacy agreements, when they return with the parents to the parents' country of origin, due to the lack of recognition of foreign birth certificates. The ECtHR has, up to now, been in favour of the inscription of foreign birth certificates and children's rights in surrogacy cases as is expounded in all of the cases, maintaining the doctrine asserted in *Menesson-Labasse v. France*¹⁸ which affirmed the child's right to an identity, embedded in Article 8 of the European Convention on Human Rights (ECHR). The recent judgment by the Grand Chamber in the case of *Paradiso and*

¹⁴ Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, and entry into force on 2 September 1990 <www.ohchr.org>.

¹⁵ The Convention has 196 countries parties to it, and 140 are signatories. See the statistics at <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en>.

¹⁶ Above n 14.

¹⁷ Committee on the Rights of the Child "General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, para. 1)", UN Doc. UNCROC/C/GC/14, 29 May 2013, at [99].

¹⁸ ECtHR, *Menesson v. France*, no 65192/11, 28th June 2014, and *Labassée v. France*, no 65941/11, June 2014.

*Campanelli v. Italy*¹⁹ does not concern the recognition of the foreign birth certificate or other complaints on behalf of the child, given that the court denied the parents the possibility of “standing to act before the Court on behalf of the child.”²⁰ Therefore, the outcome of this case does not entail a change in the doctrine regarding the child’s legal position and does not affect the argument put forward related to children’s rights.

1.2.3 *Parenthood as a source of rights*

Central to the concept of parenthood itself is the importance of legal parenthood as a source of legal rights, social welfare and health factors, as was put forward by the Hague Conference on Private International Law (HCCH).²¹ Parentless children are tantamount to rightless children. The right to have legal parents at birth is a child’s basic right, and stemming from this right many other interlinked rights are derived, such as name, inheritance, family life and nationality. And from nationality stems a further range of rights such as education, health services, social welfare and all the rights and benefits that are provided by the states.

This thesis examines the United Nations Convention on the Rights of the Child (UNCROC),²² in particular Article 7 concerning registration, identity and nationality, to explore how those rights are affected by the determination of parenthood and the possible negative impact that a delay in the establishment of filiation, or the lack of recognition of one already ascertained in another jurisdiction, has in respect of children’s rights. The rights embodied in Article 7 of the UNCROC form the core of children’s rights, and as a consequence its impact on children’s lives is significant in such a way that any lack of those rights would be disadvantageous to children.

1.2.4 *Legal parenthood and AHR in the cross-border context*

Given that most cases involving AHR take place in a multi-country environment, the determination of legal parenthood in assisted reproduction in the international context is of vital importance. The rules on conflict of laws and public policy exceptions are central to the question of the determination of legal parentage in assisted reproduction. The conflict of laws in the determination of legal parenthood is the ultimate cause of the problems arising from cross-border surrogacy.

The rules of conflict in international law vary from state to state, which results in different outcomes. That is, a child might have different parents under different jurisdictions. The most interesting cases arise when the determination of legal parenthood where the child is born is not recognised by the parent’s home country, thereby effectively leaving the child parentless. This happens because the conflict of laws applicable to the legal determination of parenthood in the parent’s country may have designated or appointed as a parent a person who has relinquished his or her rights, or who is simply not available.

The Hague Conference on Private International Law²³ aimed to introduce uniformity in private law, including the determination of legal parenthood. The Conference is engaged with the parentage/

¹⁹ ECtHR, Case of *Paradiso and Campanelli v. Italy*, Grand Chamber 25.358/12, of 24 of January 2017.

²⁰ ECtHR, Case of *Paradiso and Campanelli v. Italy*, 25.358/12, of 27 of January 2015, at [49].

²¹ Hague Conference on Private International Law, “A Study of Legal Parentage and the Issues arising from international surrogacy Arrangements,” Prel. Doc. No 3C (2014), paragraph 105 <<https://assets.hcch.net>>.

²² Above n 14. Article 24 of the International Covenant on Civil and Political Rights. Adopted by the General Assembly of the United Nations on 19 December 1966 in Article 24 enshrines the right to a birth registration and the right to a nationality.

²³ Hague Conference on Private International Law, “The private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements.” Prel. Doc. No 11 (2011) <<https://assets.hcch.net>>.

surrogacy project which aims to establish an international convention on the recognition of parentage in order to resolve the problems created by the lack of recognition of parentage as ascertained abroad, in particular as a result of cross-border surrogacy agreements, with the purpose of avoiding parentless children. An international convention on the recognition of foreign judicial decisions regarding parentage, and a protocol on the same matter but dealing specifically with surrogacy, is the route chosen by the Hague Conference in Private International Law.²⁴

The reciprocal recognition of parentage resolutions determined abroad, or the recognition of foreign birth certificates, is a more attainable solution bearing in mind that the domestic system could still advance its own policies, while giving effect to the foreign law that is applicable to a situation carried out in the foreign country. Practical considerations are also at stake in so far as rejecting foreign parentage determinations or birth certificates in cross border surrogacy leads to considering as legal parents persons who have relinquished the child, and in any case who are not under the jurisdiction of the parent's country nationality. As a consequence of this, the new determination of parentage following domestic rules is unenforceable and therefore useless.

Through an examination of case law concerning surrogacy, above all judgments of the ECtHR and the courts of England, the present thesis explores whether or not courts curtail a state's ability to enforce public policies through laws concerning children's legal parentage. In so doing, we need to bear in mind that such a policy might preclude the allocation of legal parenthood to children born through surrogacy or even other technologies if they are considered by lawmakers to be against public policies.

Mutual recognition of foreign determinations of parentage, and the filiation established therein, affect not only surrogacy cases but also other issues such as posthumously conceived children, mitochondrial replacement therapy and other human assisted reproduction techniques which could arise in the future, which are technologies that are discussed in the present thesis. Settling the mutual recognition of foreign birth certificates could also help on immigration matters. Instead of resolving problems, the refusal to recognise foreign birth certificates and filiation might create new problems and have a severe impact on children's rights and wellbeing.

The fact that new technologies of assisted human reproduction require certainty on the determination of parentage and recognition of foreign decisions or resolutions regarding legal parenthood is explained and illustrated in the following example. Imagine that a woman in New Zealand who suffers from a mitochondrial related illness travels to another country, say the UK, where mitochondrial modification is regulated. She has a baby using the egg of a healthy friend, and she uses a surrogacy agreement with a third woman due to health issues. Once the baby is born the woman returns with the child to New Zealand. She is the baby's mother according to the birth certificate issued by the authorities where the baby was born. However, the woman's friend (the egg donor) claims she is the baby's mother and initiates a lawsuit to be declared the mother. In this case both women are genetically related to the child and neither one is the gestational mother. The question then arises as to who will be recognised as the legal mother. As a result, an issue which was settled in the child's birth country is suddenly controversial. Certainty in the determination of parentage respects children's rights and thereby is in the best interests of the child. Additionally, it should be borne in mind that children develop emotional ties with their parents, and that children's perception of time differs from that of adults. Thus, any changes in the legal determination of parenthood would provoke harm to children.

²⁴ See <<https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy>>.

To appreciate the dimension of the discriminatory manner in which assisted born children are treated, it is enough to raise the question of which are the legal grounds to differentiate between assisted born children and those born naturally. It is sensible that the grounds should refer to the children themselves, with their own individuality and capacities, and not to third parties, even if they are the children's parents.

1.2.5 Pertinent legal doctrine: family law, contract law, international law

Throughout the thesis, the analysis appeals to many sources of legal doctrine – legislation in different countries, case law from different courts, international agreements and conventions, and other guidelines and advisory documents. However, overarching both the family law and the surrogacy framework of particular individual countries, the most notable fact concerning AHR is that intended parents are able to circumvent local regulations that may prohibit or restrict AHR by travelling to other countries where the practice they are interested in is legal. Therefore, the topic of the present thesis is entirely relevant to international law, and to how the legislations that are in place in each different country relate across international borders.

1.3 Research questions

The central question to tackle in the present thesis is the following; how should the determination of parenthood be decided in the light of new technologies concerning human reproduction? Above all, do any of the three accepted models of parenthood suffice for appropriate allocation of parenthood in all current and foreseeable future ARTs, or is there a need for a new model, perhaps a hybrid of the existing ones? And if a new model of parenthood is in order, what might that model look like?

Following on from that, further research questions are raised, namely (1) how to allocate parenthood of children born from surrogacy in New Zealand, given that there is no legal framework vesting parenthood of children born from surrogacy agreements, despite altruistic surrogacy being permitted; (2) how the legislative differences across different countries affects the recognition of parenthood in cross border surrogacy; and (3) what are the challenges of a future convention on recognition of foreign determination of parentage? Above all, our interest is in providing certainty in children's identity, and legal security and respect for the rights of all of the individual people involved in the conception.

The thesis discusses and analyses the issues arising from the use of AHR, from the challenges that are implied for the concept of parenthood, to the welfare of children. Along the way, the different new technologies are described and discussed, and the pertinent legal doctrine and jurisprudence is analysed.

1.4 Importance of the research

The research undertaken in the present thesis is important on a variety of levels. First and foremost, it places into the public awareness a problem that, unless checked, will affect a growing number of families as time goes on. Families form the very fabric of society, and yet family structures are placed in a situation of some peril unless children can always be guaranteed to have the correct parents, right from the very instant of birth. One cannot underestimate the social value of parenthood – children absolutely depend on it, and children are the future of any society.

Second, the research brings together into one single document a significant number of current and potential methods of assisted reproduction used to bring child into life, along with a detailed analysis

of the situation of all of the technologies that are currently or potentially in use. It also analyses case law concerning determination of parenthood in surrogacy cases in the ECtHR and The High Court of England and Wales, pointing out the drawbacks put forward by judges concerning the current determination of parenthood in surrogacy cases.

For instance, surrogacy is a widespread AHR procedure, however, in New Zealand there is no legal scheme to allocate parenthood to surrogate born children, despite the fact that altruistic surrogacy is permitted and regulated. Legal parenthood in surrogacy agreements is vested in the surrogate and her partner, disregarding the very purpose of the surrogacy procedure. The thesis proposes a model to ascertain legal parentage which could feasibly be implemented in New Zealand. The proposed model is the result of the examination of parentage laws concerning surrogacy in different jurisdictions such as England, Greece, British Columbia (Canada), and in the USA an exploration of the Uniform Parentage Act and the American Bar Association model.

Other emerging technologies, such as mitochondrial modification, gene editing and foreseeable technologies like in-vitro derived gametes and partial ectogenesis, are forecast to become feasible within a relatively short period of time. In view of these new developments, there is a need to look more closely at alternative ways of allocating parenthood, besides the existing paradigms.

The thesis offers a considered opinion, the result of many months of thought and reflection, about the best way forward for allocating parenthood of children born from AHR. A new model to ascertain legal parenthood in AHR is suggested. This model relies on the legal literature and case law regarding surrogacy, gametes, and embryo disposition. It also complements the legal literature regarding legal parenthood in AHR, and explores how to ascertain legal parenthood considering other future technologies which will become feasible to use in the procreation process.

1.5 Limitations

Several questions related to the issue of parenthood have not been answered, such as when in the process of procreation should personhood be granted to the embryo, when it is developing in an extracorporeal environment. The complexity of this issue alone deserves a whole thesis, albeit considering the technological advances in AHR, namely the feasibility of partial ectogenesis which is an issue that deserves further study.

An interesting element for the issue of parenthood is the traditional gender-based assignment of roles within the different parenthood models, and the need for there to be two parents rather than three or more or only one. However, under AHR the feasibility of collaborative reproduction and the recognition of same sex couples as a normal family formation through marriage logically imply that there is need for more neutral language, for example, using the generic term 'parents' rather than 'mother' and 'father'. However, given the practical constraints, language neutrality has been addressed only tangentially. These matters were originally included within the original thesis proposal, however the broad scope of the thesis has rendered it impossible to undertake the task of analysing them.

The extension and broad scope of the thesis render difficult to make detailed reference to the entirety of the valuable and important body of literature which exists on relevant topics. In particular, this is more noticeable in the second chapter referring to the best interests of the child and the fourth chapter related to surrogacy. Both of these chapters have been deeply and wisely analysed by reputable scholars around the world. The concepts of the welfare and best interests of the child are

probably the most analysed, and criticised, concepts in family law due to the lack of criteria to assess what exactly is the best interests of the child. However, the United Nations Committee on the Rights of the Child has embarked upon the task of providing factors and considerations for ascertaining the best interests of the child through its 2013 comments, and so the thesis focuses on the literature post-2013, and the Committee's comments. Surrogacy is a topic that has generated a huge amount of literature, not only from the legal point of view but also within other disciplines such as bioethics, in view of the controversies that have surrounded the procedure since it began. Nevertheless, the thesis is aimed at allocating parenthood in the framework of ART more generally, and consequently, has not been possible to be exhaustive with the literature which debates this particular technology.

1.6 Methodology

The research question of how to allocate parenthood to children born through assisted reproduction technology guided the selection of methods. The doctrinal method was applied through the entire thesis, relying mainly on primary sources, and the analysis of legal texts and case law of different jurisdictions. The thesis delves into different fields of law such as family law, property law and private international law to ascertain the state of the law and its operation in particular jurisdictions.²⁵ In this sense the methodology selected is classified as doctrinal. Referring to the doctrinal methodology within legal science, "McCrudden, explains that the internal method includes the study of law 'using reason, logic and argument' and the 'primacy of critical reasoning based around authoritative texts.'"²⁶

The choice of jurisdictions was conditioned by the state of the science of assisted reproduction and its regulation insofar as some technologies are regulated only in some countries. Even a cutting-edge technology such as mitochondrial modification is regulated in only one country (England), while other emerging technologies are unregulated. The approach of the thesis is comparative, given that it explores the determination of legal parenthood in different legal systems, with emphasis placed in surrogacy which is a widespread procedure. The thesis examines other aspects beyond the formal and substantive study of the law.²⁷

Considering that the research is looking into the allocation of parenthood in ART, the selection of countries was based on the way different legal systems regulate the determination of parenthood. In some countries, parenthood is ascertained directly, as is the case of Greece and British Columbia, and for others the legal scheme involves transferal of parental rights after the child's birth, such as England. The thesis weighs up which system is more respectful of children rights, paying special attention to the child's right to an identity.

The comparative method has been facilitated by the fact that the framework to consider the allocation of parenthood is children's rights, which has served to overcome the public policy aspect involved in the determination of parenthood.

The law, seen as an instrument to study social phenomena, can overcome the way the law as a discipline is divided in different fields, which implies that the present thesis is interdisciplinary in

²⁵ Ian Dobinson and Francis Johns "Qualitative Legal Research" Chapter 1 in M McConville and WH Chui *Research Methods for Law* (Edinburgh, Edinburgh University Press, 2007), at 19.

²⁶ See Terry Hutchinson and Nigel Duncan "Defining and Describing What We Do: Doctrinal Legal Research" (2012) 17 *Deakin L. Rev.* 83, at 115.

²⁷ Jeffrey Wilson "Comparative Legal Scholarship" in M Burton and D Watkins *Research Methods in Law* second ed. (Abingdon, Oxon [UK] and New York, Routledge, 2012).

nature. Technological advances require an answer from the legal perspective to deal with new situations and developments in assisted reproduction which pose a challenge to the traditional paradigms for allocating legal parenthood. The new emerging and feasible procedures of assisted reproduction are also examined in the thesis from the biological perspective, where biological fragmentation leads to scenarios that differ from the traditional allocation of parenthood. These biological aspects and technological intricacies have led the thesis to have recourse to a socio-legal method,²⁸ in so far as, following scientific literature and data, the thesis explores how certain reproductive procedures are carried out, the fragmentation they entail for the paradigms (genetic, gestational and intention), and consequently the implications for the allocation of parenthood.

The exploration of the new and emerging technologies that are taking place was done using scientific articles published in the “Pubmed” database,²⁹ and other scientific webpages. The articles were selected according to their relevance, namely when they reflected or documented a breakthrough advance in assisted reproduction. Relying on the information from those scientific articles, along with other literature, that point out the consequences and implications of the corresponding experiments and procedures and the significance of the achievements for medical science and assisted reproduction. More specifically, the thesis analyses these scientific landmarks to indicate the impacts on the legal determination of parenthood that the technological advances represent. The yardstick to gauge the impact is contingent on the relevant fragmentation, which could entail thinking about one or several paradigms for determining legal parenthood.

In addition, given that the thesis needs to provide an answer to the question of how to allocate parenthood to children born through assisted human reproduction, the thesis adopts a socio-legal method in the context of ART when it discusses emerging and potential technologies, putting forward the inability of current laws to allocate parenthood in scenarios in which biological paradigms are, or might be, fragmented.³⁰ Ultimately the thesis proposes a model, and evaluates why a hybrid model is best suited to allocate parenthood. In as much as the socio-legal perspective is non-doctrinal, the thesis has employed that methodology where appropriate. This is an obvious best practice for such materials within the thesis: “The non-doctrinal approaches represent a new approach of studying law in the broader social and political context.”³¹

The thesis criticizes the traditional determination of parenthood, bearing in mind that current laws on legal allocation of parenthood, which are to some extent rooted in natural reproduction, are not fit to deal with scenarios of fragmentation of the roles which occurs in assisted reproduction.

The thesis considers current and feasible developments in assisted reproduction to illustrate the disruption that those technologies entail in the allocation of parenthood, and suggests a new model as an alternative way of ascertaining parenthood. Therefore, the examination of the law is undertaken in a setting in which assisted reproduction takes place, or might take place, in the short

²⁸ Chris Dent “A Law Student-Oriented Taxonomy for Research in Law” (2017) 48 *Victoria U. Wellington L. Rev.* 371. At 378 Dent asserts that the socio-legal method “understands the law as being a ‘function’ of society”.

²⁹ See www.ncbi.nlm.nih.gov/pubmed/ As claimed by the data base “it comprises more than 30 million citations for biomedical literature from MEDLINE, life science journals, and online books.”

³⁰ According to Dent the research is socio-legal if it criticizes the law grounded on one particular element within its context.

³¹ McConville, M., & Chui, W. H. (2007). *Research methods for law*. Edinburgh: Edinburgh University Press. at 14

term, with the potential impact that this biological scenario might have on the law of parenthood as it is understood in current times.³²

It should be said that the fact that the thesis is interdisciplinary has required a deeper understanding of biological components. Therefore, the author dedicated a great amount of time to studying certain concepts that are not directly reflected in the thesis, but which constitute a knowledge background that was necessary to have been able to undertake the research.

However, the taxonomy for research methods in law is neither unique nor universal. Consequently, the thesis could be classified differently following other taxonomies. For example, the 1983 Social Science and Humanities Research Council of Canada introduced the term “fundamental doctrine”, while the Australian Pierce Report condensed the methods into only three, namely doctrinal, reform-oriented, and theoretical research.³³

1.7 Structure of the thesis

The thesis is divided into 9 chapters which flow from the theoretical framework set out in chapters two and three, concerning the best interests of the child and the legal analysis of parenthood and its direct impact on children rights, towards a more specific examination of the particular human assisted reproduction technologies that are currently in use, such as surrogacy, posthumous reproduction and mitochondrial modification, focusing on how the law decides the determination of legal parenthood to children born through those procedures. Special attention is dedicated to cross-border surrogacy and the problem it provokes for ascertaining parenthood due to conflicts in the determination of parenthood from two countries – that in which the child is born and the intended parent’s country of residence.

Transnational surrogacy is important in a thesis dealing with the allocation of parenthood in ART given the actual trend of crossing national boundaries in order to have recourse to technologies of assisted reproduction, and the refusal of some countries to recognize the determination of parenthood according to the foreign country’s laws. This disruption in the child’s legal status creates legal uncertainty and alters the initial allocation with the consequent negative impact on children rights, above all the right to an identity.

Once the different technologies have been discussed, chapter eight then brings the discussion together and proposes a model for the determination of legal parenthood that is applicable more generally in the context of assisted reproduction. Chapter 9 offers some conclusions.

1.7.1 Description of chapters

In a thesis about parenthood, the exploration of children’s rights is fundamental given that the significance of parenthood is to give authority to parents to care for their children, and to protect them. In short, it is pertinent to rely on the best interests principle as a central tenet to explore whether or not the determination of parenthood of children born from assisted human reproduction

³² Rob Van Gestel and Hans-W. Micklitz “Revitalising Doctrinal Legal Research in Europe: What About Methodology?” (2011). Available at papers.ssrn.com/sol3/papers.cfm?abstract_id=1824237. At 135, Dent argues that “one has to realise that normative questions concerning how the law should read can never be fully answered through empirical or sociolegal research. One will always need interpretation and argumentation to bridge the gap between facts and norms.”

³³ See Hutchinson and Duncan above n 26, at 101-102.

(AHR) respects children's rights. Following on from that, it is then coherent to consider the concept of parenthood itself and its ties with children's rights (chapter 3). Once it has been shown that children's rights emanate from parenthood, the thesis has recourse to the ensuing link to make an inference about what best serves the child's welfare. The issue of surrogacy, and in particular an analysis of the case law of England and Wales, provides the basis for the inference which constitutes the premise of the thesis. That premise is that the welfare of the child is advanced when children have legal parents at birth.

Concretely, the best interests of the child, analysed in chapter two, is a principle that is enshrined in family law and plays a crucial role in deciding guardianship, which is an integral aspect of legal parenthood. The thesis begins by exploring the concept of the best interests of the child, centred upon the comments on the best interests of the child as issued by the United Nations Committee on the Rights of the Child, and bearing in mind that the Committee endeavoured to clarify the concept and offers a series of factors with which to evaluate the best interests of the child. The criticism of the best interests of the child due to the lack of criteria upon which to ground an appraisal, and the arbitrary outcomes that have sometimes arisen as a result of its application, have generated a thorough literature on the topic. However, the thesis focuses on the literature that follows on from the Committee's comments, which set out a list of factors to assess the best interests of the child.

The thesis examines the principal jurisprudence around the best interests of the child, mainly stemming from the ECtHR, taking into account that surrogate born children might suffer distressful situations as a consequence of the way they are born. The analysis of the case law of the European Court has the purpose of illustrating the difficulties faced by surrogate children, as well as providing an insightful examination of the legal considerations at stake based on the grounds established by the European Court, and the dichotomous approach taken by the Court in resolving those cases which split the assessment of right's into two parts, that is, parents' and children's rights. The dual approach to considering the cases is grounded on the different legal positions of both parties. As was put forward by the European Court, children are different persons to parents, with their own rights, and they do not contribute to, but rather they are the result of, the prohibited acts. In short, surrogate born children are innocent of any prohibited actions. Chapter 2 finishes with an analysis of the literature regarding the child's welfare in preconception assessment, as it is considered in assisted reproduction procedures.

Chapter 3 initiates the discussion around parenthood, setting out the importance of the establishment of legal parenthood for children. In order to answer the question posed by the thesis of how to allocate parenthood in AHR, it is pertinent to explore the role that parenthood plays in children rights, in essence, why parenthood is important for a child's welfare. That task is carried out through the examination of the Convention on the Rights of the Child,³⁴ and the obligations stemming from this legal instrument. The chapter goes on to consider the issue of the importance of legal parenthood as a precursor of children rights. It puts forward the link between parenthood, nationality, and identity. It also deals with the history of guardianship which shows the historical exclusion of women as guardians of their own children. Then the analysis of the legal framework of guardianship in New Zealand is undertaken.

In a thesis concerning the determination of parenthood in new assisted reproduction technologies it is necessary to have an insight into these new technologies and the way they are regulated in some countries in order to understand the challenges that those technologies pose for the traditional method of ascertaining parenthood. In particular, the thesis explores surrogacy, posthumous

³⁴ Above n 14.

reproduction and mitochondrial modification, dedicating a separate chapter to each of these technologies.

Chapter 4, then, focuses on the determination of legal parentage in surrogate arrangements, considering the wide extension of the practice around the world and the predicted increase in the future, which has converted surrogacy into a normal ART, far from the outraged environment which surrounded the initial stage.³⁵ In chapter 4, the determination of parenthood in surrogacy agreements is addressed through a comparative examination of legislation dealing with the issue in different jurisdictions. In particular, in England where the Human Fertilization and Embryology Act (here-in-after HFEA) implemented parental orders to transfer parenthood from surrogates to intended parents,³⁶ and in British Columbia (Canada) which established a presumption of parenthood in favour of intended parents in a simplified manner.³⁷ It also examines briefly the identity of who are the legal parents and how they are assigned to children born from surrogacy in Greece, and in the USA. In this last jurisdiction the chapter considers parentage laws concerning surrogacy in the Uniform Parentage Act and the American Bar Association Model. Particular emphasis is placed on the examination of English legislation and the analysis of the case law concerning surrogacy to remark on the shortcomings evidenced by the judiciary regarding the mechanism implemented to transfer parenthood from surrogate parents to intended parents.

Chapter 4 also considers the treatment of surrogacy within New Zealand's jurisdiction. New Zealand does not have a proper framework to assign parenthood in cases of children born through surrogacy, but rather intended parents' only option is to have recourse to adoption, disregarding the fact that one or both of the parents are genetically related to the child, which entails the adoption of one's own natural child. Drawing from the examination of surrogacy legislation in other jurisdictions, a scheme for the allocation of legal parents to children born through surrogacy in New Zealand is suggested.

Surrogacy and AHR raise certain social and moral concerns which are beyond the scope of the thesis. The standpoint of the thesis is legal parenthood, and surrogacy offers real examples of the link between parenthood and children's rights. The objective is to emphasize the impact that the lack of parents at birth has on children's rights. All of the different rights that stem from the legal recognition of parenthood in surrogacy arrangements are discussed, and each is related back to the child's welfare. The legal rules governing guardianship are explored together with the history of guardianship which reveals the unfair standing of married women towards their children, since they were not legally considered as guardians of their own children.

Following on from that, chapter 5 provides an in-depth examination of the case of posthumous reproduction, with particular reference to the case law of England and Wales, and the guidelines and legislation in New Zealand. The rights of posthumously born children are assessed and fatherhood considered.

Chapter 6 is dedicated to the case of mitochondrial replacement therapy (MRT), which is a cutting-edge technology that has, as at the time of writing, only ever resulted in two births, but which promises to become more popular in the very near future. As opposed to other ART that are used by couples that cannot conceive of children naturally due to being same-sex or single, MRT is much more focused on conceiving healthy children where, without the technique, the children would be born unhealthy. Mitochondrial modification is at the very forefront of new technologies, given that the first

³⁵ ES Scott "Surrogacy and the Politics of Commodification" (2009) 72(3) *Law and Contemporary Problems* 109-146, at 4.

³⁶ Human Fertilization and Embryology Act 2008, s 54.

³⁷ The British Columbia Family Law Act SBC 2011, s 29.

healthy baby born using mitochondrial modification therapy (MRT) is reported to have been born as recently as April 2016 in Mexico. The so-called “three parent baby” was conceived with the help of researchers from the New Hope Fertility Centre in New York who carried out the procedure, given that mitochondrial modification is forbidden in the USA. The fact that the baby has genetic material from two women could potentially contribute to creating uncertainty and litigation around motherhood. The thesis applies the three existing models of determining parenthood to the case of mitochondrial replacement therapy to work out which model is more suitable for determining parentage for that technology. The first country in the world to regulate the procedure was the United Kingdom, and therefore the thesis considers the regulation of the procedure in England and relies on it to analyse which paradigm to apply, and to draw conclusions.

Chapter 7 goes on to analyse cross border surrogacy from the perspective of private international law, in particular considering the parentage/surrogacy project undertaken by the Hague Conference on private International Law, which is aimed at drawing up an international convention on recognition of judicial decisions regarding parentage. It looks into the connecting factors and the public policy exceptions usually permitted in international treaties. However, in the case of surrogacy, the brandishing of the exception could jeopardise the treaty. Chapter 7 is important for the present thesis because different regulations in different countries regarding ART poses a challenge to the determination of parenthood in an international context. Above all, we currently live in a world in which, faced with a situation in which a technology (such as surrogacy or MRT) is either not permitted or heavily regulated in their own country, people can nevertheless have easy, and legal, recourse to those same technologies in a different country.

Chapter 8 describes the three principal existing methods or paradigms of ascertaining parenthood, namely the gestational model (in which, in the first instance, the parents are understood to be the pregnant woman and her partner), the genetic model (in which parenthood is determined by biological links with the child), and the intentional model (in which parenthood is determined according to the intention to be parents).

The genetic paradigm deems the parents to be the persons who are genetically related to the child. The woman who shares the genetic link to the child is the mother. In traditional or sexual reproduction, the woman carrying the baby is at the same time the genetic mother. However, this exclusive and unique tie between both genetic and gestational motherhood can be severed when conception takes place via assisted reproduction, above all through gestational surrogacy. As a consequence of the division of roles this method is no longer valid to determine controversies in surrogacy cases. The method has also become inept as a result of mitochondrial modification which allows a child to be born with genetic material from two women and a man.

The gestational model is normally the default model in the legislation of countries around the world for determining motherhood. Under this model the woman who gives birth to a child is considered to be the mother. It is still considered as the normal means of ascertaining motherhood, although in some jurisdictions this presumption is altered where a valid surrogacy arrangement exists between intended parents and a surrogate.

The intentional model, on the other hand, establishes parentage in favour of the persons who intend to create and raise the child, and who therefore took the appropriate steps to become parents and to provide for all of the necessities of the child – material, psychological, moral and social. Chapter 8 applies the gestational, genetic and intentional paradigms to the different ART, both those currently in use as well as foreseeable developments. In order to facilitate the immediate visualization of the outcome of applying the paradigms to AHR, a matrix has been drawn up.

Following on from that, the chapter explores the use of contract law on the disposition of embryos, and property rights in gametes and embryos to arrive at a model for ascertaining parenthood based on contract and entitlement to the biological material. The term 'procreative material' is used, bearing in mind that technologies such as mitochondrial modification have genetic material from two women, and in-vitro modification could have genetic material from more than two persons.

The last chapter, chapter 9, provides conclusions and some possible directions for future research.

2. The Best Interests of the Child

2.1 Introduction

The best interests of the child is a key principle entrenched in family law in general. It is used as a factor for taking decisions in guardianship or parenting orders, that is, day-to-day care for, or contact with a child. Consequently, the thesis uses the concept as the starting point for looking into parenthood in general and, specifically, in the context of assisted reproduction. The concept has been used by the European Court of Justice and other courts to resolve cases arising from parenthood of children born through surrogacy. Due to this, the crucial concept of the best interests of the child, together with children's rights, serves as a yardstick within the normative framework of the thesis.

Bearing in mind that the present thesis deals with the determination of parenthood in assisted reproductive technologies, and considering the convulsion and controversy that the use of these techniques entails, the analysis of the best interests principle is fundamental for examining the rights of children born through assisted reproductive technologies, and to explore whether or not the determination of parenthood of children born from assisted human reproduction (AHR) respects children's rights.

The notion of the best interests of the child, enshrined in Article 3 of the Convention on the Rights of the Child (UNCROC),³⁸ has been criticised for the subjectivity and lack of criteria used to assess its application in each case, despite its general and widespread use in family law. In effect, the original article was drawn up in a general and abstract manner without considering the criteria for evaluating what best serves the interests of the child. Children's best interests are justified for ensuring that children's rights are not ignored or encroached by adults.³⁹ The best interests of the child were envisioned to be applied in the particular circumstances of each individual child, and so a general set of criteria was not foreseen as being essential in order to implement the principle in practice. However, the lack of references to gauge the best interests of the child turned out to be the principle's Achilles heel, due to the abuse of the principle. In 2013, The Committee on the Rights of the Child (the 'Committee') issued a General Comment on the principle so as to provide general guidelines for its application.⁴⁰ The Committee's comments set out the criteria to apply in evaluating the provision, referring to the rights embodied in the Convention on the Rights of the Child. Subsequently, the best interests of the child should guarantee the enjoyment of the full set of rights set out in the Convention.

This chapter will explore the best interests of the child as they have been deployed and interpreted in different legal frameworks. As a consequence, the chapter is divided into several sections. In section 2.2, it analyses the best interests of the child, starting with what is laid down in the UNCROC Committee's General Comments, and mentioning briefly some literature concerning the principle. Next, it moves on to examine the best interests of the child in the case law of the European Court of Human Rights concerning surrogacy cases. The fourth section explores the child's welfare principle and best interests of the child in New Zealand's jurisdiction, specifically in the Care of Children Act, and the history of the provision. Following on from that, section 5 examines the principle as applied

³⁸ Convention on the Rights of the Child, above n 14. Hereinafter (UNCROC).

³⁹ For a complete analysis of article 3 of the UNCROC, see Michael Freeman *Article 3: The Best Interests of the Child* (Martinus Nijhoff, 2007).

⁴⁰ Committee on the Rights of the Child, "General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, at [1])", UN Doc. CRC/C/GC/14, 29 May 2013.

in the Human Assisted Reproductive Technology Act 2004, providing a brief literature review of the main criticism of the principle in preconception assessment.

In the European Court of Human Rights the best interests of the child have provoked a reduction in the margin of appreciation conferred to national States, giving rise to a jurisprudence that forces national States to recognise the identity rights of surrogate born children on equal footing with any other children, irrespective of the way they are born. The interpretation is based on children's rights and not parents' or adults' rights.⁴¹

New Zealand inherited the welfare principle embodied in the legislation of the United Kingdom, and as a result the best interests and welfare converged in family law, although the origins of the two principles differ, in so far as the welfare principle developed in domestic legislation, while the best interests emanated from an international Convention.

The welfare principle has been extrapolated from its initial scope to the context of preconception assessment within the statutory provisions of assisted human reproduction. In the United Kingdom as well as in New Zealand the welfare principle is incorporated in the Human Assisted Reproductive regulations. In the United Kingdom the welfare of the hypothetical child should be taken into account before providing treatment services in licensed clinics, when deciding whether or not to authorise a procedure using human assisted reproduction.⁴² In New Zealand's domestic law the well-being of a theoretical child should be considered before giving approval to an assisted reproduction treatment, other than those that are classified as being established treatments.⁴³ Therefore, the literature which opposed the application of the principle in preconception assessment is valid in New Zealand in view of the similarities in both regulations.

2.2 The best interests of the child in the Convention on the Rights of the Child

Article 3 of the UNCROC asserts: "1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."⁴⁴

2.2.1 Committee comments on the best interests of the child

In its general comments, the Committee stated that the principle of the best interests of the child has three dimensions as a "substantive right", an "interpretative principle" and as a "procedure rule."⁴⁵ Those three facets reveal the importance of the concept that constitutes the foundation of children's rights or the "master key of the house" of children's rights.⁴⁶

The Committee explained that, as a 'substantive right', the best interests of the child ensure that the principle is applied on every occasion when a decision is taken related to children individually or in general, and it can be directly petitioned before a court. As an 'hermeneutic rule', it serves to impose the meaning which fulfils children's rights more effectively over other less effective interpretations.

⁴¹ *Menesson*, above n 18, at [100].

⁴² HFEA 1990, s 13(5).

⁴³ Section 4 of the Human Assisted Reproductive Technology Act 2004. No 92 (HART 2004).

⁴⁴ Convention on the Rights of the Child, above n 14.

⁴⁵ UNCROC Comments, above n 31.

⁴⁶ The expression was used in international law. See International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law—Report of the Study Group of the International Law Commission UN Doc. A/CN.4/L.682 (Apr. 13, 2006) at [420]. It was used referring to international law instead of children's rights.

And finally, as a procedural norm it implies that, when adopting a decision, the procedure must incorporate an assessment “of the possible impact (positive or negative) of the decision on the child or children concerned.”⁴⁷ It also entails that the reasoning process should be explicit, and should explain how the best interests of the child have been considered and weighed against other interests, and which criterion has grounded the outcome.

The best interests of the child is a universal concept embodied in the UNCROC although there is no universal definition or agreement about its meaning. The concept of the best interests of the child is subjective, as was commented in the drafting process,⁴⁸ and as has been acknowledged by the Committee which affirmed: “It should be adjusted and defined on an individual basis.”⁴⁹

According to the Committee’s comments, the flexibility and adaptability of the concept has two faces. On the one hand, it constitutes an advantage, given the diverse social, cultural, economic and religious context where the principle is applied, but, on the other hand the same adaptability entails a disadvantage, given that the notion has been abused and used to justify unfair policies by governments and institutions, parents and professionals.⁵⁰

The principle of the best interests of the child has detractors, who consider that the notion of children’s best interests could be counterproductive in many ways. In particular, the continued reference to the child’s best interests could hinder the full achievement of children’s rights, because children’s human rights are not essentially different from other human rights. Therefore, they should be secured on the same grounds as “those of all other human beings”. In this regard Nigel Cantwell states: “Moreover, the continued and unwarranted plethora of references to best interests, seemingly required by the UNCROC, actually impedes awareness raising about the fact that children have human rights as opposed to ‘special’ rights.”⁵¹ He suggests it would be convenient to not use the notion of best interests of the child when the case entails a violation of children’s rights which can be grounded on other rights rather than the best interests of the child. Another criticism related to the concept of the best interests of the child is given by Stephen Parker as “the indeterminacy, vagueness or open-endedness of its operating standard.”⁵²

It is undeniable that sometimes the notion is used to avoid undertaking a deep analysis of the rights at stake, and it is being applied as a general formula that encompasses the rest of children’s rights. That general analysis could overlook other children’s rights, and even worse it can serve to overstep children’s rights. The Committee is aware of the risk of misuse, and in its comments affirmed that: “an

⁴⁷ UNCROC Comment, above n 31, at [6].

⁴⁸ Philip Alston “Best Interests Principle: Towards a Reconciliation of Culture and Human Rights” (1994) 8 *The International Journal of Law and the Family* 1; 1-25, at 11. According to Alston in the drafting process there was an “observation by one representative that the phrase was inherently subjective and that its interpretation would inevitably be left to the judgment of the person, institution or organization applying it.”

⁴⁹ UNCROC Comments, above n 31, at [32].

⁵⁰ At [34].

⁵¹ Nigel Cantwell “The Concept of the Best Interests of the Child: What Does it Add to Children’s Human Rights?”, in Milka Sormunen (ed.), *The Best Interests of the Child – A Dialogue Between Theory and Practice* (2016), Council of Europe, at 24.

⁵² Stephen Parker “The Best Interests of the Child - Principles and Problems” (1994) 8 *International Journal of Law and the Family* 1; 26-41, at 1. See also J Eekelaar “The Role of the Best Interests Principle in Decisions Affecting Children and Decisions About Children” (2015) 23(1) *International Journal of Children’s Rights* 3. Eekelaar proposes to introduce a structure into the assessment of the best interests that can make decisions more reliable. He suggests to divide the decision between “decisions directly about children and decisions indirectly affecting them.”

adult's judgment of a child's best interests cannot override the obligation to respect all the child's rights under the Convention."⁵³

The critique of the concept of the child's best interests is mainly as a substantive right and the way it has been abused on occasions, but the concept is generally accepted to be used as a hermeneutic principle to assess a situation in cases where there is a tension between different rights or a way to fill gaps.⁵⁴

The use of the best interests principle wherever there is a lacuna in the Convention was put forward by Stephen Parker who asserts: "In all matters not governed by positive rights in the Convention, article 3(1) will be the basis for evaluating the laws and practices of the States Parties."⁵⁵

The vulnerability of children is often invoked as a justification for the best interests of the child as a primary consideration, especially given that the world is ruled by adults and there is a risk of children being disregarded.⁵⁶ Children come into life because adults brought them or created them as creatures invited by adults, and so they should have their rights prioritized. Protecting children's welfare is tantamount to protecting the future of the society.⁵⁷

The Committee also relied on the dependency and vulnerability of children to justify the best interests of the child as a primary consideration.⁵⁸ It is not just that children's rights are conceived of as being paternalistic or charitable, rather it is children's characteristics which require special safeguards in order to guarantee the complete and real enjoyment of those rights. In this sense the Committee is very explicit in the function that the principle of the best interests serves in the fulfilment of children's right and asserts: "The concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child."⁵⁹

2.2.2 *Specific language of article 3*

a) 'Actions'

Regarding the term 'actions' the Committee has taken a *lato sensus* approach, understanding it to include both any kind of acts, as well as omissions or inactions. The Committee affirmed that 'action' includes not only decisions "but also all acts, conduct, proposals, services, procedures and other measures."⁶⁰

As Freeman explains, it would be absurd to exclude omission so that passivity or failure to protect children from harm or abuse is not included, despite the fact that action is in the best interests of children.⁶¹

⁵³ At 1, [4].

⁵⁴ Cantwell, above n 42, at 25. On the criticism to the best interest of the child see the important book of Jane Fortin *Children's Rights and the Developing Law* (3rd ed.) (Cambridge, UK and New York, Cambridge University Press, 2009) doi:10.1017/CBO9781139168625. See also J Eekelaar, 'The Role of the Best Interests Principle in Decisions Affecting Children and Decisions About Children' (2015) 23 (1) *International Journal of Children's Rights*.

⁵⁵ Parker, above n 43, at 27.

⁵⁶ Freeman, above n. 30, at 40.

⁵⁷ At 40.

⁵⁸ UNCROC Comments, above n 31, at [37].

⁵⁹ At [4].

⁶⁰ At [17].

⁶¹ Freeman, above n 30, at 40.

b) 'Concerning children'

The Committee interpreted this term in a broad sense and explained that it operates in all actions and measures affecting children directly or indirectly, in general or on an individual basis,⁶² even if the measure is not specifically directed at children. The Committee clarified that "in relation to measures that are not directly aimed at the child or children, the term 'concerning' would need to be clarified in the light of the circumstances of each case in order to be able to appreciate the impact of the action on the child or children."⁶³ The latter indication, as the Committee acknowledged, is due to the fact that potentially it is difficult to imagine a State measure that does not affect children even remotely, but not all actions trigger the obligation to follow "a full and formal process of assessing and determining the best interests of the child."⁶⁴ The yardstick for deciding the level of compliance depends on the degree to which the measure impacts children.

According to Alston the plural 'children' used in the wording would mean that the purpose of the expression concerned is broad rather than restrictive, widening the scope of the principle of the best interests.⁶⁵ He pointed out that it is easier to determine the point at which a measure directed to a child individually is too general or lacking in focus to be seen as affecting a child in particular. On the contrary, when it refers to children in general the difficulty in knowing when the measure no longer concerns children increases.⁶⁶

c) 'a primary consideration'

In spelling out the differences between 'paramount', which was the wording on the first draft of the UNCROC, and 'primary', which was the final wording, Freeman notes the interpretation of the term 'a primary consideration' set out in the Convention was seen to have less status than the term used by the Declaration on the Rights of the Child, which establishes the child's best interests as the paramount consideration. Freeman contends the standard endorsed by the Declaration was that the principle was determinative, unlike the Convention that used the term 'primary consideration', which implies a different standard. He explains that the different wording was due to the discrepancy of some delegations over the original draft which include the principle as a paramount consideration.⁶⁷

The Committee drew a comparison between 'paramount consideration' as provided for in Article 21 of the Convention and 'primary consideration' as contemplated in Article 3, and concluded that the principle of the best interests of the child has, in some cases, the status of being a "determining factor" expressing:⁶⁸

"In respect of adoption (art. 21), the right of best interests is further strengthened; it is not simply to be 'a primary consideration' but 'the paramount consideration'. Indeed, the best interests of the child are to be the determining factor when taking a decision on adoption, but also on other issues."

The other issues where the best interests of the child are a determining factor are the following:⁶⁹

"Article 9 – separation from parents; Article 10 – family reunification; Article 37.c – separation from adults in detention; and paragraph 2.b.iii of Article 40 – procedural guarantees, notably the parents' presence

⁶² UNCROC Comments, above n 31, at [19].

⁶³ At [20].

⁶⁴ At [20].

⁶⁵ Alston, above n 39, at 14.

⁶⁶ At 14.

⁶⁷ Freeman, above n 30, at 26.

⁶⁸ UNCROC Comments, above n 31, at [38].

⁶⁹ J Cardona Llorens "Presentation of General Comment No. 14: Strengths and Limitations, Points of Consensus and Dissent Emerging in its Drafting", at 15.

at hearings in criminal cases involving children in conflict with the law. In all these cases, the convention gives the child's best interests greater weight than other interests."

When the best interests of the child conflict with other rights, it is singled out by the committee into a different classification depending on a series of different stages.

At the first stage, the committee refers to conflict of rights once the best interests of the child have been assessed. In that case the committee makes a general statement about the possible situation of conflict, e.g. "of other children, the public, parents, etc.", but mention is made of two cases. First when there is a conflict between the best interests individually considered and a group of children; second, when the conflict arises between the best interests of the child and the rights of other persons. In the case of conflict between a child's best interests individually and those of a group of children, a balance should be struck to accommodate the different interests on a case by case basis. When the best interests of the child conflict with another person's rights the solution is the same as the previous case. Then, "when harmonization is not possible", the Committee indicated: "the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best."⁷⁰ It could then be argued that the child's best interests are contemplated by the Committee as being more important than others, superior in ranking as is deduced from the definition of the term 'priority'. The notion of priority is close to the determining or determinative factor, because it could not be any other way if the principle is to serve to resolve cases where a conflict of interests arises and harmonization is not possible. One of the rights needs to have a superior ranking in the hierarchical order to resolve conflicts. Therefore, giving priority to one right means making it the determining factor.

Nevertheless, it should be conceded that the Committee is not completely categorical on this point, and there may be room for different interpretations. In this regard, referring to the Committee Comments on how to resolve a clash between different rights or interests, Cardona Llorens pondered if the Committee has a well-defined view on how to resolve the conflict, and questioned: "having read them, is it now clear how to resolve a conflict between the interest of the child and another interest?"⁷¹ If 'priority' is not to be understood as determinative it is obvious that it will be pointless for resolving conflicts. Furthermore, another element that indicates that the term is determinative is the apparent inconsistency of saying that "the child's interests have high priority and not just one of several considerations".⁷² Thus, it is not drawing a comparison to other priorities but to other considerations. The terms of comparison are not the same and this seems to give a determining role to the words 'high priority' in contraposition to other considerations.

The second stage of conflict arises when balancing the different elements or factors in the process of assessing the best interests of the child, before those best interests have been determined. The Committee warned that the assessment of the different elements depends on the case, and not all elements will be relevant for all the cases. Thus, it should be considered on a case-by-case basis. An element could be in conflict, like for instance "preservation of the family environment may conflict with the need to protect the child from the risk of violence or abuse by parents"⁷³ and in such a case, after evaluating the elements against each other the solution reached should be in the best interests of the child. The Committee stressed that "the purpose of assessing and determining the best interests

⁷⁰ UNCROC Comments, above n 31, at [39].

⁷¹ Cardona Llorens, above n 60, at 15.

⁷² At 15.

⁷³ UNCROC Comments, above n 31, at [81].

of the child is to ensure the full and effective enjoyment of the rights recognized in the Convention and the holistic development of the child.”⁷⁴

That emphasis may suggest that the solution offered by the best interests of the child is the one that ensures, in greater measure, the enjoyment of the rights. That is, the optimal solution should be the one that guarantees the effectivity of most of the rights against those that provide less protection or that infringe more rights. Then one could consider that the conflict between different elements can be resolved taking into account quantitative and qualitative elements, adopting a solution that guarantees more rights and between them the ones that protect the rights more efficiently.

Concerning the third stage of conflict, in its observation the Committee referred to procedural safeguards and, under the criteria of legal reasoning, mentioned the obligation to make explicit in a final decision concerning children all of the reasoning process behind the adoption of the decision, acknowledging the possibility that the decision chosen is not in conformity with the best interests of the child.⁷⁵ Nevertheless this is considered to be an exceptional result, because it is expected that the best interests of the child should prevail in all cases unless there exists a justified reason of greater importance that deserves to outweigh the best interests of the child. As Alston notes, in the exceptional circumstance where other interests override the child’s best interests, the *onus probandi* to demonstrate there are no other options in compliance with the best interests of the child seems to rest upon those adopting the decision.⁷⁶ Perhaps the doctrine of the European Court of Human Rights related to the proportionality test when assessing the margin of appreciation enjoyed by the European States could be used by analogy in this context.⁷⁷

The role of the principle of the best interests of the child as a means of solving disputed rights was put forward by Alston who denominated this role as a “mediating principle which can assist in resolving conflicts between different rights where these arise within the overall framework of the Convention.”⁷⁸ Therefore, as far as the “best interests of the child as a primary consideration” and its role as a means to resolve conflicts are concerned, there is still doubt as to what is the function of the best interests of the child in respect of other rights.

The interpretation of the expression ‘primary consideration’ has been a vexed question since the drafting to the Convention given that the original word, ‘paramount’, was substituted with the word ‘primary’. The purpose of that word in the article was to be determinative in children’s rights, and then the word ‘primary’ took its place. Therefore, it could be said that some of the problems that arise in the implementation of the Convention could be rooted in this change, considering that the best interests of the child play a central role in the whole Convention and that the word ‘primary’ took the role of the original word but it has not been given the same aim as the original word, that is, being determinative on children’s rights in the context of Article 3 of the Convention.

The objective or role conceived for the best interests of the child, and the expression ‘primary’ in particular, offer an explanation of why children “are the only rights-holders for whom international law foresees consideration of best interests as being essential to realising those rights.”⁷⁹ This peculiarity is precisely another argument in favour of the high ranking that the best interests of the child has in actions concerning children. Children were seen as an object rather than a subject of

⁷⁴ At [4].

⁷⁵ At [97].

⁷⁶ Alston, above n 39, at 13.

⁷⁷ At 33. Alston suggested this analogy in relation to the role that the cultural factor can play in the convention, at 20.

⁷⁸ At 25.

⁷⁹ Cantwell, above n 42, at 19.

rights,⁸⁰ or a right holder. The Convention stands to eradicate this conception from the law in general, directing the principle to all actors taking decisions concerning children. On the other hand, children are the future of society and are vulnerable thus they require special attention from the society in general, and this justifies why their interests should be placed above other considerations. Young children do not have a voice by themselves, and even upon reaching adolescence they lack the maturity and knowledge to be able to be heard if their rights are not advanced or given priority.

2.2.3 *Factors to consider*

The lack of definition of the notion of the best interests of the child and the absence of elements to ascertain what is in a child's best interest have been the most widespread criticisms of the UNCROC, alongside the "difficulty of identifying the criteria that should be used to evaluate alternative options."⁸¹ In this respect Freeman points out that it could have been supportive to determine the child's best interests if the UNCROC had been given a check list of factors.⁸²

The lack of any criteria to determine children's best interests have tainted the concept with subjectivity given that there were no common factors that could be applied in taking decisions, and those elements were not expressed in the resolution of the case. In response to that criticism two theories emerged to address the problem of indeterminacy: one, which affirmed "conventions (with a small 'c') are constructed by communities of rule users which can reduce uncertainties of application to a considerable extent."⁸³ The second one, formulated by Alston, relied on the convention itself as a source of the criteria to ascertain the best interests of the child, and affirmed the UNCROC "provides a number of signposts capable of guiding those seeking to identify what is in the best interests of the child, and excludes from the equation, by implication, various other elements."⁸⁴

The Committee reacted to those criticisms by addressing the situation and providing a list of factors that should be considered to determine what is in the child's best interests, as well as demanding that decisions related to children make explicit the reasoning process. The factors laid down by the Committee to assess the best interests of the child are based on the rights contemplated by the conventions affirming:⁸⁵

"The full application of the concept of the child's best interests requires the development of a rights-based approach, engaging all actors, to secure the holistic physical, psychological, moral and spiritual integrity of the child and promote his or her human dignity."

"The purpose of the principle of the best interests of the child is to ensure the realization of the rights enshrined in the Convention and the integral development of a child."⁸⁶ And the same could be said the other way around; the aim of the rights that are preserved by the Convention is to ensure the best interests of the child.

2.2.4 *Assessment and determinations of the best interests of the child*

⁸⁰ Alston, above n 39, at 4.

⁸¹ At 18.

⁸² Freeman, above n 30, at 31.

⁸³ Parker, above n 43, at 27.

⁸⁴ Alston, above n 39, at 19.

⁸⁵ UNCROC Comments, above n 31, at [5].

⁸⁶ At [4].

In its general comments from 2013⁸⁷ the Committee purported to give guidance for the factors which should be taken into account in assessing and determining the best interests of the child. It set out a minimum list of elements to examine and consider when assessing the best interests of the child, with the proviso that other elements could be included or taken into consideration. In that way, it is not a *numerus clausus* list as long as the added elements are not contrary to the rights protected by the Convention or entail a consequence contrary to the rights ensured by the Convention.⁸⁸

The criteria set out by the Committee in order to assess and determine the best interests of the child is a guide for the purpose of evaluation. But Cardona Llorens sees a weak point in the criteria, suggesting that perhaps they are not complete and there is no element to strike the balance.⁸⁹ The issue is that in its comments the Committee enumerates and explains a list of factors to consider in assessing the best interests of the child but is silent on which are the criteria for deciding which element is more important or more heavily weighted in the final decision. On that question it could be argued that it is the one which ensures the maximum effectivity and protection of children's rights against the one which results in greater infringement of rights.

The evaluation of the child's best interests requires bearing in mind the optimal outcome for children when taking a decision concerning children, but it also requires considering and analysing the whole range of children's rights affected by the measure. These factors are conceived of as a guide so as to provide substantive tools for helping to provide rational measures, after having considered and weighed all the elements in assessing the best interests. It could be said that this approach avoids both overseeing rights which could be affected by the measure and adducing the best interests of the child as a general formula emptied of substance.

The Committee provides guidance in assessing the best interests of the child as a substantive right and as a rule of procedure, and has enumerated specific elements in the former case, which are discussed below.

a) Child's view, based on Article 12 of the Convention.

The Committee pointed out that a child needs to be heard and his or her point of view needs to be considered in all matters concerning children, regardless of the situation of the child, that is, including young or vulnerable children.⁹⁰ This entails that a reliable mechanism of representation should be put in place to provide for the child's point of view in these cases. That general statement assures that in all cases the child's point of view is considered and that children's individual situations do not provide an excuse to disregard or omit children's points of view. The committee also referred to the complementary role of Articles 12 and 3.

b) Children's identity

The Committee emphasised that children's characteristics, which constitute their identity, need to be pondered in taking a decision: "The identity of the child includes characteristics such as sex, sexual orientation, national origin, religion and beliefs, cultural identity, personality."⁹¹ Article 8 of the Convention embodied the right to respect children's identity. In cases of placement like for example adoption, separation from parents, and foster care, the Committee recommended providing children with an environment that is close to their identity.⁹²

⁸⁷ At [48].

⁸⁸ At [51].

⁸⁹ Cardona Llorens, above n 60, at 14.

⁹⁰ UNCROC Comments, above n 31, at [53], [54].

⁹¹ At [55].

⁹² At [55], [56].

c) Preservation of family environment and family relations

The maintenance of children's family life is a right embodied in Article 18 of the Convention. According to the Committee "the term 'family' must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom."⁹³ Precluding family separations is a right contemplated in Article 9 of the UNCROC, consequently, separation from family is a measure of last resort and must only be taken when maintenance of the family relationship results in harm for the child or when it is necessary. An adverse situation for a child that could be overcome if parents are provided with some help cannot lead to the destruction of the family unit, and the Committee warned that disability or poverty cannot justify a separation measure. The Committee remarks that Articles 9, 10 and 20 are provisions where the best interests of the child must be assessed in adopting a decision to separate a child from his or her parents.⁹⁴

The Committee asserted that:⁹⁵

"In case of separation, the State must guarantee that the situation of the child and his or her family has been assessed, where possible, by a multidisciplinary team of well-trained professionals with appropriate judicial involvement, in conformity with article 9 of the Convention, ensuring that no other option can fulfil the child's best interests."

d) Care, protection and safety of the child

This criterion is included to ensure children's wellbeing which encompasses "their basic material, physical, educational, and emotional needs, as well as needs for affection and safety."⁹⁶

e) Situation of vulnerability

Children facing a situation of vulnerability are not in homogenous positions, and decision makers need to consider the different classes and degrees of vulnerability. In assessing the best interests of the child in those cases one should consider both the rights enshrined in the Convention as well as other specific conventions applicable to the case.⁹⁷

f) The child's right to health

This is provided in Article 24 of the Convention, and it is essential when assessing children's best interests. In cases where there are several treatments to cure the same condition, or there is uncertainty related to the consequences, advantages, risks and side effects should be pondered in the decision. The child's point of view should be considered in accordance with his or her age and maturity. To do this, children should be given adequate information from what is available, and have that information explained to them, and so be able to give an informed consent when it is feasible. Concerning adolescents, the information should include abuse of drugs and harmful substances in general, diet, sexual information and sexually transmitted diseases.⁹⁸

⁹³ At [59].

⁹⁴ At [58] to [63].

⁹⁵ At [64].

⁹⁶ At [71].

⁹⁷ At [75], [76].

⁹⁸ At [77], [78].

g) The child's right to education

It is in the best interests of the child to obtain formal and non-formal education alongside early childhood education free of charge. In order to accomplish this, states should provide adequate human resources, environments and learning methods.⁹⁹

2.2.5 Procedural safeguards

As far as the procedural safeguards for governmental, legislative and general policies or measures with respect to children are concerned, the Committee is mindful of the difference between assessing particular cases and general measures, by obliging the States to introduce "the child-rights impact assessment (CRIA) into Government processes at all levels and as early as possible".¹⁰⁰ The Committee asserted that the assessment must be grounded on the principles of the Convention and it must lie within the framework of the Convention and its protocol.

The Committee does not set out how to implement or put into practice the assessment, but rather it leaves it up to each State to design or form the method that it prefers, as long as it is done according to the principles of the Convention. Perhaps the freedom to implement is due to the different structures built into different Governments.

The European Union has gone further on the protection of the best interests of the child and requires States to comply with the best interests of the child in all legislation, policies and decisions by the government at all tiers and not only in regards to policies concerning children.¹⁰¹ Nevertheless it is worth mentioning that the European Union embodied the principle of the best interests of the child in Article 24.2 of the European Union Charter.¹⁰²

Having explored the principle of the best interests of the child under the UNCROC Committee comments, we now move on to an examination of the child's best interests as applied by the European Court of Human Rights (ECtHR) in some relevant cases concerning the denial of the transcription of the foreign birth certificate of surrogate born children by domestic authorities.

2.3 The best interests of the child in the jurisprudence of the ECtHR concerning surrogacy cases

The European Convention on Human Rights does not enshrine the best interests of the child, but the concept has been frequently used by the European Court of Human Rights (ECtHR) in its case law related to juvenile justice, migration and family cases, although here we consider only family cases. It is worth noting that European states can derogate some of the rights, as long as certain conditions are satisfied, namely accordance with the law, pursuance of a legitimate aim, and being necessary in a democratic society. In analysing the last element, the Court affords the States a margin of appreciation that depends on the matter at hand, the context and the consensus of the European countries in the issue at stake.

Most of the cases in which the Court has examined the best interests principle are related to custody, separation, identity and filiation. Those issues, which are included in Article 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), which embodies the right to family

⁹⁹ At [79].

¹⁰⁰ At [99].

¹⁰¹ European Parliament resolution on the 25th anniversary of the UN Convention on the Rights of the Child (2014/2919(RSP) at [11] <www.europarl.europa.eu/>.

¹⁰² Charter of Fundamental Rights of the European Union. 2012/C 326/02 <<http://eur-lex.europa.eu/>>.

and private life, have been considered also in conjunction with Article 14 of the Convention. It is observed that parents or guardians represent children which grants them the right to plead before a Court on their own, and on their children's behalf. However, in the case of *Paradiso and Campanelli v. Italy*,¹⁰³ the Italian authorities precluded the intending parents from standing for the children in a hearing at national level, and that prohibition continued when the case went before the European Court of Human Rights.

2.3.1 *Menesson v. France and Labassée v. France*

The case of *Menesson v. France*¹⁰⁴ dealt with twins Valentina and Fiorella Mennesson, born in California as a consequence of a gestational surrogacy agreement lawfully carried out in California by two French nationals, Mr. Dominique Mennesson and Ms. Sylvie Mennesson, and a surrogate woman. The intending parents had recourse to surrogacy in view of their failed efforts to have a child by IVF.

The facts of *Labassée v. France*¹⁰⁵ are similar to those of *Menesson*, and concern a married couple, Mr and Ms Labassée, who had recourse to a surrogacy agreement due to the woman's infertility problems. An embryo was implanted in the surrogate's uterus using the sperm of Mr Labassée and a donated ovum. Thereby a girl named Julietta was born in Minnesota on the 27 of October of 2011.¹⁰⁶

The Supreme Court of California ruled that the Mennessons were the legal parents of the child and a US birth certificate was issued. However, when the Mennessons went to the French consulate in Los Angeles to request the inscription of the birth certificate in the French register, the authorities refused on account of the intended mother not being able to prove she was the birth mother, and because a surrogacy agreement was involved. After several legal vicissitudes in France, the French Court of Cassation declared the refusal to be in conformity with French law, because of French international public policy which considered surrogacy agreements null.¹⁰⁷

However, in the *Labassée* case, the couple did not oppose the denial of the French Authorities to register the birth certificate. Instead they obtained an 'acte de notoriété' – a judicial document affirming that the *facto* relationship of parent-child exists. However, the document was useless to them, given that they were unable to record the document in the register of births.¹⁰⁸

The best interests of the child in the case of *Menesson v. France* was adduced by both the applicants and the respondent government. The applicants invoked Article 3.1 of the UNCROC (the exact text of which is set out in section 2.2 of the present thesis) arguing that this provision had not been taken into consideration by the French authorities, and affirming that there was a violation of the right to family life in the sense that failure to inscribe resulted in not being able to "establish a stable legal parent-child relationship,"¹⁰⁹ a situation that was in detriment of the child. They also contended that the child's best interests reduced the margin of appreciation enjoyed by the State.¹¹⁰

The applicants put forward the adverse effect that the lack of recognition of the parental relationship has on children's lives, referring to difficulties with registering the children "in the social security,

¹⁰³ *Paradiso and Campanelli (2015)*, above n 20.

¹⁰⁴ *Menesson*, above n 18.

¹⁰⁵ *Labassée*, above n 18.

¹⁰⁶ At [7] and [8].

¹⁰⁷ For a more detailed analysis of this case and others concerning surrogacy, see Debra Wilson "Different rhythms, faster tempos and unsystematic advancement: the potential impact of recent European Court of Human Rights cases on international surrogacy and human rights" (2015) 8 NZFLJ 133.

¹⁰⁸ *Labassée*, above n 18, at [12], [13].

¹⁰⁹ *Menesson*, above n 18, at [25].

¹¹⁰ At [63].

enrolling them at the school canteen or an outdoor centre and applying to the Family Allowances Office for financial assistance.”¹¹¹

The French Government argued that the prohibition of surrogacy by the legislature was justified on account of preserving the inviolability of the human body and filiation, and to protect the child’s best interests.¹¹² The ECtHR emphasised “that an essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned.”¹¹³ Even within the limits of the margin of appreciation enjoyed by the legislature, it was necessary to analyse whether a fair balance had been struck between the conflicts of interest, taking into account that “whenever the situation of a child is in issue, the best interests of that child are paramount.”¹¹⁴ The Court also pointed out the difficulties in obtaining French citizenship and inheritance rights from the mother.

At that point the Court drew a distinction between the first and second applicants (the intending parents) and the third and fourth applicants (the children), to conclude that the family relationship between the two first applicants and the children was respected, in as much as they were able to trounce the difficulties put before them due to the lack of recognition of the legal parentage in France, and they were not separated from their children. The Court came to the conclusion that from the perspective of the practical consequences produced by the rejection by the French Government of the legal parenthood established abroad, and considering the margin of appreciation afforded to the State, the test of proportionality had been met. There was therefore no breach of Article 8 in relation to the intended parents.

As to the third and fourth applicants, the Court examined the right to private life and asserted “respect for private life requires that everyone should be able to establish details of their identity as individual human beings”,¹¹⁵ where filiation or the legal parent relationship forms a part of the identity. The Court noted that filiation is indeed an essential part of identity. Arguably it is both the source of identity to a child and the source of other rights. The Court underlined the uncertainty faced by the children given the lack of recognition of filiation under French law, and remarked on the conflict between the filiation established lawfully abroad and the negation by the French authorities at the same time, which had the effect of “undermining” the children’s identity vis-a-vis the French society.¹¹⁶ The Court went on to point out the fact that the lack of recognition of the legal parent-child relationship impacted not only the parents, but also severely affected the children’s identity, which is a part of the right to private life. The court then questioned “the compatibility of that situation with the child’s best interests, respect for which must guide any decision in their regard.”¹¹⁷ It is remarkable the importance that the Court gave to the child’s best interests in balancing the rights at stake and in adopting the final decision.

Then the Court observed the “special dimension” taken by the case considering the fact that one of the intended parents, the father, was also the children’s biological parent and asserted:¹¹⁸

“It cannot be said to be in the interests of the child to deprive him or her of a legal relationship of this nature where the biological reality of that relationship has been established and the child and parent concerned demand full recognition thereof.”

¹¹¹ At [88].

¹¹² At [72].

¹¹³ At [79].

¹¹⁴ At [80], [84].

¹¹⁵ At [96].

¹¹⁶ At [96].

¹¹⁷ At [99].

¹¹⁸ At [100].

It is clear that the Court's reasoning process focussed on the best interests of the child and influenced the final outcome in favour of the children's right to private life, but in particular it is noticeable that the Court used the best interests of the child as a means of resolving the conflict between the general interest of the State to prohibit surrogacy and the individual children's right to privacy, giving priority to the rights of the children, and diluting the margin of appreciation afforded to the State. The Court affirmed: "Having regard also to the importance to be given to the child's interests when weighing up the competing interests at stake, the Court concludes that the right of the third and fourth applicants to respect for their private life was infringed."¹¹⁹ Then, in balancing the objective pursued by the measure and the negative effects on children, the Court decided in favour of the children applying the best interests of the child test. Unlike the case of the parent's right to family life, the final decision tipped in favour of the objective pursued by the measure.

2.3.2 *The case of Paradiso and Campanelli v. Italy (2015)*

Paradiso and Campanelli v. Italy,¹²⁰ involved the removal of a surrogate born child (born in Russia) from the intended parents, and its placement in the care of the social-services with posterior adoption. The applicants, an Italian married couple, travelled to Russia to have a baby through a surrogacy contract. As a result of the surrogacy agreement a child was born on 27 the February 2011. On 10 of March 2011 the Russian authorities issued a birth certificate where the couple were recorded as child's father and mother. Based on that document, the consulate at Moscow issued travel documents in favour of the baby, and Ms Campanelli and the baby returned to Italy on the 30th of April 2011.¹²¹ On 2nd of May 2011 the Consulate at Moscow warned the relevant authorities that the paperwork presented by the couple in relation to the child's birth contained false information. As a consequence, on 5th May 2011 the couple were charged with an accusation for "altering civil status" and infringement of both the law of adoption and the adoption authorisation granted to them to adopt an older child.¹²² That same day a proceeding was opened in the Campobasso Youth Court with the purpose of freeing the baby for adoption, alleging the baby was in legal terms abandoned. After having appointed a guardian or special curator, the Court considered the parties' submissions and obtained the result of the DNA, which revealed the lack of genetic connection between the parents and the baby. On 20th of October 2011 the Court decided to remove the child from the intended parents, and placed the child in a children's home. The intended parents were forbidden from being in contact with the child, and the child's location was concealed from them.¹²³

The child was placed in a children's home (casa famiglia) in a locality that was unknown to the applicants. They were forbidden from having contact with the child.¹²⁴ In April 2013 the child was given a new identity, and birth certificate in order to allow the child to have a normal life. On 5th June 2013 the Youth Court denied standing to the intended parents to act in the adoption proceedings brought by them.¹²⁵

Regarding the impact that the lack of identity was having on the child's life in practical terms, consider the following paragraph from *Paradiso and Campanelli*:¹²⁶

¹¹⁹ At [101].

¹²⁰ *Paradiso and Campanelli (2015)*, above n 20.

¹²¹ At [10].

¹²² At [12].

¹²³ At [22].

¹²⁴ At [23].

¹²⁵ At [35].

¹²⁶ At [33].

“In addition, at the beginning of April 2013 the guardian asked the juvenile court to give the child a formal identity, so that he could be registered for school without difficulty. He stated that the child had been placed in a family on 26 January 2013, but that he did not have an official identity. This ‘lack of existence’ had a significant impact on administrative matters: it was unclear under what name the child was to be registered for school, for vaccination records, or for residence. Admittedly, this situation corresponded to the aim of preventing the original family, that is, the applicants, from discovering the child’s whereabouts, for his own protection. However, a temporary formal identity would enable the secrecy surrounding the child’s real identity to be maintained, while simultaneously enabling him to have access to public services; for the time being, he was entitled only to use emergency medical services.”

In *Paradiso and Campanelli v. Italy* the issue was not the lack of recognition of the parent-child relationship but rather the disruption of the family ties between parents and children, given that the former was not considered due to the lack of exhaustion of domestic remedies.¹²⁷

The Second Chamber decision observed that, concerning the complaint initiated by the applicants opposing the refusal by Italian authorities to record the child’s birth certificate issued in Russia, they did not appeal against the refusal, and consequently the Court found they did not exhaust the national remedies, thereby precluding the Court to consider the decision.¹²⁸ The Second Chamber asserted: “The complaint concerning the impossibility of having the particulars of the child’s birth certificate entered in the civil status registers must therefore be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.”¹²⁹

Another issue which restricted the outcome of the case was the fact that the parents did not have “standing to act before the Court on behalf of the child.”¹³⁰ Indeed, nobody acted on behalf of the child in the case. The refusal to allow the applicants to act on behalf of the child was based on the lack of parental responsibility between parents and child due to the child having been under guardianship since 20 October 2011. Consequently, the guardian should be the one acting by law as child’s legal representative before the Italian authorities. The lack of recognition of the parent-child relationship, and the fact that the child had a new birth certificate and identity, hampered the legal ability to represent the child in so far as the child at that point was a foreigner to the applicants.¹³¹

In analysing the measure, the Court applied the test of proportionality to the case at hand and affirmed the first and second requirements were satisfied, that is, the measure was according to the law and had a legitimate aim. Regarding the third element, whether the measure was necessary in a democratic society, the Court warned that the margin of appreciation afforded to the State differs according to the nature and the importance of the interest affected by the measure.

The Court emphasised that in considering whether a fair balance had been struck between the general and the individual interests, it must take into account the principle that “whenever the situation of a child is in issue, the best interests of that child are paramount.”¹³² It is noted that the Court refers to the paramount consideration in any case in which the situation of a child is involved, extending the application of the principle to all situations related to children’s rights. The paramount consideration is stated in the UNCROC only to some issues, including adoptions (Art. 21) and separation of children from parents (Art. 9), because in these cases the best interests of the child is the determinative factor. But here the Court broadened the scope of the paramount consideration to all cases concerning

¹²⁷ Wilson, above n 98.

¹²⁸ *Paradiso and Campanelli (2015)*, above n 20, at [62].

¹²⁹ At [62].

¹³⁰ At [49].

¹³¹ At [49].

¹³² At [75].

children. The Court traced a clear line between the consequences of the measure to parents and children, and with respect to the former deemed the lack of recognition of the parental relationship established abroad to be reasonable, considering the circumstances of the case¹³³ (they were not the biological parents, they circumvented the law and they introduced the child into the country with false declarations). Likewise, the removal of the child was deemed proportionate and necessary to “end the illegal situation.”¹³⁴

Then the Court moved on to examine whether the national authorities had struck a fair balance between the general interests of the State and those of the children in question, in particular, whether the interests of the child had been properly weighed when the measure of separating the children from parents and placing them under guardianship was taken.¹³⁵ As was noted above, the Court found the measure of separation of parents from children to be adequate in relation to parent’s rights, but the answer was diametrically opposed concerning the situation of children and their rights. In assessing the children’s rights the court asserted:¹³⁶

“In the Court’s opinion, the reference to public order could not, however, be considered as giving *carte blanche* for any measure, since the State had an obligation to take the child’s best interests into account irrespective of the nature of the parental link, genetic or otherwise.”

As to the child, it was found that there was no “reasonable relationship of proportionality” between the measure adopted and “the aim sought to be realised”¹³⁷, vis-a-vis the best interests of the child. In the words of the Court: “The Italian authorities failed to strike the fair balance that has to be maintained between the interests at stake.”¹³⁸

The Court stated that separation of children from parents is a measure of last resort and “can only be justified if it corresponds to the aim of protecting a child who is faced with immediate danger.”¹³⁹ The Court also underlined that “such a step must be supported by sufficiently sound and weighty considerations in the interests of the child.”¹⁴⁰ Given those premises, the Court decided it was in the child’s best interest to preserve family ties and restricted separation to “very exceptional circumstances”.¹⁴¹ In conclusion, the general rule is that maintaining the family relationship is in the best interests of the child, and therefore breaking that relationship would need to be justified in the best interests of the child, that is, when children could suffer harm. In the words of the Grand Chamber, children’s rights were not “within the scope of the case”.¹⁴²

2.3.3 *Paradiso and Campanelli v. Italy*,¹⁴³ Grand Chamber judgment of 17 January 2017

The judgment of the Second Chamber was reversed by the Grand Chamber judgment on 17th January of 2017. Whereas the Second Chamber held that the applicants had acted as parents and bore parental responsibility for the child during the first months of life, and ultimately affirmed that: “There

¹³³ At [77].

¹³⁴ At [79].

¹³⁵ At [78].

¹³⁶ At [80].

¹³⁷ This terminology was used by the ECtHR to refer to the balance that need to be struck between general and individual interest. See for example the case of *James and Others v. The United Kingdom*, no. 8793/79. Judgment of 21 of February of 1986, at [50].

¹³⁸ *Paradiso and Campanelli (2015)*, above n 20, at [86].

¹³⁹ At [80].

¹⁴⁰ At [77].

¹⁴¹ At [79].

¹⁴² *Paradiso and Campanelli (2017)*, above n 19, at [86].

¹⁴³ *Paradiso and Campanelli (2017)*, above n 19.

existed a de facto family life between the applicants and the child”,¹⁴⁴ the Grand Chamber denied the existence of family life between the applicants and the child. The case’s scope was reduced to an examination of the potential infringement of the applicants’ right to private life, as a consequence of the removal of the child from their care.¹⁴⁵

Once the Court deemed family life not to be at stake, intended parents’ the case was doomed given that the margin of appreciation varies according to the subject matter, and that the father could not argue the right to become the genetic father due to the lack of any genetic link with the child. In the end, the Court afforded a wide margin of appreciation to the State, asserting that the public interest outweighed the applicants’ interest in preserving their relationship with the child.¹⁴⁶ It was held that there had been no violation of Article 8 of the Convention.

Yet, the decisive factor which influenced the case’s outcome was that the Court denied parental standing to act on behalf of the child, albeit that exclusion was also held by the Second Chamber. The Grand Chamber contended: “Accordingly, this part of the application is not within the scope of the case before the Grand Chamber.”¹⁴⁷ This preclusion implies that the complaints concerning the infringements of the child’s rights were not considered by the ECtHR in either of the instances, and nobody acted before the Court on the child’s behalf, not even a guardian ad litem, nor was a special curator appointed by the Court. This is in contradistinction to the domestic procedures which did appoint a representative. Therefore, the child’s right to an identity was not considered by the ECtHR in either of the instances.

The lack of representation and the restrictive view adopted by the Court is surprising considering that the child’s right to be heard is proclaimed in Article 12.2 of the UNCROC, and the broad interpretation assumed by the Committee that asserted: “Article 3, paragraph 1, cannot be correctly applied if the requirements of article 12 are not met.”¹⁴⁸ The Committee understood that some mechanism should be put in place to guarantee the right to be heard, including representations for babies or children who, for whatever reason, cannot express their own views.¹⁴⁹ Indeed children have the right to be heard and to stand in a proceeding independently of their parents, with greater reason when they lack parents or when parentage is in dispute, because a legal representative forces consideration of the issue from the child’s point of view and not only that of the adults. Likewise, representation precludes that certain procedural or legal requirements would be denied to the child on account of the parents not exercising the right at all or perhaps doing so incorrectly, hindering the right of the child to have his or her own standing in a procedure. For example, had the child enjoyed representation, the Court would have pondered the claim related to the denegation of the inscription of the birth certificate, and the other measures in the light of the children’s rights. Nevertheless, the lack of representation has an explanation in the principle of review, given that the European Court examined the case once the domestic remedies had been exhausted,¹⁵⁰ therefore the parties to the litigation were established in the domestic court.

2.3.4 *Foulon and Bouvet v. France*

¹⁴⁴ At [69].

¹⁴⁵ At [165].

¹⁴⁶ At [215].

¹⁴⁷ At [86].

¹⁴⁸ UNROC Comments, above n 31, at [43].

¹⁴⁹ At [44], [45].

¹⁵⁰ Art 35 of the European Convention on Human Rights signed in Rome on 4 November 1950.

In the case of *Foulon and Bouvet v. France*¹⁵¹ the Court did not alter the standpoint expressed in this regard in the case law preceding the judgment, and relied on the arguments set forth in the *Menesson* and *Labasse* cases. *Foulon and Bouvet v. France* dealt with the lack of inscription in the French civil register of foreign birth certificates of children born in India through a surrogate mother. The claimants were two French nationals who entered into a surrogate contract in India and then brought the children to France. The characteristic of this case is that the Indian surrogate mothers and the children's intended fathers (first and third applicants), appeared as mother and father of the children concerned (second, fourth and fifth applicants) on the birth certificates issued by the Indian administration. Then, in contrast to *Menesson* and *Labasse*, the genetic and gestational mothers were the same. Another feature of the case was that the children's intended mothers were not claimants. Given that there was a surrogacy agreement, most likely the surrogate had no interest in the result, despite being recorded as the legal mother on the birth certificate. Nevertheless, the child's father did not explicitly admit before the French authorities that a surrogacy case was involved. Rather, Mr Foulon took issue with the prosecutor's affirmation and contended that the prosecutor had failed to prove that the child's birth had been the result of a surrogacy agreement.¹⁵²

Prior to requesting the inscription of the children's foreign birth certificates in the French civil register, and even before the children were born, both parents proceeded to recognise the children as their own before their respective city council or Mayor. Thus, these two cases are similar to the cases of *Menesson* and *Labasse*,¹⁵³ although those preceding cases were handed down by the French Supreme Court prior the judgments of the ECtHR, and then the exception of *res judicata* was the main obstacle to the inscription of the birth certificates in France, despite the evolution of the French jurisprudence in favour of the inscription of foreign birth certificates of children born to French parents from surrogate contracts. The reversal of the French jurisprudence was pointed out by the Court, namely in two judgments of the Supreme Court of France on 3rd of July 2015,¹⁵⁴ which set out that surrogacy contracts do not preclude the inscription of the birth certificate in France as long as the birth certificate is regular and the facts correspond to the reality.¹⁵⁵

The Government's argument was that that the applicants had the opportunity to establish filiation using the recognition of paternity or by way of *possession d'état*.¹⁵⁶ The Court noted that this remedy offered by the government was "hypothetical" and disputed by the claimant,¹⁵⁷ and consequently dismissed the contention. Then the Court examined the case in light of the effects that the lack of inscription of the birth certificate produces in the children's lives, and found the situation of the applicants in the case at hand was similar to that of the applicants in the cases of *Menesson* and *Labasse*, and affirmed that there was no reason to conclude differently, that is, there had been no violation of the right to respect for family life of the applicants (the intended parents and children concerned), but that there was a violation of the right to respect for the privacy of the children concerned.

¹⁵¹ ECtHR Case *Foulon and Bouvet v. France*, 9063/14 and 10410/14, judgment of 21 of July 2016.

¹⁵² At [14].

¹⁵³ *Menesson*, above n 18 and *Labassée* above n 18.

¹⁵⁴ *Foulon and Bouvet*, above n 142, at [36].

¹⁵⁵ Arrêt no 619 of 3 July 2015, 14-21.323 and arrêt no 620, 15-50.002, of 3 July 2015

<www.courdecassation.fr>.

¹⁵⁶ "The fact enjoyment of status". Article 311.1 of the French Civil code asserts: "Apparent status shall result from a sufficient collection of facts showing a bond of parentage and relationship between an individual and the family to which he is said to belong. Apparent status must be continuous." See also Arts 311-2, 310-3, 317 of the French Civil Code. An English version of the French Civil code is available at <www.legifrance.gouv.fr>.

¹⁵⁷ *Foulon and Bouvet*, above n 142, at [56].

2.3.5 Questions that have not yet been answered by the courts

Following the *Menesson* case, the Grand Chamber of the ECtHR handed down an advisory opinion requested by the French Court of Cassation,¹⁵⁸ concerning the *Menesson* case. It was the first advisory opinion handed down by the Court, under protocol 16 of 2 October 2013.¹⁵⁹ However, Article 5 of the protocol laid down: “Advisory opinions shall not be binding.”¹⁶⁰

The question posed by the French Court of Cassation was whether or not in the circumstances of the Case of *Menesson v. France*,¹⁶¹ the right to respect for private life embedded in Article 8 of the Convention, which entails the recognition of the parent-child legal and biological relationship ascertained abroad, “also requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother”,¹⁶² when the legal father-child filiation has been recognised. In short, the question is whether or not the intended mother could be excluded from the child’s legal filiation once the father-child relationship has been recognised, bearing in mind that the Court stressed the importance of the biological nexus asserting: “it cannot be said to be in the interests of the child to deprive him or her of a legal relationship of this nature where the biological reality of that relationship has been established.”¹⁶³

The second question, conditional upon an affirmative answer of the first one, was:¹⁶⁴

“whether the child’s right to respect for his or her private life within the meaning of Article 8 of the Convention requires such recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad, or whether it might allow other means to be used, such as adoption of the child by the intended mother.”

That is, if the mother can be excluded from the child’s legal filiation, is it possible to use another legal mechanism, such an adoption to recognise the maternal filiation, instead of recording the foreign birth certificate?

The answer to the first question was positive. As to the second question, the answer was also affirmative. In summary, according to the Court, in the circumstances of the case it was not mandatory to record the birth certificate, and the country might use another mechanism to recognise the child-mother relationship, including adoption.¹⁶⁵ The Court warned: “Adoption may satisfy this requirement provided that the conditions which govern it are appropriate and the procedure enables a decision to be taken rapidly, so that the child is not kept for a lengthy period in a position of legal uncertainty as regards the relationship.”¹⁶⁶

A final question is whether or not denying the inscription of the child’s birth certificate would be considered a contravention of Article 8 of the Convention, when both of the intended parents lack a biological connection to the child. Useful elements for articulating a plausible reply to this question can be drawn from the *Menesson v. France* case given that in the case of *Paradiso and Campanelli v. Italy* the ECtHR rejected the application related to the refusal to record the birth certificate in the

¹⁵⁸ ECtHR, Grand Chamber Request no. P16-2018-001 of 10 de April of 2019.

¹⁵⁹ See protocol <www.echr.coe.int/Documents/Protocol_16_ENG.pdf>.

¹⁶⁰ Council of Europe Treaty Series 214 – Human Rights (Protocol No. 16), 2.X.2013.

¹⁶¹ *Menesson*, above n 18.

¹⁶² Grand Chamber Request, above n 149, at [32].

¹⁶³ *Menesson*, above n 18, at [100].

¹⁶⁴ At [33].

¹⁶⁵ At [53].

¹⁶⁶ At [54].

register because the claimants had not exhausted the domestic remedies prior to the application to the ECtHR.¹⁶⁷

Then, formulating the opposite question would give us an answer, that is, would it be in the best interests of the child to deny him or her of the parental legal relationship when the biological relationship has not been established? Two crucial legal issues are raised by the Court, namely the best interests of the child and the lack of legal parental relationship or absence of the children's filiation. Therefore, the answer to the question depends on these two elements.

As can be deduced from the previous cases, the child's rights have the effect of splitting the analysis of the cases, assessing on one hand parental rights considered independently and on the other hand the children's rights and their best interests as a main test to assess a particular situation.

The dichotomy in the examination of the cases is grounded firstly on the obligation to consider the child's rights as a person independently of their parents; second, on the basis of the different legal positions of the child and parents, as consequence of the parents being contributors to the surrogacy contract; and third, due to the best interests of the child as a principle that should guide the assessment of their rights. The ECtHR has carefully considered the situation of both parties, parents and children, without conflated them.

As to the parent-child relationship the Court pointed out that in addition to the consequences that the deprivation of the parent-child relationship produces on parents, it also affects children's right to private life which encompasses the right to an identity. In this regard the Court verbatim said:¹⁶⁸

"They also affect the children themselves, whose right to respect for their private life – which implies that everyone must be able to establish the substance of his or her identity, including the legal parent-child relationship – is substantially affected. Accordingly, a serious question arises as to the compatibility of that situation with the child's best interests, respect for which must guide any decision in their regard."

First, it should be noted that the Court applied the best interests of the child as a yard-stick to judge any situation concerning children, and in particular in the parent-child relationship whether or not there is a biological connexion between them. Second, the Court asserts that everyone is entitled "to establish the substance of his or her identity". The Court does not limit the right to an identity, and nor is the parent child relationship limited to the biological one. On the contrary, it used a general formula without conditions. And it could not have been done in any other way, because the legal filiation does not always coincide with the biological one. For example, the marital presumption of paternity, or the presumption of consent in cases of artificial insemination, has nothing to do with biological paternity, but it does not preclude the law to establish filiation between parents and children in these cases, whether or not the parent is biologically related to the child.

Another argument in favour of the affirmative answer is the fact that in these cases children have no other parents who can provide for them. Thus, the denegation of the filiation with the intended parents leaves the child without parents, identity, and nationality. All those rights are guaranteed by the UNCROC.

In assessing these two elements, the Court acted in conformity with Articles 8 and 3 of the UNCROC which contemplate the duty of the States to preserve children's identity and to implement children's best interests in all actions concerning children. Therefore, it is the child's best interests and the child's right to an identity which impose a duty upon the authorities to recognise the child's parental

¹⁶⁷ *Paradiso and Campanelli (2015)*, above n 20, at [62] and [90].

¹⁶⁸ At [99]. See also [96].

relationship determined abroad, despite the fact that surrogacy is legally precluded, since denegation of the filiation infringes the child's right to an identity and subsequently the child's right to private life.

According to this approach, and given that these two elements concur in the parent-child relationship even when there is no biological connexion, the suggestion is that the answer to the question could be affirmative – that is, the parent-child relationship lawfully established abroad should be recognised in absence of any biological connexion. It should be reiterated that this answer is in light of the child's rights, and although there exists an inextricable link between parents and child, a distinction ought to be made between children's rights and parent's rights. These two sides of the same parent-child relationship are what generates divergent outcomes for children and parents. However, the Court could consider that the state is equally legitimated to provide other alternative methods to give effectivity to the parental relationship ascertained abroad.

In fact, the ECtHR judgment is not a challenge to state policies of some European countries, but merely it is a consequence of appraising the child's situation in conformity with the principles emanating from the domestic legal system, and the international obligations assumed by the states. The Court has merely underlined the rights of the child that the state policy overlooked when precluding the inscription of the child's birth certificate on account of the nullity of the surrogacy contract.

Nevertheless, it should be noted that in the circumstances of the case in which we posed the question, motherhood is not disputed by another woman. It also should be stressed that the identity of the child, which includes the parent-child relationship, refers to both parents – father and mother – consequently in the light of children's rights – not parent's rights – it seems that it is not in the best interests of the child to exclude the parents from the filiation and consequently from the child's identity, given the negative impacts that such an outcome would imply for the child's life. The legal recognition is again based on children's rights, because, in the words of the Court, "where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted."¹⁶⁹ In short, despite the moral and ethical issues that surrogacy raises, the child's identity reduces the margin of appreciation afforded to the states to recognise the foreign birth certificate where the intended parents are entered as the child's parents.

There are additional questions to answer, like for example whether states are restricted from implementing punishment measures that impact on children directly. But some indirect measures do impact on children's best interests. The question is, at what point is the measure in conformity with the best interests of the child? For example, is criminalisation of surrogacy in the best interests of the child, given the impact that it has on children's right to care, in particular if both parents are prosecuted? Also, up to now some European countries deny parental leave to surrogate parents, or refuse to apply certain tax benefits or welfare benefits in general, although they impact indirectly on the best interests of the child. Are they still suitable measures?

2.3.6 Conclusion

The analysis of the case law of the ECtHR has shown that, in resolving surrogacy cases, courts place significant importance upon the principle of individual responsibility and the objective that parentage rules are purported to serve, rather than questioning whether or not surrogacy agreements should be permitted by states. Bearing in mind that children's rights are at stake, namely filiation or parentage, the paramountcy principle of the best interests of the child is the rule that is applied in every case to decide the issue.

¹⁶⁹ At [77].

The ECtHR has pointed out the adverse effects on children's lives arising from the denial to recognise the child's parentage as ascertained abroad. Lack of nationality, inheritance, problems to enrol in schools and medical attention reduced to emergency cases were all put forward in the judgment as disadvantages that stem from the lack of legal parenthood.

The case law of the ECtHR has incited states to recognise the birth certificates of children born overseas from surrogacy agreements, where there exists a genetic link between the intended father and the child. However, given the divergence on the outcome of *Paradiso and Campanelli v. Italy*, where the father bore no genetic link to the child, there is still ambiguity regarding the scope and legal consequences of the case, bearing in mind that the refusal to examine the child's rights was grounded on the parents' lack of standing to act on behalf of their child. Would the Court have upheld the child's right to an identity, even in absence of a genetic link, had the parents been able to act on behalf of the child? As has already been argued above, parenthood and the identity it confers to children do not always arise from genetic links. It follows then that the Court might have upheld the right to an identity even in absence of the genetic link.

In *Mennesson v. France* the ECtHR affirmed that "where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted."¹⁷⁰ However, in *Paradiso and Campanelli v. Italy* the margin of appreciation given to the state was wide, given that the child's right was excluded due to a procedural objection. Consequently, if the child's rights – and in particular the right to an identity – were at stake, the margin of appreciation of the Italian authorities would have been abated somewhat, which might well have given rise to a positive outcome in favour of the child's identity.

The legal relationship between parents and children ascertained lawfully abroad in surrogacy cases should be recognised irrespective of the genetic link in the intended parent's home country, because otherwise the child would be without an identity merely on account of the method of birth.

2.4 The best interests of the child in the Care of Children Act

In New Zealand's jurisdiction the doctrine of the best interests of the child is enshrined in ss 4 and 5 of the Care of Children Act 2004 (CoCA).¹⁷¹ Section 4(1) asserts: "The welfare and best interests of a child in his or her particular circumstances must be the first and paramount consideration." The threshold of the principle is within the application of the Act itself, and in proceedings related to guardianship or providing a caregiver for a child.

The provision follows the recommendation established by the United Nations Committee on the Rights of the Child, acknowledging that a child's best interests should be assessed according to the particular situation of that child, given that each case is different and what suits one child probably would not suit another in his/her specific circumstances. This requisite indirectly obliges the professionals dealing with each case to consider the child's unique and particular situation so as to identify the best outcome for the child in question.

The paramount consideration, instead of the primary consideration, is applicable given that the Act deals with parental and caregiver issues as well as guardianship, that is, the determination of the person(s) in charge of the upbringing of the child. These matters require the application of the

¹⁷⁰ *Mennesson*, above n 18, at [77].

¹⁷¹ Care of Children Act 2004 as modified by the Care of Children Amendment Act (No 2) 2013, of 24 September 2013.

paramount consideration because parental rights are at stake, since guardianship or other kinds of care form a part of the parental role.

2.4.1 *Best Interests and the rights of the child*

Section 1 of CoCA asserts that the purpose of the Act is to “promote children’s welfare” and to “recognise certain rights of children”. The words ‘certain rights’ are paradoxical in the setting of regulation of children’s rights in as far as they could be understood as having the connotation of exclusion, recognising some but not all rights. It would have been more inclusive if the word ‘certain’ were omitted, or if a reference to specific children’s rights were made. Furthermore, the Committee’s comments contend that “the ultimate purpose of the child’s best interests should be to ensure the full and effective enjoyment of the rights recognised in the Convention and the holistic development of the child.”¹⁷² Therefore, a child’s best interests and the fulfilment of children’s rights go hand-in-hand in such a way that a regulation which does not warrant children’s comprehensive rights is deemed not to be in the best interests of the child.

The reason for the provision’s wording is two-fold. First, the provision was introduced in the Care of Children Bill as a result of a recommendation of the Select Justice and Electoral Committee, based on support for the amendment in the submission process, given that at the outset it did not contain any allusion to children’s rights.¹⁷³ Second, the Select Justice and Electoral Committee contended that a reference to the United Nations Treaty was not desirable, taking into account that the treaty contemplated a more wide-ranging set of rights than those handled by the Bill.¹⁷⁴ However, in view of the limitation imposed in section 4 of the Act, it is open to discussion whether the word ‘certain’ was strictly necessary or whether maybe the Justice and Electoral Committee was simply being somewhat cautious.

2.4.2 *Relevant considerations in determining best interests*

This sub-section will briefly explain the relevant considerations regarding the best interests of the child in individual cases.

Section 4(2) of CoCA sets out two factors that must be taken into account in determining best interests, and one factor that may be taken into account. The first mandatory consideration is that, in assessing the best interests of the child, one must take into account that the decision should be adopted and applied in a time period that is in conformity with the child’s perception of time. This principle implies that the decision should be adopted in the shortest period of time possible, given that children’s time perception differs from adults.¹⁷⁵ Also, it is relevant that a child can quickly develop emotional ties that could be to the detriment of the relationship between the child and the caregiver who is not with the child. The second mandatory factor is that the principles of s 5 must be considered. This will be discussed in more detail below.

Third, under s 4 (2) (b), the court may take into account the conduct of the person who is applying to undertake the upbringing, in as far as it is relevant to the child’s best interests and welfare. Thus, the conduct of a caregiver that is not pertinent to the case should not be considered, thereby avoiding discrimination or moral judgments that favour one person over another. That provision has the virtue

¹⁷² UNCROC Comments, above n 31, at [51].

¹⁷³ Care of Children Bill (54-2) (29 June 2004) (select Justice and Electoral Committee report) at 1. See Mark Henaghan and Ruth Ballantyne “Bill Atkin: A Fierce Defender of Children’s Rights and Proponent of Child-Focused Legislation” (2015) 46(3) *Victoria University of Wellington Law Review* 591-609, at 595.

¹⁷⁴ Care of Children Bill, above n 164, at 3.

¹⁷⁵ UNCROC Comments, above n 31, at [93].

of focusing on assessing the aptitude and attitude of the person in relation to their ability to meet the needs of the child.

Section 4 (3) refutes gender as a basis for presuming that the best interests of the child requires that a child of any age “be placed in the day-to-day care of a particular person.”¹⁷⁶ Therefore, irrespective of their gender, both parents are on equal footing as far as assuming the role of caregiver, no matter the age of the child, even a baby. Likewise, s 5 of the Act enumerates the principles or elements to be taken into account in assessing the best interests of the child.

Finally, s 4 (4) (b) of CoCA states “This section does not prevent any person from taking into account other matters relevant to the child’s welfare and best interests.” The emphasis on other additional elements that could be considered for ascertaining the best interests of the child is in line with what was stipulated by the UNCROC Committee, which understood that the list of elements was not exhaustive by affirming the “assessment and determination [of the child’s best interests] should be carried out with full respect for the rights contained in the Convention and its Optional Protocols.”¹⁷⁷

2.4.3 *The principles of s 5*

The principles enumerated in s 5 are the following:¹⁷⁸

- a. Children’s integrity and safety. Children must be protected from all kinds of violence in any ambit.
- b. Responsibility for upbringing. Parents and guardians have the responsibility of upbringing and caring for the child at all levels.
- c. Collaboration. Parents, guardians and caregivers should collaborate and be consulted in order to facilitate the upbringing and care of the child.
- d. Permanency and continuity. Child care must be an ongoing task and it is in the benefit of the child not to change the caregiver due to the ties that develop with the caregiver. The relationship with the parents and family in a broader sense “should be preserved and strengthened” including “the family group, whānau, hapū, or iwi.”¹⁷⁹ The child’s identity and background should be upheld and enhanced, including cultural elements, language and religious heritage.

2.4.4 *Conclusion on best interests of the child*

The paramountcy principle of the best interests of the child is a way of deciding parental rights in a neutral manner, given that the supremacy of fathers’ parental rights no longer exists. On the contrary, the principles embedded in s 4 of CoCA assume that parental rights should be exercised by both parents, and involvement of both parents in a child’s life is in his or her best interests (s 5 (b) (e) (d) of CoCA). Agreement between both parents is also enshrined in Article 4 (c) of CoCA, and this underpins the whole regime of family dispute resolution. One can also grasp from an analysis of cases concerning parenting orders (day to day care and access) that the judiciary is upholding that same principle in every case. Attempts to minimise the other parent’s role in child’s life, or reluctance to agree on the involvement of the other parent in the upbringing of the child, is viewed as disregarding the best interests of the child, by placing the parents’ interests first.

¹⁷⁶ CoCA 2004, s 4(3).

¹⁷⁷ UNCROC Comments, above n 31, at [32].

¹⁷⁸ It is noted that the principles set out by the Care of Children Act in Article 5 differ from the criteria asserted by the UNCROC committee, even though it would be feasible to accommodate the principles of the UNCROC convention, given that the CoCA deemed that the principles listed were open ended.

¹⁷⁹ CoCA 2004, s 5(e).

As to the time period being in accordance with child's perception of time, this requirement seems obvious, taking into account that a child quickly develops an emotional bond to a caregiver. Coming to a timely decision is important for the child, and also it avoids favouring one parent over the other on account of an attachment or closer relationship having developed while the case was in dispute, which would not be the fault of the parent, but rather it would be a product of bureaucracy.

Paragraph 4 (2) (b) has the benefit of focusing on the welfare of the child, rather than parents' behaviour, taking into account that parenting orders are usually made in the context of conflict between parents after separation.

2.5 Preconception well-being principle in the Human Assisted Reproductive Technology Act

Section 4 of the Human Assisted Reproductive Technology Act (HART 2004) states:

"This Act must be guided by each of the following principles that is relevant to the particular power or function: (a) the health and well-being of children born as a result of the performance of an assisted reproductive procedure or an established procedure should be an important consideration in all decisions about that procedure."

The ACART Guidelines on Surrogacy Involving Assisted Reproductive Procedures 2013 (Guidelines) state, in s 1, the same principles established in s 4 of HART. In addition, the Guidelines set out exhaustive requirements to examine. Namely, s 2 (b) considers the risk that the procedure entails for all parties involved, and specifically the "risks to the health and wellbeing of a resulting child."¹⁸⁰ However, there is no criteria or benchmark for assessing the well-being of the child, which can be subject to complete discretion rather than transparency and objectivity.

It should be noted that the wording refers to children born as a result of a procedure, rather than to children yet "to be born", despite the fact that the principle is applied, in the context of surrogacy, before the child is conceived.¹⁸¹ It is not clear if the wellbeing referred to in the preconception agreement approved by ECART is the same as the welfare principle post-birth. However, it seems that the far-reaching examination of ECART, by necessity, would include or overlap with the welfare principle considered before a Court, taking into account that the 2013 Guidelines scrutinised several issues, such as the parties' eligibility, risk involved, availability of counselling before and after birth to the parties, residence etc. Furthermore, it seems that the words were considered equivalent in the parliamentary process.

In the original Human Assisted Reproductive Technology Member's Bill, introduced by Dianne Yates, s 3 of the provision was drawn up as: "The following principles guide the operation of this Act: (a) the paramount importance of the welfare of any child born as a consequence of assisted reproduction procedures."¹⁸² In the report of the Human Assisted Reproductive Bill, the Health Committee contended: "We recommended amending the proposed principle that the 'health and well-being' of children born as a result of assisted human reproduction should be 'paramount' in all decisions about procedures."¹⁸³

¹⁸⁰ Section 2 (B) of the "Guidelines on Surrogacy Involving Assisted Reproductive Procedures" issued by ACART on 12 December 2013 <www.acart.health.govt.nz>.

¹⁸¹ In UK the HFEA s 13.5 refers to the welfare of any child who may be born.

¹⁸² Human Assisted Reproductive Technology Member's Bill, as reported from the Health Committee, at 24. The Committee in the introduction warned that they considered "two bills that contain substantively similar subject matter, the Assisted Human Reproduction Bill, a Government bill introduced in 1998, and the Human Assisted Reproductive Technology Bill, a Member's bill introduced in 1996 in the name of Dianne Yates.

¹⁸³ At 5.

In addition, the Committee concluded that: “We consider ‘paramount’ should be replaced with ‘an important consideration’”.¹⁸⁴ The reason is that health risks in assisted reproduction are greater than in natural reproduction, therefore the application of the paramountcy principle might have the effect of denying approval of the procedure if the risk to the child’s welfare is greater than in natural reproduction, however minor that risk difference may be. The report asserted: “We consider it more appropriate that the risks of assisted human reproduction procedures be balanced against the benefits to children, families, and society in general.”¹⁸⁵ Thus, the original wording of ‘welfare’ was changed to ‘well-being’, at the same time as ‘paramountcy’ was dropped and substituted with ‘an important consideration’.

The welfare principle was developed to apply to children as current rights holders, whereas in preconception there is no child, it is just a theoretical or potential child, so there is no human being with personhood to evaluate.

2.5.1 *The well-being of the child in preconception assessment and the HART Act*

In New Zealand the well-being of the future child is set out in the 2004 HART Act. The fertility services standard, which is set out in provision 1.8, and which refers to Consumer’s Rights, sets out that “the health and well-being of offspring born as a result of fertility services shall be an important consideration in all decisions about the services.”¹⁸⁶ The provision’s wording reveals the connexion between the principles of welfare and harm by referring to the well-being and the health of the child in tandem, albeit there is no definition of well-being, or which criteria should be the reference for the appraisal. Neither the guidelines issued by the Advisory Committee in Assisted Reproduction Technologies (ACART), nor the fertility services, specify the benchmark or criteria to assess the well-being of the child, endorsing instead the principles without further ado.

During the Parliamentary process the principles set out in s 4 of the Bill were raised during MP Judy Collins’ speech. Collins implicitly agreed with the principles, except for clause (f) which refers to the values and beliefs of Maori, which she thought should be deleted, arguing that it was not needed given that paragraph (g) deals with the same issue directed to the whole society, and that Maori people are an integral part of society. Clause (e) of the Bill, which embodied the right to know one’s genetic origins, was praised by the MP, contending that all children, irrespective of their race, should know their origins.¹⁸⁷ However, besides that point, the lack of definition or criteria for assessing a child’s well-being was never put forward. The reason for disregarding those points becomes clear from a reading of the parliamentary debates, given that the HART Bill was a principled based regulation which delegated the specific implementation to the ACART committee, which was in charge of drawing the specific guidelines. As affirmed by Dr Paul Hutchison: “the beauty of the way that this Bill is constructed, is that it allows flexibility.”¹⁸⁸ He also pointed out the values of the guidelines, for instance commenting on the difficulties of determining what constitutes a serious congenital or genetic condition, and the variability of the definition. He provided an example of a child affected by Down syndrome and another affected by Lesch-Nyhan syndrome, which implies that the baby will be born with mental retardation and a tendency for self-destruction. The baby affected by the former illness could find him/herself to be beneficial for the parents and those surrounding him/her, whereas for a family who already has a child with Lesch-Nyhan syndrome, a new child with same condition could be

¹⁸⁴ At 5.

¹⁸⁵ At 5.

¹⁸⁶ “New Zealand Standard Fertility Services, NZS8181:2007” published by New Zealand Standard Fertility Services <www.standards.govt.nz/assets/Publication-files/NZ8181-2007.pdf>.

¹⁸⁷ Hansard Debates, volume 620 7 September to 14 of September 2004, at 558.

¹⁸⁸ At 583.

distressful.¹⁸⁹ This comment indirectly touches on the relative concept of a life worth living. The latter case could be raised as an example of an extreme disability in which the life does not deserve to be lived, while the former case is completely contingent upon the circumstances in which the child is born. Furthermore, he asserted there was “need for flexibility within the mechanism” proposed by the Bill in order to offer a pragmatic solution to manage the variety of human assisted reproductive technologies.¹⁹⁰ He also added: “There is a set of principles spelt out clearly to ensure that the health and well-being of children born as a result should be an important consideration in all decisions about procedures.” He indicated that the risks faced by all people involved in the procedure are considered “seriously important”.¹⁹¹

MP Dianne Yates asserted: “In relation to the principles of ensuring the health and well-being of children born from these technologies, I point out that we are particularly concerned about the safety and dignity of the present and future generations.” She commented on the disagreement regarding the removal of the clause which refers to “the stress on woman in terms of those procedures”, indicating that the gestational woman was of much concern because there is a fear of a future market for commercial surrogacy.¹⁹²

MP Bill English referred to part I of the Bill, which laid down the objectives, as a “robust and flexible framework” and noted the principles were general enough to allow advisory committees to take decisions. Nevertheless, his concern focused on the fact that the Bill did not envisage an accountability mechanism to allow Parliament to exercise control over ACART decisions, which implies that Parliament would be forced to change the legislation whenever it would be necessary to challenge a decision taken by the Advisory Committee. He also pointed out that Parliament could not provide “public policy guidance that those committees might need.”¹⁹³

MP Sue Kedgley, of the Green Party, agreed with Bill English about the need to introduce an accountability mechanism to the decisions and guidelines issued by the Committees. In the end, in a subsequent parliamentary process, changes were introduced and approved with respect to the control that Parliament exercises over the committees. Namely s 36(3) of the HART Act requires the Minister to present a copy of the guidelines to the House of Representatives. Beyond the lack of accountability, what the debate demonstrated was that the HART Act is a principle-based regulation, which requires further interpretations of the principles by the Advisory and Ethics Committees.

The nature of the issues regulated by human assisted reproduction law require flexibility to deal with the different scenarios and new technologies that are in constant development. At the same time the nature of the law requires some degree of definition, certainty and objectivity in the application in order to guarantee legal principles such as the right to not be discriminated or the principle of legality. The principles were enacted to allow flexibility and with the expectation that the Committees would further develop them through the guidelines, establishing criteria or yardsticks for deciding the child’s wellbeing.

The child’s welfare principle was historically envisaged to apply to children as human beings that were already born, with personhood and therefore as holders of rights. However, the implementation in assisted reproductive regulations entails the principle to operate in a different framework with no references to evaluate it.

¹⁸⁹ At 583.

¹⁹⁰ At 577.

¹⁹¹ At 556.

¹⁹² At 560.

¹⁹³ At 563-564.

2.5.2 A comparison with the HFEA

Other shortcomings have been put forward by scholars, given that the principle should be assessed for a hypothetical child, before authorising an assisted human conception. For instance, the recommendation of several scholars, as well as the House of Commons Science and Technology Committee (HCSTC) in the United Kingdom, was to abolish the principle from preconceptions assessment.¹⁹⁴

Section 13 (5) of the HFEA sets out:¹⁹⁵

“A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for supportive parenting, and of any other child who may be affected by the birth).”

The same contentions could be raised in New Zealand, bearing in mind that the well-being principle is enshrined in s 4 of HART. Slight differences in the wording do not render the argument invalid, given that the precept is directed to “all persons exercising powers or performing functions under this Act”.¹⁹⁶ Thus, the principles or guidelines are to be applied by the Ethics Committee on Assisted Reproductive Technology (ECART) when assessing authorization of assisted reproduction treatments. Furthermore, there is a link between the well-being and health of a future generation, as is also the case in the UK, although in the UK the welfare principle is further developed in the Code of Practice¹⁹⁷ as mandated by guidance 25.2, which asserts:¹⁹⁸

“The guidance given by the code shall include guidance for those providing treatment services about the account to be taken of the welfare of children who may be born as a result of treatment services (including a child’s need for supportive parenting), and of other children who may be affected by such births.”

The Code of Practice is elaborated by the HFE authority and approved by the Secretary of State, and it establishes the criteria to be taken into account to assesses the welfare principle. Factors concerning the welfare principle are set forth in guidance 8.10 which sets out: “The centre should consider factors that are likely to cause a risk of significant harm or neglect to any child who may be born or to any existing child of the family.”¹⁹⁹

2.5.3 Criticism of the welfare principle

John Harris takes issue with the welfare principle as embodied in the HFEA and also offers some contention of the Brazier’s Report,²⁰⁰ related to the principle. He argues that is always in the child’s interest to come into life, unless the condition or circumstances will be so harmful that “it would not have a worthwhile life.”²⁰¹

¹⁹⁴ House of Commons Science and Technology Committee (HCSTC), Human Reproductive Technologies and The Law, Fifth Report of Session 2004-05 volume 1.

¹⁹⁵ HFEA 1990, s 13(5).

¹⁹⁶ HART Act 2004, s 4.

¹⁹⁷ HFEA 1990, s 25.1 mandates the Human Fertilization and Embryology Authority to maintain de code of practice, which gives guidance concerning fertility treatments regulated by the HFEA.

¹⁹⁸ HFEA 1990, s 25.2.

¹⁹⁹ The Code of Practice is revised frequently. The specific factors are enumerated in s 8.10 of the Code <<https://ifqlive.blob.core.windows.net>>.

²⁰⁰ M Brazier, A Campbell and S Golombok “Surrogacy: Review For Health Ministers of Current Arrangements For Payments and Regulation – Report of the Review Team.” *The Stationary Office*, October 1998. Also known as the Brazier Report.

²⁰¹ J Harris “The Welfare of the Child” (2000) 8(1) *Health Care Analysis* 27–34, at 29.

He goes on to affirm that when judgments about the circumstances of a theoretical person deliver the result that it is not optimum, but without reaching the level of a life not worth living, “there is no moral justification to impose our ideal to others,” depriving the child of coming into a worthwhile existence. This affirmation is the reality in issues involving ART or surrogacy, where there can be no proof of harm, only subjective impressions.²⁰² The author asserts “The state must show good and sufficient reason to curtail a fundamental liberty, which in the case of procreation, must amount to high probability of major harm to potential children.”²⁰³

Emily Jackson has recommended the abolition of the principle of the welfare of a child that might be born from the HFE Act 1990. The author is opposed to using the concept during preconception on account of three arguments. First, it is argued that preconceptions assessment before providing fertility services is discriminatory and infringes the right to privacy in so far as natural reproduction does not entail vetting the decision of adults to bring a child into life. The author differentiated the principle from the medical “common law duty of care.”²⁰⁴ Second, Jackson contends that the principle is deceitful, given that it is not fit for purpose, that is, it does not exclude inapt parents from assisted conception. And third, the comparison between the welfare preconception assessment and cases of wrongful life highlight a legal inconsistency in as much as it implies pondering existence against non-existence, while the judiciary denies the possibility of such a metaphysical exercise. In particular the article analyses the case of *McKay v. Essex Area Health Authority* [1982] QB 1166, where a child born with disabilities as a consequence of a doctor’s negligence to detect and treat the mother’s rubella contracted during pregnancy, claimed that had the doctor been diligent she would not have come into life, and therefore would not have suffered injuries and a life not worth living. The Court rejected the claim and put forward that the essence of the complaint implied drawing a comparison between existence and non-existence. The Court deemed such an appraisal impossible.²⁰⁵

As Jackson argues, the preconception welfare principle (PCWP) provision was not debated in the parliamentary process. “Instead, it was simply assumed to be self-evidently true that their future children’s welfare ought to be taken into account before a couple is offered assistance with conception”.²⁰⁶

In 2005 the House of Commons Science and Technology Committee issued its fifth report, the purpose of which was, among others, to consider “the balance between legislation, regulation and reproductive freedom”.²⁰⁷ The Committee reported on the PCWP in the and Embryology Act with a recommendation of abolishing the principle from the HFEA, affirming: “The welfare of the child provision discriminates against the infertile and some sections of society, is impossible to implement and is of questionable practical value in protecting the interests of children born as a result of assisted reproduction.”²⁰⁸

Besides, the principle was qualified as an inconsistency taking into account that it applies only when fertilization takes place outside the woman, or involves gametes donation, while other kinds of infertility or subfertility treatments are exempt from the assessment, and so are provided without taking into account the child’s welfare.

²⁰² At 31.

²⁰³ At 32.

²⁰⁴ Emily Jackson “Conception and the Irrelevance of the Welfare Principle” (2002) 65(2) *The Modern Law Review* 176-203, at 177.

²⁰⁵ At 196.

²⁰⁶ At 176.

²⁰⁷ House of Commons, above n 185.

²⁰⁸ At [107].

The committee noticed that the case law has declined to take action to protect an unborn child, and has postponed the action until the birth of the child. It also remarked that social services protect children from harm and consequently the same social services can act to avoid any harm to the child once born.²⁰⁹ Some concerns related to multiple pregnancies and the unknown genetic origin of children born with anonymous gamete donation were raised during the consultation, although the report deemed that there were other means to resolve the problem without need to maintain the PCWP. The imposition of a limit on the number of pregnancies along with the obligation to provide identifiable information to children born through gametes donation were the offered solutions. The Committee recognised that there could be difficult cases, however it considered they could be resolved by local clinic ethics committees, applying “the minimum threshold principle” stipulating that the “threshold should be the risk of unpreventable and significant harm.”²¹⁰

The Science and Technology Committee pointed out the difference between the welfare principle in adoption and in preconception, given that it was assimilated by some commentators, affirming that in assisted reproduction the child is hypothetical while in adoption the child exists, and the state undertakes the responsibility for an existing child. It also considered that the welfare provision is quite close to a concept of “fitness for parenting” which is generally refused due to its dubious past, taking into account that historically it was used as a eugenic tool to preclude reproduction from some socially excluded groups.²¹¹

The PCWP concept in the context of ART is considered to be discriminatory, given that the principle both constrains and deters reproductive choices for infertile people and for certain sectors of society. It places an onus, mainly upon infertile people who need to have recourse to some kind of fertility services, to demonstrate the ability for parenting while other people who reproduce naturally, or who require other kinds of fertility services, are not scrutinised before conceiving a child.

The PCWP could contravene Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) which refers to the right to privacy and family life. It was argued that third party intervention, or assisted reproduction, does not change the classification from being private, therefore it is not included among the exceptions established in paragraph two of the provision. Furthermore Article 12 of ECHR was also considered to be engaged if the PCWP hinders the possibility to reproduce.²¹²

In the USA, Glenn Cohen analyses the best interests of the child, or children’s welfare,²¹³ in preconception as a legal justification to control and limit choices around reproductive technologies by individuals. He maintains that extrapolating the best interests principle from family law to preconception assessments, or interfering in access to reproductive services, overlooks or ignores the non-identity problem, which is implicitly the underlying reason for rejecting a claim of wrongful life in tort suits by the judiciary.²¹⁴ Cohen focusses on the non-identity problem espoused by Parfit,²¹⁵ because the application of the principle entails two options, namely a child’s existence if the reproduction technology is carried out, or non-existence if the procedure is rejected. He claims that,

²⁰⁹ At [49].

²¹⁰ At [107].

²¹¹ At [107].

²¹² At [103], [104]. It should be noted that New Zealand is not part of the European Convention for the protection of Human Rights.

²¹³ IG Cohen “Regulating Reproduction: The Problem with Best Interests” (2011) 96(2) *Minnesota Law Review* 423-519, at 425. Cohen refers indistinctly to the best interests of children or child’s welfare.

²¹⁴ At 425.

²¹⁵ D Parfit *Reasons and Persons* (Oxford: Clarendon Press, 1984).

except in rare cases of a life not worth living, bringing a child into the world cannot be considered as preventing harm to them, because otherwise they would not have come into existence. Besides, if somebody does not come into life, it cannot be said that harm has been prevented because non-existence cannot be qualified, therefore it is an ontological impossibility. He defined a life worth not living as “a life so full of pain and suffering and so devoid of anything good that the individual would prefer never to have come into existence.”²¹⁶ Rarely can any life be considered as being a wrongful life because the threshold for being a life not worth living should be an extremely severe condition that makes the life absolutely miserable in view of the mental and physical disabilities. Therefore, the intervention that Cohen examined is far from being considered a life not worth living. In general, life is preferred to non-life, even if that life is not lived in optimal conditions.

The author noticed the dissimilarity between parental scrutiny in adoption cases versus preconception vetting, given that a particular child who is available for adoption could be harmed by an adoption by inept parents, whereas “if potential genetic parents are unfit, a particular child that would result cannot be harmed if gate keeping rules them out because that particular child would not otherwise come into existence.”²¹⁷ Cohen also analyses imperfect non-identity problems, and explores a tentative substitute to the welfare principle.

An example of an imperfect non-identity problem is a surrogacy contract, where a couple would have no recourse to a surrogacy contract if the contract were not enforceable, or they might resort to another alternative such as a surrogate in another country.²¹⁸ The whole scheme of surrogacy is geared to the transferral of parental rights, or to have a baby genetically related to them, given that the purpose of the procedure is not gamete donation, and thus it affects the child coming to life.

Cohen contends that restraining access to reproductive technologies on the grounds of the best interests of the resulting child is “incoherent based on a perfect non-identity problem.”²¹⁹ In general he argues the futility of the application of the child’s best interests to cases of perfect non-identity problems.

It should be noticed that each person individually is the only possible judge of his or her own deserving life. Ultimately, if a person considers their life to be not worth living, he or she could commit suicide, in spite of legal regulations or social constraints, unless doing so would not be physically possible for him or her, perhaps because of the disabilities they may have.

In a saga following a second article, Cohen proposed certain alternative or modified models to apply to preconception assessment instead of the best interests of the resulting child in order to overcome the non-identity problem. However, he briefly enunciated some of the same ideas in the first article, such as ‘reproductive externalities’ which focus on the harm provoked to third parties if the child were to come into being. These externalities can be circumscribed as costs to the family, or more generally as costs to the state.²²⁰ ‘Legal moralism and virtue ethics’ are concepts that are similar to externalities, given that the intervention is based not on harm to the child but rather to “society or the reproductive agent”.²²¹

John McMillan noticed that the welfare principle in preconception assessment has been considered as an appraisal of best interests of children who might be born, where this interpretation is itself part

²¹⁶ Cohen, above n 204, at 437.

²¹⁷ At 457.

²¹⁸ At 470.

²¹⁹ At 450.

²²⁰ At 518.

²²¹ At 519.

of the problem because when it is understood in that way the principle becomes meaningless. He suggested an alternative benchmark “as requiring those wishing to exercise their procreative liberty to have a reasonable plan to care and nurture any resulting child.”²²²

Sacha Waxman examined the welfare principle of the resulting child in preconception as set out in section 13 of the HFEA, along with the harm concept, however the analysis focuses on in-vitro procedures (IVF) and preimplantation genetic diagnosis (PGD). The author differentiated familial harm from genetic harm, and noted that in the UK the welfare concept was intentionally not described, advocating for the elimination of familial harm.²²³ She contends that “In the context of gaining access to IVF, the familial harm assessment is not based on any reliable or well-reasoned assessment tool.”²²⁴ Waxman considers the welfare assessment to be illogical, in view of it entailing that the optimal child’s welfare is to be born in the best of circumstances, therefore, if those circumstances do not concur the result could provoke the outcome of non-existence. The article takes into account Parfit’s time dependency claim, and affirms that the welfare principle is illogical when applied to preconception evaluation of a theoretical child rather than to an existing child, which buttresses the argument against the “familial harm threshold.”²²⁵ This highlights the fact that it is not possible to evaluate the welfare principle of a hypothetical child, albeit it is feasible to speculate on the future of different children who may be born. Waxman also contends that the principle is applied inconsistently, trumps reproductive choice and its purpose is ambiguous.²²⁶

In any case, it should be noticed that preconception assessment is in general a method that could be used by regulators to perpetuate a model of parenthood, and control or restrict access to new assisted reproduction technologies depending on the benchmark selected in each case. As is asserted by Cohen, the legitimacy of state intervention on account of the welfare of the child is out of the question, and therefore the transposition of the principle from family law to the realm of AHR laws was an easy task which promotes consensus and contributes to overlooking the drawbacks of the assessment as it was conceived. Thus, the conclusion of the literature is that the principle should be dismantled and removed from ex-ante procreation evaluation, giving freedom of choice as in natural reproduction. The preconception appraisal critics do not preclude laws to apply other explicit and general principles to have access to new assisted reproduction technologies, as long as it is general, consistent and transparent. Therefore, the evaluation made by Ethics Committees could be reviewed on objective grounds, if it deviates from the purpose in the application. Cohen has already suggested some alternative principles which could be applied in preconception assessment to replace the subjectivity and ontological impossibility of applying the welfare principle to a prospective child. However, the fact that assisted reproduction technologies, and in particular some adjacent procedures performed before or during the procreation process, could provoke genetic harm to the embryo, suggests that some level of intervention should be necessary to prevent harm to the embryo. Even in such cases, the issue could be resolved by medical laws or general codes that preclude performing some procedures in a healthy embryo. It should be acknowledged that assisted reproduction is a field in constant development and it touches upon matters that can be completely unforeseen but that are still related to our definition and limitation as human beings. Therefore, controversy is unavoidable.

²²² John McMillan “Making Sense of Child Welfare When Regulating Human Reproductive Technologies” (2014) 11(1) *Journal of Bioethical Inquiry* 47-55, at 47.

²²³ Sacha R. Waxman “Applying the Preconception Welfare Principle and the Harm Threshold: Doing More Harm than Good?” (2017) 17(3) *Medical Law International* 134-157.

²²⁴ At 145.

²²⁵ At 147.

²²⁶ At 148.

2.6 Conclusion

This chapter was aimed at examining the welfare, or best interests, principle considering the widespread application of the tenet in family law, and in particular the transfer of the welfare principle to preconception assessment in the laws regulating assisted reproduction techniques. Section 2 has outlined the UNCROC Committee comments on the best interests of the child, and noted that the criteria for evaluating the best interests are the child's rights as embodied in the Convention. Therefore, the child's best interests cannot be invoked to infringe other rights.

Section 3 has focused on the analysis of the case law of the European Court of Human Rights related to surrogacy. This has evinced the child's rights centred approach taken by the Court, which focuses on the child's best interests and right to an identity, to yield a judgment which upholds the surrogate born child's right to an identity, and the child's right to have the foreign filiation recognised by domestic authorities. The ECtHR judgments are based on the best interests of the child and the right to an identity, delimiting clearly children's rights independently of parents' conduct. The significance of the judicial precedent is in asserting the child's right to an identity, irrespectively of the way they were born, and has underlined the importance of legal parenthood as a source of children rights.

The fourth section discussed the legal framework in New Zealand. It briefly considered the best interests of the child in CoCA, and the criteria that are listed in CoCA to assess those best interests. It was noted that the listed criteria do not exclude other issues relevant to the child's welfare being taken into account.

Finally, section 5 explored the issue of the welfare of the child in preconception evaluation. The fact that well-being in preconception entails the evaluation of a theoretical child restricts its application on account of a philosophical principle known as Parfit's non-identity problem,²²⁷ in which the well-being principle could yield to a consequence for non-existence or existence of a different child. Another argument deployed by the literature is the impact of the principle on reproductive choices which generate discrimination on account that parents are free to conceive independently of the child's welfare in natural reproduction. Therefore, references to well-being rather than welfare, and some minor differences in the regulation of the principle, do not defeat the core of the objection to the principle by scholars in other jurisdictions, in particular when it is applied to procedures which do not entail genetic harm.

Genetic harm is also problematic, except if it entails an extreme case of a life not-worth living, given that the harm threshold in the majority of cases is not significant, and so it does not render the child's life not-worth living. The conclusion of the literature is that the child's welfare principle should be restricted to children already born.

²²⁷ Parfit, above n 206.

3. An Overview of the Importance of Legal Parenthood

3.1 Introduction

This chapter explores children's rights and their relationship with parenthood, examining the role that legal parenthood plays for children rights. Once the direct nexus between legal parenthood and children rights has been shown, the thesis employs that link to infer what best serves the welfare of the child. That inference is carried out in the next chapter (surrogacy). The resulting inference sets out the premise regarding what is in the best interests of the child concerning the allocation of parenthood in assisted reproduction.

It also analyses the impact that the determination of parenthood has on children's rights, such as the right to birth registration, nationality, identity and its preservation, inheritance rights and other rights that derive from parenthood. Then it moves on to discuss the meaning of legal parenthood, parental responsibilities, guardianship and guardians. It starts by defining these terms and then continues with an analysis of the statutory regulations of legal parenthood and parental responsibilities under New Zealand Law. The historical legal evolution of guardianship from England until the current regulation in New Zealand is explored, revealing the gender discrimination towards women who were deprived from being guardians of their own children. This chapter sets out the legal framework to underpin the argument of the thesis regarding the need to redefine legal parenthood in order to protect children born from the use of new assisted reproduction technologies.

3.2 Legal parenthood

Legal parenthood is conferred in New Zealand under the Status of Children Act (SoCA) and the Human Assisted Reproduction Technology Act (HART). Once a person is deemed to be a parent, he or she is deemed to have the rights and obligations necessary to raise the corresponding child. The determination of parenthood, and the responsibilities that parents have for children are therefore the main legal decisions concerning children.²²⁸ Bearing in mind the general vulnerabilities of a child – physical, mental, and legal – it is obvious that a child depends on his/her parents, and parents also need to be considered as such by the law in order to be able to provide for their children in all aspects of life. When the law strips the function of caregiver from the legal title of parents it restricts and hampers the ability of parents to protect children and, reciprocally, it obstructs the protection and wellbeing of the child.

Article 7 of the United Nations Convention on the Rights of the Child asserts: "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents."²²⁹ Thus, the aforementioned Convention proclaims the right of children to have legal parents at birth, their right to an identity and to a nationality. For the majority of children, the legislation that granted these rights was clear, but the surge of new assisted reproductive technologies has created situations where

²²⁸ J Carbone and N Cahn "Which Ties Bind-Redefining the Parent-Child Relationship in an Age of Genetic Certainty" (2002) 11 *Wm. & Mary Bill Rts. J.* 1011.

²²⁹ Above n 14. Article 24 of the International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on 19 December 1966, in article 24 enshrines the right to a birth registration and the right to a nationality.

this law fails to assign effective legal parents to a child at birth. Failure to provide children with parents at birth endangers them due to their defencelessness and vulnerability, as is recognised in the preamble of the Declaration of the Rights of a Child.²³⁰ It is undeniable that providing children with parents at birth constitutes the most basic of human rights and as such it is a principal responsibility of states in order to guarantee adequate protection of infancy.

States have the duty to promulgate laws that ensure that children have legally recognised parents at birth.²³¹ As a result, it is not up to the states to decide whether or not to regulate parenthood in cases of assisted reproduction technologies, but rather this is an obligation derived from international human rights treaties. Omitting regulation of the new situations, which are not contemplated in traditional or sexual reproduction, may constitute a violation of human rights. Laws which do not guarantee a “child's fundamental right to legal parents at birth”,²³² including those born through assisted reproduction technologies, are unconstitutional.²³³

The identity of a child is established and derived from the identity of his/her legally recognised parents. Parents transfer their surname (or one of their surnames) to the child and stand with the legal responsibility to protect the child and to take both ordinary and vital decisions when the child is born. Therefore, it is crucial for the child's life in general to have parents at birth, as well as for the society and the state.

The main purpose of legal parenthood is to identify those individuals with the duty to raise a child and the duty to assist the legal offspring in all their needs. Thereby a state which denies the right to legal parenthood at birth deprives children of basic rights, and renders them helpless.

Up to now, some states have addressed the issue of parentage following the use of new reproduction technologies from the point of view of a parent or parents who decide to turn to such technologies, but this approach omits to focus on the children which are born as a result of these non-sexual reproduction methods. As Storrow has contended, the legal history of discrimination toward children based on the way they are born, and their relationship with their parents (legitimacy versus illegitimacy), is replicated by legislators in the field of new assisted reproduction technologies “despite the progress made toward dismantling disparate treatment based on ‘illegitimacy’ of birth.”²³⁴

The fact that some states apparently equate nullity of the surrogate contract with nullius in law children overlooks the necessary legal distinction between a parent who signed the surrogacy contract and the children who are innocent third parties. Therefore, it necessarily follows that the adverse and negative effects of the prohibition impacts upon children. This oversight is best seen in states which prohibit the practice of surrogacy. These states adopt a policy which turns a blind eye to the fact that there are children born from surrogacy contracts who are entitled to the same rights as any other child, whether or not their parents turned to assisted reproduction in order to overcome the impossibility of having children through sexual reproduction.

²³⁰ Declaration of the Rights of the Child, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959). In its preamble it states: “... by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.”

²³¹ Byrn and Ives, above n 12. See also Fortin above n 54 for a thoughtful analysis of children's rights implementation in England and Wales.

²³² At 309, they write in the context of USA constitutional rights and contended that: “Only by guaranteeing the child's fundamental right to parents at birth through this designation of parental rights will state parentage statutes be constitutional.”

²³³ Byrn and Ives, above n 12.

²³⁴ Storrow, above n 10, at 565.

A child is a person independently of the circumstances of birth. The nature or legal definition of a child²³⁵ does not change because of the way he or she is born, and consequentially the rights should also be the same. As can be seen from the cases involving surrogacy heard by the ECtHR, the most legally problematic cases come from citizens whose countries of origin forbid surrogacy, since the main aim of such legislation is to enforce the prohibition without considering the rights of the children born or the harm that may be inflicted upon them. For example, the cases brought before the European Court of Human Rights have a common denominator – namely the suffering of children, because of failure to recognise their identity as human beings.²³⁶ Ironically, only some years after the disappearance of discrimination between legitimate and illegitimate children from most European statutes, a new kind of *filius nullius* has been created grounded on the circumstances of birth. Such a regression is surprising in view of the human treaties which did not exist when the *nullius filius* concept was imposed over illegitimate children.

The *nullius filius* doctrine was enacted in English statutes to legally separate parents from their illegitimate genetic children in order to safeguard the rights of primogeniture children.²³⁷ As was argued by Blackstone, those children were the ‘nobody children’, and referring to the incapacity of illegitimate children he asserted:²³⁸

“The incapacity of a bastard consists principally of this, that he cannot be heir to any one, neither can he have heirs, but of his own body; for, being *nullius filius*, he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived.” [] “for he can inherit nothing, being looked upon as the son of nobody, and sometimes called *filius nullius*, sometimes *filius populi*. Yet he may gain a surname by reputation, though he has none by inheritance.”

This historical disconnection between illegitimate children and legal parents, despite the genetic ties, is an example of the use of legal parenthood to advance policies at the expense of children. In the current cases of surrogacy, the lack of genetic ties with parents is the cause for considering them *nullius filius*, because when a genetic tie exists with at least one of the parents, in most jurisdictions the genetic ties may be recognised *a posteriori*, in order to transfer parenthood. Albeit such ties do not suffice for the intended parents to be deemed the legal parents at the moment of the child’s birth. There is still the lack of a new conception of parenthood which includes the allocation of parenthood for cases of children born from new forms of assisted reproduction technologies, recognizing parenthood beyond the traditional gestational paradigm.

The definitive allocation of legal parenthood over a child to the persons who will be upbringing and raising the child, whichever was the birth method under which the child was brought into life, is a duty of the state towards any child as a human being, above all since that child’s rights stem from parenthood, in particular the right to an identity.

²³⁵ Above n 14. Article 1 sets out: “For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”

²³⁶ *Mennesson, and Labassée*, above n 18.

²³⁷ *Carbone and Cahn*, above n 228.

²³⁸ Blackstone, above n 10.

3.3 Birth registration and nationality

“A birth certificate is a ticket to citizenship. Without one, an individual does not officially exist and therefore lacks legal access to the privileges and protections of a nation.”²³⁹ That assertion defines precisely the significance of a birth certificate for a person and for a nation. A birth certificate is required for almost any service that the state provides such as vaccination and health services, access to school and education in general, to obtain a passport, to open a bank account, to own land, to marry, to work for the Government and some other institutions.²⁴⁰ A birth certificate gives the right to an official identity but that identity is based on the child’s legal parents, in other words, children’s names, nationality and rights are defined by the legal linkage between parents and child.

The UNCROC establishes the state’s obligation to register a child immediately after birth.²⁴¹ The child’s birth registration is the process in which the state records the child’s birth in an official register. In some countries it is a civil register, however each country has its own rules. For instance, in Germany, there are professional civil services in charge of recording the birth certificates and managing the register. Registration could also be carried out by a politically elected member as is the case in Italy, where the mayor of the city is in charge of the civil register. In addition, each country has its own rules regarding the determination of a person’s civil status.²⁴² When a child is born overseas, the birth certification process involves recognising the foreign birth certificate, and in that process international private laws are applied to the person’s civil status to ascertain the child’s parents, name and nationality. This can lead to a divergence in those important matters, and it can even end up with the child being parentless.²⁴³

A child’s birth registration plays an important role in securing for that child the right to a nationality, as was acknowledged by the United Nations High Commission for Refugees (UNHCR) in its conclusion on civil registrations.²⁴⁴ The conclusion states: “The lack of civil registration and related documentation makes persons vulnerable to statelessness and associated protection risks, and that birth registration is often essential to the reduction and prevention of statelessness.” The lack of birth registration amounts to the denial of the effectivity of a birth certificate that is issued abroad. In short, the denegation of recognition implies that the child cannot rely on that birth certificate before the national authorities to obtain nationality and all the rights derived from it. It is simply a voided document.

Birth registration is a precondition for acquiring nationality, and failure to fulfil this requirement may lead to a situation of statelessness, as has been demonstrated by surrogacy cases. The ability to register a birth certificate in the parent’s country of residence is increasingly important in a global world where people and their offspring move around, but also specifically in surrogacy cases where children are born in countries other than the parents’ country. The European Convention on

²³⁹ “The Progress of Nation 1998, Civil Rights Commentary” <www.unicef.org>.

²⁴⁰ “The Progress of Nation 1998”.

²⁴¹ Article 7 of the United Nations Convention on the Rights of the Child, above n 14, and Art. 24(2) of the International Covenant on Civil and Political Rights (adopted by the United Nation General Assembly on 16 December 1966, above n 220).

²⁴² Dr Eliantonio, Ms Brunello and Mr von Freyhold “Life in Cross-Border situations in the EU (a comparative study on civil status)” (2013), commissioned by The European Parliament, Directorate-General Internal Policies <www.europarl.europa.eu>.

²⁴³ This parentless outcome was the case of *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam). This case will be commented later in the present thesis.

²⁴⁴ UNHCR Executive Committee, *Conclusion on Civil Registration*, No. 111, 17 October 2013 <www.unhcr.org/525fddef9.pdf>.

nationality²⁴⁵ also aims to eradicate the statelessness of people within the party states, but despite the rights proclaimed it fails to resolve the statelessness of children born from surrogacy contracts abroad due to the reason mentioned above, that is, the lack of inscription of the birth certificate in the parents' country of residence.

In cross-border surrogacy, the denial to record the child's birth certificate, or to recognise the foreign determination of parenthood, can be the result of contradictory outcomes in applying international private law, or the brandishing of the public policy consideration even when the application of conflict of laws principles does not lead to any change in the determination. In the second scenario, the reason to prohibit the inscription of the birth certificate of a child born abroad from surrogacy arrangements is the underlying surrogacy contract, and the enforcement of the prohibition of the practice of surrogacy through the denial of the inscription. However, the child has nothing to do with the way he or she was born, and therefore such a contract should not be detrimental to the child.

The denial of the inscription is a measure which has a direct negative impact on children's rights, and also indirectly on parents too. Hence, states might consider refraining from using the determination of parenthood to achieve goals or public policies which impact negatively upon children's rights and wellbeing. Second, the best interests of the child involve giving effectivity to the birth certificate, because a child born abroad lacks parents other than the intending parents. Therefore, a legal dispute about who are deemed to be the legal parents cannot result in any benefit to the child. On the contrary, it is detrimental to the child's wellbeing. This does not mean that in exercising the parents' *patria* powers, a state cannot deprive parents of the right to raise a child when they are neglecting their responsibilities as such, but that decision should be based on an assessed and demonstrated cause, and it should not be simply a convenient way to enforce a policy or to punish the infringement of an internal norm. The state can still use other direct methods to enforce the law, such as fines or other options which do not impact children's rights directly.

The effect that the denial of birth certificates entails goes beyond the children's parents to the children themselves. It should be noted that that even criminal laws do not deprive a convicted person from the right to nationality, identity or inheritance. Nevertheless, the denial of a birth certificate implicitly denies those rights. This example highlights the severe costs that the lack of inscription entails for those children, despite the fact that they are third parties in the surrogacy contracts.

3.4 Parentage and nationality

The Convention on the Rights of the Child (UNCROC) enshrined several rights in Article 8 – the right to be registered, the right to a name, the right to a nationality – with the right to have parents underlying the linkage between them, given that the rights to a name, nationality and registration are all derived from the concept of legal parenthood. In this sequence of rights the first step is to determine who the child's legal parent will be. Once someone is deemed to be a legal parent, the child will have an identity that stems from that legal parenthood, and that identity gives rise to a nationality. To refuse to record a child's birth certificate or similar document constitutes, implicitly, the denial of legal parenthood because it is a legal document which proves in every instance the relationship between parents and offspring. The interconnections between those rights is most noticeable in the cases of surrogacy where the lack of recognition of legal parents, which is determined abroad, leads to the lack of inscription in the birth register, and in turn that denial implies the lack of nationality, and from that

²⁴⁵ Europe Treaty Series 166 on Nationality, carried out in Strasbourg on 6/11/1997.

the rejection of other rights. Therefore, the right to legal parents at birth is a basic right for every person, regardless of the circumstances of birth.

The vulnerability and lack of capacity of children requires parenthood to be allocated to the persons that are both able and willing to provide protection for them from the moment of birth – those who have the intention of upbringing the child. Thus, giving the parental rights to those true caregivers also gives them the right to take important decisions on behalf of the child. The lack of legally recognised parents at birth renders a child stateless from the moment of birth, and submits him or her to disadvantages from the very start of his or her life. Providing a child with a nationality by default could help to alleviate the burdens of stateless children, but in some cases it is not enough. For example, countries that give nationality to all children born within its territory.

3.4.1 *Birth certificate and the relationship with nationality*

A birth certificate is therefore required to obtain a nationality, and from nationality stems a series of rights such as health, education, inheritance etc. International surrogacy is a field which provides us with actual cases of stateless children and parents facing grave difficulties to enter, or to live with their child, in their country of origin. Even in cases where the child is not stateless, difficulties and problems arise when children cannot enjoy their parent's nationality, and they encounter barriers to accessing services or rights provided to citizens of the country in question. The implications of not having legally recognised parents at birth are manifold, and the problems arising from international arrangements are due to the absence of a universal definition of legal parenthood. However, reciprocal acceptance of birth certificates between countries could resolve the problem.

3.4.2 *Nationality*

“Nationality [] is an essential factor at all levels of human life. Each of us, as individuals, would be deprived of an important part of our most fundamental rights if we did not have a nationality.”²⁴⁶ Nationality is considered to be the source of rights, the base upon which the enjoyment of other rights lies. Therefore nationality is a precondition to entitlement to other basic rights, and as a consequence a stateless person is rendered vulnerable and is likely to be subjected to all kinds of infringement of rights, given that many rights stem from state institutions.²⁴⁷ The European Convention on Nationality defines nationality as “the legal bond between a person and a State and does not indicate the person's ethnic origin.”²⁴⁸ As is spelled out in the explanatory reports,²⁴⁹ the concept comes from the *Nottebohm* case.²⁵⁰ The International Court set out that granting nationality ensures that person

²⁴⁶ Statement made by Hans Christian Krüger, Deputy Secretary General of the Council of Europe on the 1st European Conference on Nationality “Trends and Developments in National and International law on Nationality” (Strasbourg, 18 and 19 October 1999), at 9 <<https://www.refworld.org/pdfid/43f202412.pdf>>.

²⁴⁷ Constantin Sokoloff and Richard Lewis “Denial of Citizenship: A Challenge to Human Security” issues paper 28, 1.04.2005 <www.epc.eu>.

²⁴⁸ Article 2 at [a]] of the European Convention on Nationality, carried out in Strasbourg on 6/11/1997, Europe treaty series 166, entered into force 01/03/2000 <www.refworld.org/pdfid/3ae6b36618.pdf>.

²⁴⁹ European Convention on Nationality and Explanatory Report, European Treaty Series No. 166, *Council of Europe*, Strasbourg, 1997 <<https://rm.coe.int/16800ccde7>>.

²⁵⁰ In the *Nottebohm Case (second phase)*, judgment of April 6th, 1955: I.C.J. Reports 1955, p. 4 at 23. The International Court of Justice defined nationality as “a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties” <www.icj-cij.org/docket/files/18/2674.pdf>.

“enjoys the rights and is bound by its obligations” as are imposed by the law.²⁵¹ It affirmed verbatim that nationality:²⁵²

“constitutes the juridical expression of the fact that the individual upon whom it is conferred either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State.”

The 1930 Hague Convention Relating to the Conflict of Nationality Laws laid down in its Article 1 that the law enacted by a State for the purpose of determining the identity of its nationals “shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.”²⁵³ Article 5 of the Convention refers to criteria of “genuine connections”²⁵⁴ for the purpose of resolving issues of dual nationality. The genuine connections or concordance between reality and legal entitlement of nationality is a principle in international law which has been applied on a regular basis in international law to resolve conflicts on nationality.

These same principles should lead to the granting of a parent’s nationality to a surrogate child born abroad, when the parents’ actual residence is not in the birth country, and family life is based in a different country. Therefore, even in cases when the child is not stateless, the denial of nationality of the country of the parents’ residence entails adverse and negative effects for the child’s rights in view of the disconnection between place of birth and current family residence.

The disadvantages suffered by surrogate children born in the USA to European parents illustrates the point that there is a need for concordance between fact and legal determination of nationality, otherwise the child is precluded from the exercise of rights in the parents’ country due to the condition of being surrogate born. In the case of children, the denial of parental citizenship also provokes anomalies and violation of rights since the child is forced to live as a foreign national in the parents’ country, thereby creating barriers in the enjoyment of some rights and benefits such as health, education, inheritance and possibly even problems to travel abroad. The discrimination in these cases is blatant when there is a genetic link between the parents and the children.

The 1961 Convention on the Reduction of Statelessness (1961 Convention)²⁵⁵ was focused on providing a nationality to every child by establishing a default rule based on the *jus soli* concept which operates in cases where a child would be otherwise stateless. The 1961 Convention also applies the *jus sanguinis* criteria²⁵⁶ in Article 4 when providing nationality for persons born in countries which are not parties to the Convention to parents who are nationals of states that are parties to the Convention, although the criteria could be subject to certain conditions stipulated in paragraph 2 of that provision. The 1961 Convention addresses or resolves the problem arising out of surrogacy, in as much as it includes the *jus sanguinis* criteria to grant nationality to children born abroad from national parents,

²⁵¹ At 20.

²⁵² At 20.

²⁵³ The Hague convention of 12 of April of 1930 Convention on Certain Questions Relating to the Conflict of Nationality Laws <www.refworld.org/docid/3ae6b3b00.html>.

²⁵⁴ The term was used by The International Court of Justice in the *Nottebohm Case (second phase)*, above n 250, p. 4 at [23].

²⁵⁵ Convention on the Reduction of Statelessness, adopted on 30 August 1961 by a Conference of Plenipotentiaries which met in 1959 and reconvened in 1961 in pursuance of General Assembly resolution 896 (IX) of 4 December 1954 Entry into force: 13 December 1975, in accordance with art 18 <www.ohchr.org>.

²⁵⁶ Latin for ‘right of blood’. This is the nationality law principle under which citizenship is determined, or acquired, according to the nationality of one or both parents.

but in current times again the fragmentation of parenthood poses new challenges to resolve the problem of statelessness of children not born in their parents' countries.

Nevertheless, the problem or conundrum in cases of assisted reproduction lies in the denial of effectivity given to birth certificates issued abroad, or the lack of recognition of the legal parenthood as determined by the country where the child was born. In its Article 6 paragraph 1 a), the European Convention on Nationality stipulated the right to a nationality for children born to national parents (*jus sanguinis*) with the proviso that children born abroad could be subject to exceptions. Nevertheless, the *jus sanguinis* criteria is widespread in European Countries, namely 29 countries apply these criteria to determine nationality. From among those, countries such as France, Italy, Spain, and Germany, which forbid surrogacy, confer automatic nationality to nationals' descendants born abroad.²⁵⁷ The problem arises not out of the lack of international or national regulations concerning nationality, given that national statutes of most European countries confer nationality to children born from national parents regardless of the birth place, but rather from the lack of recognition of the foreign birth certificate, and the determination of parenthood stated in those birth certificates, on the grounds of it being against domestic public policy.

Denial of inscription of the birth certificate and the subsequent refusal of nationality is a linkage that is common in international cases. In the case of *Yarnin v. Dominican Republic*, the Inter-American Court of Human rights decided a controversy that arose from the lack of birth certificates and the subsequent statelessness of the children concerned, despite the fact that the claimants were born in the territory of the country and therefore were entitled by the law of the state to enjoy nationality. The Court pointed out that nationality is conferred the status of an inherent human right, and it is the precondition for the enjoyment of other rights as well as being an important factor to acquire legal capacity. The Court also emphasised that state jurisdiction in matters of nationality is curtailed and limited by the responsibility to guarantee protection of human rights, asserting:²⁵⁸

“Thus, despite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each state to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the states in that area, and that the manners in which states regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; those powers of the state are also circumscribed by their obligations to ensure the full protection of human rights.”

States cannot regulate nationality in a way that introduces discrimination directly or indirectly between individuals.

3.4.3 Identity

Article 8 of the UNCROC sets out the obligation of states parties to respect children's "identity, including name nationality and family relations." The Convention for the Protection of Human Rights and Fundamental Freedoms also protects the right to a name and to an identity under the rubric of the right to private and family life in Article 8, as has been declared by the ECtHR in its jurisprudence. The Court has observed that although names are not explicitly contemplated in Article 8 of the

²⁵⁷ See Eudo citizenship database <<http://eudo-citizenship.eu/databases/>>.

²⁵⁸ Inter-American Court of Human Rights, Case of the *Girls Yean and Bosico v. Dominican Republic*, Judgment of September 8, 2005, at [138] <www.corteidh.or.cr/docs/casos/articulos/seriec_130_%20ing.pdf>.

Convention, “since they constitute a means of identifying persons within their families and the community, forenames, like surnames ... do concern private and family life.”²⁵⁹

In the specific case of surrogacy, the European Court found that the relationship and filiation between a biological father and his offspring is included in the notion of identity and therefore in the right to private and family life.²⁶⁰ The identity of the child encompasses the relationship between parents and children, and since filiation is derived from the legal parents, the issue concerning who is deemed to be the legal parents in assisted reproduction is a vexed question which depends on each state’s policy. Therefore, problems can arise when the laws of the state where a child is born conflict with the laws where the child is going to be raised, which in most cases coincides with the parents’ nationality.

The relationship between nationality and identity was stated by the ECtHR in the case of *Genovese v. Malta* which declared that although the refusal of nationality is not included in the scope of Article 8, the effects that this denial produces on the child’s social identity makes it worthwhile to include the matter in the ambit of this article. The Court set out:²⁶¹

“However, as the Court has observed above, even in the absence of family life, the denial of citizenship may raise an issue under Article 8 because of its impact on the private life of an individual, which concept is wide enough to embrace aspects of a person’s social identity. While the right to citizenship is not as such a Convention right and while its denial in the present case was not such as to give rise to a violation of Article 8, the Court considers that its impact on the applicant’s social identity was such as to bring it within the general scope and ambit of that Article.”

The child’s right to preserve his or her identity is enshrined in Article 8 of UNCROC,²⁶² which sets out: “1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.” Maintenance or preservation of a child’s identity is disregarded in cases of surrogacy where the initial determination of parentage in the child’s country of birth is refused in the intended parents’ country²⁶³ or if intended parents are allowed to acquire parental status through a legal mechanism such as adoption. In an adoption process, the initial determination of parenthood is changed during the adoption process, reallocating parenthood in favour of intentional parents. As a result, the child’s initial identity changes to the one provided by the intended parents. “The adopted child shall be deemed to become the child of the adoptive parent, and the adoptive parent shall be deemed to become the parent of the child, as if the child had been born to that parent in lawful wedlock”.²⁶⁴ Furthermore, “Every adoption order shall confer on the adopted child a surname, and 1 or more given names.”²⁶⁵ The name given to the child is that specified by the applicants. The fact that the child has two birth certificates evidences the changes of the child’s identity.²⁶⁶

3.5 Legal parenthood, parentage and parental responsibilities

²⁵⁹ ECtHR, *Guillot v. France*, No. 22500/93, 24 October 1993, at [21].

²⁶⁰ Case of *Mennesson v. France*, above n 18, at [96].

²⁶¹ ECHR *Genovese v. Malta* (no. 53124/09), 11th October 2011, at [33].

²⁶² Above n 14. Art 8 states: “1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.”

²⁶³ *Mennesson*, and *Labassée*, above n 18.

²⁶⁴ Adoption Act 1955, s 16(2)(a).

²⁶⁵ Section 16.1.

²⁶⁶ This legal fiction is explained in detail in this thesis, through the examination of the case law of England related to parental orders.

“Biological and social factors have long shaped the law of parental recognition. The common law tied parenthood to marriage and thus made parentage a legal, rather than biological, determination.”²⁶⁷ Until the introduction of gestational surrogacy, motherhood was always certain as was reflected in the maximum “mater semper certa est”. On the other hand, fatherhood was attached to the woman’s husband, although this determination was not verifiable (only presumed) from the male side given that until more recently there was no reliable manner to know for sure whether the husband was the child’s biological father. In contrast, in current times the certainty has been inverted. While the biological link to a man can be attested without doubts,²⁶⁸ the mother’s biological link, which was once indissoluble, might show that more than one woman can have a biological connection to the child. This is due to the fragmentation between the genetic and gestational roles (as is the case in gestational surrogacy), or owing to sharing of the genetic contributions to the child between two women (as is the case with mitochondrial modification). Other potential technologies such as in-vitro derived gametes can fragment the genetic contribution between several people. In this context legal parenthood has become by necessity a social and intentional construction, and legislators need to decide which of the different persons involved in the creation of a child should be considered to be the legal parents, or what rights and obligations to confer to each of them.

As discussed above, legal parenthood confers rights and responsibilities upon adults to care for a child. Currently, in a traditional reproduction situation, both parents have legal guardianship of their children and together they share the whole gamut of rights and responsibilities. However, the legal parents might not also be the child’s guardians, for example if they are deprived of guardianship due to unwillingness or inability to carry out the rights and responsibilities that guardianship entails.²⁶⁹ The child’s guardians might not be the child’s legal parents, for example if another person is appointed to be the child’s guardian by a judge, even if there is no biological connection to the child. In addition, under the Care of Children Act (CoCA 2004), parenting orders can be granted to persons who are neither legal parents nor have a biological relationship to the child.²⁷⁰ For instance, step-parents can be appointed as guardians in addition to the parents, or instead of one parent. Several persons who are not considered legal parents (who may or may not have a biological relationship with the child), might contribute to the child’s upbringing.

The rights and responsibilities over children, whether derived from legal parenthood, guardianship or parental orders, and whether fragmented over several persons, are relevant to understanding parenthood in AHR where several persons contribute to the creation of a child and might want to be involved in raising the child or to be a part of the child’s life. In practical terms, guardianship has been deployed as a way to acquire parental rights and responsibilities over a child by intending parents involved in a surrogacy agreement, obviously without legal parental status.²⁷¹

3.5.1 A history

²⁶⁷ Douglas Nejaime “The Nature of Parenthood” (2017) 126 *Yale Law Journal* 2260, at 2261. For a thorough discussion regarding family formation and the persistence of the nuclear family in the law see Alan Brown “Introduction” in *What is the Family of Law? The Influence of the Nuclear Family* (Oxford, Hart Publishing, 2019).

²⁶⁸ Scott Bader *A Guide to Forensic DNA Profiling* edited by Allan Jamieson, (West Sussex (UK), John Wiley & Sons, 2016), at 43.

²⁶⁹ Care of Children Act 2004, s 29.3.

²⁷⁰ Section 47 (e) sets out that an eligible person to apply for a parental order is “any other person granted leave to apply by the court.”

²⁷¹ See, for instance, *Minkov v. Caldwell* [2014] NZFC 3587, [2014] NZFLR 922.

This subsection will offer an overview of the legislative history of children’s parental rights which reflects the struggles of women to obtain legal parental rights over their children on an equal basis to men.

Historically, fathers were considered by the common law as the only guardians of their children born from their legal wife, thereby excluding the legal mothers despite the fact that women were the child’s caregivers. The fact that guardianship came before parenthood²⁷² shows that guardianship is essential for the protection of a child. Parenthood without guardianship is essentially an empty shell, in so far as guardianship-less parents cannot exercise the rights and responsibilities which guardianship confers to the child’s upbringing. The definitions of parentage and parenting are elusive and depend upon the jurisdiction or the context, which provokes the necessity of deciding between the different definitions available.

During the eighteenth and nineteenth centuries, under common law,²⁷³ a father was considered to be the sole guardian of his legitimate children born from his legal wife, giving him absolute control over his children until they reached the aged of discretion, “virtually without question, against strangers and mother alike.”²⁷⁴ The mother had no control over her legitimate children during the life of her husband. The father was the only one who could appoint a guardian to a child.

“Women, when they married, lost their identity in the eyes of the law and all that they possessed.”²⁷⁵ Based on women’s lack of identity, the husband was regarded by the law as the natural guardian and this warranted him sole custody of his legitimate children.²⁷⁶ Canonist and common lawyers maintained that the law considers “husband and wife were but one person. This one person was, for practical purposes, the husband.”²⁷⁷ Blackstone explains the doctrine of coverture as follows:²⁷⁸

“By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs everything; and is therefore called in our law-french a *feme-covert*; is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*.”

Paradoxically, a married woman was legally incapable – she could not own her own property or have parental rights over her children, albeit, as an exception of the doctrine of coverture, she could be accused and punished separately. The rationale behind the exception was “for the union is only a civil union.”²⁷⁹ The origin of the doctrine and its one-sidedness, may be found in the treatment of women in primitive times as inferiors. “According to the scriptures, the woman was created for man and

²⁷² UK Law Commission Report 172 “Family Law: Review of Child Law, Guardianship and Custody”, at 5 <<https://assets.publishing.service.gov.uk>>.

²⁷³ UK Law Commission Working Paper no. 91, “Family Law Review of Child Law: Guardianship” at [3.6], at 68 asserted that it was “a common law rule that the father is the natural guardian of his legitimate children.” <<https://s3-eu-west-2.amazonaws.com>>.

²⁷⁴ At 32.

²⁷⁵ John Wroath *Until they are Seven: The Origins of Women’s Legal Rights* (Winchester, Waterside Press, 1998) at 9.

²⁷⁶ At 9.

²⁷⁷ JH Baker *An Introduction to English Legal History* (London, Butterworths, 2002), at 483-484.

²⁷⁸ Blackstone above n 10, at 421 <www.gutenberg.org/files/30802/30802-h/30802-h.htm#Page_421>.

²⁷⁹ At 421.

bound to obey him.”²⁸⁰ However, at the death of the father, the mother was guardian for nurture until the child reached the age of fourteen, provided there was no other guardian.²⁸¹

The first statutory description of a guardian’s powers was in the Tenures Abolition Act of 1660, which remained in force until 1973.²⁸² Guardians appointed under that Act had the custody and tuition of the child and were enabled to:²⁸³

“take into [their] ... custody to the use of such child ... the profits of all lands, tenements and hereditaments of such child ... and also the custody, tuition, management of the goods, chattels and personal estate of such child ... and [could] bring such action in relation thereunto as by law a guardian in common socage might do.”

By 1836, Caroline Norton, a well-connected and influential woman²⁸⁴ who had separated from her violent husband, encountered the situation that her husband denied her any contact with her three children. She had no legal remedy, and so confronted with the facts, she started a campaign against the cruel situation she faced of not having custody of her children. In 1837, following a suggestion that Caroline Norton made to her contacts, Mr Talfourd introduced a Bill in Parliament. The Bill was passed in the House of Commons, although it was defeated in the House of Lords. After the initial drawback, the Bill was reintroduced in the House of Commons in 1838. By 1839 Parliament passed the Custody of Infants Act 1839 which conferred a wife the right to claim custody over her children under seven years old, and to petition access to older ones, provided she has not been guilty of adultery.²⁸⁵

In the Parliamentary debates, Lord Lyndhurst draw a comparison between a ‘virtuous’ married woman who is deprived of her children, owing to the father’s absolute control over her children, and a ‘profligate woman’ who could keep her children because “the father had no absolute control over the child”.²⁸⁶ In turn, the Lord Chancellor pointed out the great danger of courts failing to take account of the “primary object of all courts of justice – the conservation of the rights of the children.”²⁸⁷ The debate in Parliament centred on the unfair position of married women in contrast to unmarried women who enjoyed the right of custody of their children under seven years old.

The Custody of Infants Act 1839, affirmed:²⁸⁸

“That after the passing of this Act it shall be lawful for the Lord Chancellor and the Master of the Rolls in England, and for the Lord Chancellor and the Master of the Rolls in Ireland, respectively, upon hearing the petition of the mother of any infant or infants being in the sole custody or control of the father thereof or of any person by his authority, or of any guardian after the death of the father, if he shall see fit, to make order for the access of the petitioner to such infant or infants, at such times and subject to such regulations as he shall deem convenient and just; and if such infant or infants shall be within the age of seven years to make order that such infant or infants shall be delivered to and remain in the custody of the petitioner until attaining such age, subject to such regulations as he shall deem convenient and just.”

²⁸⁰ Baker, above n 277, at 483-484.

²⁸¹ Law Commission WP 91, above n 273, at 32.

²⁸² UK Guardianship Act 1973 schedule 3 expressly repealed section 9 of the Tenures Abolition Act 1660.

²⁸³ Law Commission WP 91, above n 273, at 49.

²⁸⁴ Her influence was due to being a public person, on account of her social status and her friendship with Lord Melbourne during his term as Prime Minister and before.

²⁸⁵ Wroath, above n 275.

²⁸⁶ HL Deb 18 July 1839 vol 49 cc485-9 <<https://api.parliament.uk/historic-hansard/lords/1839/>>.

²⁸⁷ At 449.

²⁸⁸ As cited by Wroath, above n. 275, annex at 139.

Section 4 established the proviso that the order could only be made provided the mother was not found guilty of adultery.

By 1873 the mother's right to apply for the custody of her children extended to those under the age of sixteen years old, and the Act also superseded the condition that the mother was not found guilty of adultery. However, the courts usually limited the right to female children and refused to confer guardianship over male children, on account of the father being qualified to raise a male child.²⁸⁹

The Guardianship of Infants Act 1886 established the right of a child's mother to apply for custody over her child under the age of twenty-one. For the first time it set out that the welfare of the child was the main consideration together with the conduct and wishes of the parents in deciding child's custody. The Guardianship of Infants Act 1886 started its Parliamentary procedure as the Infants Bill 1884, introduced by Mr Bryce and another three Members of Parliament as a Private Members Bills.²⁹⁰ It is considered to be the first legislative attempt to place a mother's parental rights to children "as on equal footing and equal authority with those of her husband."²⁹¹

The essence of the Bill to equate parental rights of mothers and fathers in respect of their children was contained in clauses two and three, which state:²⁹²

- "2. The parents of any infant shall during the continuance of their marriage be its joint guardians.
3. On the death of either of the parents of an infant the survivor shall be its guardian."

On the second reading of the Bill, held on the 26th of March, it was manifest that the majority of the House opposed clause 2 which recognised both parents as joint guardians, and therefore challenged the authority of the father. After several strategic delays, on 23rd of July 1844 the majority of votes in the House of Commons went against clause 2. By the time the Bill was sent up to the House of Lords it had undergone substantial changes, which distorted the Bill and diverted it from the original purpose. A new clause 5 was drafted by the Parliamentary sponsor of the Bill as a remedy to overhaul the removal of clause 2. Instead of automatic guardianship under the old clause 2, the new clause now allowed the mother to apply to the courts for the custody of her children. This would be decided considering the welfare of the child.²⁹³ Thus, the Bill was modified and became a government measure, finally being enacted as the Guardianship of Infants Act 1886.

The Guardianship of Infants Act 1886 fell short of declaring both parents to be guardians, but curtailed parent's rights and allowed custody cases to be decided taking into account the welfare of the child. However, where the court believed the child's welfare was not compromised, the father's supremacy was upheld.

As an example of the Act's application, in *Campbell v. Campbell*²⁹⁴ the Court dealt with an application by the father for custody over a female child of almost two years of age. The Court granted custody to the father, despite the mother's allegation that section 5 of the Guardianship of Infants Act 1886

²⁸⁹ Susan Maidment *Child Custody and Divorce: The Law in Social Context* (London, Croom Helm, 1984).

²⁹⁰ Elizabeth Wolstenholme-Elmy "The Custody and Guardianship of Children, The Infants Bill", at 5 <<https://archive.org/stream/custodyandguard00elmygoog#page/n1/mode/2up>>.

²⁹¹ At 6.

²⁹² At 17, appendix.

²⁹³ Above n 290.

²⁹⁴ *Campbell v. Campbell*, judgment of 7 of November 1919, SLR 75.

rendered both parents joint guardians. The Court dismissed the mother's claim and instead, asserted:²⁹⁵

"This contention finds no support in the language of the section, which assumes that the father remains the sole guardian but indicates certain circumstances in which his power over the person of his child may be lost or restricted."

In the English case of *Sleigh v. Sleigh*,²⁹⁶ it was held that: "Now, while the statute gives to the Court a large discretion according to what appears to be the interest of the children, it does not alter the position of the father as head of the family."²⁹⁷

In New Zealand, the Infants Act 1908 reproduced literally the relevant provision of the Guardianship of Infants Act 1886 (s 5), setting out in s 6:

"The Court may, on the application of the mother of any infant (who may apply without next friend), make such order as it thinks fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father; and may alter, vary, or discharge such order on the application of either parent, or, after the death of either parent, of any guardian under this Act; and in every case may make such order respecting the costs of the mother and the liability of the father for the same or other-wise as to costs as it thinks just."

Indeed, the Act allowed a mother to petition for custody over the children, which was to be determined taking into account the welfare of the child alongside the parents' wishes, but the Act did not impinge upon the father's supremacy at common law.

The Guardianship of Infants Act 1925 in England²⁹⁸ created two new statutory principles: the first elevated the welfare of the child to "the first and paramount consideration" in custody cases, and the second imposed a "role of neutrality as between mothers' and fathers' claims to their children".²⁹⁹ It has been described as "a device to actually deny women's demands for equal rights."³⁰⁰ It seems however that the welfare principle was a double-edged sword. On the one hand, it allowed women to advance their right to children's custody and depart from their initial position as a stranger to their children, considering that in theory, the paramountcy principle of the child's welfare was the yardstick to rule and decide custody cases. On the other hand, in practice, "judges deemed the welfare of the child to be best served by upholding the "sacred right of the father" to his children."³⁰¹

The welfare principle first appeared in New Zealand's legislation the following year in the Guardianship of Infants Act 1926, section 2 of which stated:³⁰²

"Where in any proceeding before the Supreme Court or any other Principle on which Court of competent Jurisdiction the custody or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the Court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at

²⁹⁵ Per Lord Skerrington, at 231.

²⁹⁶ *Sleigh v. Sleigh*, January 20 [1893], 30 S.L.R. 272, as cited by *Campbell* above n 294.

²⁹⁷ At 275.

²⁹⁸ Guardianship of Infants Act, 1925, s. 1 (Imperial). 12 Halsbury's Statutes of England. 2nd cd., p. 954.

²⁹⁹ Maidment, above n 289, at 107.

³⁰⁰ At 108.

³⁰¹ At 108.

³⁰² Guardianship of Infants Act 1926, s 2.

common law possessed by the father, in respect of such custody, upbringing, administration, or application is superior to that of the mother, or the claim of the mother is superior to that of the father.”

The Guardianship of Infants Act 1968 expressly declared both married parents to be guardians of their children, given that the Guardianship of Infants Act refers to similar powers as to the father to apply to the Court, but omitted to explicitly confer guardianship to the mother. The mother was the guardian at the death of the father, alone or jointly if the father appointed a testamentary guardian.³⁰³

The Guardianship Act 1968, establishes that: “(1) Subject to the provisions of this Act, the father and the mother of a child shall each be a guardian of the child.”³⁰⁴ Likewise, the mentioned Act maintains the paramountcy principle of the child welfare in any matter concerning a child custody or guardianship.³⁰⁵ However, given that it expressly declared both parents to be guardians of their child, it removed the proviso of not taking into account “any right at common law possessed by the father.”³⁰⁶

In 1968 the Guardianship Act 1968 clarified:³⁰⁷

“‘Custody’ means the right to possession and care of a child: ‘Guardianship’ means the custody of a child (except in the case of a testamentary guardian and subject to any custody order made by the Court) and the right of control over the upbringing of a child.”

Consequently, a parent having custody was also a guardian to the child, but the contrary was not always true. “Custody was commonly awarded to one parent, while both remained guardians.”³⁰⁸ The same was applied in New Zealand under the Guardianship Act 1968, which is why section 15 mandated to the courts:³⁰⁹

“On making any order with respect to the custody of a child, the Court may make such order with respect to access to the child by a parent who does not have custody of it under the order as it thinks fit.”

Section 159 of CoCA establishes, in general terms, which terminology of the superseded Guardianship Act 1968 equates to the new one set out in CoCA, in the following form: ‘custody’ equates to ‘day-to-day care’ and ‘access’ is “to be read” as ‘contact with’, with the caveat that it is conditioned to “the context otherwise requires.”³¹⁰

In the provision that implements in New Zealand’s law the Hague Convention on the Civil Aspects of International Child Abduction, s 97 of the Care of Children Act 2004 states that the rights of custody encompass “(a) rights relating to the care of the person of the child (for example, the role of providing day-to-day care for the child); and (b) in particular, the right to determine the child’s place of residence.” Sections 158 and 159 of CoCA also refer to equivalence of order under the Guardianship Act 1968 and the Care of Children Act 2004.

3.5.2 *Legitimacy in New Zealand*

³⁰³ Guardianship of Infants Act 1926.

³⁰⁴ Guardianship Act 1968, s6.

³⁰⁵ Section 23.

³⁰⁶ Above n 302, s 2.

³⁰⁷ Above n 302, s 3. Repealed by s 152 (a) of the Care of Children Act 2004.

³⁰⁸ John Dewar and Stephen Parker “The Impact of the New Part VII Family Law Act 1975” (1999) 13(2) *Australian Journal of Family Law* 96, at 3.

³⁰⁹ Above n 304, s 15.

³¹⁰ CoCA, s 159.

“Bastardy, or illegitimacy, was a condition imposed upon a child by the Church as a punishment for the sin of parents who conceived it by illicit connection.”³¹¹ The Status of Children Act 1969 repealed the concept of illegitimate children in New Zealand which had historically discriminated against children born out of wedlock. Section 2 stated that “the purpose of sections 3 and 4 is to remove the legal disabilities of children born out of wedlock.” Section 3 named “all children of equal status” and mandated that the legal relationship between children and parents be determined without reference to parents’ marital status, whether or not the child was born in New Zealand and applied retroactively to all children since the entry in force of the Act.

In the UK, the abolition of the distinction between legitimate and illegitimate children did not occur until 18 years later, with the enactment of the Family Law Reform Act 1987, which declared that references to a relationship between two persons be constructed that disregards the marital status of the mother and father. However, the wording of the provision is less conclusive and the effects are not retroactive as in New Zealand. It is noted that the provision stated “unless the contrary intention appears”, a proviso which prompted doubts where the intentions pointed to the contrary.

Section 1(1) states:³¹²

“In this Act and enactments passed and instruments made after the coming into force of this section, references (however expressed) to any relationship between two persons shall, unless the contrary intention appears, be construed without regard to whether or not the father and mother of either of them, or the father and mother of any person through whom the relationship is deduced, have or had been married to each other at any time.”

In the UK the legislative changes were forced by a series of international treaties signed by Great Britain, including the European Convention on the Legal Status of Children born out of Wedlock,³¹³ and the European Convention on Human Rights,³¹⁴ which in the case of *Marckx v. Belgium*³¹⁵ held that Belgian legislation concerning illegitimate children contravened the ECHR.

Article 1 of the ECHR, establishes: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.” Article 46 of the same Convention sets out: “The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.” Therefore, once a case has been held to be in breach of the Convention, any similar case will be decided in the same terms, moving the states members to align their legislation according to the case law of the ECtHR.

The case of *Marckx v. Belgium*³¹⁶ dealt with the application of a natural mother (Alexandra) and her daughter (Paula) born out of wedlock concerning the different and discriminatory treatment of children born out of wedlock by the Belgian Civil Code as enacted at that time, namely the way of establishing the filiation and the effect of the recognition on the child’s family relationship and the patrimonial rights on intestacy.³¹⁷ “The child does not become a member of his mother’s family. The

³¹¹ Baker, above n 277, at 489.

³¹² Section 1.1 of the Family Reform Act 1987.

³¹³ European Convention on the Legal Status of Children Born out of Wedlock, opened for signature 10/15/1975, entry into force 8/11/1978, C.E.T.S. No. 85. The UK ratified the treaty on 2/24/1981 and entered into force 5/25/1981.

³¹⁴ Convention for the Protections of Human Rights and Fundamental Freedoms, signed in Rome on 4th of November 1950.

³¹⁵ *Marckx*, above n 13.

³¹⁶ *Marckx*, above n 13.

³¹⁷ Series A No. 31 at [13].

law excludes it from that family as regards inheritance rights.”³¹⁸ The legal alternative offered by the Civil Code to overcome the inheritance disadvantages was for the mother to adopt her own natural child.³¹⁹

In respect of the maternal filiation the Court found that there was violation of Article 8 alone and Article 8 in conjunction with Article 14 with respect to both applicants.³²⁰ The same outcome was held in relation to Alexandra Marckx’s extended family relationships.³²¹ On the patrimonial rights relied on by Alexandra and Paula, it was held that there was no breach of Article 8 of the Convention alone, but that there was a violation of Article 14 in conjunction with Article 8.³²²

a) General Definitions

Legal parenthood bestows “powers, duties, rights and responsibilities” upon adults in relation to children, so that they can provide security and protection to them as vulnerable members of society.³²³ Parental responsibilities are defined by Section 15 of CoCA as follows: “(a) all duties, powers, rights, and responsibilities that a parent of the child has in relation to the upbringing of the child.”³²⁴ It includes rights and responsibilities conferred upon the guardian under any other legislation, or those entrusted to a guardian prior to the entry into force of the Guardianship Act 1969.³²⁵ The rights and responsibilities vested in the guardian are an open ended list, those decisions encompass a wide range of actions such as development or care of the child.

Without these parental responsibilities, therefore, a caregiver would be unable to make important decisions concerning the child, bearing in mind that a mere caregiver or the facto parents have no standing to act on behalf of the child until those rights are conferred or transferred from the legal parents.

b) Parentage

New Zealand’s law does not define parentage explicitly, nor does it differentiate parentage from parenthood. ‘Parentage’ appears to be the term used in New Zealand’s regulation to refer to a child’s biological or genetic parents, or lineage. This is the implicit meaning in s 54 of the Family Proceeding Act, which states:

“In any civil proceedings (whether under this Act or not) in which the parentage of a child is in issue, (a) the court may, of its own motion or on the application of a party to the proceedings, recommend that parentage tests be carried out on (i) the child; and (ii) any person who may be a natural parent of the child.”

This suggested distinction between parentage and parenthood is not universally accepted. In the USA, parentage is equivalent to parenthood, and in fact the Uniform Parentage Act (UPA) deals with the determination of legal parenthood, despite its name. Scholars use the term to refer to parenthood in

³¹⁸ At [16].

³¹⁹ At [19].

³²⁰ Ruling II.

³²¹ Ruling III.

³²² Rulings IV and V.

³²³ New Zealand Law Commission Report “New Issues in Legal Parenthood” (Wellington, N.Z, Law Commission, 2005), at 15. For a discussion regarding the differences between parenthood, parentage and parental responsibilities. See also Andrew Bainham “Parentage, Parenthood and Parental Responsibility: Subtle, Elusive, Yet Very Important Distinctions” in A Bainham, S Day Sclater and M Richards (eds.) *What is a Parent? A Socio-Legal Analysis* (Oxford, Hart Publishing, 1999).

³²⁴ CoCA, s 15 (a).

³²⁵ Sections 15 (b) and (c).

general and not only to genetic parents.³²⁶ The Hague Conference on Private International Law, for instance in the surrogacy project, alludes to a study on legal parenthood under the heading “A study of legal parentage and the issues arising from international surrogacy arrangements”.³²⁷

‘Parentage’ then identifies the genetic parents. In natural reproduction, the genetic and the legal parents are understood to be the same persons, given that the genetic mother in natural reproduction coincides with the legal one. As to the father, there is an underlying assumption that the presumptive legal father is also the genetic one, and this explains why the father can rebut the marital presumption of parenthood. Where assisted reproduction is used to conceive a child, the genetic and legal parents diverge. For instance, in gamete donation one or both of the legal parents could be genetically unrelated to the child. In gestational surrogacy, New Zealand’s regulations deem the woman who gives birth to the child and her partner to be the legal parents, whether or not they are genetically related to the child.³²⁸

c) Legal parenthood and marital presumption.

Although legal parents are deemed to be the legal guardians of the child,³²⁹ most of the powers, duties, rights and responsibilities that legal parenthood entails are embedded in the concept of legal guardianship, and do not stem from parenthood itself.³³⁰ As an example, the right to inheritance derives from parenthood, and therefore the legal relationship between parents and children entitles them to a proportion of the estate when a parent dies in intestacy.³³¹ Citizenship also derives from legal parents, and so a child born in New Zealand or overseas from New Zealand parents, otherwise than by descendant, is a New Zealander.³³² Section 3(2) of the Citizenship Act deems a child to be a New Zealand citizen if he or she is adopted by a New Zealand citizen.

The presumption of parenthood in favour of a child born from a woman during her marriage or within 10 months after the ceasing of the marriage for any reason, is stated in SoCA³³³ as a means to assign, ipso facto, legal parents to a child born from marriage. Specifically, s 5 of SoCA sets out:

“(1) A child born to a woman during her marriage, or within 10 months after the marriage has been dissolved by death or otherwise, shall, in the absence of evidence to the contrary, be presumed to be the child of its mother and her husband, or former husband, as the case may be.

³²⁶ For example, Nejaime above n 267, at 2266 affirms: “State legislatures can restructure parentage law in ways that credit parenthood’s social dimensions, and state courts can apply parentage principles to recognize as legal parents those who have committed to the work of parenting.” See also Leslie Joan Harris “The Basis for Legal Parentage and Andrew Bainham’s “The Clash Between Custody and Child Support” (2009) 42(3) *Indiana Law Review* 611, at 612 which asserts that “in the United States today, there are two legal bases for parentage, biology and function.”

³²⁷ “A study of legal parentage and the issues arising from international surrogacy arrangements” Preliminary Document N 3C of March 2014, HCCH <<https://assets.hcch.net/docs/>>.

³²⁸ Status of Children Act 1969, ss 17 and 18.

³²⁹ CoCA, s 17.

³³⁰ Law Commission, above n 323, at 15.

³³¹ Administration Act 1969, s 78.

³³² Citizenship Act 1977, ss 6 and 7. The rules of citizenship are specific to the case. Section 7 (2) sets out an exception to the acquisition of citizenship by a child born overseas to a New Zealander by descent if the child would be otherwise stateless.

³³³ SoCA, s 5 asserts: “A child born to a woman during her marriage, or within 10 months after the marriage has been dissolved by death or otherwise, shall, in the absence of evidence to the contrary, be presumed to be the child of its mother and her husband, or former husband, as the case may be.”

(2) Every question of fact that arises in applying subsection (1) shall be decided on a balance of probabilities.”

The marital presumption was an easy way to ascertain parenthood in times where there was no accurate method of proving the genetic connection between a father and child, and where common law struggled for hundreds of years to set out rules concerning paternity.³³⁴ Owing to the fact that the mother of a child was a straightforward determination in natural reproduction, the law created a presumption of paternity that identifies the father based on the legal relationship with the woman who gives birth.³³⁵

There is a clear advantage to the presumption. It assigns parents to a child automatically, right from the very moment of birth, without further requirements, thereby protecting the child’s rights which flow from legal parents. Without it, further administrative steps would be required for determining paternity, with the subsequent effect of there being fewer fathers recorded on birth certificates,³³⁶ and correspondingly fewer legal parents for the child.

Whether or not the statutory presumption of parenthood applies to civil unions and factio couples is a controversial issue that has not yet been settled. Leading scholars maintain “It is unclear if this section applies to civil union and the factio couples or only to married couples.”³³⁷ The controversy started with the enactment of the Status of Children Amendment Act 1987 whose s 1 extended the scope of the application of the Act to the 1969 Act,³³⁸ and s 2 of the same Act states:

“2. Interpretation – For the purposes of this Act, (a) A reference to a married woman includes a reference to a woman who is living with a man as his wife in a relationship in the nature of a marriage, although not legally married to him; and (b) A reference, however expressed, to the husband or wife of a person (i) is, in the case where the person is living with another person of the opposite sex as his or her spouse in a relationship in the nature of a marriage although not legally married to the other person, a reference to that person; and (ii) does not, in that case, include a reference to the spouse (if any) to whom the person is legally married.”

Indeed, the effect of the wording of the Status of Children Amendment Act 1987 (SoCA 1987) was to extend indirectly the presumption of parenthood to unmarried couples.³³⁹ Nevertheless, the purpose of the definition of a married woman in the SoCA 1987 was to ascertain parenthood of children born through human assisted reproduction, even in cases where a married woman was in a de facto relationship to a third person. However, the Status of Children Amendment Act 2004 expressly repealed the Status of Children Amendment Act 1987,³⁴⁰ thereby terminating the polemic in this regard.

Despite the repealing of the Status of Children Amendment Act 1987 which was the source of the controversy, other legislative changes have sparked doubt regarding the scope of the presumption. For instance, in the case of an unmarried man, section 15 (2) of the Births, Deaths, and Marriages

³³⁴ Chris Barton and Gillian Douglas *Law and Parenthood* (London, Butterworths, 1995), at 54.

³³⁵ Law Commission, above n 323, at [4.1].

³³⁶ At [4.9].

³³⁷ Mark Henaghan et al *Family Law in New Zealand 18th edition* (Wellington, LexisNexis NZ Limited, 2017), [6.502.01] at 389.

³³⁸ Status of Children Amendment Act 1987, s 1, asserts: “This Act may be cited as the Status of Children Amendment Act 1987, and shall be read together with and deemed part of the Status of Children Act 1969 (hereinafter referred to as the principal Act).”

³³⁹ See Dick Webb et al *Family Law in New Zealand* (10 ed, LexisNexis, Wellington, 2001) vol 2 [6.50], at 800.

³⁴⁰ Status of Children Amendment Act 2004, s 18, in the part called “amendment to other Act”.

Registration Act 1995³⁴¹ mandates not “to register as part of the child's birth information any information indicating or purporting to indicate that the man is child's father”³⁴² unless other conditions are met. Certainly, that provision entails that the marital presumption of fatherhood was circumscribed only to married couples. However, s 15 of the aforementioned law was amended by schedule 4 of CoCA 2004 to include de facto relationships, allowing a parent in a de facto relationship to register the birth of a child without need to provide consent from the other partner, as was the case for married couples.

The current Births, Deaths, Marriages, and Relationships Registration Act 1995 does not differentiate between married or unmarried couples, establishing the obligation of both parents jointly to notify the child's birth.³⁴³ In that sense, it seems that the position of all couples vis-a-vis the registration of child's birth are equal.

However, the Citizenship Act 1977, as modified, by section 4(1) of the Citizenship Amendment Act 2005 (2005 No 43) asserts:³⁴⁴

“For the purposes of this Act a person shall, in the absence of evidence to the contrary, be presumed to be the father of another person if, (a) he is or was married to, or in a civil union or a de facto relationship with, that other person's mother at any time during the period commencing with that other person's conception and ending with that other person's birth.”

Thus, the wording of the provision “for the purpose of this Act” limits the application of the provision to citizenship.

Likewise, SoCA has been modified several times, most notably in the presumption section headline.³⁴⁵ However, the legislator did not amend the text to extend the presumption to civil union partner and de facto couples. In view of the reluctance of the legislator to explicitly broaden the presumption where opportunities have arisen, it seems that the presumption as it now stands has not been extended to de facto couples.³⁴⁶

As to the application of the marital presumption to married couples alone there are, however, disadvantages, most notably derived from the decreasing number of marriages and civil unions.³⁴⁷ Additionally, in the case of separation a parent can refuse to identify the other, perhaps in order to avoid either involvement in child's life or economic liabilities.³⁴⁸ Further, there are also detractors who argue that it can create legal fictions and introduce uncertainty in situations where it is possible to prove paternity through reliable genetic tests. Therefore, it would be advisable to limit the time the presumption can be rebutted after a child's birth with the consequential effect of rendering the presumption *jure et de jure* once the prescribed time of refutation has elapsed. The onus of refutation within the prescribed time should lie with the father, in view of the availability of the test, and the

³⁴¹ The Births, Deaths, and Marriages Registration Act 1995.

³⁴² Section 15(2).

³⁴³ Section 9.

³⁴⁴ Citizenship Act 1977, s 3.1.

³⁴⁵ Status of Children Amendment Act 2004, s 6.

³⁴⁶ This view is tentative, given that the thesis is focused on the determination of parenthood in assisted reproduction.

³⁴⁷ In 2017 “The general marriage rate was 10.9 marriages and civil unions per 1,000 people aged 16 years and over who are not married or in a civil union.” <www.stats.govt.nz/information-releases/>. The number of civil unions dropped from 300 to less than 60 in the period 2014 – 2017 due to the fact that same-sex marriage was legally permitted. Thus, civil unions were a substitute for marriages among same-sex couples when marriage was not possible.

³⁴⁸ Law Commission, above n 323, at [4.9].

accumulative negative impact that the denegation of parenthood has upon children's lives as time passes. The disruption that the rebuttal action produces in a child's life increases with the child's age, and so the limit on time increases legal certainty and respect for children's rights.

While s 5 of SoCA seems to confine the presumption to marriage, the Citizenship Act 1977 extended the presumption of fatherhood to other intimate relationships different to marriage, with the apparent purpose of conferring New Zealand citizenship to children. This approach is also in contrast with the stance adopted by the Status of Children Act which limits the evidences and recognition of paternity to the effects of "succession to property or to the construction of any will or other testamentary disposition or of any instrument creating a trust, or for the purpose of any claim under the Family Protection Act 1955,"³⁴⁹ to the ones listed in the provision.³⁵⁰

The lack of consistency in the rules concerning the presumption of parenthood could mean that a child is deemed to have a legal father under one set of rules but not under other regulations, thereby generating legal uncertainty.

Under s 8 the Status of Children Act, there are the following methods to establish paternity:

1. A certified copy of the birth certificate with the father's name entered in the New Zealand register of births, or the corresponding register of births of a foreign country,³⁵¹ "shall be prima facie evidence that the person named as the father is the father of the child."³⁵²
2. "Any instrument signed by the mother of a child and by any person acknowledging that he is the father of the child shall, if executed as a deed or by each of those persons in the presence of a solicitor, be prima facie evidence that the person named as the father is the father of the child."³⁵³
3. A paternity order granted under the Family Proceeding Act 1980 or any previous corresponding Act.³⁵⁴
4. "A declaration of paternity pursuant section 10 shall, for all purposes, be conclusive proof of paternity."³⁵⁵
5. An order made in a specified country outside New Zealand declaring a person to be the father of a child,³⁵⁶ so long as the Governor-General, by Order in Council, declares that subsection (5) applies with respect to orders made by any court or public authority in that specified country outside New Zealand.³⁵⁷

Given that parenthood is the source of children's rights, then the determination of who a child's parents are is essential to guarantee their rights. For this reason, legal regulations dedicate certain rules concerning paternity applications whose purpose is to obtain a judicial declaration of paternity in relation to a child.

³⁴⁹ SoCA, s 7(1).

³⁵⁰ Section 7.

³⁵¹ Conditional upon the birth certificate having the pertinent legalization or the apostille if it is from a country signatory of the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, signed at the Hague on 5 October 1961.

³⁵² SoCA, s 8(1).

³⁵³ Section 8(2).

³⁵⁴ Section 8(3), refers to the Domestic Proceedings Act 1968, which was replaced by the Family Proceeding Act 1980.

³⁵⁵ Section 8(4).

³⁵⁶ Section 8(5).

³⁵⁷ Section 8(6).

Traditionally, a woman who was not married to a man needed to have recourse to a judicial procedure in order to obtain a declaration of paternity. The current law confers action to the child's mother, the father, or other people who have a legitimate interest, to sue so as to obtain a legal declaration that a parental relationship exists between a child and a man (or conversely to declare that it does not exist). Declarations of paternity in a sensu stricto are the judicial decisions handed down by a Court following an application under s 10 of SoCA, considering that "a declaration made under section 10 shall, for all purposes, be conclusive proof of the matters contained in it."³⁵⁸

An application for a declaration of paternity can be brought by the child's mother, the child's father or a person "who wishes to have it determined whether the relationship of father and child exists between 2 named persons and has a proper interest in the result."³⁵⁹

The Court can also make a declaration of non-paternity, either by its own motion or on application "by a party to the proceeding."³⁶⁰ Section 10 (2) of SoCA establishes that the declaration of paternity can be made even if either the father or child or both of them are dead.

The Family Proceeding Act regulates paternity orders which according to s 8(3) of SoCA constitute "prima facie evidence of paternity in any subsequent proceedings, whether or not between the same parties." Section 51(2) of the Family Proceeding Act asserts: "For the purposes of proceedings under s 74, a paternity order in respect of a child shall be conclusive evidence that the person against whom it is made is the father of the child." Section 74 refers to applications for maintenance orders.³⁶¹

At the outset, under the Family Proceeding Act the person who has locus standi to apply for a paternity order is the mother. Nevertheless, the provision allows other persons to apply as a representative in the following cases: "where the mother is under the age of 16 years, by any person having custody of, or who has the role of providing day-to-day care for, the mother; or a social worker with the written consent of the mother."³⁶²

"Where the child has been born, and the mother is dead, or has abandoned the child, or is for any reason unable to make an application herself,"³⁶³ the persons entitled to make an application for a paternity order are the parents of the child's mother, a social worker or the child's guardian. However, with the leave of the court, any other person can bring an action against the alleged father. This provision spreads the standing to bring an action against an alleged father to the point that it could be any person, as long as the Court granted leave. Indeed, allowing any third person to apply for a paternity order, with the Court's leave, is done in benefit of the child, probably to avoid a stressful

³⁵⁸ Section 8 (4), with the proviso of "Subject to subsection (1) of section 7" of SoCA.

³⁵⁹ Section 10 (1) (c).

³⁶⁰ Section 10 (3).

³⁶¹ Section 74 of the Family Proceeding Act 1980 was repealed on 1 July 1992, by s 10(1)(a) of the Family Proceedings Amendment Act 1991 (1991 No 144). However, s 74 referred to application for a maintenance order. Section 52(2) of the Domestic Proceeding Act 1968 (1968 n 62) contained the evidence provision. In fact the reference of s 8 (3) of the Status of Children Act is to s 52 of the Domestic Proceeding Act 1968 which states: "Every paternity order shall, for the purposes of any application for a maintenance order under section 35 or section 36 of this Act or of any proceedings in respect thereof, be conclusive evidence that the person against whom it is made is the father of the child." The Status of Children Amendment Act 1971(1971 N 132) in s 2 modified s 8(3) of the Status of Children Act 1969 in the following terms: "Evidence of paternity-Section 8 of the principal Act is hereby amended by inserting in subsection (3), after the word "shall", the words "subject to section 52 of that Act".

³⁶² Family Proceedings Act 1980, s 47.

³⁶³ Section 47, at (1) [d].

situation for an orphan. Only when one of the prior situations occurs might an action be brought in benefit of the child and without the child's mother's intervention.

Section 47(2) of the Family Proceeding Act 1980 precludes an application for a paternity order when either the man is married or in a civil union, or has been married or in a civil union with the child's mother, unless the marriage or civil union was dissolved before the child's birth.

Parents can always sign the birth certificate or declaration acknowledging parenthood of both parties, which implies the man is considered to be a legal parent and to have automatic legal parental rights and responsibilities.³⁶⁴ Although the nexus that parenthood creates lasts forever, parental rights and responsibilities are limited to childhood. Once the child is considered an adult, those obligations cease.

In addition to the methods already mentioned to ascertain parenthood, the Child Support Act 1991, in s 7 (1), widened the evidences to prove the relationship between a parent and a child to include the following:

“(d) A New Zealand court, or a court or public authority of any overseas jurisdiction, has at any time found that the person is a parent of the child, and the finding has not been cancelled or set aside; or (e) the person has, at any time in any proceeding before any court in New Zealand, or before any court or public authority in an overseas jurisdiction, or in writing signed by the person, acknowledged that he or she is a parent of the child and a court has not made a finding of paternity of the child that is to the contrary of that acknowledgment.”

The effect of that Act is that any acknowledgement that a person is a parent, before any Court of New Zealand or overseas, implies that person is considered to be a parent under the Child Support Act 1991, unless the Court has deemed another person to be a parent of the child. Furthermore, a natural mother is always considered to be a parent of the child.³⁶⁵ Nevertheless, when considering the situation of children born as a result of an AHR procedure, the Child Support Act 1991 refers to the rules of parenthood stipulated in Part 2 of the Status of Children Act 1969.³⁶⁶

d) Definition of legal rights and responsibilities

Section 15 of the Care of Children Act defines guardianship as having “(a) all duties, powers, rights, and responsibilities that a parent of the child has in relation to the upbringing of the child.” Section 16 provides a non-exhaustive list of the powers and duties are conferred on a guardian:

“(1) The duties, powers, rights, and responsibilities of a guardian of a child include (without limitation) the guardian's;
(a) having the role of providing day-to-day care for the child (however, under section 26(5), no testamentary guardian of a child has that role just because of an appointment under section 26); and
(b) contributing to the child's intellectual, emotional, physical, social, cultural, and other personal development; and
(c) determining for or with the child, or helping the child to determine, questions about important matters affecting the child.”

Paragraph (c) recognises the gradual maturity of the child, and that is reflected in the wording which alludes to “helping the child to determine”, rather than just “to determine”, considering that as the child grows, his or her capacities to make their own decisions increases. The obligation to respect the

³⁶⁴ SoCA, s 15.

³⁶⁵ Child Support Act 1991, s 7.

³⁶⁶ Section 7 (4).

evolving capacities of the child, and consider their voices and opinions, derives from Article 12 of the Convention on the Rights of the Child, which sets out:

“1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”

Hence, the right to be heard and express their own opinion once the child is capable has led courts to consider to which extent parental rights are limited by children’s rights when a child has reached a level of sufficient maturity to take decisions on his or her own without parental intervention.

In regards to this matter, the pathbreaking case of *Gillick v. West Norfolk Area Health Authority*³⁶⁷ in the UK dealt with the case of whether a female child might be given contraceptive or abortion advice and treatment without informing the parents. The particularity of the case was that it involved a health issue, hence the application or extrapolation to other matters is not straightforward, although it is indicative of the point at which parental rights should concede in favour of children’s rights, in order to not contravene children’s rights under Article 12 of the UNCROC.

The decision in *Gillick* set out the conditions to be met to consider a child under the age of 16 as mature enough to give an informed consent, and it has been used and adopted in several Commonwealth jurisdictions. In the judgement, Lord Fraser examined previous case law regarding the scope of parental authority and suggested that the rule of strict and “absolute” parental authority over the child until its coming of age had been discarded and rejected. Therefore, in deciding the issue one should rely on “what is the best for the particular welfare of a child.”³⁶⁸

His Lordship asserted that parents’ control over their children decreases gradually as they develop and in practical terms parental control over their children is contingent upon “his understanding and intelligence”. He affirmed “social customs change, and the law ought to, and does in fact, have regard to such changes when they are of major importance.”³⁶⁹

The judgment acknowledges children’s progressive acquisition of autonomy, according to their evolving capacities, debunking the proposition of a fixed rule concerning the extent of the parental rights over a child and recognising the reality of family life, given that the more children develop the more autonomy they acquire.

In a relevant New Zealand case, *Hawthorne v. Cox*, an application was made by the lawyer representing a 16-year old girl asking permission to apply for guardianship after the girl’s parents withdrew an application asking for parental orders. In resolving the case, the Court considered extensively the concept of guardianship and the extent to which guardianship is considered to be a notion that is adaptable to the child’s age.

The Court asserted:³⁷⁰

³⁶⁷ *Gillick v. West Norfolk Area Health Authority* [1986] 1 AC 112 (UKHL).

³⁶⁸ At 173. Judgement of Lord Fraser of Tullybelton.

³⁶⁹ At 171.

³⁷⁰ *Hawthorne v. Cox* [2008] 1 NZLR 409 (HC) at [61].

“Put in those terms, the Act is consistent with the philosophy underpinning *Gillick*, namely that a parent’s interest in the development of his or her child does not amount to a ‘right’ but is more accurately described as ‘a responsibility or duty’. The terms of s 16 itself reflect that proposition.”

It further conceded that: “The dual focus on determination and assistance in s 16(1)(c), coupled with the general policy shift towards a more child-centred approach to guardianship, reflects the concept applied in *Gillick*.”³⁷¹

The Court pointed out as a relevant factor in analysing the concept of guardianship that the provision’s wording as enacted by the Guardianship Act 1968 was changed by the Care of Children Act, which abandoned the concept of parental control.³⁷² Emphasising that s 16 does not refer to a guardian in absolute terms as a decision maker, it considered that it instead defines a guardian as someone who is “contributing to the child’s” development and “determining for or with the child, or helping the child to determine” questions about the important matters listed in s 16(2).³⁷³

The judgment explicitly acknowledges the evolving capacities of a child, affirming: “As the child gets older and becomes more mature, the guardianship role changes to that of an adviser or a counsellor, endeavouring to assist the child to make good decisions.”³⁷⁴ The judicial decision examines the progressive declination of parental control as contemplated in the regulation, noting that the regulation indicates once a child reaches 16 years old they are no longer under the direction of parents.

It is clear then that, rather than parental rights, parents have parental responsibilities and duties concerning their children, given that parents’ power to make decisions instead of the child is curtailed by the age of the child and obviously by the paramountcy principle of the welfare of the child. Parents’ powers are circumscribed within the welfare of the child principle. In the UK, the Law Commission report on guardianship affirmed that the term “parental rights” is a misnomer, considering that parental powers are the “concomitant of their parental duties.”³⁷⁵

3.6 Guardianship

3.6.1 Definition

Guardianship confers rights and liabilities on adults relating to the upbringing and caring for children and fulfilling those responsibilities which are normally vested in parents as automatic guardians. However, other adults who are not parents could be legally appointed as guardians in addition to parents, or even excluding parents as guardians, in situations where parents would not perform the normal duties as caregivers of the child, or may act in detriment of child’s interests. But since this is done without the full entitlement or status of parenthood, the legal parents could be different from the guardians, and the child’s surname, identity, inheritance, citizenship, and maintenance, still stem from legal parents.³⁷⁶ Guardianship lasts only during childhood, unlike legal parenthood which confers a status which lasts for the whole life.³⁷⁷

³⁷¹ At [57].

³⁷² At [51].

³⁷³ At [56].

³⁷⁴ At [60].

³⁷⁵ UK Law Commission Working Paper no. 96, “Family Law Review of Child Law: Custody”, at 218 <www.lawcom.gov.uk>.

³⁷⁶ Law Commission, above n 323, at [3.13].

³⁷⁷ Unless there is a transference of parental rights, as is the case of adoption or surrogacy in some jurisdictions.

3.6.2 Legal recognition

Section 17(1) of CoCA establishes the principle that the father and mother of a child are both guardians, except if the mother is sole guardian. Paragraphs 2 and 3 set out when a mother is sole guardian by exclusion:

- “(1) The father and the mother of a child are guardians jointly of the child unless the child’s mother is the sole guardian of the child because of subsection (2) or subsection (3).
(2) If a child is conceived on or after the commencement of this Act, the child’s mother is the sole guardian of the child if the mother was neither—
 (a) married to, or in a civil union with, the father of the child at any time during the period beginning with the conception of the child and ending with the birth of the child; nor
 (b) living with the father of the child as a de facto partner at any time during that period.
(3) If a child is conceived before the commencement of this Act, the child’s mother is the sole guardian of the child if the mother was neither -
 (a) married to, or in a civil union with, the father of the child at any time during the period beginning with the conception of the child and ending with the birth of the child; nor
 (b) living with the father of the child as a de facto partner at the time the child was born.”

Therefore, a *contrario sensus*, if the mother was married to, or in a civil union with,³⁷⁸ or living with the child’s father as a de facto partner,³⁷⁹ at any time during the period beginning with the conception of the child and ending with the birth of the child, she cannot be considered a sole guardian, and consequently she cannot preclude the child’s father from having parental rights and responsibilities, unless he has been deprived of guardianship by the court. This provision is in favour of giving parental responsibility to both parents and has the effect of restricting the mother’s ability to deny parental involvement of the father in his child’s life, even if he is not married to the mother.

The traditional rule under common law was that the father of a legitimate child had sole and exclusive automatic parental rights over the child (including the right to custody), thereby excluding the mother. Conversely, the mother would have sole parental rights to illegitimate children.³⁸⁰ This was the historical position until the law entitled married women to equal parental rights over her children. Likewise, the law presumes the husband of a woman to be the father of her children born during the marriage, hence a married man automatically becomes the father, and it is obvious that in this case a woman could not be a sole guardian. The purpose of section 17 of CoCA is to give guardianship to the father when he is not married to the child’s mother. The father’s entitlement as a guardian is by exclusion following the historical wording which deemed an unmarried mother to be the sole guardian, although including additional situations where there is a relationship between the child’s mother and father.

³⁷⁸ Civil unions are regulated by the Civil Union Act 2004.

³⁷⁹ Although the word ‘de facto’ implies in reality a practical term, effective, legal regulations establish the conditions to recognise a relationship as de facto when it admits or gives some legal effect. In this sense section 2D of the Property (Relationships) Act 1976 defines the *facto* relationship as: “(1) For the purposes of this Act, a de facto relationship is a relationship between 2 persons (whether a man and a woman, or a man and a man, or a woman and a woman) – (a) who are both aged 18 years or older; and (b) who live together as a couple; and (c) who are not married to, or in a civil union with, one another”.

³⁸⁰ The UK Law Commission Report, no. 118, Family Law, Illegitimacy, ordered by the House of Commons to be printed on 20th December 1982, at [7.16].

Before the commencement of the Act (1st of July 2005)³⁸¹ a mother was sole guardian if she was not “living with the father of the child as a de facto partner at the time the child was born.” However, from the date of commencement the law regards a mother to be a sole guardian if she was not in a de facto relationship with the child’s father at any time during the relevant period where the child was conceived and the child’s birth. Thus, prior to 1st of July 2005, the child’s mother would have been the sole guardian if the de facto relationship broke down before the child’s was born, whereas under the new provision the mother is not a sole guardian even if the relationship dissolves before the child’s birth, as long as the relationship had existed at any moment during the pregnancy.

In cases where the mother was not married, in a civil union or a de facto relationship during the relevant time between conception and the child’s birth, the biological parent can acquire guardianship if the mother signs the birth certificate together with the father.

Section 18 (1) of CoCA asserts:

“A child’s father who is not a guardian of the child just because of section 17(2) or (3) becomes a guardian of the child if his particulars are registered after the commencement of this section as part of the child’s birth information because he and the child’s mother both notified the birth as required by section 9 of the Births, Deaths, Marriages, and Relationships Registration Act 1995.”

Section 9 of the Births, Deaths, Marriages and Relationships Registration Act sets up the obligation of both parents, in conjunction, to notify the Registrar of the child’s birth, establishing:³⁸² “(1) Both parents of a child born in New Zealand must, as soon as is reasonably practicable after the birth, (a) jointly notify a Registrar of the birth in accordance with this Act”. Those provisions together have the effect of providing fathers to almost any child, owing to the fact that the responsibility of registering the child lies with both parents together and, in turn, extends parental rights to both parents, bearing in mind that both parents are guardians.

Guardianship terminates when the child turns 18 years old, or before this age if “the child marries or enters into a civil union or the child lives with another person as de facto partner”.³⁸³ It also ends by a court order that deprives a person of guardianship, or when a guardian is appointed by a court “for a specific period or a specific purpose, the period expires or the purpose is achieved.”³⁸⁴

3.6.3 *Role of a guardian*

Where a child’s legal parents are deprived of guardianship, the guardians, rather than the legal parents, have the right to decide about medical treatments, or whether to apply for a passport. Paragraph 5 of CoCA sets out that guardians “must act jointly” in exercising the entitlement of guardianship. “(in particular, by consulting wherever practicable with the aim of securing agreement) with any other guardians of the child.”³⁸⁵

Paragraph 6 establishes an exception with the following wording: “Subsection (5) does not apply to the exclusive responsibility for the child’s day-to-day living arrangements of a guardian exercising the

³⁸¹ There is a difference when the mother is sole guardian by reason of a de facto relationship with the child’s father before the commencement of the Act and after, that is, before 1st of July of 2005, where the provision was amended by s 3 of the Care of Children Amendment Act 2005 (2005 No 5).

³⁸² Births, Deaths, Marriages and Relationships Registration Act 1995, s 9.

³⁸³ CoCA, s 28 establishes when guardianship terminates.

³⁸⁴ Section 28(1)(e).

³⁸⁵ Section 16(5).

role of providing day-to-day care.”³⁸⁶ Henaghan³⁸⁷ contends that the wording of this provision is ambiguous and could be understood either as a guardian having exclusive responsibility for the child’s day-to-day living arrangements due to a parenting order to that effect, or when, in exercising the day-to-day care, one guardian is not required to consult with the other guardian. However, according to the report of the Select Committee of CoCA, the exception of consulting with the other guardian entitles the guardian acting as a day-to-day care provider to the child to not consult the other guardian. In particular the Select Committee stated that it refers to “when making day-to-day living arrangements decisions while exercising the role of providing day-to-day care.” The word “while” makes it clear that the exception refers to the guardian exercising the day-to-day care, rather than the exclusive exercise of responsibility due to a parenting order excluding the other guardian from day-to-day care.³⁸⁸ Indeed, the final version omits the word, which would have clarified what that section means.

3.6.4 Additional guardians

Given that guardianship can be conferred on several persons, there might be cases where the day-to-day care is exercised by a sole guardian. For example, in cases of divorce the day-to-day care may be exercised by the mother, even though the father is still a legal guardian.

a) Step parents

A step parent can become an additional guardian, even while the parents remain as guardians also, as is set out in Section 23 of CoCA, which asserts: “An eligible spouse or partner of a parent may be appointed as an additional guardian of a child.”³⁸⁹ This provision implies that a parent with guardianship is able to choose his or her partner as a guardian without impinging on the other parent’s guardianship. In that case the child may have three guardians, subject to some conditions. The power to assign an additional guardian rests with those who are already guardians. Therefore, if both parents are guardians, that decision must be taken by, and agreed to by, both parents, or in conjunction with a testamentary guardian if there is one, appointed by a dead parent.³⁹⁰ Otherwise, the court will decide who the guardians are to be, according to the circumstances.

Furthermore, a child’s father who is not a guardian because he was not married, in a civil union or in a de facto relationship with the child’s mother during relevant time of procreation, must agree to the appointment of an additional guardian, even though he himself is not a guardian. An implicit interest is presumed for the biological father, as well as having the opportunity to participate in child’s life, given that he might prefer to be a guardian instead of assigning a third person.

In this regard s 21(3) asserts: “If the mother of the child is the sole guardian of the child just because of section 17(2) or (3), the appointment must be made by the mother and the father of the child.”

Section 23(2) establishes the conditions to be met by an eligible spouse or partner concerning an application to be appointed as an additional guardian.

It is compulsory that all guardians, that is the one exercising guardianship and any additional guardians that have been appointed, make the declarations³⁹¹ in the terms laid down in s 25 of CoCA. That is

³⁸⁶ Section 16(6).

³⁸⁷ Henaghan et al., above n 337, at [6.201].

³⁸⁸ Report of the Justice and Electoral Committee on the Care of Children Bill, at 9.

³⁸⁹ CoCA, s 23.

³⁹⁰ Section 21(4).

³⁹¹ Section 23.5.

that the appointment promotes the welfare and best interests of the child and the appointee has taken into account child's view.

An additional appointment of a guardian requires stringent conditions to be met by the appointee because the selection is based on the best interests of the child, given that the child already has legal guardians who provide for him or her. Hence, the child's best interests would have dictated the outcome. In particular using the criminal records is a wise limitation, owing to the risk that the child could be harmed by a guardian with a misconduct profile.³⁹²

b) Parenting orders

Parenting orders are resolutions made by the courts regulating or distributing the day-to-day care for, or contact with, the child between the adult caregivers. Parenting orders are in principle directed to parents when they are unable to reach an agreement about an important issue concerning the child, or, for a separation order, an order declaring a marriage or civil union to be void *ab initio*, or an order dissolving a marriage or civil union.³⁹³ A parenting order determines "the time or times when specified persons have the role of providing day-to-day care for, or may have contact with, the child."³⁹⁴ The law mandates that an order granting the day-to-day care of a child should be specific, contemplating that the person has the role "at all times or at specified times; and (b) either alone or jointly with 1 or more other persons."³⁹⁵

Section 48(3) sets out that a parenting order granting contact to a person must specify whether the contact is direct or indirect and in this case the means of providing contact, for example, by phone, by letter. Contact could also be via any other technological means, such as social media apps. The court can impose any other conditions it considers relevant for the purpose of protecting the child's safety.

Section 48 lists the people who are considered eligible for a parenting order starting with parents, guardians, and step-parents. Then it extends the eligibility to other people, provided they obtain a court's leave to apply, for example any member of the child's family or whānau, or indeed any other person. In situations where the second parent is not involved in the child's life for reason of death or a court order, or due to unwillingness to have contact with the child, then other members of the family pertaining to the line of the absent parent are eligible to apply for a parental order, such as: the child's grandparents, the child's uncles and aunts, and the child's siblings, although a sibling can be from either side of the family, and full sibling or not, given that the provision does not establish conditions.³⁹⁶

The application for a parenting order mandates that the application should contain a declaration by the applicants (or on the applicants' behalf) concerning the arrangement that the order should include to involve the other person or persons in the care of the child. Section 47A (2), asserts: "The application must include a statement made by or on behalf of the applicant for the order about whether and how the order can and should provide for any other person or persons to have the role of providing day-to-day care for, or contact with, the child."

This provision is consistent with the principles set out in s 5 of CoCA and in particular with paragraph (e) which stipulates the child's continued relationship with both parents. In granting the day-to-day

³⁹² Section 24 at [(c)] and [(d)].

³⁹³ Section 53.

³⁹⁴ Section 48.

³⁹⁵ Section 48(2).

³⁹⁶ Section 47(2).

care to one parent, excluding the other, the Court should provide whether and when the other parent would have access to the child.³⁹⁷

Section 50 establishes that a parental order for the day-to-day care of a child terminates when the child attains the age of sixteen, unless the order stipulates otherwise, and precludes the Court from making an order of this type when the child is sixteen years old, except in special circumstances. This provision does not apply in the case of guardianship of the Court.

Section 56 of SoCA deals with variations or discharges of a parenting order, establishing that “the court may vary or discharge an order vesting the guardianship of a child in 1 parent or in any other person or persons.” Therefore, the variation of a parenting order could change the status of guardian in respect of a child, however the provision sets out that if no other order is made in relation to the child’s guardianship, it remains with the persons who are already nominated as the child’s guardians. In an application for variation of an order, the set of people who can be considered eligible is broad, and includes persons affected by the order or the child. The variation of an order can be made by agreement between the parties to the agreement (Memorandum of Consent). The memorandum includes the terms of the variation and how the day-to-day care of the child or contact will be exercised. Section 56 (3) lays down the requirements of the memorandum.³⁹⁸

Paragraph (4) of the same provision states: “On the filing of a consent memorandum, the Registrar may make and seal an order varying the final parenting order in terms of the proposed variation set out in the memorandum.” It is noted that where there is agreement between the parties to varying the parenting order, the agreement has effect without considering whether or not the parenting order served the best interests of the child affected by the parenting order. The variation of a parenting order could be detrimental for the child or it could make the child worse off compared to the previous situation and in this case the best interests of the child is not paramount.³⁹⁹

Either before or after the principal order, the court may make any interim or final order it thinks fit about the role of providing day-to-day care, contact with, or the upbringing of a child of a marriage or a child of a civil union (as defined in section 2 of the Family Proceedings Act 1980).

3.7 Conclusion

This chapter has evidenced the impact that the determination of parenthood has on children’s rights, and it has examined the legal concepts of parenthood, guardianship and additional guardians. In addition, it has explored the historical dissociation between parenthood and guardianship, in such a way that a parent without guardianship or parental responsibilities, is precluded from taking decisions on behalf of the child or protecting them. Thus, retaining parenthood and guardianship together is in benefit of the child, unless there are unsurmountable reasons to decouple them. However, a legal parent is by law a guardian of their offspring. The equality that the current law holds regarding both parents is relatively new, as has been briefly shown in the section devoted to legal history. Until relatively recently, a married woman was excluded from being the legal guardian of her own children.

Moreover, this chapter has highlighted the direct relationship between parenthood and children’s rights, given that children rights emanate from parenthood. Consequently, from that link a premise

³⁹⁷ SoCA, s 52.

³⁹⁸ Section 56(3).

³⁹⁹ Sections 5 and 6.

concerning what is in the best interests of the child when ascertaining parenthood in ART is established in the next chapter.

4. Determination of Parenthood for Surrogate Born Children

4.1 Introduction

This chapter addresses the determination of parenthood in surrogacy agreements through a comparative examination of legislation dealing with the issue in different countries. In particular, it will focus on England where the Human Fertilization and Embryology Act implemented parental orders to transfer parenthood from surrogates to intended parents,⁴⁰⁰ and British Columbia (Canada) which established a presumption of parenthood in favour of intended parents in a simplified manner.⁴⁰¹

The exploration of the practice of surrogacy will help to illustrate the legal hurdles encountered by intending parents to acquire parental rights over surrogate born children, as well as representing and evidencing the way some jurisdictions address legal parenthood in ART. Taking into account that the thesis deals with the allocation of parenthood in ART, it is pertinent to explore the determination of parenthood of children born via surrogacy employing a comparative method that looks at different countries to assess which legal system is the best from a perspective of children's welfare and rights. Consequently, in the conclusion to the chapter, the premise regarding what is in the best interests of the child regarding parenthood is settled.

Surrogacy is a practice that is prohibited in some countries. Given this, the thesis has recourse to jurisdictions which both regulate the practice and have a legal mechanism to either ascertain parenthood directly or to transfer parental rights to intended parents after birth. Specifically, the thesis looks at whether the legal system guarantees meaningful parents at birth.

To investigate this, the thesis considers a selection of countries that ascertain parenthood directly, as is the case of Greece and British Columbia, and others where the legal scheme involves transfer of parental rights after birth, such as England. The thesis pays particular attention to which legal scheme offers more certainty for the allocation of parenthood, so as not to disrupt the identity of the child and the rest of children's rights.

After the comparison of different legal systems, a new model for allocating parenthood in surrogacy cases is proposed that takes into account surrogacy as it is practiced and regulated in New Zealand. Therefore, this model is specifically tailored to the allocation of parenthood in surrogacy cases within the New Zealand context.

After an examination of parentage laws concerning surrogacy in the USA (the Uniform Parentage Act and the American Bar Association model), England, Greece, and British Columbia (Canada), this chapter will propose a parentage model which could feasibly be implemented in New Zealand. The focus of the model is parentage in surrogacy as is currently permitted in New Zealand, that is for altruistic surrogacy, without dealing with the controversial issues that surrogacy entails.⁴⁰² The suggested model draws particularly upon the regulation of parentage in surrogacy agreements in British Columbia and in Greece, and argues in favour of conferring parentage directly on intended parents upon the birth of the child. The model suggests that a presumption of parenthood is the most

⁴⁰⁰ HFEA, s 54.

⁴⁰¹ The British Columbia Family Law Act, s 29.

⁴⁰² Complete proposal for regulation of surrogacy in New Zealand exist. See for example Ruth Walker and Liezl Van Zyl *Towards a Professional Model of Surrogate Motherhood* (Palgrave Macmillan, London, 2017).

appropriate mechanism to protect children and the surrogate from intended parents who change their minds. Albeit, the presumption could be rebutted by the surrogate mother in a court.

Parts of the present chapter have been published recently in the New Zealand Family Law Review as “A New Model to Complete the Puzzle”, *New Zealand Family Law Journal*, 9(9), April 2019.

4.2 The USA

Several different schemes have been designed in the US to implement the intentional model or paradigm in the determination of parenthood.

4.2.1 UPA model

The National Conference of Commissioners of Uniform State Laws adopted the Uniform Parentage Act (UPA) which constitutes a complete framework to address matters of parentage in assisted reproduction.⁴⁰³ The UPA 2017 sets out two different schemes for the determination of parenthood in surrogacy agreements depending on whether the surrogacy is gestational⁴⁰⁴ or genetic (also known as traditional).⁴⁰⁵ In gestational surrogacy, the UPA confers direct legal parenthood to intended parents upon the birth of the child, so long as they comply with the requirements set out in the regulations.⁴⁰⁶ Section 809 provides the following: “(a) Except as otherwise provided in subsection (c) and Section 812, on birth of a child conceived by assisted reproduction under a gestational surrogacy agreement, each intended parent is, by operation of law, a parent of the child.”

Paragraph (d) of this provision maintains parenthood in favour of the intended parents even if the child does not have the genetic characteristic expected by the intended parents, due to a clinical or laboratory mistake. As long as the parties meet the statutory requirements, the intended parents are treated by operation of the law as the legal parents of the child born as a consequence of a gestational surrogacy agreement “without the need for a court order or judgement.”⁴⁰⁷

Paragraph (4) of s 803 includes as a standard clause in the agreements that the genetic parents will be the legal parents of the child born from the surrogate, irrespective of “number, gender, or mental or physical condition of the child.” The two latter provisions seem to emphasise that the surrogacy role is performed as a service, and that the intended parents are to be considered the legal parents, responsible for the child whatever may be the child’s condition or circumstances.

In contraposition to gestational surrogacy agreements, which do not require validation, a genetic or traditional surrogacy agreement must be validated by a court so as to be enforceable.⁴⁰⁸ The fact that

⁴⁰³ This model was last updated in 2017 in order to respond to social changes and legal requirements such as the right to marriage between two people of the same sex, which was upheld by the United States Supreme Court in *Obergefell v. Hodges* (135 S. Ct. 2584 (2015)). Consequently, the regulation is gender-neutral, not only in the language but in the substantive rights that it confers to parties, whether they are heterosexual or homosexual. UPA available at <www.uniformlaws.org>.

⁴⁰⁴ Section 801 (2) sets out: “‘Gestational surrogate’ means a woman who is not an intended parent and who agrees to become pregnant through assisted reproduction using gametes that are not her own.”

⁴⁰⁵ Section 801 (1) states: “‘Genetic surrogate’ means a woman who is not an intended parent and who agrees to become pregnant through assisted reproduction using her own gametes.”

⁴⁰⁶ Section 812 states: “(a) A gestational surrogacy agreement that complies with Sections 802, 803, and 804 is enforceable.”

⁴⁰⁷ American Society for Reproductive Medicine “Surrogacy Back in the News: Courts and Legislatures” (12 March 2018) <www.sart.org/>.

⁴⁰⁸ UPA, above n 403, s 813 (a).

in traditional (genetic) surrogacy, the gestational woman is genetically related to the child she is carrying, because she conceives the child with her own eggs, has great significance in the statute to the point of granting the right to withdrawal the consent within 72 hours of the child's birth. Genetic surrogacy reunites the genetic and gestational roles in one woman.⁴⁰⁹

4.2.2 ABA model

The regulation of gestational surrogacy by the American Bar Association Model Act Governing Assisted Reproductive Technology (2008 ABA Model) has been modified recently. The Association adopted the new model in August 2018 (here-in-after ABA model),⁴¹⁰ following the refurbishment of the UPA model in 2017.

The ABA model deals with reproduction treatments involving collaborative reproductions, including gestational and genetic surrogacy. It lays down detailed regulations concerning the contract's content, eligibility of both the intended parents and the surrogate, and the contract's formalities. It is also a standard regulation aimed at ensuring the surrogate's autonomy, and it considers the interests of both parties – the intended parents and the surrogate – to ensure a foreseeable and respectable relationship.⁴¹¹

In the case of gestational surrogacy, the model mandates parents to sign a contract between themselves, prior to embryo formation, setting out the intended use of the embryos, and disposition of cryopreserved embryos, in case of separation of the intended parents, incapacity or death of one of them.⁴¹²

As regards parenthood, intended parents who enter into a surrogacy agreement, (whether genetic or gestational), are considered to be the child's legal parents upon birth. The 2018 ABA model confers legal parenthood and parental rights to intended parents upon the birth of the child, thereby depriving the surrogate mother and the legal spouse, if any, of the child's parenthood,⁴¹³ as long as the surrogacy contract fulfils the requirements set out in the regulations⁴¹⁴ and both the intended parents and the surrogate meet the eligibility criteria established in the model governing surrogacy. Section 705A 3 (a) which refers to gestational surrogacy agreements, and s 706 A 2 (a) which alludes to genetic surrogacy agreements, both state "The intended parent(s) shall be the parents of the child for purposes of state law immediately upon the birth of the child."⁴¹⁵

Intended parents are deemed to be the legal parents in a surrogacy agreement even in a case where wrongful genetic material is transferred to the surrogate due to a mistake of the fertility provider, "unless otherwise determined by a Court."⁴¹⁶ The persons having standing to bring the action are the parties in the agreement, and it needs to be done within the two years following the child's birth.

⁴⁰⁹ Section 814 (2).

⁴¹⁰ Available at <www.americanbar.org/content/dam/aba/images/abanews/mym2018res/115b.pdf>.

⁴¹¹ Section 70 [c] sets out: "A surrogacy agreement may not limit the right of the gestational or genetic surrogate to make decisions to safeguard the gestational or genetic surrogate's health or that of the embryo(s) or foetus."

⁴¹² Section 5.

⁴¹³ Section 705, at [A 3 (c)] and [A 3 (d)].

⁴¹⁴ Section 705 [A 3] establishes: "In the case of a Gestational Surrogacy agreement satisfying the requirements set forth in paragraph 1 of this Section 705(A). In the case of a genetic surrogacy contract section 706 A 1 established the requirement that should be fulfilled."

⁴¹⁵ Sections 705 [A 3] and 706 [A 2], referring respectively to gestational surrogacy and genetic surrogacy agreement.

⁴¹⁶ Sections 705 [A 5] and 706 [A 2] and [A 3] referring respectively to gestational and genetic surrogacy.

The 2018 ABA model contemplates two ways of establishing legal parenthood for the baby in a gestational surrogacy agreement, both of which vest parenthood on the intended parents upon the child's birth. The first is an administrative method which is carried out through a certification issued by the attorneys representing both parties, asserting that the parties entered into a surrogacy agreement and met the criteria established in s 704. The certification could either be prior to the birth or within 3 business days following the child's birth.⁴¹⁷ The second method for establishing parenthood is a judicial or alternative method, which works by applying to the appropriate court for "a pre-birth or post-birth judgment establishing the parent-child relationship with respect to the child."⁴¹⁸ This method is only valid as long as the requirements of s 704 are satisfied.⁴¹⁹

The 2018 model sets out further requirements to be fulfilled for genetic surrogacy agreements in order to establish legal parenthood between the resulting child and the intended parents consisting of the obligation to apply for a judicial validation of the surrogacy agreement prior to starting an assisted reproduction procedure.⁴²⁰ Thereby, the establishment of parenthood in the case of genetic surrogacy requires a judicial pre-approval of the agreement before starting the assisted reproduction procedure, and a second order once the child is born.⁴²¹ Once the child is born, the parties to a pre-approved genetic surrogacy contract should apply to the court for an order "confirming that the intended parent(s) are the parent(s) of the child." Thus, the appropriate agency is requested to issue a birth certificate recording the intended parents as the child's legal parents, and if it is necessary, to order that the child be handed over to the intended parents.⁴²² Failure to request a judicial order once the child is born entitles the appropriate state agency, as demanded by any party, to ask for a court parenthood order declaring the intended parents to be the child's legal parents, and to make them financially responsible.⁴²³ Therefore, in the case of genetic surrogacy there is no administrative method for establishing legal parenthood.

The determination of legal parenthood of a child born as a consequence of a surrogacy agreement which does not meet the requirements and procedures set out in the ABA regulation will be established according to the other applicable state laws, bearing in mind the intention of the parties to the agreement at the time of execution and the best interests of the child.⁴²⁴ Where it is alleged that the child born was not the result of an assisted reproduction procedure, the court should order a genetic test to ascertain the child's genetic origin. "If the child was not conceived as result of the assisted reproduction procedure(s), the parent-child relationship shall be determined as provided under other applicable state law."⁴²⁵

Section 802 establishes the conditions to be eligible to act as a surrogate woman, whether in traditional or gestational surrogacy. Sections 803 and 804 set out the statutory requirement process and content of the surrogacy agreement. In particular, paragraph (8) of s 803 stipulates the obligation of intending parents to pay "for independent legal representation for the surrogate", while s 804 (7) safeguards the surrogate's autonomy, stating: "The agreement must permit the surrogate to make all

⁴¹⁷ Section 705 [B 1].

⁴¹⁸ Section 705 [B 4].

⁴¹⁹ Section 705 [B 4].

⁴²⁰ Section 703 [3].

⁴²¹ Section 706 [B 1].

⁴²² Section 706 [B 2].

⁴²³ Section 706 [C 3].

⁴²⁴ Sections 705 [B 6] and 706 [C 4] concerning gestational surrogacy agreements and gestational surrogacy agreements respectively. In the latter case, judicial pre-approval of the genetic surrogacy agreement is a precondition to establish the child's parenthood.

⁴²⁵ Sections 705 [A 4] and 706 [C 2] alluding to a gestational and genetic surrogacy agreement respectively.

health and welfare decisions regarding herself and her pregnancy. This [Act] does not enlarge or diminish the surrogate's right to terminate her pregnancy." The ABA model also respects women's autonomy by way of excluding from the agreement any clauses which would restrict the surrogate's autonomy, such as clauses concerning the health of the mother or the embryo, stipulating that those decisions are at the disposition of the surrogate.⁴²⁶

4.3 Greece

We now turn to a brief consideration of the regulation of parenthood in Greece as far as surrogacy agreements are concerned. Greece only allows non-commercial surrogacy and regulates parenthood in the case of gestational surrogacy.

Under Greek regulations it is mandatory to obtain a judicial order approving the surrogacy agreement prior to undertaking the assisted reproduction procedure. Judicial intervention ensures that legal conditions are met and respected by both parties prior to transferring the embryo. Article 1458 of the Greek Civil Code sets down that, the intended mother should ask for a court authorization prior to undertaking the transfer of the fertilized ovum to the surrogate woman, provided that the following conditions are met: (1) there is a non-commercial written agreement between both parties – the surrogate and her spouse, if she is married, and the intended parents –, and (2) that the intended mother has shown that she is medically unable to conceive a child whereas the surrogate is "in good health condition and able to conceive."⁴²⁷

As to the determination of parenthood in gestational surrogacy, the Civil Code establishes a presumption of parenthood in favour of the intended mother, so as to automatically render the intended mother the child's legal mother. This provision ensures that the effective mother has parental rights and responsibilities to care and provide for the child right from the moment of birth.

Section 1464 of the Greek Civil Code sets out: "In case that the child is born after medically assisted reproduction of a surrogate mother, under the conditions of article 1458, it is presumed that mother is the one who has obtained the court permission."⁴²⁸

In the six months following the child's birth, the presumption of parenthood can be rebutted or contested by either the intended mother, or the surrogate if there is evidence that the child is genetically related to the surrogate, in which case motherhood is reversed retroactively in favour of the surrogate as the child's genetic mother.⁴²⁹

Therefore, once court authorization has been obtained, the intended parents are the legal parents upon the child's birth, given that the court will have already examined that the conditions of Article 1458 have been met by the parties.

4.4 British Columbia (Canada)

⁴²⁶ Christine Metteer Lorillard "Informed Choices and Uniform Decisions: Adopting the ABA's Self-Enforcing Administrative Model to Ensure Successful Surrogacy Arrangements" (2010) 16 *Cardozo J.L. & Gender* 237, at 243.

⁴²⁷ Greek Civil Code, Art 1458, added by Law 3089/2002 entitled "Medically Assisted Human Reproduction".

⁴²⁸ Greek Civil Code, Article 1464, as modified by s 8 of the Law 3089/2002

<www.bioethics.gr/images/pdf/ENGLISH/BIOLAW/MEDICALLY_ASSISTED_REPRODUCTION/law_3089_en.pdf>.

⁴²⁹ Section 1464.

The Canadian Assisted Human Reproduction Act 2004 prohibits commercial surrogacy, precluding “any person to pay consideration to a female person to be a surrogate mother”⁴³⁰ and rendering an offence the violation of this provision with punishment up to 10 years of imprisonment.⁴³¹ However, the Act permits the surrogate to be reimbursed for pregnancy related expenses as long as this is done in conformity with the regulations.⁴³² Currently there is a Bill in Parliament proposing the amendment of the Human Assisted Reproduction Act,⁴³³ “to decriminalize payment for sperm or ovum donation and for surrogacy.”⁴³⁴ The Bill modifies s 6 and repeals s 12(c) of the Act.⁴³⁵ The Assisted Human Reproduction Act is a federal regulation whereas the determination of parenthood, including surrogacy born children is a provincial regulation in Canada.

Part 3 of the British Columbia Family Law Act SBC 2011⁴³⁶ regulates parentage in general. Namely, s 29 sets out parentage of children born from a surrogacy agreement establishing a presumption that the intended parents are the parents, provided a written agreement is completed before conception, stipulating that:

“(i) the surrogate will not be a parent of the child, (ii) the surrogate will surrender the child to the intended parent or intended parents, and (iii) the intended parent or intended parents will be the child’s parent or parents.”

The British Columbian regulation of parenthood concerning surrogacy sets out a straightforward presumption for the determination of parentage in favour of the intended parents. Once the child is born, the surrogate gives written consent to surrender the child and the intended parent or parents take the child into their care. It is noted that in addition to initial consent on the agreement, the surrogate should give written consent to surrender the child for the presumption to operate. As an alternative option, the British Columbia Family Law Act⁴³⁷ allows the parties, before the conception, to sign an agreement including the surrogate as a parent to the child, in conjunction with the intended parents, in which case the child would have three legal parents. This provision is useful for a surrogate woman who wants to be part of the child’s life.

In view of the presumption, it is noted that there is no need to ask for a declaration of parentage. However, s 31 provides for the possibility to make a judicial declaration of parentage if there is a dispute or uncertainty as to whether a person is a legal parent or not.

In case a dispute arises after the birth of the child, the agreement “may be used as evidence of the parties’ intentions with respect to the child’s parentage.”⁴³⁸ It seems that the surrogacy agreement concerning the child’s parentage will be weighed heavily in favour of the intended parties, where there is no agreement to include the surrogate as a third child’s parent.

⁴³⁰ Canadian Assisted Human Reproduction Act 2004, s 6.

⁴³¹ Section 60.

⁴³² Section 12 (c).

⁴³³ Bill C-404, An Act to Amend the Human Reproduction Act <www.parl.ca/Content/Bills/421/Private/C-404/C-404_1/C-404_1.pdf>.

⁴³⁴ Bill C-404, Summary.

⁴³⁵ Sections 2 and 4.

⁴³⁶ The British Columbia Family Law Act SBC 2011 <www.bclaws.ca>.

⁴³⁷ Section 30.

⁴³⁸ Section 29 (6).

As can be seen, British Columbia establishes a simplified method to provide children born from surrogacy with parents at birth, without recourse to unnecessary bureaucracy. It also permits flexibility to include the surrogate in the procreative project.

4.5 UK legislation and case law concerning parental orders

4.5.1 Introduction

This section analyses regulation of parental orders in the United Kingdom (UK), which implemented a legal scheme to transfer parental rights from the surrogate to intended parents. Also, the case law is examined to argue that the application of the paramountcy principle of the welfare of the child for the transfer of parental rights in surrogacy cases has led courts to take an increasingly purposive interpretation of the requirements to grant a parental order. This is due to the fact that, initially, the UK's legal scheme was premised on accomplishing public policies.

4.5.2 UK regulation

The HFEA established parental orders as the means of transferring parental rights from the surrogate to intending parents. Article 30 of the HFEA was introduced as a result of a complaint that was raised in the House of Commons at the second reading on 2 April 1990, by Mr Michael Jopling MP, who was persuaded by a constituent couple who had a child through a gestational surrogacy arrangement and had no other way to obtain parentage except for adoption. During the report process a Government amendment was presented on 20 June 1990.⁴³⁹ The Human Fertilisation and Embryology Regulation 1994⁴⁴⁰ implemented and gave effectivity to Article 30 of the 1990 HFEA, through the parental order which transfers parental rights in surrogacy agreements.

The 2008 HFEA reform introduced changes in s 30 of the 1990 Act which became s 54 of the HFEA, and allowed same-sex and unmarried couples the same right to apply for a parental order, as married heterosexual couples. However, surrogacy as such was not changed, and the unenforceability of surrogacy arrangements and the prohibition of commercial surrogacy were left untouched. Thus, public policy still buttressed parental order regulations. In spite of the demand for surrogacy,⁴⁴¹ the regulations have not evolved in accordance with the phenomenon, which has the effect of provoking adverse effects on children, given that the surrogate is considered the legal mother until the parental order is granted to intending parents.⁴⁴² Nevertheless, the Law Commission is reviewing surrogacy as part of the (2018) 13th program of Law Reform in the United Kingdom.⁴⁴³

The Human Fertilisation and Embryology (Parental Orders) Regulations 2018⁴⁴⁴ (herein after HFEA Parental Order Regulations 2018) modified secondary legislation related to the granting of a parental order, and superseded the Parental Orders (Human Fertilization and Embryology) Regulation 2010 (herein after HFEA Parental Order Regulation 2010) and Human Fertilization and Embryology (Scotland) Regulation 2010.

⁴³⁹ *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), at [15].

⁴⁴⁰ Parental Orders (Human Fertilization and Embryology) Regulation 1994.

⁴⁴¹ According to CAF/CASS statistics on parental orders, there were 202 cases in the period 2013-2014, 242 in the period 2014 to 2015 and 295 in the period 2015-2016 <www.cafcass.gov.uk/media/297946/caf_16-79_parental_order_statistics_for_2015-16_and_country_of_origin_for_surrogates.pdf>.

⁴⁴² HFEA, s 33.1.

⁴⁴³ See <www.lawcom.gov.uk/surrogacy-laws-set-for-reform-as-law-commissions-get-government-backing/>.

⁴⁴⁴ The Human Fertilisation and Embryology (Parental Order) Regulations 2018 (SI 2018 No 1412).

The Parental Order Regulations 2018 were enacted to align them with the changes introduced in HFEA s 54A by the HFEA 2008 (Remedial) Order 2018 No. 1413. In contrast, the purpose of the Parental Order regulations 2010 was to bring the Parental Order Regulation up-to-date with the changes introduced by the HFEA 2008, as well as with the modifications produced by the adoption legislation. Consequently, it was essential that it should be consistent with the legislation from which it stemmed.⁴⁴⁵ In particular, s 1 of the Adoption and Children's Act 2002, which refers to the child's welfare as the paramount consideration when the Court decides an application related to the adoption of a child, is applicable to a parental order.⁴⁴⁶ As a result, the Court's paramount consideration when deciding a parental order is the child's welfare, which provokes the reading down of provisions concerning a parental order in a broad rather than restrictive manner, so as to give effectivity and primacy to the child's welfare. The HFEA Parental Order Regulation 2018 translates the check-list that the Court should take into account when assessing the child's welfare in adoption matters to the granting of a parental order in England and Wales.⁴⁴⁷

Concretely, in England and Wales the regulation initially required that the applicant for a parental order should be a couple, denying single persons the opportunity to be granted a parental order. Consequently, a single person (either woman or man) who had recourse to a surrogacy agreement to have family, needed to adopt the child to obtain parental responsibilities.

In view of the High Court finding in *The matter of Z (A Child) (No. 2)*,⁴⁴⁸ The Secretary of State, acting in conformity with s 10 of the Human Rights Act 1998, issued the Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018 No. 1413, currently in force since 3rd of January 2019. This Order introduces s 54A, which is additional to s 54 of the HFEA, and which allows a court to grant a parental order in favour of a single person if the conditions of the provision are met.

Consequently, s 54 of the HFEA 2008 regulates the conditions for issuing a parental order in cases of surrogacy in favour of couples who apply as intending parents to obtain a child's parental order which transfers parental rights from the surrogate and her partner to the intending parents. Section 54A effectuates the same transferral of parental rights in favour of a single person, under the same conditions as s 54, except for the requirement that the applicant must be a couple.

a) *Couples*

Section 54 of the HFEA set forth: "On an application made by two people ('the applicants'), the court may make an order providing for a child to be treated in law as the child of the applicants" as long as the condition stipulated in the provisions are met.⁴⁴⁹

The first condition for issuing a parental order is that a surrogacy contract is involved. Second, the conception should have taken place by means other than coitus (in vitro, artificial insemination, or the placement of an embryo in the uterus). And third, the gametes of at least one of the commissioning parents should have been used in the creation of the child. Therefore, the child should be genetically related to at least one of the commissioning parents the child must be living with the applicants, and

⁴⁴⁵ Explanatory Memorandum to the Human Fertilisation and Embryology (Parental Orders) Regulations 2010. No. 985 (SI 2010/985) [2].

⁴⁴⁶ The references are limited to The Human Fertilisation and Embryology (Parental Orders) Regulations 2010 No. 985 (SI 2010/985), schedule 1 which apply to England and Wales. Therefore, in this case the legislation related to adoption is the Adoption and Children's Act 2002.

⁴⁴⁷ The Human Fertilisation and Embryology (Parental Order) Regulations 2018 (SI 2018 No 1412) Sch 1 [2].

⁴⁴⁸ *Re Z (A Child) (Surrogate Father: Parental Order) (No. 2)* [2016] EWHC 1191 (Fam).

⁴⁴⁹ HFEA, s 54.

at least one of the applicants must be domiciled in the United Kingdom, or in the Channel Islands or the Isle of Man. The surrogate woman and any other partner (woman or man) recognised as the legal parent should consent freely, unconditionally and with full understanding to the making of the parental order, except when such parent cannot be found or is incapable of giving consent. The consent of the surrogate woman should be given no earlier than six weeks after the birth date. The application for the parental order should be made within a period of six months after the child's birth. Finally, the court must be satisfied that no money, beyond reasonable expenses, has been exchanged as a consequence of the surrogacy agreement, unless authorised by the court.

b) Single parents

Section 54 A of the HFEA establishes: "On an application made by one person ('the applicant'), the court may make an order providing for a child to be treated in law as the child of the applicant"⁴⁵⁰ as long as the condition listed in the provision are fulfilled. The conditions listed in the provision are the same as for couples except the requirement that the applicants must be a couple.

4.5.3 English case law

A new dynamic regarding the interpretation of the regulations for parental orders in England has been set in motion since the introduction of the paramountcy principle of the child's welfare in Parental Order Regulation 2010. Whereas in earlier times public policy prevailed, now English courts are compelled to prioritize the welfare of the child when deciding parental orders. In effect, the public policy principle that underpinned parental orders has been inverted in favour of the paramountcy principle of child's welfare.

a) Single parent

*Re Z (A Child) (Surrogate father: Parental Order) number two*⁴⁵¹ triggered the Remedial Order 2018. However, an earlier case, *A and P*, was the first in which a parental order was given in favour of two parents, although the father was dead when the court issued the parental order.

*A and Other v. P and Other*⁴⁵² involved a married couple which had a child using a surrogacy agreement in India. The child was born on 12 of April 2010 in India. The couple returned to UK and applied for a parental order in their favour to transfer the parental right within the time period set out in regulations. Unexpectedly, the father died from cancer in December of 2010. Section 54 required that the application could only be given to two parents and precluded issuing a parental order in favour of a single person, thus the Court encountered the problem of how to provide in favour of the child's welfare in view of the unexpected death of the father. According to the Court, the central issue was whether 'applicants' could be understood as simply entailing the making of the application by two people, but not as requiring that there be two living applicants when issuing the parental order.⁴⁵³

⁴⁵⁰ Section 54 A introduced by The Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018 (S.I. 2018/1413), arts. 1(1) and 2(5).

⁴⁵¹ *Re Z (A Child) (no. 2)*, above n 448.

⁴⁵² *A v. P (Surrogacy: Parental Order: Death of Applicant)* [2011] EWHC 1738 (Fam), [2012] 2 FLR 145, also cited as *A & Anor v. P & Ors* [2011] EWHC 1738 (Fam) (08 July 2011). See Claire Fenton-Glynn "The Regulation and Recognition of Surrogacy under English Law: An Overview of the Case-Law" (2015) 27 (1) *Child and Family Law Quarterly* 83. She examines in-depth the changes on the interpretation of S54 of HFEA by the High Court of England since the introduction of the paramountcy principle of the welfare of the child in parental order regulation.

⁴⁴⁴ At [17].

In resolving the case the Court took a purposive interpretation based on the obligation undertaken by states to respect child's right "to preserve his or her identity", as is set out in Article 8 of the UNCROC as well as the same provision of the ECHR which encompasses the legal recognition of the relationship between parents and children.⁴⁵⁴ The Court was compelled to adopt a purposive interpretation so as to protect child's identity and summarized the disadvantages faced by the child if a parental order were not to be granted, as follows:⁴⁵⁵

- "(i) There is no legal relationship between the child and his biological father who is also the commissioning father.
- (ii) The child is denied the social and emotional benefits of recognition of that relationship.
- (iii) The child may be financially disadvantaged if he is not recognised legally as the child of his father (in terms of inheritance).
- (iv) The child does not have a legal reality which matches the day to day reality.
- (v) The child is further disadvantaged by the death of his biological father."

Despite the exceptional factual circumstances involved, the case substantiated that the child's rights were at stake with the refusal of a parental order, and thus the same is applicable to any parental order case in as much as the effects upon the child are the same regardless of the underlining cause for denial of the parental order. Once the impact on children's rights had been ascertained, it would have been difficult not to focus on the child's rights so as to put public policies first, in contravention of the paramountcy principle of the child's welfare. Thus, the subsequent step was to give priority to children's rights. This case underlined that reliance on children's rights to resolve conflict in parental orders was pertinent, and influenced the latter judgment in *Re X (A Child)* concerning the time limit which deemed the six-month time limit a requirement at the discretion of the Court.⁴⁵⁶ Sir James Munby endorsed the approach of Theis J in the aforementioned case based on the respect of children's rights, and in particular the right to identity to further advance children's rights.

Re Z (A Child) involved a child, Z, born in 2014 in the USA (Minnesota) under Illinois law, from a father's sperm and a third-party donor's egg implanted in an American surrogate mother. Subsequently, in accordance with Illinois law regulating the surrogate arrangement, the intended father was considered the only parent.⁴⁵⁷ However, the Court noted that under English law the surrogate is the child's mother and the father lacks legal entitlement as a parent. Section 54 (1) of the HFEA requires the applicant for a parental order to be a couple, and therefore in the case at hand, the father as a single applicant asked the Court to read down the provision in conformity with s 3.1 of the Human Rights Act 1998 (HRA).⁴⁵⁸ The applicant's second position was to seek a declaration of incompatibility under s 4 (HRA).⁴⁵⁹

Contrary to the earlier decision where the Court had recourse to a teleological method of interpretation to reading down the provisions in conformity to the Human Rights Act, in this judgment the Court deemed that debates in Parliament demonstrated that there was an expressed

⁴⁵⁴ At [27] and [28].

⁴⁵⁵ At [26].

⁴⁵⁶ *Re X (A Child)*, above n 439, at [53].

⁴⁵⁷ *Re Z (A Child)*, (*Surrogate Father: Parental Order*) [2015] EWFC 73, [2015] 1 WLR 4993 at [2]. For an exhaustive and challenging analysis of this judgment and the previous one, see Alan Brown "Two Means Two, but Must Does Not Mean Must: An Analysis of Recent Decisions on the Conditions for Parental Orders in Surrogacy" (2018) 30 *Child & Fam. L. Q.* 23.

⁴⁵⁸ Human Rights Act 1998, 1998 C 42.

⁴⁵⁹ *Re Z (A Child)*, above n 457, at [22] and [23].

Parliamentary feature in the legislation to require that only a couple could apply for a parental order. The Court examined carefully the Parliamentary debate on s 54 (1) of the Bill in the House of Commons on 12 June 2008, and quoted the answer of Dawn Primarolo, Minister of State, Department of Health to some amendments proposed by Dr Pugh, Member of Parliament, who intended to permit a single person to apply for a parental order.⁴⁶⁰ The Court also reviewed the legislative history of parental order regulations as well as adoption legislation, and relied on the principles established by the House of Lords in *Ghaidan v. Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, in particular paragraph 33, to determine the boundary between interpreting or legislating via amendments to conclude that:⁴⁶¹

“The principle that only two people – a couple – can apply for a parental order has been a clear and prominent feature of the legislation throughout. Although the concept of who are a couple for this purpose has changed down the years, section 54 of the 2008 Act, like section 30 of the 1990 Act, is clear that one person cannot apply.”

The Court added that to read down the provision to include single applicant “would not be compatible with the underlying thrust of the legislation.”⁴⁶² In short, the fact that application by two parents was a key element of the parental order scheme poses an obstacle to the reading down of the provision in a purposive manner that is consistent with children’s rights.

The sequel to the previous judgment was *Re Z (A Child) (Surrogate Father: Parental Order) (No 2)*⁴⁶³ where the applicant asked for a declaration of incompatibility, given the refusal to read down s 54 (1) of the HFEA so as to include single people. The applicant argued that this exclusion was an infringement of Articles 8 and 14 of the ECHR.⁴⁶⁴ In the procedure the Secretary of State for Health conceded that the exclusion of single people from applying for a parental order violates Article 14, taken in conjunction with Article 8, of the Human Rights Act. The outcome of the case was that the Court declared:⁴⁶⁵

“Sections 54(1) and (2) of the *Human Fertilisation and Embryology Act 2008* are incompatible with the rights of the Applicant and the Second Respondent under Article 14 ECHR taken in conjunction with Article 8 insofar as they prevent the Applicant from obtaining a parental order on the sole ground of his status as a single person as opposed to being part of a couple.”

The lack of a parental order left the child parentless, given that the mother had relinquished the rights to the child and no longer had any responsibilities for the child, even though under UK law she was deemed to be the child’s mother. On the other hand, the second parent was not recognised under UK law, despite being the only parent available to the child, and the intended parent.

⁴⁶⁰ *Re Z (A Child)*, above n 457, at [16]. The answer of the Minister of State, Department of Health was: “The difference is this: adoption involves a child who already exists and whose parents are not able to keep the child, for whom new parents are sought. That is different, which is why there is no parallel. IVF involves a woman becoming pregnant herself and giving birth to her child – there is not a direct parallel. Surrogacy, however, involves agreeing to hand over a child even before conception. The Government are still of the view that the magnitude of that means that it is best dealt with by a couple. That is why we have made the arrangements that we have.”

⁴⁶¹ At [34].

⁴⁶² At [35].

⁴⁶³ *Re Z (A Child) (No 2)*, above n 448.

⁴⁶⁴ At [12].

⁴⁶⁵ At [17].

This decision may be understood as recognising that children need parents, without distinction between sexual or assisted reproduction.⁴⁶⁶ As consequence of the judgement, the remedial order has placed the parental rights of single people and couples in AHR on an equal footing. Likewise, the judgment upends the legal assumption that children need two legal parents in surrogacy arrangements in contraposition to sexual reproduction,⁴⁶⁷ or even supportive parenting in assisted reproduction,⁴⁶⁸ given that the regulation does not preclude a single person to be a legal parent in sexual reproduction or adoption. However, attention should be paid to the fact that in the judicial procedure, the point of comparison was to the adoption legislation, which allows single parents to adopt a child and become a sole legal parent. Furthermore, when the Secretary of State conceded the violation of the right to privacy (Article 8) and the right to equality (Article 14), he pointed out that the admission to incompatibility was to both provisions in conjunction,⁴⁶⁹ rather than Article 8 singled out. He excluded the right to confer parenthood using surrogacy, thus, asserting: "Article 8 does not entitle a person to any particular method of obtaining legal recognition of the parent-child relationship following that arrangement."⁴⁷⁰ It should be noticed that the affirmation could be understood in the sense that as long as the parent-child relationship is established, Articles 8 and 14 of the ECHR are respected. Thus, the legal modus to ascertain legal parenthood is irrelevant when examined under Articles 8 and 14 in conjunction. However, from a child's point of view, the method could be relevant for the right to identity or other rights as the case law pointed out.

b) Time limit

Section 54 of the HFEA 2008 sets out the requirements which must be met by the applicant to be granted a parental order. Paragraph 3 mandates the commissioning parent to apply for the order within a period of six months "beginning with the day on which the child is born."⁴⁷¹ The six-month time period was enacted by the HFEA 1990 s 30, and confirmed by the 2008 Act. It was interpreted by the UK courts as a period that was strict and mandatory. However, the paramountcy principle of the welfare of the child started to erode the strictness of the time cap in favour of a purposive interpretation. The recent jurisprudence of the High Court maintains that, despite the wording of paragraph 3, the elapse of the six-month period does not preclude a court to make a parental order.⁴⁷²

In the famous case of *Re X (A Child) (Surrogacy: Time Limit)*,⁴⁷³ in explaining why a parental order ought to be distinguished from other types of order in which the lapse of the time limit was fatal to the case, the president of the Family Court spelled out why a parental order could be made even when the six-month has elapsed, despite the statutory provision requiring the application to be made within six months. He asserted:⁴⁷⁴

⁴⁶⁶ Section 4(6) of the Human Right Act 1998 asserts that a declaration of incompatibility: "(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and (b) is not binding on the parties to the proceedings in which it is made."

⁴⁶⁷ Indeed, sexual reproduction implies two people, but a single woman can be legal mother. However, Art 54 (2) of the HFEA requires two people in order to grant a parental order.

⁴⁶⁸ Section 14 of the HFEA 2008 modified the wording of section 13 of the HFEA 1990, which calls for the ART provider to consider the need for a father, but the controversy around the possible exclusion of same-sex couples and single mothers provoked the change of the word 'father' to 'supportive parenting' when the statute was amended in 2008.

⁴⁶⁹ *Re Z (A Child) (No 2)*, above n 448, at [14].

⁴⁷⁰ At [13].

⁴⁷¹ HFEA 2008.

⁴⁷² *Re X (A Child)*, above n 439, at [57].

⁴⁷³ *Re X (A Child)*, above n 439.

⁴⁷⁴ At [64].

“The first is that a parental order goes not to just status but to identity as a human being. The second is that the court is looking, indeed is required by statute to look, to a future stretching many, many decades into the future. The third is that the court is concerned not just with the impact on the applicant whose default in meeting the time limit is being scrutinised but also with the impact on the innocent child, whose welfare is the court’s paramount concern.”

i) Identity of the child

Regarding the first reason identified in the above cite, identity as a human being is understood as individuality, and his or her place in the family, as well as identification before the law as a person with all the same rights as other human beings.⁴⁷⁵ This understanding requires accuracy with the circumstances of the identity and genetic connexions of the child in question, because otherwise, an adoption order would have been sufficient to give parental rights over the child. However, adoption would distort the reality of the situation, as well as the child’s identity, given the genetic connexions and conception with the purpose to become a member of the family.

The Court’s statement was literally:⁴⁷⁶

“Section 54 of the HFEA 2008 goes to the most fundamental aspects of status and, transcending even status, to the very identity of the child as a human being: who he is and who his parents are. It is central to his being, whether as an individual or as a member of his family.”

Adopted children are not usually genetically related to the adopting parents, and are conceived with different intentions to surrogate born children. Establishing legal parenthood to a genetically related child through adoption rather than using a parental order is to alter part of the child’s identity as a human being. Certainly, a surrogate child is not a child free to be adopted, and is conceived with a purpose and commitment from the commissioning parents to raise and bring up the child as any other genetically related child. There is a false assumption when adoption is used to give parental rights to commissioning parents, instead of a parental order.⁴⁷⁷ This distorts the genetic truth, but in the case of surrogacy the established procedure touches upon the right to an identity in as much as the child is not different from a traditionally born child.

An example to highlight this point is the following. Assume that a couple have a naturally conceived child, although the pregnancy entailed a risk to the mother’s health. After the baby is born the mother cannot have any more children naturally, and decides to resort to a gestational surrogacy agreement in order to complete the family and give a sibling to the first child. So, a surrogate is implanted with an embryo conceived from the gametes of both commissioning parents. If the couple are required to use adoption in order to gain parental rights, the outcome of this situation is that from a legal standpoint they have a genetically born child and an adopted one, although the second child is genetically related to both parents in exactly the same way as his or her sibling. This result affects the child’s status in society, and the child’s identity, given that the second child will appear in the original birth certificate as the child of the surrogate and her husband, although in an international surrogacy arrangement the birth certificate could reflect the genetic parents as the child’s parents. Under English law, the child’s parents are the surrogate and her partner (second parent or fatherhood depend on

⁴⁷⁵ At [54]. For a critique of the Court’s approach regarding the difference between adoption and parental orders see K Norrie “English and Scottish Adoption Orders and British Parental Orders After Surrogacy: Welfare, Competence and Judicial Legislation” (2017) 29 (2) *Child and Family Law Quarterly* 93.

⁴⁷⁶ At [54]. T Callus “A New Parenthood Paradigm For 21st Century Family Law in England & Wales?” (2012) 32 *Legal Studies* 347–68 argues that parenthood is at the heart of a person’s identity.

⁴⁷⁷ *AB v. CD (Surrogacy - Time Limit and Consent)* [2015] EWFC 12, at [71], used the word ‘fiction’ and made the point from which this argument draws.

the facts of the case), although that is completely fictional for a child who is genetically related to both commissioning parents. The original birth certificate in an adoption reflects the genetic parents, but in this case it would be reflecting a “fiction” because the surrogate and her husband are not in this case child’s genetic parents.

ii) The Court is required to look into the child’s future.

The psychological relationship forged between parents and child has a permanent and long-standing effect on the child. Thus the Court must deal with child’s welfare “throughout his life as paramount.”⁴⁷⁸ This could be understood as the impact on the child’s future, not just in the present. Courts should examine the immediate consequences as well as the long effects that a parental order will have on the child’s life.

iii) Impact on children’s rights

The third reason given in *Re X* for disregarding the time limit when a parental order is required is the fact that rejecting the order will adversely affect the child, even if the delay is the parent’s fault. Consequently, denegation of the parental order would be in contravention of the principle that the best interests of the child are paramount. In international surrogacy, a parental order provides legal parents to a child who, under the jurisdiction of that particular state, has no other parent or whose biological parents have relinquished the baby. Thereby, that child is in need of having legal parents, and that particular situation leaves no opportunity to the court to provide otherwise.

The impact on children’s rights is part of the assessment of the welfare of the child⁴⁷⁹ by the UK courts. The effect that parental orders have on children is sufficient grounds alone based on the principle of individual responsibility, because a “child cannot be blamed for circumstances for which he or she is not responsible.”⁴⁸⁰ In a recent judgement related to the refusal of British citizenship to a child born from an unmarried couple where the father was British and the mother foreigner, the UK Supreme Court asserted: “The child is not responsible for the marital status of his parents or the date of his birth, yet it is he who suffers the consequences.”⁴⁸¹ Indeed, a child is not guilty of his or her parent’s actions, and should not bear the adverse effects. There is a general consensus on this point, and both the UK Supreme Court and the European Court of Human Rights (ECtHR) agree with the contention that children should not be penalised for wrongful decisions of their parents. However, surrogate born children do suffer the consequences of their parent’s actions, despite being third parties that are completely alien to the parents’ decisions.

Children are legal persons who are independent of their parents. They have legal personhood from the moment of their birth, and consequently their rights should be respected and assessed independently of third parties, even if those third parties are their parents. Nevertheless, there does exist a clear link between the rights of children and their parents: “... legal parenthood which is now, arguably, the gateway through which many of the rights of children, and obligations to children, flow.”⁴⁸² The fact that legal parenthood and children’s rights are linked, as children’s rights emanate from their parents and that the paramountcy principle of the child’s welfare is implemented in

⁴⁷⁸ *Re X (A Child)*, above n 439, at [54].

⁴⁷⁹ At [64].

⁴⁸⁰ Case of *Mazurek v. France*, no. 34406/97 1 of February of 2000, at [54].

⁴⁸¹ [2016] UKSC 56 Johnson, *R (on the application of) v. Secretary of State for the Home Department* [2016] UKSC 56 (19 October 2016).

⁴⁸² Private International Law Issues Surrounding the Status of Children, Including Issues Arising From International Surrogacy Arrangements, Hague conference on surrogacy, preliminary document 11 of March 2011 at 3 <<https://assets.hcch.net/docs/f5991e3e-0f8b-430c-b030-ca93c8ef1c0a.pdf>>.

parental order regulations, both compel family courts to give priority to children's rights rather than enforcement of public policies directed to adults when there is a conflict between both.

Some scholars contend that surrogate born children represent the new illegitimacy,⁴⁸³ given that the majority of jurisdictions do not implement a suitable system for determining legal parenthood or for transferring the legal rights to intended parents, thereby creating situations that are to the detriment of children. Individual responsibility and the impact that illegitimacy had upon children forced the legal change, with Belgium being one of the last European countries to abandon that practice.⁴⁸⁴ As a consequence, the differences between legitimate and illegitimate children is history – at least in Europe and western countries. Children are on equal footing before the law irrespectively of parental status. The difference in the determination of legal parenthood between legitimate and illegitimate children collapsed due to the unfair effect on children, and likewise the difference in the determination of legal parenthood between surrogate and natural born children seems to be following the same path, as can be deduced from the UK jurisprudence.

*A & B (No 2 - Parental Order)*⁴⁸⁵ concerns a parental order arising from a surrogacy arrangement in India. The case is a notable example of the commissioning parents (in spite of having researched the issue on the internet prior to establishing the surrogacy contract) having a distinct lack of knowledge concerning the requirement to have a parental order over the children born from the surrogacy contract in order that they have a solid legal position as parents in Great Britain. The surrogate mother, who at the time of the contract was married, gave birth to twin girls using eggs donated from a third party, and the commissioning father's sperm. The commissioning parents applied for a parental order only when the children (twin girls) born from the arrangement were 3 years of age. By that time, the commissioning parents had split up, and one had been served a legal non-molestation award against the other. Also involved in the case were the surrogate mother and her husband as respondents, and the children themselves were made parties. The commissioning parents were both British subjects, and the twins born from the surrogacy arrangement entered the United Kingdom 3 months after their birth using British passports.

When deciding the case, the Court noted that, following the doctrine set out in *Re X*, it was established that Article 54(3) could be interpreted as applying the teleological method of interpretation and "that in any event, it is possible to 'read down' the provision to give effect to the Convention rights engaged, in particular Article 8."⁴⁸⁶ In this case the Court concluded that the applicants were acting in good faith and were unaware of the need to apply for a parental order so as to have parental rights over the child.⁴⁸⁷ Further, the Court added: "Secondly, to not construe it in such a way could have detrimental long-term consequences for the children and the applicants, which is precisely what the section sets out to prevent."⁴⁸⁸

The time limit is a requisite under the discretion of the Court, and can be dispensed with when the good faith of the parties concerned concurs, and in particular considering the welfare of the child which is the paramount consideration of the Court.

⁴⁸³ Storrow, above n 10.

⁴⁸⁴ *Marckx*, above n 13, at [41].

⁴⁸⁵ *A & B (No 2 -Parental Order)* [2015] EWHC 2080 (Fam).

⁴⁸⁶ At [64].

⁴⁸⁷ At [64] and [65].

⁴⁸⁸ At [72].

In *A & Another v. C & Another*,⁴⁸⁹ Theis J granted a parental order to the applicants with three children who were adolescents when the order was issued, given that the case involved twins born in 2002 and another child born in 2004. In resolving the case the Court observed that the child's welfare outweighs the policy consideration, despite the fact that the parental order exceeded significantly the six-month time limit.

The policy of the time limit has been shown by the case law to be counterproductive. On the contrary, a duty to report any surrogacy agreement taking place, and the subsequent birth, might help to bring surrogacy arrangements to the surface.

In cases of international surrogacy, when the Court considers if the case at hand meets the legal requirements (under English law, or that of another jurisdiction), the examination takes place as a "*fait accompli*", since the child is already born and the commissioning parents by now are the social, psychological and de facto parents, and – what is more important – they are the legal parents in conformity with the legal framework of the country where the child was born. These circumstances imply that the decision taken by the Court would have a direct impact on children whose welfare is the paramount consideration, thereby provoking that the balance is inclined in favour of granting the parental order, despite the fact that domestic regulations are not completely fulfilled when the case is judged by the Court. In short, the child cannot be considered the culprit of the actions of third parties.

This reflection was made by the Court in the case of *Re X and Y*⁴⁹⁰ (*Foreign Surrogacy*) where the Hon. Mr. Justice Hedley stated:⁴⁹¹

"The difficulty is that it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order. Bracewell J's decision in *Re AW* (supra) is but a vivid illustration of the problem. If public policy is truly to be upheld, it would need to be enforced at a much earlier stage than the final hearing of a Section 30 application."

The aforementioned affirmation also underlines the difficulties in conciliating public policy with the principle of the child's welfare. The Court warned that parental order procedures are not the adequate instrument for enforcing public policies which should be scrutinised in an earlier phase. Once the child is born, it is difficult to compel public policies at the cost of children's welfare. The above affirmation referred to clashes between public policies and the welfare of the child, and preceded the introduction of the paramountcy principle of the child's welfare in parental orders, which since then has provoked the inversion of resolution of the conflict in favour of the child's welfare.

Granting a parental order requires the consent of the surrogate and her partner, if the partner is considered by law to be the legal parent as is set out in s 54 of the HFEA. Therefore, the refusal of consent by the surrogate could impinge on the parental order and the rights of children to an identity, given the relationship between legal parenthood and the child's identity. Indeed, the former President of the Family Division, Sir James Munby, contended that the parental order goes beyond status to the very identity of the child as a human being.

This approach has led the courts to point out the differences between an adoption and a parental order, and their respective impact on the identity of the child. Taking that into account, in surrogacy

⁴⁸⁹ *A & Another v C & Another* [2016] EWFC 4.

⁴⁹⁰ *Re X and Y*, above n 243.

⁴⁹¹ At [24].

cases a parental order would be preferred over an adoption. Consequently, adoption in surrogacy cases is a measure of last resort where it is impossible to obtain a parental order.

*AB v. CD (Surrogacy - Time Limit and Consent)*⁴⁹² explained why parental orders reflect and respect children's identity in surrogate born children as opposed to an adoption resolution, despite the fact that both decisions transfer parental rights over the child.⁴⁹³

"A parental order and the consequences that flow from it are, from a welfare perspective, far more suited to surrogacy situations. They were specifically created to deal with these situations. Put simply, they are a more honest order which reflects the reality of what was intended, the lineage connection that already exists and more accurately reflects the child's identity. An adoption order in these situations leaves open the risk of a fiction regarding identity that may need to be resolved by the child later in life. The effect of an adoption order according to s 67 (1) ACA 2002 of treating the child 'as if' the child is born as a child of the adopter or adopters is not the reality; the child is born with a biological connection to one of the applicants."

Clearly, this line of reasoning is congruent to the right to identity and to knowing the origins. Adoption is a legal scheme in benefit of a child, given the willingness of the parent to hand over the child to an adoption. Therefore, adopted children need time and relative maturity to assume a painful reality. On the other hand, in surrogacy cases, if adoption takes place in lieu of a parental order, a needless fiction is created in detriment of the child. In the UK a parental order requires a genetic link with at least one of the commissioning parents and probably that is why adoption is considered a fiction which is not suitable for the transferral of parental rights over a surrogate born child.

c) *Woman's consent*

The fiction that ensues from the use of adoption to transfer parental rights of surrogate born children was acknowledged in the decision of *Re AB (Surrogacy: Consent)*,⁴⁹⁴ and led the Court to adjourn an application for a parental order when the surrogate and her partner negated the consent to give the parental order to the commissioning parents, even though the children were being cared for by the commissioning parents, and the surrogate and her partner did not oppose a transfer of parental rights through an adoption. However, the judge decided that a parental order was the optimal solution and declared: "From the perspective of these children's lifelong emotional and psychological welfare parental orders are the only orders that accurately and properly reflect the children's identity as surrogate born children."⁴⁹⁵ The surrogate's reason to deny consent for the parental order was that the relationship broke down between the parties due to intended parents' lack of attention and concern towards the wellbeing of the surrogate when she encountered health problems at week 12 of the pregnancy.⁴⁹⁶

The refusal of the surrogate and her partner to consent to the parental order was criticised by the Court. However, there was no legal possibility to dispense with the requisite of consent in order to advance the child's rights and conform the de facto parents and family to the legal ones, because consent is configured as an imperative and indispensable requisite which can be dispensed with only if the person required to give the consent cannot be found or is incapable.⁴⁹⁷

⁴⁹² *AB v. CD*, above n 477.

⁴⁹³ At [71].

⁴⁹⁴ *Re AB (Surrogacy: Consent)* [2016] EWHC 2643 (Fam).

⁴⁹⁵ At [32].

⁴⁹⁶ At [19].

⁴⁹⁷ Section 54 (7) of the HFEA 2008.

In the case of *Re X and Y (Foreign Surrogacy)* the Court categorically affirmed:⁴⁹⁸

“It should be noticed that, unlike the adoption legislation, the court has no power to dispense with a required consent however unreasonable the withholding of that consent may be or however much the welfare of the child is prejudiced by such refusal, even if they bear no legal responsibility for the child under their own domestic law, the persons whose consent is required truly have an absolute veto.”

The “absolute veto” of the surrogate mother was based on the unenforceability of the surrogacy contract and the position of the surrogate as a legal mother under English law. These two provisions thus constitute a barrier to dispensing with the consent. However, in cases in which the person cannot be found or is incapable, there is no opposition, simply either nobody to consent, or incompetency to consent.

Nevertheless, maintaining the requisite of surrogate consent at any cost, where the refusal of consent is unreasonable and contradictory to a child’s reality, affects the child’s welfare. Rather, it might be possible to take a purposive interpretation similar to other cases, taking into account that when the mother hands over the baby to the commissioning parents, thereby recognising that she is not interested in the upbringing of the child, she is in fact implicitly giving consent to the commissioning parents. The unenforceability of the surrogacy contract and the maternity presumption in favour of the woman who gives birth have no moral or legitimacy base when the surrogate woman is unwilling to form a part of the child’s life.

The decision in *Re X and Y (Foreign Surrogacy)* was handed down before the introduction of the paramountcy principle of the child’s welfare. Thus, it would be possible that a court departs from that literal interpretation to a purposive one, given that when the child is living with the commissioning parents, the welfare of the child calls for the legal recognition of legal parentage and of the family ties already formed.

Following the impact of the parental order on the identity of children which underpinned the preference for parental orders rather than adoptions, the case of *CC v. DD*⁴⁹⁹ illustrated this paradigm under English law. The case concerned a surrogacy arrangement between a British-French married couple, and a surrogate mother from Iowa in the USA. The child, Q, was conceived using the egg of the surrogate mother and the sperm of the commissioning father. The novelty of the case is that, following the birth, a step-parent adoption was carried out in USA in favour of the commissioning mother, with the full consent of the surrogate mother, and in accordance with the law of Iowa. The Court had to consider whether the commissioning parents were already recognised under UK law as the legal parents of the child due to the step-parent adoption, and if so, what impact that should have on the granting of a parental order.

Theis J observed that the main characteristic of the case was the lack of correlation between the laws of Iowa and UK. Due to the adoption order in Iowa, according to UK law the commissioning mother was the legal mother of the child, while the commissioning father, despite his genetic connection to the child, was not considered to be the legal father. This was due to the fact that he was not subject to the adoption order and also the fact that the surrogate was married, making the surrogate’s husband the legal father.⁵⁰⁰ The Court noted that the child would not be British even if the court declared that the US adoption was to be recognised in UK law. Therefore, the Court decided that “A

⁴⁹⁸ *Re X and Y*, above n 243, at [13].

⁴⁹⁹ *CC v. DD* [2014] EWHC 1307 (Fam).

⁵⁰⁰ At [39].

parental order is the order most suited to surrogacy situations.”⁵⁰¹ Additionally, Theis J added: “A parental order will confer legal parenthood on both applicants. This will also give Q a British birth certificate confirming his parentage, which better reflects his identity as a child of reproduction rather than an adopted child.”⁵⁰²

In conclusion, the UK courts emphasise the suitability of parental orders to transfer parentage in surrogacy cases, given that at least one of the commissioning parents is genetically related to the child.

i) When the surrogate woman cannot be found

*Re D (A Child)*⁵⁰³ dealt with a commercial international surrogacy agreement which took place in the Republic of Georgia, between a surrogate woman whose marital status was unknown and the commissioning parents. The child was born in 2010 from an egg donation and sperm of the first respondent. The surrogate woman could not be found so as to know with certainty her marital status, and since there were several contradictory affirmations from the agency management which indicated that the surrogate woman was single, married and divorced. The surrogate woman’s marital status at the time of the assisted conception was significant to determine whether the surrogate’s husband was considered the father of the child. Under UK law, the commissioning mother was not considered the legal mother either.⁵⁰⁴ After several attempts to locate the surrogate woman in Georgia at the agency’s stated address, the Court’s solution was to grant a shared residential order, with the child remaining a ward of the Court.⁵⁰⁵

*Re B (Foreign Surrogacy)*⁵⁰⁶ dealt with a surrogacy arrangement between a British couple and a fertility clinic in India. Written and signed consent for a parental order from the surrogate mother and her husband at the time was given shortly after the birth of the child in 2010. However, for reasons related to the fear of a high cost of applying for a parental order, and the possibility of such an application being unsuccessful, the commissioning parents did not apply for a parental order within the 6-month time limit, but rather when the child was aged 6 years. For all of that time, the commissioning parents had been providing parental care for the child. The Court did not make further investigations related to the surrogate’s consent and decided on the basis of the previous written consent, considering that “the respondent surrogate mother and her husband have consented to this Court making a parental order freely and with full understanding in relation to what is involved.”⁵⁰⁷ Those documents were signed by both the surrogate and her husband in August 2010 with all the guarantees to secure the free consent and with full knowledge of the legal effects of their consent, and left no doubt about the free and informed consent of the surrogate and her husband. The Court expressly pointed out that they received both legal advice and explanations about the document’s content in Hindi.⁵⁰⁸ The excessive delay in submitting the application, which made it difficult to contact the surrogate, led to the judicial decision being made on the basis of the document signed at the time the surrogacy took place. Besides, the Court examined other cases ex post facto where family ties existed between the child and the applicants, and noted that the granting of a parental order would not only bestow equal

⁵⁰¹ At [40] (2).

⁵⁰² At [40] (1).

⁵⁰³ *Re D (A Child)* [2014] EWHC 2121 (Fam).

⁵⁰⁴ At [9].

⁵⁰⁵ At [27].

⁵⁰⁶ *Re B (Foreign Surrogacy)* [2016] EWFC 77.

⁵⁰⁷ At [41].

⁵⁰⁸ At [13].

parenting responsibilities to the applicants, but would also ensure the security and identity of the child as a member of the applicants' family in the best possible manner.

d) *The legal mother is the woman who gives birth*

Section 33 of the HFEA sets out: "(1) The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child." Subsection 3 specifies that the provision applies whether the woman was in the UK or elsewhere when the assisted conception took place.

Sections 35 to 47 of the HFEA determine who is considered to be the other parent of the child carried by the woman when assisted reproduction is used in the conception of a child. Those provisions determining the other parent in cases of assisted reproduction do not affect the common law presumption that "a child is the legitimate child of the parties to a marriage."⁵⁰⁹ In assisted reproduction there is a presumption that a man married to the woman carrying the embryo is the father, unless it can be shown that he did not consent to the treatment.⁵¹⁰ In the case of a woman who is married or in a civil partnership with another woman "at the time of the placing in her of the embryo or the sperm and eggs or of her artificial insemination,"⁵¹¹ there is a presumption of parenthood in favour of the other woman, unless she did not consent with the artificial assisted pregnancy.

The parenthood presumption in assisted reproduction is conditioned upon the consent of the other party in the marriage, while the common law presumption of fatherhood has no such condition. However, the first is a *jure et de jure* presumption, while the second is a presumption of fact or "*juris tantum*" presumption.

The unenforceable character assigned to surrogacy contracts was designed, in theory, with the aim of discouraging commercial surrogacy.⁵¹² However, real cases have shown that the issue is more complex in view of the effects it has over the child's rights, and that in any case it does not prevent disputes concerning children's care and guardianship.

An example that portrayed this conflict is the case of *H v. S (Disputed Surrogacy Agreement)*,⁵¹³ which dealt with a case of traditional surrogacy where a woman agreed to be artificially inseminated by the sperm of a gay man living with his partner. However, she misled the men to believe they were going to play the main role in the upbringing of the child. Given the legal requirement of the women's consent in order to obtain a parental order and the unenforceability of the surrogacy contract, the genetic father was prevented to apply for a parental order under s 54 of the HFEA. Consequently, the man asked for a child arrangement order under s 8 of the *Children Act 1989*.⁵¹⁴ The Court emphasised that the case had nothing to do with a parental order but rather with the care of the child, stating: "It was not the function of the Court to decide on the nature of the agreement between the adults but to decide what best served the interests and welfare of the child."⁵¹⁵ Ms Justice Russell asserted:⁵¹⁶

⁵⁰⁹ HFEA 2008, s 38.

⁵¹⁰ Section 35.

⁵¹¹ Section 42.

⁵¹² Brazier Report, above n 200.

⁵¹³ *H v. S (Disputed Surrogacy Agreement)* [2015] EWFC 36.

⁵¹⁴ Section 8 of the Children Act 1989 was modified by Children and Families Act 2014 and gave the name of 'children arrangement order' to what was previously known as 'residence and contact orders'.

⁵¹⁵ *H v. S*, above n 513, at 723.

⁵¹⁶ At [7].

“I have been referred to numerous cases including that of *Re N (A Child)* [2007] EWCA Civ 1053, [2008] 1 FLR 198, a case which has similar facts to this one, in which the Court of Appeal endorsed the following approach as an impeccable statement of the issues the trial judge had had to decide (at [12]): ‘... the test here is ... as between the two competing residential care regimes on offer from the two parents (with their respective spouses) and available for his upbringing which, after considering all aspects of the two options, is the one most likely to deliver the best outcome for him over the course of his childhood and in the end be most beneficial. Put very simply, in which home is he most likely to mature into a happy and balanced adult and to achieve his fullest potential as a human?’”

In the case at hand the guardian information was beneficial to the man, given the demeanour and behaviour of the woman towards the couple and her behaviour in the Court during the trial, which is what inclined the judge’s balance in the man’s favour. Therefore, the outcome of the case was that the court held:⁵¹⁷

“making a child arrangement order for the child to live with the men (thus granting parental responsibility to the father’s partner); ordering supervised contact with the mother, the frequency to be arranged by the parties, that the child take the father’s surname and that there be a reporting restriction order.”

Notwithstanding, the mother’s rights and her denomination as a legal mother in the case at hand, in practical terms the rights over the child are exercised by the father and his partner, while the woman has restrictive contact with the child. This division between the denomination and practical effects of parental rights does not preclude or avoid conflict, rather it increased the adverse effects and divorced theory from practice.

This case, and the case of *Re A, B and C (UK surrogacy expenses)*,⁵¹⁸ have the same result of a split between nominative and practical rights which impact children’s rights. This raises the question of whether it is convenient to maintain the surrogacy contract as unenforceable, or rather to give effect to the intention of the parties when they reach the agreement. In the latter instance it is not fair to require the woman’s consent when she is not involved in upbringing the child and has no desire to act as a mother, but plans to abuse of her position to block a measure in benefit of the child.

*Re Z (surrogacy agreements) (Child arrangement orders)*⁵¹⁹ represents a more complicated scenario of a disputed surrogacy agreement. This case concerns a surrogacy agreement between gay commissioning parents (A and B) and a woman in her twenties (X). The couple found the surrogate woman on the internet. After having signed the agreement using a template which they also found on the web, the surrogate woman and A travelled to Cyprus where the couple had stored frozen embryos from a third-party egg’s donor and the sperm of A, created for an earlier surrogacy agreement between the commissioning parents and another surrogate woman, from which twins had been born. X was impregnated using one of those embryos.

The judgment put forward a detailed examination of the pitfalls of the relationship, given that X initially misled the commissioning parents by suggesting that a miscarriage had occurred, although the commissioning parents discovered this not to be true. In fact, she was pregnant with twins and had miscarried one foetus, but continued the pregnancy with the other one.

The case started as a private surrogacy arrangement, given that the commissioning parents applied for a parental order, but later the case was converted by an application for a child arrangement order. As the case proceeded, it was revealed through psychiatric examination of X that she had learning

⁵¹⁷ Judgement, at 723.

⁵¹⁸ *Re A, B and C (UK surrogacy expenses)* [2016] EWFC 33.

⁵¹⁹ *Re Z (surrogacy agreements) (Child arrangement orders)* [2016] EWFC 34.

difficulties and was a person with low self-confidence who was easy to influence. She was also experiencing economic difficulties at the time she had signed the surrogacy agreement. On the other hand, the commissioning parents were people who did not take into account X's views and needs and simply saw her as a carrier. The Court opined that it was "palpably evident" that one of the applicants felt that he had "ownership" of the child and that the surrogate "was merely a gestational surrogate, a mere vessel, with no rights over the child she was carrying and none over the child when he was born."⁵²⁰

Furthermore, V – the woman who had served as a surrogate mother of the applicants' previous twins – expressed to the Court the difficulties, self-interest and lack of understanding shown by the applicants when she was pregnant, which illustrated the little empathy they had for dealing with emotional needs. The attitude of the commissioning parents towards both the twins' surrogate and the respondent surrogate in the case at hand, as well as their behaviour before the Court, played a decisive role in the judge's decision. The judgment explained in detail the applicants' attitude and why it was significant when assessing the welfare of the child and thereby the child arrangement decision.

Ms Justice Russell indicated that in the circumstances of the case there was no doubt about the inability of the surrogate mother to express a free and informed consent with full knowledge of the consequences of the act, and therefore a parental order would not be given even if the mother had consented.⁵²¹ In dealing with the child arrangements order, Ms Justice Russell noted that "There is no substantial disagreement as to the law which applies in this case which will be decided on the basis of the child's welfare and where and with whom it is in his best interests to live."⁵²² Endorsing the approach followed by Lord Hope in *In Re B (A child)* [2010] 1 FLR 551, the court stated:⁵²³

"All consideration of the importance of parenthood in private law disputes about residence must be firmly rooted in an examination of what is in the child's best interests. That is the paramount consideration. It is only as a contributor to the child's welfare that parenthood assumes any significance."

The Court decided that the child (Z) should live with the surrogate mother (X) and her partner (P), and so granted parental responsibility to them, but with ongoing contact with A, the biological father.⁵²⁴ The outcome was that three people shared parental responsibility towards the child.

This case is at odds with the previous case discussed above, *H v. S (Disputed Surrogacy Agreement)*,⁵²⁵ which was decided in favour of the commissioning homosexual couple where the attitude of surrogate and commissioning parents were in contrast to each other at a given point.

It is noted that in both of the cases mentioned, where there was a dispute between the commissioning parents and the surrogate, counselling was not provided to the parties prior to the treatment, either because the counselling requirement was bypassed given that the embryo implantation took place outside the UK, as was the case in the full gestational agreement, or due to the fact that the insemination was not a clinical treatment because it was carried out at home.⁵²⁶ The lack of counselling promotes disputes between parties in a surrogacy agreement, for several reasons. For example, it is more likely that the parties do not understand fully the consequences of the agreement,

⁵²⁰ At [76].

⁵²¹ At [84].

⁵²² At [85].

⁵²³ *Re B (A child)* [2010] 1 FLR 55, at [37].

⁵²⁴ *Re Z*, above n 519, at [128].

⁵²⁵ *H v. S*, above n 513.

⁵²⁶ Schedule 3ZA of the HFEA 1990, actual schedule 4 as modified by the HFEA 2008 established the requirement to provide counselling as a condition of licence for treatment.

the rights and obligations of each other, the expectations of both parties, their personalities and emotional needs.

e) Enduring family relationship

Section 54(2) of the HFEA set out in relation to an application for a parental order made by two people that:

“(2) The applicants must be (a) husband and wife, (b) civil partners of each other, or (c) two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other.”

The wording ‘enduring relationship’ was introduced by the HFEA 2008 to extend the application of the parental order to the de facto couple, and Parliamentary debates affirmed that the meaning of this wording was left to the interpretation of the Court, in accordance with the circumstances. Therefore, there is no parliamentary intention to guide the judiciary in the exegesis of the term ‘enduring relationship’. Taking into account that s 54 A of the HFEA⁵²⁷ allows a single person to apply for a parental order, under the same conditions as for couples, the requirement of being a couple or being in an enduring relationship has no substantial effect on the right to obtain a parental order if the rest of the requirements are met.

Re F & M (Children) (Thai Surrogacy) (Enduring family relationship).⁵²⁸ This case involved an application for parental orders for twins (a girl, F, and a boy, M), who were born in Thailand from a commercial surrogacy agreement between the applicants and a surrogate mother. The children were conceived from a donor egg and sperm from the first applicant, and from the moment of birth, the children have been under the parental care of the applicants. Applications for parental orders for the children were filed with the Central Family Court in London when the twins were four months old, together with the relevant birth certificates from Thailand (with certified translations), and the form A101A which had been signed by the respondent and witnessed by a notary.

In this case the court observed that there was no definition of enduring relationship in the HFEA 2008, and had to resort to the meaning of this wording in other statutes, starting with the definition in the *Adoption and Children’s Act 2002*, that were suggested by the Council and quoted:⁵²⁹

“In relation to the definition under the Adoption and Children’s Act 2002 (ACA 2002), that to establish that a couple are ‘living as partners in an enduring family relationship’, there must first be an unambiguous intention to create and maintain family life and, second, a factual matrix consistent with that intention. Both matters are a question of fact and degree in each case. There is no requirement that both partners should reside in the same property (Re T&M Adoption [2011] 1 FLR 1487).”

The Court then went on to consider the Hansard debates to ascertain parliamentary intentions, and cited an answer from the Minister of State in the parliamentary debates, affirming:⁵³⁰

“Gentlemen would agree with the principle that the family division of the High Court, with its experience, is the best place to test whether a relationship is an enduring one. That decision is better made by the courts than by Parliament seeking to put in place arbitrary time periods or definitions, however well-meaning we may want to be. The ultimate test when issuing the parental order is what is best for the child.”

⁵²⁷ The Human Fertilisation and Embryology Act 2008 (Remedial) Order (S.I 2018/ 1413).

⁵²⁸ *Re F & M (Children) (Thai Surrogacy) (Enduring family relationship)* [2016] EWHC 1594 (Fam).

⁵²⁹ At [17].

⁵³⁰ At [28].

The Court then concluded that it is within the Court's domain to ascertain where an enduring relationship exists, and went on to explore the factual situation of the couple asserting:⁵³¹

“By the time of the hearing they had been in a relationship for nearly two years, had been through the treatment and conception with the respondent together and supported the respondent through pregnancy together, they have supported each other throughout her pregnancy and they have cared for F and M together as a family since the day they were born.”

Ms Justice Russell also pointed out that to determine whether a relationship is enduring the longevity of the relationship is not necessary, since “Parliament pointedly and specifically decided not to define an enduring family relationship in terms of its longevity.”⁵³² Finally, based on the facts, the court was satisfied that they “are a couple and part of a family and that theirs is an enduring family relationship.”⁵³³

The interpretation so far has been akin to family relationship. The Court deemed that a couple living together for a year prior to applying for a parental order, and for almost two years at the time of the hearing, equates to an enduring relationship. Notwithstanding the qualification of enduring, the paramountcy principle of the child's welfare has the potential to make any relationship enduring.

Despite the fact that the provision is applicable to couples, the introduction of section 54 (A) of the HFEA which allow single people to apply for a parental order has the potential to make the requirement nugatory

f) Payments

The case law of UK has asserted that what constitutes reasonable expenses to pay to a surrogate is a factual determination that depends on the circumstances of the case at hand, although the court should scrutinise and ensure the free consent of the surrogate woman. Low payments could imply the surrogate's exploitation, and high payments might influence the woman's consent.⁵³⁴ In both cases the woman's consent would be conditioned and not freely expressed. However, the courts emphasise that authorization of retrospective payments is a part of a parental order. Therefore, in deciding whether those payments must be approved the court needs to take into account the welfare of the child as the paramount consideration.⁵³⁵

Since the child's welfare is the main objective, the focus of the parental order thereby sheds light on both the interpretation of the law and the examination of the factual circumstances of the case at hand. The paramountcy principle of the best interests of the child puts the child first when resolving conflicts between public policy and the welfare of the child. As a consequence, payments in excess have been regularly approved by the courts. Nevertheless, as a measure of last resort, public policy can prevent the issuing of a parental order if the parties act in bad faith and with manifest abuse of public policy.⁵³⁶ In one Court's words: “it will only be in the clearest case of the abuse of public policy

⁵³¹ At [32].

⁵³² At [32].

⁵³³ At [32].

⁵³⁴ *Re WT (Foreign Surrogacy Arrangements)* [2014] EWHC 1303 (Fam), at [35], which asserted that the principles for authorising payments are established in the following cases: “starting with *Re X and Y (Foreign Surrogacy)*, above n 243 (at [19] and [20]) and the cases that have followed (in particular *Re S (Parental Order)* [2009] EWHC 2977 (Fam), *Re L (Commercial Surrogacy)* [2010] EWHC 3146 (Fam), [2011] 2WLR 1006 *Re JJ (Foreign Surrogacy Agreement Parental Order)* [2011] EWHC 921 (Fam) [2011] 2FLR 646 and *Re X and Y (Parental Order: Retrospective Authorisation of Payments)* [2011] EWHC 3147 (Fam).”

⁵³⁵ At [35].

⁵³⁶ At [35].

that the court will be able to withhold an order if otherwise welfare considerations support its making.”⁵³⁷

The factual determination of payment based on the circumstances recognises the plurality of society, in particular when transactions take place amongst people from different countries, different living standards and different social backgrounds, which makes the power of the acquisition of money variable and relative. As Hedley J in *L (A Minor)*⁵³⁸ put forward: “It is necessary to emphasise (as comparisons between the USA and Western India graphically illustrate) that no guidance can be gained from ‘conventional’ capital sums or conventional quantum of expenses. Each case must be scrutinised on its own facts.”

Re A, B and C (UK surrogacy expenses),⁵³⁹ a case where the applicant initially did not disclose to the Court the amounts paid as a consequence of the surrogacy agreement, illustrates the point about the difficulties of setting in advance a quantity to pay in surrogacy agreements that constitute reasonable expenses. In this case, the Court mentioned a long list of costs and disbursements caused by the pregnancies, evidencing the difficulties, detriments and outflows that a pregnancy entails. Consequently, a sum initially considered as elevated ended up being fair according to the situation.⁵⁴⁰

In the first paragraph of the judgment, the Judge highlighted the social reality surrounding surrogacy agreements and the need for the Government to respond to the demand driven by people who want to be parents:⁵⁴¹

“This is a case which brings into sharp relief the “surrogacy market” referred to by Moylan J in *Re D* [2014] EWHC 2121 and could be considered to provide further illustration of the need for better regulation of surrogacy agreements in the United Kingdom recognising the reality that there is an existing market.”

4.5.4 Conclusion to UK case law

The analysis of the jurisprudence has shown that the paramountcy principle of the child’s welfare has set a new dynamic upon the interpretation of the requirements established in s 54 of the HFEA, since courts are given leave to prioritize children’s rights over public policies, and to carefully examine the effects that the refusal of a parental order produces for children’s welfare. The public policy principle that underpinned parental orders has been inverted in favour of the paramountcy principle of child’s welfare. In addition to the effect of the paramountcy principle of the child’s welfare, the judgment in *Re Z (A Child) (Surrogate Father: Parental Order) (No 2)*⁵⁴² in which a declaration of incompatibility was made between s 54(1) and Articles 8 and 14 of the ECHR in conjunction with the Human Rights Act 2008, has provoked an amendment to s 54 of the HFEA. In view of the High Court finding in the matter of *Z (A Child) (No. 2)*⁵⁴³ the Secretary of State, acting in conformity with s 10 of the Human Rights Act 1998, issued a Remedial Order,⁵⁴⁴ currently in force from 3 of January 2019 which introduces s 54A, additional to s 54 of the HFEA, that allows a court to grant a parental order in favour of a single person if the conditions of the provision are met.

⁵³⁷ *Re L (A Child) (Parental Order: Foreign Surrogacy)*, *Re* [2010] EWHC 3146 (Fam), at [10].

⁵³⁸ At [7].

⁵³⁹ *Re A, B and C*, above n 518.

⁵⁴⁰ At [16], [17], and [18].

⁵⁴¹ At [1].

⁵⁴² *Re Z (A Child) (no 2)*, above n 448.

⁵⁴³ *Re Z (A Child) (no 2)*, above n 448.

⁵⁴⁴ The Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018 No. 1413.

4.6 Favoured model

New Zealand's legislation still lacks a framework to assign parentage to children born from surrogacy despite altruistic surrogacy being impliedly permitted, thus, the scenario justifies a re-evaluation or reassessment of parenthood in surrogacy.⁵⁴⁵ The gestational test assumes that the gestational woman and her partner are willing to raise the child, thereby assigning parenthood to them, whereas the verified reality is that in most of surrogacy agreements the gestational woman and her partner do not want to raise the child.

Despite the Law Commission's recommendation of implementing a legal scheme for transferring parenthood to intended parents in surrogacy cases,⁵⁴⁶ such a scheme never eventuated. Likewise, a Private Members Bill, the Care of Children (Adoption and Surrogacy Law Reform) Amendment Bill⁵⁴⁷ was formulated in 2012 by the MP Kevin Hague from the Green Party, which contained provisions relevant to this. However, in 2015 the proposed Bill was removed from the ballot and so it was never introduced in Parliament.⁵⁴⁸ The proposed Bill would have allowed commissioning parents to adopt a child born from a surrogacy agreement who was genetically related to one or both of them.⁵⁴⁹ Thus, the Bill kept the determination of parenthood in surrogacy cases in the realm of the adoption law. Yet it purported to implement a clause which seemingly accepted as evidence of parenthood the persons recorded in a foreign birth certificate, as long they were not resident in New Zealand and the child was born overseas. The clause included New Zealand resident parents before the enactment of the proposed bill.⁵⁵⁰

4.6.1 2013 Guidelines on Surrogacy Arrangements involving Assisted Reproductive Procedures

In New Zealand it would be feasible to adopt the intentional model within the current framework,⁵⁵¹ considering the functions assigned to the Ethics Committee on Assisted Human Reproductive Technology (ECART)⁵⁵² in relation to surrogacy agreements. In 2013, ACART, the Advisory Committee

⁵⁴⁵ In Australia, Chief Minister Kate Carnell MLA, expressed her thoughts in presenting The Artificial Conception Amendment Bill asserting "To me, it is both illogical and cruel that non-commercial surrogacy is legal but when the baby arrives he or she cannot be recognised as the child of the genetic parents." Cited from "A Proposal for a National Model to Harmonise Regulation of Surrogacy", January 2009, at 25.

⁵⁴⁶ Law Commission, above n 323, at 95.

⁵⁴⁷ Care of Children (Adoption and Surrogacy Law Reform) Amendment Member's Bill, available at http://adoptionaction.co.nz/wp-content/uploads/2018/08/2015-06-23-Care-of-Children-Adoption-and-Surrogacy-Law-Reform-Amendment-Bill_v1.pdf

⁵⁴⁸ Mark Henaghan et al. "Genes Versus Gestation: Protecting the Interest of Surrogate Mothers" in Mark Henaghan, Jesse Wall, and P. D. G. Skegg (eds) *Law, Ethics, and Medicine: Essays in Honour of Peter Skegg* (Thomson Reuters New Zealand Ltd, 2016), 266-291 at 271.

⁵⁴⁹ Clause 167.6 of the Care of Children (Adoption and Surrogacy Law Reform) Amendment Member's Bill.

⁵⁵⁰ Part 2, clauses 7 and 8.

⁵⁵¹ 'Feasible' does not mean 'easily' as Professors Henaghan and Wademan contended: "A system that allows pre-birth parentage orders would be very difficult to reconcile to section 17 of the Status of Children Act 1969." See Henaghan, M. and J. Wademan *International Surrogacy: Worldwide Approaches* (Continuing Legal Education, New Zealand Law Society, Wellington, 2014).

⁵⁵² Section 28 of the Human Assisted Reproductive Technology Act 2004 set out the functions assigned to ECART, among them paragraph (b), it is established "to consider application to consider and determine

on Assisted Reproductive Technology,⁵⁵³ issued Guidelines for ECART to follow that set out the conditions and requirements to be met by the parties to surrogacy agreements. Following a tendency that is similar to that of other jurisdictions,⁵⁵⁴ the Guidelines only apply to gestational surrogacy.⁵⁵⁵ Therefore, in the process of giving ethical approval, ECART could; first, scrutinise the conditions established for the surrogacy agreement in question in order to be satisfied that they are met by the parties; second, ensure that the surrogate and her partner give an informed and free consent to the surrogacy agreement; and third, certify that the parties have agreed to the assignment of legal parenthood to the intended parents.

The Guidelines provide a safeguard to protect the expectations of the parties involved in the proposal by requiring that the parties debate and agree about the guardianship, day-to-day care and adoption of the resulting child. They also ensure that all parties to the surrogacy agreement have independent medical advice, and independent legal advice and counselling, in conformity with the current Fertility Services Standard.⁵⁵⁶ Clause (2b) (iii) sets out that the proposal should indicate the risk that the procedure entails to the health and wellbeing of both the parties involved, and also to that of the resulting child.

In particular, the Guidelines establish that the proposal must include a consideration of the foreseeable risk that the surrogate mother could change her mind, or that a deterioration in the relationship between the parties could lead to legal disputes, affecting respectively the health and wellbeing⁵⁵⁷ of the intended parents and the child.⁵⁵⁸ Counselling should be provided to all parties, the parties' children and extended family. In addition, the Guidelines take into account "whether the intended surrogate has completed her family" in order to ensure she gives an informed consent, since a young girl with no prior experience of pregnancy cannot fully appreciate what she is consenting to, and so this reduces the risk of the surrogate changing her mind. The fact that the Guidelines are quite comprehensive and detailed as to the requirements of the proposal, has the added advantage of being able to easily simplify any future modification of the proposal, so as to accommodate into it any new scheme of presumption of parenthood in favour of intended parents.⁵⁵⁹

4.6.2 Criticism

In general, New Zealand's guidelines are similar to the requirements that have been developed in other jurisdictions such as Australia and the USA that guarantee equality among the parties involved in a surrogacy agreement. Despite these detailed regulations concerning the surrogacy procedure, it

applications for approvals for the performance of assisted reproductive procedures or the conduct of human reproductive research."

⁵⁵³ Section 32.

⁵⁵⁴ The former Uniformed Parentage Act (UPA) in the USA, referring to traditional surrogacy asserts the following: "The latter practice has elicited disfavour in the ART community, which has concluded that the gestational mother's genetic link to the child too often creates additional emotional and psychological problems in enforcing a gestational agreement."

⁵⁵⁵ The preamble of the 2013 Guidelines on Surrogacy Arrangements involving Assisted Reproductive Procedures dictate that the guidelines apply to a surrogacy that "involves the use of an assisted reproductive procedure, where an embryo transferred to the surrogate mother, may be: created from the gametes of two intended parents, or created from the gametes of one intended parent and the gametes of a third party."

⁵⁵⁶ Guidelines, above n 180, clause 2.

⁵⁵⁷ Clause 2 (c) i.

⁵⁵⁸ Clause 2(b) iii.

⁵⁵⁹ In Victoria Australia there exists a Patient Review Panel in charge of approving the agreement, the equivalent of which in New Zealand is ECART. See section 40 of the Assisted Reproductive Treatment Act 2008.

is paradoxical that there is no specific provision in New Zealand dealing with the transferral of parental rights of children born by means of surrogacy.

The fact that children born from a surrogacy agreement need to be adopted so that intended parents acquire parental rights raises questions about the purpose of the Guidelines. For instance, in the matter of *C [Adoption] an application of two genetic parents to adopt a child born from a surrogacy agreement approved by ECART*, the court affirmed:⁵⁶⁰

“This application has also exposed the piecemeal reforms taken by the legislature to new birth technologies and procedures, which seems to lag behind, even though these are in use and other bodies (I presume such as NECAHR) have been set up to approve arrangements such as surrogacy.”

The current surrogacy Guidelines require a genetic link between the child and at least one of the intended parents, however this requirement is inconsistent with adoption since adoption does not require a genetic link. In the consultation process, ACART is planning to remove the requirement of the genetic link.

Recourse to parenthood through adoption overlaps or duplicates phases between the guidelines and the adoption legislation, bearing in mind that the judge of the adoption process will examine the welfare of the child⁵⁶¹ along with other factors already considered by ECART when it approved the surrogacy agreement in particular child’s welfare. Certainly, the use of adoption to transfer parenthood of surrogate born children is not fit for purpose. Using adoption to transfer parental rights distorts the true intention of intended parents towards the child, who is conceived as a result of the intended’s parents’ initial actions.⁵⁶² It is especially confusing when intended parents are both genetically related to the child as remarked in *Re Arnold*,⁵⁶³ which involved an application of two genetic parents to adopt their child born from the intended mother’s sister through an altruistic surrogacy agreement. The Court contended: “There is a desperate need for an overhaul of the legislation to recognise the modern world in which we live. For it seems wrong that Ms. Toketoke has to apply to the Court to adopt a child who is biologically her own.”⁵⁶⁴

Adoption used as a means to transfer parentage in surrogacy endangers children, since in the interim period between birth and adoption the intended parents cannot act on behalf of, or protect, the child even though the woman who gives birth handed the child over to the parents.

Another drawback that adoption law poses when applied to surrogate born children is that this situation does not respect either children’s rights to know their genetic origin or their right to an identity. Using adoption to transfer parental rights to intended parents with genetic links to the child is itself misleading, since the surrogacy agreement was in place so that they could become parents and raise the child. It also alters the child’s identity and creates a legal fiction, as was contended by the High Court of England and Wales.⁵⁶⁵ This happens because the parents originally registered on the

⁵⁶⁰ In the matter of *C [Adoption]* [2008] NZFLR 141. Also known as *An Application by ARS and PMC to adopt a child*, at [65].

⁵⁶¹ Section 11 (b) of the Adoption Act 1955.

⁵⁶² John Lawrence Hill, “What does it Mean to be a ‘Parent’? The Claims of Biology as the Basis for Parental Rights” (1991) 66(2) *New York University Law Review* 353. At 414 asserts: “The intended parents are, so to speak, the ‘first cause’ of the procreative relationship; they are the ones who have engineered the birth of the child.”

⁵⁶³ *Re Arnold* [2015] NZFC 3348.

⁵⁶⁴ At [6].

⁵⁶⁵ *AB v. CD*, above n 477, at [71].

birth certificate are the surrogate and her partner,⁵⁶⁶ whereas the reality is that in most cases both of the intended parents, or at least one of them, are the genetic parents.⁵⁶⁷ Particularly misleading is the fatherhood recorded on the birth certificate as a consequence of a surrogacy agreement, given that the surrogate's partner does not have any biological link to the child which would merit being recorded in the birth certificate – because he neither contributes with his gametes nor can he be a surrogate. The adoptee might believe he or she is genetically connected to the surrogate and her partner, although this is not true in cases of gestational surrogacy. Once a person is twenty years old, he or she can obtain a copy of the original birth certificate showing the details of his or her birth before adoption.⁵⁶⁸

In addition, the Adoption Act 1955 itself has been the subject of much criticism,⁵⁶⁹ and the Human Rights Review Tribunal in a decision of 7 March 2016 declared some provisions to be in breach of Section 19 of the New Zealand Bill of Rights 1990.⁵⁷⁰

4.6.3 *The Proposed New Zealand Model*

Relying on both the Greek and the British Columbian legislation to ascertain parenthood in surrogacy, the proposed model assigns parenthood directly, thereby giving effectivity to the primary purpose of the procedure. The determination of parentage in favour of the birth mother or gestational woman, instead of the intended parents, runs contrary to the objective of the surrogacy agreements, bearing in mind that “the whole thrust of a surrogacy arrangement is geared to the arranged parents becoming parents and is being driven by their desire to be parents and the whole concept of surrogacy rests on the possibility of the birth mother being able to give up the child.”⁵⁷¹

Conferring parenthood through a presumption is functional and in benefit of the child, avoiding duplication in the determination of parenthood and thereby preserving the child's identity as is enshrined in the Convention on the Right of the Child.⁵⁷² Only if the presumption is rebutted would there be a disruption of the initial determination, and in such a case it is possible that the child's identity could be altered.

The legislation that would need to be enacted to determine parenthood could consider establishing a presumption of parenthood in favour of the intended parents,⁵⁷³ which in turn could be rebutted by

⁵⁶⁶ See Section 23 and 24 of the Births, Deaths, Marriages, and Relationships Registration Act 1995. Although there is a proposed bill to modify the actual law it raises the question whether or not the change would be a solution to the misleading identification in case of surrogacy. See the proposed bill at <<https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/>>.

⁵⁶⁷ For a discussion of cases where there was no genetic link between parents and child, see Debra Wilson “International Surrogacy and the Adoption (Intercountry) Act: Defining habitual residence” (2016) *New Zealand Family Law Journal*, 8(12) 217.

⁵⁶⁸ See Adult Adoption Information Act 1985. See also <www.govt.nz/browse/family-and-whanau/adoption-and-fostering/finding-your-birth-parents/>.

⁵⁶⁹ See, for instance, New Zealand Law Society, Law Talk 865, of 22 May of 2015. “Does Adoption Law Need Updating?” pp. 6-12 where a group of experts, including Professor Bill Atkin, put forward the pitfalls of the adoption law.

⁵⁷⁰ The Human Right Review Tribunal [2016] NZHRRT 9 <www.justice.govt.nz/assets/Documents/Decisions/2016-NZHRRT-9-Adoption-Action-Inc-v-Attorney-General.pdf>. The Human Rights Review Tribunal declared ss 3(2), 4(1)(a), 4(2), 7(2)(b), 7(3)(b) and 8(1)(b) of the Adoption Act 1955 to be inconsistent with the right to freedom from discrimination enshrined in by s 19 of the New Zealand Bill of Rights Act 1990.

⁵⁷¹ Dr Joseph Parkinson from the L J Goody Bioethics Centre, cited by Report 12 of The Standing Committee on Legislation in Relation to the Western Australia Surrogacy Bill 2007, May 2008 at [8.4].

⁵⁷² Article 8 of the Convention on the Rights of the Child, above n 14.

⁵⁷³ The new legislation should modify SOCA, in particular s 17.

the surrogate within 25 days of the child's birth.⁵⁷⁴ This presumption is advisable for many reasons; it ensures the child's wellbeing and rights by conferring parentage, *prima facie*, on those who desire to raise the child; it avoids transferral of parentage in most of the cases,⁵⁷⁵ thereby reducing costs and wastage of resources; it respects the child's identity, given that both intended parents are, in the great majority of gestational surrogacy agreements, the genetic parents, and so the birth certificate would reflect the genetic reality; and finally, it gives effectivity to the agreement reached by the parties, which is hardly ever challenged.

On the other hand, the possibility that the proposed scheme would offer the surrogate the ability of rebutting the presumption of parentage in favour of the intended parents guarantees her rights. Likewise, it recognises the significance that the birth mother enjoys in New Zealand's society, and the important contribution she provides by gestating the child.⁵⁷⁶ The interests of the surrogate mother lurk in the minds of many, namely, "the inherent vulnerability in the surrogate mother's particular social context, which can make it difficult for them to make a true choice."⁵⁷⁷

Furthermore, the presumption of parenthood would not be able to be rebutted by the intended parents. Therefore, if the surrogate does not exercise her option of rebuttal, the intended parents are the legal parents of the child, irrespective of the number, health, physical or genetic characteristics of the child or children born.⁵⁷⁸ This is a reasonable outcome for the surrogate, as it ensures that she is not left with a responsibility that she is not prepared for, nor one that she did not want to assume, in as much as the presumption of parenthood in favour of the intended parents precludes them from changing their minds. In particular, this forecloses the possibility of avoiding parenthood when the child does not meet the expectations of the intended parents. It should be noted that conferring parentage to the surrogate and her husband, as is the current scheme in New Zealand, could have an adverse result for the surrogate if the intended parents were to change their minds.

It is proposed that a special section, called the "Register of Intention", should be implemented in the Register of Birth, Deaths and Marriages to record the arrangement, duly approved by ECART, and that it should also be made possible to include any future intentional parenthood options allowed by law, as for example might be the case of mitochondrial modification or other future reproduction technologies which entail several contributors to the creation of a child. Upon the birth of the child, and based on the approval of the surrogacy agreement by ECART, the Register of Birth, Deaths and Marriages would then record the birth with the name of the intended parents along with that of the surrogate in a special register accessible only to the interested parties. The original birth certificate

⁵⁷⁴ The presumption of parenthood in favour of intended parents in a surrogacy agreement is established in the Greek Civil code in s 1464. Although the purpose of the presumption is to foreclose the surrogate's option to change her mind, it is still possible to implement the presumption with flexibility allowing the surrogate to rebut the presumption on certain grounds if it is in the child's best interests. A presumption of parenthood was also proposed by Tammy Johnson "Through the looking-Glass: A Proposal for National Reform of Australia's surrogacy Legislation" in P Gerber and K O'Byrne (eds) *Surrogacy, Law and Human Rights* (Routledge, New York, 2016). See, also "Revisiting Surrogate Parenting: Analysis and Recommendations for Public Policy on Gestational Surrogacy", 2017 report by the New York State Task Force on Life and the Law, at 57 which proposed that "Custody should be awarded to the intended parents, at least as a rebuttable presumption, if the agreement complies with all of the articulated provisions."

⁵⁷⁵ Johnson, above n 574, at 50.

⁵⁷⁶ The same cannot be said regarding the surrogate woman's husband, who in gestational surrogacy has no contribution to the creation of the child.

⁵⁷⁷ Mark Henaghan et al., above n 548, at 267 it is argued that the gestational mother is "extremely vulnerable" during the pregnancy and birth.

⁵⁷⁸ However, the Greek Civil Code allows intended parents to rebut the presumption. We consider it would be better to restrict this possibility due to the fact that such a restriction is in benefit of the child.

would be issued in favour of the intended parents as the legal parents. However, if the presumption is successfully rebutted by the surrogate woman, then a new birth certificate would be issued, designating the surrogate mother as the legal parent. In this case, the surrogate woman would need to initiate a procedure to rebut the presumption when the inscription is made in the Register of Births, Deaths and Marriages.⁵⁷⁹

Efficiency reasons indicate that in order to provide parents at the moment of birth to the majority of children born from gestational surrogacy, the intentional paradigm is the most adequate model, taking into account that most of the parties abide by the agreement even in absence of legal enforcement mechanisms. The law could be considered to be inefficient by insisting upon using a paradigm that is normally irrelevant to the parties' intentions. The gestational test, which is based on natural reproduction, does not fit with assisted reproduction when the contributions to the creation of a baby are split between different parties. This does not mean that the surrogate's contribution would be belittled. On the contrary, the surrogate woman could be recorded on the birth certificate, or if she prefers not to be recorded in the birth certificate her name could be kept together with that of the donor (if there is one), using the same record as is mandated by the Human Assisted Reproductive Technology Act.⁵⁸⁰

In the majority of cases, the surrogate woman relinquishes the baby in favour of the intended parents,⁵⁸¹ notwithstanding that she is not bound to do so by the agreement. A systematic review of studies concerning surrogacy has concluded that: "Most surrogacy arrangements are successfully implemented and most surrogate mothers are well-motivated and have little difficulty separating from the children born as a result of the arrangement."⁵⁸² A further study concludes that: "Most surrogates remained in contact with the child and enjoyed the relationships they had. Surrogates did not view the child as their own child, supporting previous findings ...".⁵⁸³ A review considering 40 studies on the experiences of surrogates in America and Britain⁵⁸⁴ has concluded that surrogates do not have traumatic experiences relinquishing the children. This reveals that the gestational paradigm would not work for the determination of parenthood in gestational surrogacy, because it would designate as parents persons who do not intend, or desire, to assume the upbringing of the child. In New Zealand, for example, there has not been a single case of disputed parental rights from a surrogacy agreement.

In reality, surrogates expect that intended parents will provide the upbringing and parenting of the child, and so the surrogates will hand the child over to the parents. Therefore, the legal default position should be to sanction the positive outcome, which is the majority of cases. This would protect

⁵⁷⁹ This model only includes gestational surrogacy, which is the one contemplated by the current 2013 Surrogacy Guidelines. As far as international surrogacy is concerned, a court would need to adjudicate parenthood according to the merits of the case and consequently, it would need to examine the foreign surrogacy agreement and be sure that the surrogate had agreed to relinquish the child. However, it is in the best interests of the child to presume that the intended parents are the legal parents of the child, above all when the foreign birth certificate records the intended parents as the legal parents of the child.

⁵⁸⁰ Section 48 of the HART Act 2004.

⁵⁸¹ Henaghan et al., above n 548, at 268.

⁵⁸² Viveca Söderström-Anttila et al. "Surrogacy: Outcomes for surrogate mothers, children and the resulting families – a systematic review" (2016) 22(2) *Human Reproduction Update* 260.

⁵⁸³ Susan Imrie and Vasanti Jadva "The Long-Term Experiences of Surrogates: Relationships and Contact with Surrogacy Families in Genetic and Gestational Surrogacy Arrangements" (2014) 29 *Reproductive BioMedicine Online* 424-435 at 433.

⁵⁸⁴ K. Busby and D. Vun "Revisiting the Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers" (2010) 26(1) *Can J Fam L* 13.

children and surrogates alike, although the surrogate would still hold the ability to rebut the presumption.

4.7 Conclusion

The comparison of different legal schemes to ascertain parenthood of children born through surrogacy offers a perspective regarding which legal system is more respectful of children's rights. A case in point was the analysis of the case law of the High Court of England and Wales, which has shown that the application of the paramountcy principle of the child's welfare in decisions on parental orders requires both flexibility in the interpretation of the requirement as well as a prioritization of children's rights over public policy considerations. In particular, England's case law highlights children's right to an identity and the negative impact that refusal to grant a parental order has on children's welfare and rights.

Having analysed different legal mechanisms for ascertaining parenthood in different countries, the thesis infers that the best interests of the child, or the child's welfare, is best served and promoted when children have legal parents at birth. Thus, situations in which parents remain undetermined at birth, or when disputes concerning legal parenthood can occur, is detrimental to children rights. That being so, the right to have legal parents at birth is a premise that underpins the thesis. Consequently, legal regulations concerning parenthood which do not guarantee the right to have children at birth is not fit for purpose. Certainly, conferring parenthood at the moment of birth, in as many cases as possible, would be a valid objective when evaluating the paradigms for ascertaining parenthood.

In addition, following on from that premise, this part has proposed a model for the allocation of parenthood in surrogacy cases within New Zealand's legal system. The model suggests allocating parenthood by means of a presumption of parenthood in favour of the intended parents, as long as the agreement fulfils the legal requirements set out in the model and has been approved by ECART before the procedure is undertaken.

5. Posthumous reproduction

5.1 Introduction

Cryogenetic freezing allows the preservation of gametes or embryos during long periods of time with full viability. This technology has facilitated the conception of a child after the death of the gamete provider. Considering that posthumous reproduction is a technology that is currently permitted in several countries, this chapter will address the regulation of posthumous conception in New Zealand and England to find out whether or not the legislation of those countries confers fatherhood to posthumously conceived children, and which children's rights are at stake. It provides the possibility to appreciate how New Zealand and England respond to the challenges of new assisted reproduction regarding fatherhood, and provides an insight into the main research question of how to allocate parenthood of children born through ART.

This chapter, first, analyses the current framework regulating posthumous assisted reproduction in New Zealand. Second, it analyses *Re Lee (Deceased)*,⁵⁸⁵ a remarkable judgment in New Zealand decided by the High Court of Auckland in 2017, which sheds light on the regulation of the procedure in New Zealand, and which considers whether or not the widow has property rights over the deceased husband's semen. If the answer is affirmative, the widow will have control over the deceased husband's sperm. Third, the chapter examines the case of Diane Blood in England, and the challenge she posed to English law which, at that time, did not allow a deceased man to be recorded as a child's father in the birth certificate. Finally, the parenthood of children conceived posthumously in New Zealand and their rights closes off the chapter.

Parts of the present chapter will be published as "From the Grave to the Cradle: Looking for Answers to the Question of Consent in Posthumous Reproduction", *Victoria University of Wellington Law Review*, forthcoming 2019.

Posthumously conceived children are one possible avenue for those unfortunate people who die young, and sometimes unexpectedly, to have the opportunity to fulfil their desire of having descendants, even if it is after death. An increasing number of men are storing their sperm, known as cryopreservation, especially soldiers, astronauts and cancer patients. The second Gulf war triggered a notable demand from military personal for cryopreservation.⁵⁸⁶ It is now also possible to retrieve immature eggs from the follicles of a deceased woman's surgically removed ovaries. Those eggs can then be matured in vitro and cryopreserved.⁵⁸⁷ Oocyte cryopreservation is considered a standard procedure, and the fact that they have similar quality to fresh ovum has sparked increasing requests to store female procreative material as an elective procedure.⁵⁸⁸ While the majority of cryopreserved gametes will be subsequently used by the owners of the genetic material, it is also possible to conceive

⁵⁸⁵ *Re Lee (Deceased)* [2017] NZHC 3263.

⁵⁸⁶ Amy Lai "A Critique of the 2008 Model Act Governing Assisted Reproductive Technology" (2011) 24(4) *American Journal of Family and Law* 218-225 at 218.

⁵⁸⁷ Akiyasu Mizukami et al. "The Acceptability of Posthumous Human Ovarian Tissue Donation in Utah" (2005) 20(12) *Human Reproduction* 3560–3565, at 3566. Immature (germinal vesicle) oocytes are those which have been matured in vitro, fertilized and transferred resulting in a birth.

⁵⁸⁸ Catrin E. Argyle et al. "Oocyte Cryopreservation: Where are we now?" (2016) 22(4) *Human Reproduction Update* 440-449.

children posthumously using gametes stored prior to the death of one or both parents, or to gestate an embryo after the death of one or both of the genetic parents.

Posthumous reproduction raises “ethical, moral, cultural and spiritual considerations about the use of sperm from a person who did not give express consent to its use after death.”⁵⁸⁹ In particular, the retrieval and posthumous use of female procreative material has not yet been considered in some jurisdictions, including in New Zealand, due to the novelty of the technique. However, the posthumous use of female procreative material elicits greater ethical and moral dilemmas than the posthumous use of male gametes since it requires a second woman to gestate the embryo.

The legal situation of posthumous reproduction in New Zealand is, to a certain degree, uncertain, due mainly to the fact that the current regulations, the “Guidelines for the Storage, Use and Disposal of Sperm from a Deceased Man” (hereinafter, the “Guidelines”) were issued in February 2000 by the National Ethics Committee on Assisted Human Reproduction (NECAHR, the predecessor to ECART).⁵⁹⁰ They therefore preceded the Human Assisted Reproductive Technology Act 2004 (HART 2004), although they have been subsequently adopted by ACART.⁵⁹¹ A recent application to the High Court by the partner of a man who unexpectedly died, requesting permission to have sperm retrieved from the deceased man, and the subsequent judgment handed down by the High Court on the 20th of December 2017,⁵⁹² have highlighted the shortcomings of the Guidelines. In particular, the Court noted that there are no express provisions concerning the retrieval and subsequent use of sperm from a deceased man.⁵⁹³ These issues, together with the likely application of the widow in *Re Lee* to the Ethics Committee on Assisted Reproductive Technology (ECART) for the use of the deceased man’s sperm to conceive a child, have triggered the launch of a consultation process by the Advisory Committee on Assisted Reproduction Technology (ACART) with the objective of reviewing the 2000 Guidelines.⁵⁹⁴

This chapter will, first, analyse the current framework regulating posthumous assisted reproduction in New Zealand, Second, it will analyse *Re Lee (Deceased)*,⁵⁹⁵ the High Court case referred to above. Third, the chapter examines the case of Diane Blood in England, and the challenge she posed to English Law which, at that time did not allow a deceased man to be recorded as the child’s father in the birth certificate. Finally, the parenthood of children conceived posthumously in New Zealand and their rights will close off the chapter.

5.2 The Law and Guiding Principles of Posthumous Reproduction in New Zealand

Posthumous reproduction in New Zealand is regulated by the Human Assisted Reproductive Technology Act (HART Act) 2004. The Act is an attempt to balance the social and individual benefits that can be found in assisted reproductive techniques, specifically the ethical concerns, and certain legal issues, that impinge upon unfettered use of such techniques. The HART Act is concerned mainly with the regulation of the supply and use of gametes by living persons, and the development and interpretation of the Act has been left in the hands of a Parliamentary approved advisory committee,

⁵⁸⁹ *Re Lee*, above n 585, at [97].

⁵⁹⁰ *Guidelines for the Storage, Use and Disposal of Sperm from a Deceased Man*, issued in February 2000 by the National Ethics Committee on Assisted Human Reproduction (NECAHR) <www.acart.health.govt.nz>.

⁵⁹¹ They have, however, been adopted by ACART and appear on the ACART website.

⁵⁹² *Re Lee*, above n 585.

⁵⁹³ *A Review of the Current Guidelines for the Use, Storage and Disposal of a Deceased Man’s Sperm to Take into Account Gametes and Embryos*, ACART consultation, executory summary, at [2]. Available at <<https://acart.health.govt.nz/consultations/past-consultations>>.

⁵⁹⁴ However, the review has been officially on ACART’s workload agenda since 2016.

⁵⁹⁵ *Re Lee*, above n 585.

the Advisory Committee on Assisted Reproductive Technology (ACART).⁵⁹⁶ ACART's functions are laid down in s 35 of the HART Act, which makes specific mention of issues related to assisted reproductive procedures and research. ACART's main tasks include, among others: "to (a) issue guidelines and advice to the ethics committee and to keep such guidelines and advice under review: (b) to provide the Minister with advice in the same matters." While not exhaustive, this Advice to the Minister includes whether the Act, or any other enactment, should be amended to either prohibit or provide for any particular kind of assisted reproductive procedure or human reproductive research, or whether any given kind of procedure or treatment should be declared to be an established procedure.⁵⁹⁷

The functions of the Ethics Committee on Assisted Reproductive Technology (ECART) are set out in s 27 of the HART Act. Among other functions, ECART is responsible for receiving applications on matters concerning 'regulated' assisted reproductive procedures or human reproductive research, and approving them provided these applications are in the established form and meet the requirements set out by ACART's guidelines and advice. When the application for approval refers to an activity not covered by the Guidelines, the Ethics Committee must "decline the application" and refer it to ACART.⁵⁹⁸ ECART also reviews approvals, and monitors the progress of assisted reproduction technologies (ARTs) and research in ARTs.

Article 4 of HART sets out the principles which should guide "every person exercising power or performing functions under the Act." The Act lists seven fundamental principles for the exercise of acts that are of relevance to the Act. Those principles include the requirement to take into account the health and well-being of children born as a result of the procedure, the health, safety and dignity of present and future generations (above all the well-being of women is primordial), the necessity of informed consent by donors and recipients, the necessity for offspring to be informed of their genetic origins, and the respect for beliefs and values of Maori and other cultural perspectives.⁵⁹⁹

According to the regime implemented by the HART Act, all assisted reproductive procedures⁶⁰⁰ require approval by the Ethics Committee unless the procedure in question had previously been declared to be an established procedure by an Order in Council from the Governor-General.⁶⁰¹ The Human Assisted Reproductive Technology Order 2005,⁶⁰² currently sets out the assisted reproduction procedures which are deemed to be established procedures, and therefore they can be carried out without ECART approval.⁶⁰³ For example, artificial insemination is an established procedure, so long as the donor is the woman's husband, the husband's brother or cousin, or an anonymous donor, and all participants in the procedure are at least 20 years old.⁶⁰⁴

⁵⁹⁶ Section 32 of the HART Act sets out: "The Minister must establish a committee to be known as the Advisory Committee on Assisted Reproductive Procedures and Human Reproductive Research."

⁵⁹⁷ HART Act 2004, s 35.

⁵⁹⁸ HART Act 2004, s 18 (2).

⁵⁹⁹ HART Act 2004, s 4.

⁶⁰⁰ HART Act 2004, s 5 defines an assisted reproductive procedure.

⁶⁰¹ HART Act 2004, s 6.

⁶⁰² The Human Assisted Reproductive Technology Order 2005.

⁶⁰³ Debra Wilson "Surrogacy in New Zealand" (2016) *NZLJ* 401, at 402. The article explains in detail the HART Act and in particular surrogacy in New Zealand.

⁶⁰⁴ See *Guidelines on Donations of Eggs and Sperm between Certain Family Members*, available at http://acart.health.govt.nz/system/files/documents/publications/guidelines_on_donation_of_eggs_or_sperm_between_certain_family_members.pdf

5.3 Use of Gametes

Both in New Zealand and Australia, the procedure of retrieval of procreative material differs from the use of the gametes once retrieved. That is, the extraction of procreative material is independent of the subsequent use. In general, in exercising their inherent jurisdiction, courts may authorise the retrieval of sperm, and they have given primacy to the extraction, independently of whether or not the use of the extracted material to procreate might have been authorised by ECART, on the grounds that otherwise the very opportunity to reproduce would be hampered.⁶⁰⁵ Sperm and ovarian tissue extraction from a deceased, or soon to be deceased, person is carried out with urgency, because the viability of all procreative material to reproduce is limited. According to Sharma, it is possible to retrieve sperm up to 48 hours after death⁶⁰⁶, however Shafi suggests that the standard time of retrieval is up to 36 hours after death.⁶⁰⁷

There exists a stark difference between living and deceased persons when it comes to the use to be made of retrieved sperm, which may have some implications. The Human Assisted Reproductive Technology Order of 2005 declares certain medical procedures to be established procedures in part one of the schedule.⁶⁰⁸ These relevantly include collection of eggs and sperm for purposes of donation, artificial insemination, egg cryopreservation, and IVF.

Part 2 of the Schedule is dedicated to setting boundaries and certain exceptions in relation to the use of deceased female gametes. For instance, paragraph seven states: “Despite the descriptions of established procedures in Part 1, a procedure is not an established procedure if it involves the use of eggs collected from a person who is dead when the eggs are collected or who dies before the procedure is carried out.” Thus, the use of a deceased female’s gametes requires approval by ECART, because it is not classified as an established procedure.

In relation to the use of deceased male gametes, as is outlined in the Human Assisted Reproductive Technology Order of 2005 (Sch. 1, pt. 2, clause 5) “Despite the descriptions of established procedures in Part 1, a procedure is not an established procedure if it involves the use of sperm that was collected from a person, who has since died, who did not give consent to the specific use of the sperm before that person’s death.”⁶⁰⁹ Therefore, if while alive and capacitated, the man in question gave express consent and instructions as to the specific use of extracted sperm, then any use of his sperm that respects the particular consent given will be considered an established procedure, and therefore will not require approval by ECART. Otherwise, approval will be required.

It is noted that the exceptions set out in clauses 5 and 7 refer to the use of both female and male gametes, but the Order does not mention retrieval from a deceased person. Thus, posthumous retrieval might be considered to be an established procedure, because no exceptions are mentioned, and the retrieval of semen and eggs is listed in part 1 as an established procedure without any

⁶⁰⁵ *Re Lee*, above n 585, at [16] asserted: “If an order were not made, no sperm would have been preserved, and Ms Long would have lost her opportunity to persuade a Court, after full argument, that authority for the procedure should be given.” Heath J cited Lord Woolf MR in *R v. Human Fertilisation and Embryology Authority; ex parte Blood* [1999] Fam 151 (CA) at 178.

⁶⁰⁶ A.P. Sharma et al. “Fertility Preservation in Men: Perspective” (2018) 34(4) *Indian J Urol.* 241-244.

⁶⁰⁷ Shafi Shafi et al. “Posthumous Sperm Retrieval: Analysis of Time Interval to Harvest Sperm” (2006) 21(11) *Human Reproduction* 2890-2893.

⁶⁰⁸ Human Assisted Reproductive Technology Order 2005 (SR 2005/181) s 4 sch 1.

⁶⁰⁹ Part 2 of schedule 1 clause 5 of the 2005 HART Order.

caveat.⁶¹⁰ Regarding this aspect, in *Re Lee (Deceased)* the High Court affirmed that there exists a gap in the law.⁶¹¹ Indeed, there is no provision indicating who should authorise sperm retrieval.

The current 2000 Guidelines contemplated only the use of sperm extracted with consent when the man was alive, asserting in clause 2; “Consent forms must include specifications as to what is to happen should the sperm donor die leaving sperm in storage at a clinic/service.”

In the case of a person storing sperm prior to undertaking certain medical procedures which may result in death or incapacity before the sperm is used, again there are two options, but in this case they should be mentioned on the consent form which sets out what should happen upon the death of the sperm provider. The two options are: “a. That sperm should be disposed of in a culturally appropriate and respectful manner... b. ... sperm be available for use only by a specified person within a specified timeframe.”⁶¹² Consequently, the 2000 Guidelines restrict the meaning of ‘specific use’ to the use by a specific person within a specific framework,⁶¹³ whereas the Order in Council 2005 does not impose any such restriction, and may raise other interpretations.

The Guidelines establish what should occur in three specific situations; (a) the case of a donor who voluntarily gave an anonymous donation and who dies before use is made of the donation, (b) the case of a man storing sperm before undertaking specific medical treatment that might result in either sterility or death, and (c) the case of extraction of sperm from a deceased or comatose man. In paragraph 2.1 the guidelines establish that it is compulsory “to provide appropriate counselling for men donating sperm.”

Where situation (a) occurs, the Guidelines allow for two options:⁶¹⁴

1. The stored sperm may be used by any person or persons who have, in the past, conceived a child (or children) by insemination from that same sperm.
2. If item 1 above does not apply, the sperm should be disposed of in an appropriate manner.

Situation (b) could lead to an application to use the sperm, in which case the guidelines require that any woman intending to use the sperm should receive appropriate counselling, which includes advice on the option to wait a certain time for proper consideration before proceeding with the treatment.

Prior to his death, the man may have authorised the use of his sperm by a specified person within a specified timeframe, and if not, the 2000 Guidelines clearly restrict the use of voluntarily and anonymously donated sperm, once the donor has died, to women who have already conceived a child using the donated sperm.⁶¹⁵ As to the posthumous use of gametes, ovarian tissue or embryos created with female procreative material, the 2000 Guidelines are silent.

Section 7 of The New Zealand Human Tissues Act 2008 expressly excludes human embryos or human gametes from the definition of ‘tissue’, thereby giving no authority for extraction of such material from a deceased person. However, as noted by ACART in the 2018 consultation process,⁶¹⁶ it does not exclude ovarian or testicular tissue. The omission is likely due to the fact that ovarian and testicular tissue are used in medical practice for other purposes, and at the time the law was enacted ovarian

⁶¹⁰ Nicola Peart “Life beyond Death: Regulating Posthumous Reproduction in New Zealand” (2015) 46 *Victoria U. Wellington L. Rev.* 725 at 732.

⁶¹¹ *Re Lee*, above n 585, at [100].

⁶¹² 2000 Guidelines, above n 589, cl 2.2.b)

⁶¹³ 2018 ACART Consultation, above n 592, at [43].

⁶¹⁴ Clause 2.1.

⁶¹⁵ Clause 2.1.

⁶¹⁶ Footnote 18.

tissue was not used for reproductive purposes. The technological advances in assisted reproduction will create an overlap in the law, taking into account that gametes might be derived in vitro from other cells.⁶¹⁷

Section 4 of the HART Act, in paragraph d) states: “No assisted reproductive procedure should be performed on an individual and no human reproductive research should be conducted on an individual unless the individual has made an informed choice and given informed consent.”⁶¹⁸ However, the provision is silent on the exact form of consent. Certainly then, the law does not restrict the consent to be in written form, as is the case in England.⁶¹⁹ Therefore, in theory, it would be possible to establish consent through other means admitted in law.

As can be seen from the above, the legal right to extract gametes from men who, at the time of proposed extraction, are deceased or otherwise incapacitated, rests heavily with prior written consent by that person, rather than consent in any form.

As far as women’s material is concerned, it is observed that authorisation to use a woman’s procreative material, or implantation of an embryo created by a deceased woman’s gametes, would require another woman to gestate the embryo. Hence, in the actual framework it would be better to consider both the authorisation to use female procreative material and the authorisation for surrogacy in conjunction, rather than individually. After all, it makes no sense to authorise the use of procreative material if the surrogacy agreement would be rejected.

Posthumous use of female procreative material is more complicated because it requires the additional step of maturation of the eggs. In fact, the only known case of posthumous maternity is Nissim and Keren Ayash of Israel, whose baby was born to a surrogate mother, who gestated the embryo created by both parents before Keren died from cancer.⁶²⁰

Section 12 of the HART Act restricts any reproductive use of sperm from a donor who is less than 16 years old. The only permitted extraction and use of semen from a minor less than 16 years old is in order to preserve the gamete or to conceive a child that is likely to be brought up by the individual from whom the sperm was extracted. In a widely cited case, the family of Cameron Duncan, an adolescent who died at age 17 from complications arising out of cancer treatment, applied for the posthumous use of semen that he had stored at age 15, before his treatment began.⁶²¹ Master Duncan gave express written authority to his mother to decide how the sperm should be used in case he were to die, but the ECART advised that any use at all would constitute a breach of s 12.

⁶¹⁷ Deepa Bhartiya, et al. “Making Gametes from Alternate Sources of Stem Cells: Past, Present and Future” (2017) 15(1) *Reproductive Biology and Endocrinology: RB&E* 15:89, at page 1 of 14 “Pluripotent, very small embryonic-like stem cells (VSELs) have been reported in adult tissues including gonads, are relatively quiescent in nature, survive oncotherapy and can be detected in aged, non-functional gonads. Being developmentally equivalent to PGCs (natural precursors to gametes).”

⁶¹⁸ HART Act, s 4(d).

⁶¹⁹ HFEA 1990, schedule 3 at [1] and [2].

⁶²⁰ Irit Rosenblum “Being fruitful and multiplying: legal, philosophical, religious, and medical perspectives on assisted reproductive technologies in Israel and internationally” (2013) Fall *Suffolk Transnational Law Review* 627.

⁶²¹ See Kirsty Wynn “Frozen sperm battle after tragedy” *The New Zealand Herald* (online ed, Auckland, 4 January 2015); and Deirdre Mussen “Fight to allow dead boy to father child” *Sunday Star Times* (New Zealand, 21 December 2014) at 1.

5.4 The Case of *Re Lee (Deceased)* [2017]

In October 2017 Mr Lee died unexpectedly. His partner, Ms Long, who was pregnant with her first baby, applied to the High Court for an authorisation to retrieve and store Mr Lee's semen within 36 hours after his death, given that sperm is only viable for reproduction for a limited number of hours after death. In the affidavit, Ms Long affirmed that: "I wanted to retain the ability for my unborn child to have the benefit of a sibling."⁶²²

The issue before the Court was whether or not the deceased man's partner ought to have the right to harvest her deceased husband's sperm. The subsequent gamete use after their retrieval was not a matter before the Court. The Court handed down a judgment which analysed the Court's power to grant the order sought by Ms Long, the other legal alternatives that would have entitled Ms Long to have the right to control the procreative material, such as property rights in her partner's semen, and the overall legal framework concerning posthumous reproduction.

The Court remarked on the non-existence of evidence regarding Mr Lee's express consent to the use of his sperm post-mortem, and noted it "raises some important public policy considerations."⁶²³ However, there were three elements in the case which were taken into consideration by the Judge; (1) Mr Lee had been subjected to fertility treatment prior to his death and had given sperm samples (although the samples were not stored), (2) Mr Lee had expressed during his life the desire to give a sibling to his child, as was contended by Mr Lee's parents, and (3) all of the members of Mr Lee's family - parents, sister, and brother - agreed with Ms Long's application.

Before examining the jurisdiction of the Court, the Judge asserted: "There are no statutory or regulatory provisions that deal explicitly with the ability (or otherwise) for a person in the position of Ms Long to collect and use sperm from a deceased spouse or partner."⁶²⁴ It was also noted that the HART Act 2004 is silent on the authorisation to retrieve or use sperm posthumously. However, the possible use of sperm retrieved from a deceased man is not barred by the HART Act 2004.

Justice Heath handed down a remarkable judgement considering the extensive analysis of all legal aspects surrounding the case at hand. In particular, the examination of the legal scheme underpinning the authorisation of human assisted reproduction procedures, and in particular, posthumous reproduction, constitutes the first judicial decision on this issue in New Zealand.

5.4.1 Property rights

The stance taken by the Court in *Re Lee (Deceased)*⁶²⁵ regarding whether or not there are property rights in the deceased gametes is relevant given that a positive answer would have afforded Mr Lee's partner the right to control the sperm of her deceased partner. The examination taken by Heath J in *Re Lee (Deceased)* was whether or not Ms Long had property rights in relation to the semen. The judgment analysed Australian and English case law on the matter, and found that in Australia, in *Doodeward v. Spence*⁶²⁶ it was possible to have property rights in parts of a human body, as long as there was additional work or skills applied, which transformed the body into something other than a "mere corpse".⁶²⁷

⁶²² *Re Lee*, above n 585, at [8].

⁶²³ At [9].

⁶²⁴ At [26].

⁶²⁵ At [26].

⁶²⁶ *Doodeward v. Spence* (1908) 6 CLR 406.

⁶²⁷ At 411 and 414.

Justice Heath asserted that the property stance stated in *Doodeward v. Spence* has been followed in Australia in applications made by widows to obtain authorisation to collect the sperm of their deceased husbands in order to conceive a child. His Honour cited *Re H, AE (No 2)*,⁶²⁸ where (as quoted from the Judgement) it was held: “The deceased’s sperm may be treated as property, at least to the extent that there is an entitlement to possession.”⁶²⁹

Doodeward v. Spence held:⁶³⁰

“I do not know of any definition of property which is not wide enough to include such a right of permanent possession. By whatever name the right is called, I think it exists, and that, so far as it constitutes property, a human body, or a portion of a human body, is capable by law of becoming the subject of property. It is not necessary to give an exhaustive enumeration of the circumstances under which such a right may be acquired, but I entertain no doubt that, when a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it, at least as against any person not entitled to have it delivered to him for the purpose of burial, but subject, of course, to any positive law which forbids its retention under the particular circumstances.”

In *Yearworth v. North Bristol NHS Trust*⁶³¹ the Court recognised the existence of property interests in preserved sperm samples and held: “In our judgment, for the purposes of their claims in negligence, the men had ownership of the sperm which they ejaculated.”⁶³² The Court of Appeal rejected the argument that men lack the ability to “direct” their sperm usage separately from its ownership, and pointed out that “their negative control over its use remains absolute.”⁶³³

Despite the previous doctrine under English law granting ownership of the sperm, the Court in the *Re Lee* case deviated from this approach, pointing out that *Yearworth* dealt with living men who sued the bailee who had failed to uphold the duty of care causing the sperm to perish, whereas the case at hand concerned a dead man.

Nevertheless, citing the Supreme Court doctrine, in *Takamore v. Clarke*⁶³⁴ the Court held that: “the New Zealand common law position” is that “there can be no property in the dead body of a human being.” The Judge concluded that this legal position was binding on him, and consequently he deemed the partner had no property rights over her partner’s semen.⁶³⁵

The Court entertained further arguments around the decision of denying property rights on the sperm of a deceased man, among others the inconsistency that would be created with the HART Act scheme, and the interference with the function assigned by law to ACART and ECART weighed heavily as reasons to conclude there was no property rights in sperm extracted in the case at hand.⁶³⁶ Indeed, had the court accepted property rights in the sperm of the deceased, it would have allowed the partner of Mr Lee to have control over the sperm.

⁶²⁸ *Re H, AE (No 2)* [2012] SASC 177.

⁶²⁹ *Re Lee*, above n 585, at [80].

⁶³⁰ *Doodeward*, above n 616, at 414, by Griffith C.J.. Justice Barton completely agreed with the Chief Justice.

⁶³¹ *Yearworth v. North Bristol NHS Trust* [2009] EWCA Civ 37, [2010] QB 1, [2009] 3 WLR 118, [2009] 2 All ER 986 CA [2009] All ER (D) 33 (CA).

⁶³² At [45] (f).

⁶³³ At [45] (f)(ii).

⁶³⁴ *Takamore v. Clarke* [2013] 2 NZLR 733 (SC), at [117].

⁶³⁵ *Re Lee*, above n 585, at [78].

⁶³⁶ At [89].

In the answering the question the Court drew a distinction between gametes from a dead body and gametes while a person is alive. The express contraposition between sperm from dead and living persons seemed to suggest that it could be possible to argue in favour of property rights in a similar case of breach of bailment. Nevertheless, the Court affirmed: "I leave open the question whether, as a matter of New Zealand law, an action for breach of bailment could be maintained in the circumstances disclosed in that case."⁶³⁷

In addition, the Court found that despite the fact that sperm retrieval from a deceased man was not unlawful, and the partner is entitled to apply to ECART requesting permission to use the sperm for reproductive purposes, there is no legal indication concerning the extraction process. The Judge remarked: "The inherent jurisdiction may be invoked where it is thought necessary to preserve a partner's ability to apply to the Ethics Committee for permission to use an assisted reproductive procedure to bear a child through the use of her late partner's sperm extracted after his death."⁶³⁸ The upshot of the case was that the Court granted permission to the applicant to have the sperm extracted from the husband's dead body, but that ECART would need to decide on its use.⁶³⁹

The Court made it clear that New Zealand courts have the jurisdiction to make an order to retrieve sperm from a deceased man at the request of the deceased's partner.⁶⁴⁰ After asserting the jurisdiction of the Court to make a retrieval order, Heath J considered who has control of the sperm during and after the decision of the Ethics Committee. The Judge resolved this issue by reserving this control to the Court, including giving effectivity to any measure adopted by ECART, whether positive or negative, to determine whether the gametes samples should be destroyed or used "in some other way."⁶⁴¹ This 'other way', which would have to be authorised by the Court upon application from Ms Long, would be to export the sperm to another jurisdiction should the application to ECART fail. According to the judgment, in deciding such an application, due regards must be taken to the reasons expressed by ECART in a decision rejecting Ms Long use of the sperm.⁶⁴²

5.5 Female Retrieval and Children's Rights

The answer to the question of whether or not the Court might exercise the inherent jurisdiction to order the retrieval of ovarian tissue or female procreative material from a deceased woman at the request of her partner has yet to be determined. At first blush the answer to the question might be positive, giving equal footing to the extraction of procreative material from men and women. However, the fact that the partner of a deceased woman would need to have recourse to a surrogate to have a child complicates the authorisation to use female gametes. New Zealand has implemented a restricted surrogacy scheme where only altruistic surrogacy is permitted and the agreement is unenforceable.⁶⁴³ Besides, the surrogacy arrangement must meet the requirements set out in the Guidelines on Surrogacy.⁶⁴⁴ For instance, clause 2 (a) requires that at least one of the intending parents must be genetically related to the child, which implies that the man must be fertile to meet the requisite, and in general the guidelines set out a stringent regime concerning authorisation.

⁶³⁷ At [91].

⁶³⁸ At [102].

⁶³⁹ Judgment result, at [125].

⁶⁴⁰ At [78].

⁶⁴¹ At [120].

⁶⁴² At [123].

⁶⁴³ HART Act 2004, s 14.

⁶⁴⁴ *Guidelines*, above n 180.

As far as female procreative material is concerned, the current definition of mother and father in ss 17 and 18 of the Status of Children Act 2004⁶⁴⁵ will hinder a deceased woman's ability to be considered a mother, and it will also preclude the man's ability to be considered the legal father, if the child is conceived through a surrogacy agreement. The surrogate and her partner would be deemed to be the parents of the child conceived using the deceased woman's gametes. Nevertheless, of course, the child can be adopted by the father once it is born.

5.6 Fatherhood and children's rights

Under the current status of the law, the paternity of a child born from a posthumous use of gametes is not guaranteed. The Status of Children Act 1969 (SoCA),⁶⁴⁶ governs parenthood of children born using assisted human reproduction (AHR) procedures, and it provides rules for determining legal parenthood. Whereas the HART Act 2004 *regulates* assisted reproduction technologies, section 15 of SoCA *enumerates* a series of procedures considered as ART for the purpose of its parentage rules, with the proviso that where or how the procedure is carried out does not change the qualification as ART. That means, for example, that artificial insemination qualifies as an ART under SoCA, whether it is performed at home or in a clinic. The procedures listed as an ART procedure are:⁶⁴⁷

“(a) an artificial insemination procedure; (b) a donor semen implantation procedure; (c) a donor ovum or donor embryo implantation procedure; (d) a donor semen intra-fallopian transfer procedure; (e) a donor ovum intra-fallopian transfer procedure; (f) a donor embryo intra-fallopian transfer procedure; (g) an embryo (donor semen) intra-fallopian transfer procedure; (h) an embryo (donor ovum) intra-fallopian transfer procedure.”

Section 15 (2) (a) of SoCA defines a human assisted reproduction to involve the semen of a man who is not the woman's partner.⁶⁴⁸ However, the deceased man is not considered the woman's partner, given that the marriage is dissolved by death.⁶⁴⁹ In no case therefore can the deceased ex-spouse be deemed to be the father of the child conceived by his widow using his sperm after death.⁶⁵⁰ Under the Status of Children Act 1969 a child conceived by posthumous reproduction could certainly not be the child of the deceased. The father of a child born from such a procedure is the mother's current partner, if that partner gave his or her consent to the procedure.⁶⁵¹ And if no consent was given, or if the woman is partnerless, the child is born fatherless.⁶⁵²

Despite the fact that Part 2 of Schedule 1 clause 5 of the 2005 HART Order considers the use of sperm posthumously to be an established procedure, as long as the sperm was collected while the man was alive and gave written consent to the specific use of the sperm, the law is silent regarding fatherhood of children conceived posthumously with written consent.

⁶⁴⁵ SoCA 1969, ss 17-18.

⁶⁴⁶ “Part 2 Status of Children Conceived as a result of AHR Procedures”, introduced on 1 July 2005, by s 14 of the Status of Children Amendment Act 2004. (2004 No. 91).

⁶⁴⁷ SoCA, s 15 (1). Section 15 (2) defines each of the procedures.

⁶⁴⁸ Status of Children Amendment Act 2004, s 15(2).

⁶⁴⁹ SoCA, s 5.

⁶⁵⁰ Status of Children Amendment Act 2004, ss 21 and 22.

⁶⁵¹ Status of Children Amendment Act 2004, s 18.

⁶⁵² SoCA, s 22. Besides, s 26 of SoCA, referring to the rules of conflicting evidences, establishes that ss 18, 21, and 22 prevail, despite any “conflicting evidences”, “conflicting declarations” or “any other evidence that the man who produced the semen was the father of the child of the pregnancy.” Consequently, the deceased man is not the father of a child conceived posthumously.

Posthumous reproduction has further effects on children's rights which need to be addressed by Parliament. For instance, important questions such as, their registration, their inheritance rights, and other social rights. The regulation of posthumous reproduction and its consequences as a whole, requires Parliamentary intervention in order to provide an adequate framework for posthumous reproduction.

5.7 Posthumously born children in Britain

This section discusses the case of Dianne Blood in England, however given that the approach to the issue of consent in New Zealand is similar to the one in England requiring written consent, at least according to the current 2000 Guidelines, the approach can be extrapolated to New Zealand, given that the law is silent regarding fatherhood of surrogate born children and the rights derive from that filiation.

5.7.1 *The case of Mrs. Blood*

The storage and use of gametes by a licenced clinic is and was a regulated activity under the HFEA 1990. Schedule 3 constitutes a condition that the licence is required to fulfil, and that the storage of gametes or embryos needs consent in writing.⁶⁵³ Mrs. Blood and her husband of four years had been trying unsuccessfully to have a child together when, on 26th February 1995, Mr. Blood contracted meningitis and became comatose. On February 28th, Mrs. Blood requested doctors to take a sample of her husband sperm, which was carried out on 1st March. A second sample was taken the next day, just before Mr. Blood was certified as having deceased. Both samples were stored while the Human Fertilization and Embryology Authority (here-in-after HFEAth) considered Mrs. Blood's request to use the samples. Permission was denied under the provisions of the 1990 Act. The extraction of sperm without consent was an offense under UK law, and additionally Mrs. Blood was precluded from using the sperm of her deceased husband without having obtained his prior written consent.⁶⁵⁴ Nevertheless she did get authorisation to export the sperm to Belgium under European law, where she eventually used the sample to successfully conceive two sons.

The current HFEA, as modified in 2008, stipulates the need of consent for both the storage and use of gametes or embryos, as well as setting out the requirement of the written consent and the need to provide counselling.⁶⁵⁵ The formality of the written consent means that the law prioritizes certainty, and excludes cases where the consent could be deduced by other means, when for example it was not possible to give written consent due to the unexpected circumstances of the death.

Following on from the birth of her sons, Mrs. Blood was again forced to challenge the law because her sons had no father, as it was forbidden for her to register the deceased father on the birth certificates. Section 28(c) of the 1990 Act, as enacted at that time, stipulated "(b) the sperm of a man, or any embryo the creation of which was brought about with his sperm, was used after his death, he is not to be treated as the father of the child." The Human Fertilisation and Embryology (Deceased Fathers) Act 2003 was enacted to fill this gap in the law, but has now been replaced by the HFEA 2008 (HFEA).⁶⁵⁶

⁶⁵³ Schedule 3 at [1] and [2] of the HFEA 1990.

⁶⁵⁴ *R v. Human Fertilisation and Embryology Authority*, ex p Blood [1997] 2 WLR 806 (CA), at [28].

⁶⁵⁵ HFEA, s 14 referring to "conditions of storage licences." Regarding counselling it is required under ss 13 (6), 13 (6) (A) and 13A (3) of the HFEA.

⁶⁵⁶ Human Fertilisation and Embryology Act (c.22) which received Royal Assent on 13 November 2008, s 39 substitutes the provisions introduced in the 1990 Act by the Human Fertilisation and Embryology (Deceased Fathers) Act 2003. The provisions modified are now ss 28 (5A) and (5B).

Section 39 (C) of the HFEA, as enacted in 2008, deals with the transfer or use of the sperm or embryo after the death of the man and determines that the man may be treated as the child's father provided he has consented in writing to the use of the sperm or embryo after his death, and that he did not withdraw such consent. He also must have assented in writing to being treated as the child's father for the purpose of birth registration. Within 42 days from the day on which the child is born, the woman must elect or decide in writing that the sperm provider should be registered on the birth certificate as the child's father as long as no other man can be treated as the father in application of other provisions. Section 39 (3) precludes the deceased donor to be considered the father for any purpose other than birth registration.⁶⁵⁷ Despite this peremptory time, an exception permits the woman to make her choice after the 42 days have elapsed as long as "the Register General at the time of the election is satisfied that there is a compelling reason for giving his consent to the making of such election."⁶⁵⁸

Fatherhood is therefore a condition embedded in the consent and not a legal effect provided by law, because the consent in writing that is required for the use of the sperm or embryo also stipulates that the donor must consent to be treated as the father of the resulting child. This approach could be followed to provide the opportunity for decisions on other consequences of post-mortem fatherhood, like for example the child's right to inheritance or social security, nationality and other rights which stem from the legal parenthood.

The approach taken by the HFEA is arguably not in the best interests of the child because it limits the rights of the future child without reason, despite the father's consent. The limitation introduced upon the legal effect of fatherhood constitutes a disadvantage for children born posthumously and hinders the fulfilment of their rights.

In the Parliamentary debates on the Human Fertilisation and Embryology (Deceased Fathers) Bill in the United Kingdom, referring to the right of a child to have the father's name on the birth certificate, Mr. Clark affirmed:⁶⁵⁹

"If we fail to implement the Bill, we will also be in breach of Articles 8 and 14 of the European Convention on Human Rights, which deal respectively with the rights to choose or discover who one is and to enjoyment of rights without discrimination of birth. Therefore, the Bill will ensure that British law is brought into line with the laudable intentions of both the UN Convention on the Rights of the Child and, more specifically, Articles 8 and 14 of the European Convention on Human Rights."

In general, there is an inconsistency in how legislation on reproduction technologies requires further requisites to procreate children that are not required in natural reproductions, and especially in how those regulations alter children's rights when they are born through the use of AHR as opposed to natural born children.

Furthermore, it is within the will of the person who assumes the eventuality of becoming a father post-mortem to decide the rights he wishes to give to his children, given that parents always desire the best for their children even in a situation where they will be absent. Why should the law deprive those children from the right to inheritance when the genetic father wants to give them part of his assets?

⁶⁵⁷ HFEA 2008 s 39(3) corresponds to the current s 28 (5I).

⁶⁵⁸ HFEA 2008, s 52 (2), corresponds to s 28 (5F).

⁶⁵⁹ House of Lords Debate of 10 December 2010, column 36 Baroness Hollis of Heigham <www.publications.parliament.uk/pa/ld200708/ldhansrd/text/71210-0006.htm>.

Despite the fact that UK legislation hinders the rights of posthumous born children, it requires those providing the relevant services to take into account the welfare of the child: “A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a supportive parenting), and of any other child who may be affected by the birth.”⁶⁶⁰

The original wording of the 1990 Act called for the AHR provider to consider the need for a father, but the controversy around the possible exclusion of same sex couples and single mothers provoked the change of the word ‘father’ to ‘supportive parenting’ when the statute was amended in 2008. There was an important debate at the time in Parliament about the importance of the role of fathers in children’s lives, but it was also pointed out that current society cannot guarantee that a child will have parents because the rate of divorce is high, which makes it impossible to ensure that a child who has a father at the time of an IVF treatment would still have him for the rest of the childhood. It also could be the case that a woman who is single at the time of birth encounters a partner, and thereby the child gains a father.⁶⁶¹ Lord Tornburn also argued that:⁶⁶²

“Patients come because they might need hormonal therapy or tubal surgery to improve their fertility. Their parenting skills may be looked at but that is not a legal obligation at that stage. Only when they come, finally – having gone through many of these procedures – to IVF are they suddenly faced with having to answer questions about whether they are suitable parents and whether a father should be involved.”

The approach taken by the legislature by introducing the words ‘supportive parenting’ is in accordance with social reality and the UNCROC given that the UNCROC Committee endorses a broad concept of family that includes the extended family.⁶⁶³ Likewise posthumous children are often supported by the extended family, because in general families usually see in those children the relative who was lost prematurely.

As to inheritance, the legislation needs to adapt to the new reproductive techniques so as to respect the rights of posthumously conceived children, given that inheritance law comes from an era when it was impossible to conceive children after the death of the parents. Thus the only rights contemplated for future children of deceased parents was the ‘*nasciturus rule*’ or *qui in utero est, pro iam nato habetur* (a child in the womb is held as already born in any question which arises concerning its rights or interest).⁶⁶⁴ Therefore children conceived after a parent’s death are excluded from the rule that guarantees them a right in the inheritance. This is the rule in civil law countries and in the United Kingdom.⁶⁶⁵

Apart from the fact that the *pro iam nato* rule applied in the UK, Article 29 (3b) of the HFEA clearly excludes that the determination of fatherhood extends to inheritance, because the scope of fatherhood is expressly restricted to the inscription in the birth register. The yet to be conceived child could receive a gift as could any other unrelated person if such a gift is provided for in the will, by “making a provision, express or implied, for a bequest to any child born as a product of his sperm.”⁶⁶⁶ This last possibility is not a solution in the case of an intestate death, and in any case the child is

⁶⁶⁰ HFEA s 13.

⁶⁶¹ House of Lords Debate, above n 658.

⁶⁶² Column 35.

⁶⁶³ Committee on the Rights of the Child “General Comment”, above n 17, at [48].

⁶⁶⁴ Roderick RM Paisley “The Succession Rights of the Unborn Child” (2006) 10(1) *Edinburgh L. Rev.* 28-59 at 30.

⁶⁶⁵ At 51.

⁶⁶⁶ At 58.

disadvantaged because most jurisdictions impose a limit on the amount of an inheritance that can be given to non-family members.

5.8 The best interests of the child in posthumous reproduction

Article 3 of the UNCROC proclaims that in all actions concerning children the best interests of the child should be the primary consideration, and it is argued that the best interests are not fulfilled when the law does not guarantee posthumous conceived children the right to a father. Furthermore, that restriction impinges on the right to not be discriminated, the right to nationality and a series of other rights as was exposed in chapter 2. The denial of the right of inheritance could have an important impact on the child's future because it denies him or her opportunities that this inheritance might have provided. If the child has a sibling, this could create inequalities or even disadvantages. For example, in the case of Dianne Blood, which required international travel to legally use the posthumously collected sperm, there is the possibility that, on the mother's return to her country of domicile, inscription of the child on the civil register (with the genetic father as 'father') might not be permitted. This would leave this child at a disadvantage compared to his or her full genetic sibling born prior to the father's death.

From the point of view of the child, once born his or her rights should be the same as any other child, that is, the child born from posthumous reproduction should not be disadvantaged because of the circumstances of birth (Article 2 of the UNCROC).⁶⁶⁷ The right to be registered after birth as enshrined in Articles 7 and 8 of the UNCROC⁶⁶⁸ should be respected; as should the right to an identity; and the right to know the parents. To deny the inscription of the father's name would infringe all of these rights, given that the right to an identity is a fundamental right.

It is in the best interests of the child to be considered the legal child of the deceased, with all of the rights inherent in the legal establishment of parenthood. The only difficulties that could arise in the recognition of the same rights as other children are related to the passage of time, but those difficulties could be overcome by imposing a limit to the use of the sperm. It is also advisable to impose a limit in order to ensure legal certainty. As an example, s 708 of the Uniform Parentage Act 2017⁶⁶⁹ in the USA deemed the deceased to be the father of a child conceived posthumously, provided that he had consented in a record to be treated as the child's parent, or it is proven by other evidences that he consented to be the child's father. However, the provision limits the time during which posthumous conception should be carried out after the individual's death to 36 months to conception, or 45 months to birth. That approach is an intermediate stance which gives effectivity to the deceased's consent, but restricting the time during which the procedure could be carried out.

5.9 Succession

The child's legal status in relation to the deceased determines a priori whether or not the child is entitled to the deceased's inheritance. A posthumously conceived child is excluded, although a child in uterus is included.

Section 2(1) of the Administration Act 1969 states: "References to a child or issue living at the death of any person include a child or issue who is conceived but not born at the death but who is

⁶⁶⁷ Convention on the Rights of the Child, above n 14.

⁶⁶⁸ Above n 14.

⁶⁶⁹ The Uniform Parentage Act 2017, s 708.

subsequently born alive.”⁶⁷⁰ That provision includes children in uterus or *in ventre sa mere*. Thus, if legal parenthood were conferred to posthumously conceived children, the wording of that provision should be changed.

Interestingly it seems that the definition set out in that section might give rise to two different outcomes. If the deceased’s gametes are used to reproduce posthumously, the child cannot be included under the definition of s 2 (1) of the Administration Act 1969, whereas in a scenario in which an embryo was created and stored by a man who then dies before the embryo is implanted, and where the embryo is implanted posthumously, it could be argued that it is included within the definition of s 2 (1) of the Administration Act 1969. Certainly, when the law was drafted, posthumous reproduction or even cryopreservation were not considered. Therefore, depending on the interpretation of the term ‘conception’, a child born posthumously from an embryo implantation may be included in the definition of the aforementioned precept.

Regarding citizenship, the father of a child conceived posthumously cannot transfer his citizenship by descent given that the law confers citizenship in accordance with parents’ citizenship at the time of the child’s birth,⁶⁷¹ and the deceased man is not considered the child legal father. However, if the mother is New Zealander, a child born posthumously acquires citizenship from the mother. If the child is born from a woman who is citizen of another country, and holds a visa as a permanent resident, if born in New Zealand territory the child is regarded as a New Zealand citizen.⁶⁷² Then concerning citizenship, a posthumously born child still can be considered to be a New Zealand citizen in most of the cases, although there is still room not to be deemed a New Zealander if the mother is not a permanent resident.

5.10 Conclusion

The judgment of *Re Lee (Deceased)* has evidenced that there is a gap in the regulation of posthumous reproduction in New Zealand, given that there is no provision regarding the course of action to obtain consent for the posthumous collection of sperm, despite collection being a lawful procedure. Therefore, courts have relied on their inherent jurisdiction to fill a gap in the law, and have granted permission to the applicant to collect and store the sperm while the application to the Ethics Committee to use the sperm is resolved. In analysing *Re Lee* it has been shown that the High Court maintained the doctrine of lack of property rights in sperm taken from a deceased body, and the need for ACART to regulate the extraction of gametes from a deceased person. However, the Court left open the question of whether or not there are property rights on gametes of living persons. In resolving the case, the Court pondered the role of ACART and ECART, deciding to deny property rights in the sperm, because otherwise it would have conferred control over the sperm to the deceased partner, while the application to use the gametes was pending before ECART.

The analysis of posthumous regulation also put forward that it would be easier to confer property rights to the widow over the sperm of the deceased husband, and that it would be feasible to allow a deceased man to express his intention regarding parenthood, given that the current ACART guidelines regarding posthumous reproduction require the gamete provider’s consent to the specific use of the sperm.

⁶⁷⁰ Administration Act 1969, s 2(1).

⁶⁷¹ Citizenship Act 1977, s 6 (1) (b).

⁶⁷² Section 6 (1) (b).

In the exploration of the legislation concerning parenthood, it has been concluded that New Zealand's legislation does not confer legal fatherhood of posthumously conceived children to the deceased. Likewise, the Administration Act 1969 in s 2(1) includes the words 'a child living', and a child in uterus or '*ventre sa mere*', but does not mention children conceived posthumously. Therefore, the estate of a deceased person must be distributed only to children already born when the intestate dies, excluding children conceived posthumously.

6. Mitochondrial Replacement Therapy

6.1 Introduction

Whereas chapter 4 explored different legal frameworks to confer parenthood to children born through surrogacy agreements to suggest a model to confer parenthood, this chapter considers mitochondrial modification as it is regulated in England, which is the only country in the world which has implemented a legal framework on the matter. The chapter will lay down what the technique consists of, or how it is carried out, exploring how the different paradigms for allocating parenthood work out when applied to children born using mitochondrial modification.

The fragmentation of motherhood into two components – genetic and gestation – and as a consequence the disconnection between conception and procreation due to the use of the new technologies of assisted reproduction, has made it possible that several persons jointly contribute to the creation of a child, in contraposition to traditional or sexual reproduction which combine those components into only one.⁶⁷³

Nowadays the developing field of assisted reproduction might introduce more contenders for the parentage of a child and in theory could create a more contested setting for motherhood as mitochondrial modification permits two different women to provide genetic material for one child, thus breaking the genetic contribution into two elements and potentially increasing the number of women who might claim motherhood and parentage. The first baby born healthy using mitochondrial modification therapy (MRT), or the so called “three parent baby”, is reported to have been born in April 2016 in Mexico, where researchers of the New Hope Fertility Centre in New York carried out the procedure, given that mitochondrial modification is forbidden in the USA. This chapter will analyse in depth the medical aspects of the procedure, in so far as these characteristics influence and shape directly the legal regulation of the procedure. At the same time this procedure will provide a window into the intricacies of how the law curtails the further uses of the technique and gives entitlement to the procreative material (fused egg) to one of the women. To this aim the chapter will explore the regulation of mitochondrial modification in the UK the first country in the world to have regulated the procedure and the resulting issues surrounding parentage.⁶⁷⁴

6.2 What is Mitochondrial modification replacement (MRT)?

“Mitochondria are found in the cell cytoplasm, which is a usually jelly-like fluid inside the cell that surrounds the nucleus and fills the cell.”⁶⁷⁵ Mitochondria can be explained in the following way:⁶⁷⁶

“Mitochondria are present in almost all human cells. They generate the majority of a cell’s energy supply. For any cell to work properly, the mitochondria need to be healthy. Unhealthy mitochondria can cause genetic disorders known as mitochondrial disease.”

⁶⁷³ Hill, above n. 562, at 354.

⁶⁷⁴ <www.newscientist.com/article/2107219-exclusive-worlds-first-baby-born-with-new-3-parent-technique/>.

⁶⁷⁵ Nuffield Council on Bioethics, *Novel Techniques for the Prevention of Mitochondrial DNA Disorders: An Ethical Review*, (2012), at 18 paragraph 1.3.

⁶⁷⁶ Human Fertilisation and Embryology Authority, March 2013 *Mitochondria replacement consultation: Advice to Government*, paragraph 2.7, at 8 <www.hfea.gov.uk/docs/Mitochondria_replacement_consultation_-_advice_for_Government.pdf>.

MRT is an in-vitro fertilization procedure that allows a woman with faulty mitochondria to have healthy genetic related children, and avoid transmitting the illness to her descendants, using a special method that involves the genetic material of two different women and a man. As a result, the child born from the procedure has DNA from three parents.

According to the researchers who carried out the successful mitochondrial modification to create the healthy baby, they used a method called ‘spindle transfer’⁶⁷⁷ which consists of extracting the female nuclear genetic material from unfertilized eggs pertaining to the woman suffering from mitochondrial disease, and transferring that material into unfertilized eggs pertaining to a healthy woman which have had the nucleus previously removed, but which contain healthy mitochondria. Then the resulting complex egg undergoes a cell membrane fusion applying .4 kV/ cm DC voltage and finally, “the reconstituted oocytes were fertilized by intracytoplasmic sperm injection (ICSI).”⁶⁷⁸ This technique is explained by the fact that Mitochondrial DNA (MtDNA) is contained in the cell’s cytoplasm while the chromosomal genes are contained in the nucleus.⁶⁷⁹ That is why the nucleus is removed from the mother’s egg and reinserted in the donor’s enucleated egg.

MRT is carried out to replace mutant mitochondria using any of three methods. The first method is metaphase spindle transfer (S/T), which is explained above. The second is pronuclear transfer (PNT), which is in essence the same procedure but in which the egg has already been fertilized,⁶⁸⁰ and therefore PNT is the transfer of the male and female nuclear genetic material from a fertilized egg into a fertilized egg which has the nucleus previously removed. Both eggs – the original and donor egg – are fertilized, with the same male semen and at the same phase.⁶⁸¹ The third method is polar body transfer (PBT).⁶⁸² This method is new and was assessed in *The UK Human Fertilisation and Embryology (Mitochondrial Donation) Report* in 2014. In contrast to the other two methods that require the extraction of nuclear DNA from both eggs – the donor’s and the mother’s eggs, PBT introduces the whole polar body into a donor’s enucleated egg. As a consequence, it does not require the extraction of the nuclear DNA from the mother’s egg.⁶⁸³ The PBT technique can be performed either with fertilized or unfertilized eggs. In the former case it transfers the first polar body while in the latter case it uses the second polar body.⁶⁸⁴

Pronuclear transfer implies the creation and destruction of embryos given that the method is performed on fertilized eggs whereas spindle transfer is performed on eggs before fertilization and so no embryos are discarded. As the researchers of the New Hope Fertility Centre in New York explained,

⁶⁷⁷ Zhang et al., above n 2.

⁶⁷⁸ At 376.

⁶⁷⁹ Tachibana M. et al. “Towards germline gene therapy of inherited mitochondrial diseases” (2013) 493 (7434) *Nature* 627-631. doi:10.1038/nature11647.

⁶⁸⁰ The medical term is Zygote which is defined as a “fertilized egg cell that results from the union of a female gamete (egg, or ovum) with a male gamete (sperm).” This is in contraposition to ‘oocyte’ which is the unfertilized egg, although the definition of the oocyte is an immature egg <www.britannica.com/science/zygote>.

⁶⁸¹ FDA Briefing Document, Cellular, Tissue, and Gene Therapies Advisory Committee Meeting # 59, February 25, 2014, at 12 <www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/BloodVaccinesandOtherBiologics/CellularTissueandGeneTherapiesAdvisoryCommittee/UCM385461.pdf>.

⁶⁸² The HFEA Addendum to “Third scientific review of the safety and efficacy of methods to avoid mitochondrial disease through assisted conception: 2014 update”, asserts: “Polar bodies are formed during the process of egg maturation and fertilisation; they contain mostly DNA (genomic) in the form of chromosomes, with very little surrounding material (cytoplasm).” <www.hfea.gov.uk/8807.html>.

⁶⁸³ I National Academy of Science Engineering and Medicine report, February 2016 <www.nap.edu/download/21871>, at 79, footnote 2, at 3.

⁶⁸⁴ HFEA, at [2.7], at 4.

they used the spindle transfer due to the fact that the patient preferred that method for “religious reasons”.⁶⁸⁵ Nevertheless, the bringing to life of the first baby with mitochondrial modification required using five eggs, from which only one was implanted into the mother affected by the disease.⁶⁸⁶

According to the researchers “the developed blastocysts⁶⁸⁷ were biopsied for preimplantation genetic screening (PGS) by array comparative genetic hybridization⁶⁸⁸ and whole quantitative genomic MtDNA analysis by Next Generation Sequencing.”⁶⁸⁹ This sophisticated genetic screening revealed the quantity of mutated mitochondria that was in the embryo before implantation.

Once the test was carried out it showed that the average level of the mother’s mitochondria inherited by the baby was less than 1.60 or 0.92%.⁶⁹⁰ This was one of the concerns assessed by the HFEAth, whose prediction based on non-human experiments were met in the first baby undergoing MRT, according to the data provided by the researchers.⁶⁹¹

6.3 2016 HFEAth Report

After the first baby had been born, and certain scientific information was released, the HFEA issued (in November 2016) the fourth scientific review of the safety and efficacy of methods to avoid mitochondrial disease through assisted conception. This report reassessed concerns put forward in previous reports, and made recommendations according to the state of science. In the review the Authority analysed the latest research and held a video-conference with Dr Zhang (a member of the New Hope Fertilization Centre team which had carried out the successful mitochondria transfer procedure), as well as with Professor Shoukhrat Mitalipov from Oregon National Primate Research Centre.⁶⁹²

One of the concerns re-evaluated by the 2016 report of the HFEAth was the apprehension that different mitochondrial haplotypes between the donor and the mother might potentially generate incompatibility between the mitochondria and the nucleus in the resulting child.⁶⁹³ However this point has been dismissed by several experiments carried out by the scientific community that show that MRT is safe even when the mother’s and the donor’s mitochondria have different group haplotypes

⁶⁸⁵ Zhang et al., above n 2.

⁶⁸⁶ Zhang et al., above n 2.

⁶⁸⁷ A blastocyst is the embryo after day 5 or 6 of cultivation <www.hfea.gov.uk/blastocyst-transfer.html>.

⁶⁸⁸ Bassem A Bejjani and Lisa G Shaffer “Application of Array-Based Comparative Genomic Hybridization to Clinical Diagnostics” (2006) 8.5 *The Journal of Molecular Diagnostics* 528-533, at 528: “Array CGH compares DNA content from two differentially labelled genomes. The two genomes, a test (or patient) and a reference (or control), are co-hybridized onto a solid support (usually a glass microscope slide) on which cloned or synthesized DNA fragments have been immobilized.”

⁶⁸⁹ Y Yang, B Xie and J Yan “Application of Next-generation Sequencing Technology in Forensic Science” (2014) 12(5) *Genomics, Proteomics & Bioinformatics* 190-197 (doi:10.1016/j.gpb.2014.09.001). Next generation sequencing allows “Millions or billions of DNA molecules [] be sequenced in parallel, thereby increasing the throughput substantially and minimizing the need for the fragment-cloning method often used in Sanger sequencing.”

⁶⁹⁰ Zhang et al., above n 2.

⁶⁹¹ Human Fertilisation and Embryology Authority, “Mitochondrial Donation: An Introductory Briefing Note”, October 2014, at [3].

⁶⁹² Human Fertilisation and Embryology Authority Fourth Scientific Review of the Safety and Efficacy of Methods to Avoid Mitochondrial Disease Through Assisted Conception, at 14 <www.hfea.gov.uk/media/fourth_scientific_review_mitochondria_2016.pdf>.

⁶⁹³ At [3].

as has been put forward by the HFEAth in the fourth report of November 2016.⁶⁹⁴ However, the panel continues to recommend that “consideration is given to MtDNA haplogroup matching as a precautionary step in the process of selecting donors.” And irrespective of the medical decision, information about the mother and donor halogroup should be recorded.⁶⁹⁵

Another concern was the carryover of mitochondria after having applied MRT, although the 2016 report confirmed that the carryover of mitochondria from the mother’s eggs is very low due to improvement in the techniques. In both methods – PNT and MST – the level of mitochondria was less than 2 per cent, which is considered safe and without probabilities of developing illness.⁶⁹⁶

An important concern from the ethical, social and medical point of view that has been revisited by the HFEAth is whether or not MRT should be applied to male embryos exclusively as a way to avoid genetic alteration in the germline. The HFEAth panel alludes to the FDA approach which limits mitochondrial transfer to male embryos exclusively, discarding the female ones, as a safety precaution to avoid inherited genetic modification by the female progeny, until further research settles the uncertainties of the technique.⁶⁹⁷

The FDA report indicated that if applied to women, MRT is a ‘germline alteration’ since, given that mitochondria is transmitted by maternal lineage, any change in the mitochondrial genome will pass to successive generations, and those effects can endure forever. Likewise the report highlighted that MRT constitutes an irreversible genetic modification⁶⁹⁸ affecting “every cell type of the resulting individual.”⁶⁹⁹ The FDA panel concluded that MRT to produce male offspring would not constitute a heritable genetic modification.⁷⁰⁰

In contrast to the stance of the FDA, the UK Panel maintained the opinion of the 2014 report, and remained in favour of the application of MRT on embryos of both genders without exclusion of female embryos. This position was supported by several factors. First, selecting only male embryos for MRT implies additional manipulation that could affect the fragile embryo and which could decrease the number of existing embryos for transfer. Second, as a consequence of the first factor, the technique’s efficiency is altered, and would likely provoke reiterated cycles. Third, the fatality of normal female embryos is involved. Lastly the panel pointed out a legal hurdle, given that “under the HFE Act, sex selection is only permitted for sex-linked diseases, which do not include diseases due to mutations in MtDNA.”⁷⁰¹

The report analysed the safety of MRT methods contemplated by the United Kingdom, and made technical recommendations in accordance with the latest developments concluding that MRT could be approved in cases with severe mitochondrial problems asserting: “in specific circumstances, MST and PNT are cautiously adopted in clinical practice where inheritance of the disease is likely to cause death or serious disease and where there are no acceptable alternatives.”⁷⁰²

⁶⁹⁴ At 5.

⁶⁹⁵ At 7 and 8.

⁶⁹⁶ At 24.

⁶⁹⁷ At 32.

⁶⁹⁸ NASEM, above n 5, at 6 asserts that genetic modification is the changes to the genetic material within a cell.

⁶⁹⁹ Abstract at XIV.

⁷⁰⁰ At 89.

⁷⁰¹ HFEAth 2016, above n 692, at 33.

⁷⁰² At 3.

6.4 The UK regulations

The UK Human Fertilisation and Embryology (Mitochondrial Donation) Regulations 2015 (hitherto, HFER 2015) is the world's first legal framework regulating MRT. It was also the first to contemplate the possibility of implementing or regulating mitochondrial modification therapy as was established in s 3ZA(5).⁷⁰³ The HFEA 2008 asserts that regulations may establish that an egg or embryo can be permitted, in spite of that egg or embryo having "had applied to it in prescribed circumstances a prescribed process designed to prevent the transmission of serious mitochondrial disease."⁷⁰⁴ The 2015 law considers the woman who provides the healthy mitochondria to be a mere donor,⁷⁰⁵ as was recommended by the HFEA's mitochondrial replacement consultation, which deemed that "mitochondria donors should have a similar status to that of tissue donors".⁷⁰⁶ Section 12 of the HFER 2015 modified the HFEA 2008 to clarify that a child conceived through MRT is not considered to be related to the mitochondrial donor, or to any other child who was or might be born using the same donor's mitochondria. Subsequently there is no right to access information for the purpose of marriage, or entry into a civil partnership, or to have or to intend to have any intimate physical relationship. The reason for disregarding this information might be that MtDNA is transferred by the maternal line, that is, men do not transfer their mitochondria to the offspring: "During fertilization, the oocyte and sperm each bring their mitochondria to the union. Shortly afterward, the paternal mitochondria are degraded, and only the maternal mitochondria are conveyed to the progeny."⁷⁰⁷ That is, all sperm mitochondria which might be in the fertilised egg are destroyed, due to a process that has only recently been understood.⁷⁰⁸

Section 16 establishes that once the mitochondrial replacement therapy has been performed using either eggs or embryos, neither of the persons providing genetic material can vary or modify the consent. This provision reflects the circumstance that once the procedure is done it is too late to change one's mind or to reverse the irreversible,⁷⁰⁹ because MRT implies a fusion of the respective parts of the eggs used in the treatment.

Sections 4 and 7 set out the process or method for replacing the mitochondria, either in the egg (Section 4) or in the embryo (Section 7). Those methods are the ones described above. In both cases the regulations establish three conditions with the objective that genetic manipulation performed through the in-vitro reproduction process is restricted to repairing faulty mitochondria in patients affected by the disease, precluding the use to other purposes. Those conditions are the following: First, the HFEA must have issued a determination that there is a particular risk that any "egg extracted" (s 5) or "embryo created by fertilization" (s 8) from the woman whose egg is affected by the mitochondrial disease (egg B) "may have mitochondrial abnormalities caused by mitochondrial DNA". Second, that "there is a significant risk that a person with those abnormalities will have or

⁷⁰³ As drafted by the HFEA 2008, s 3.5.

⁷⁰⁴ HFEA 2008, s 3.5.

⁷⁰⁵ The Human Fertilisation and Embryology (Mitochondrial Donation) Regulations 2015. In s 11, the last paragraph asserts that the "mitochondrial donor in respect of a person who was or may have been born in consequence of treatment services using such a permitted egg or such a permitted embryo is the person whose mitochondrial DNA (but not nuclear DNA) was used to create that egg or embryo." <www.legislation.gov.uk/ukdsi/2015/9780111125816/contents>.

⁷⁰⁶ HFEA, above n 675, at [2.7], at 8 n 4.

⁷⁰⁷ Qinghua Zhou "Mitochondrial Endonuclease G Mediates Breakdown of Paternal Mitochondria Upon Fertilization" (2016) 353(6297) *Science* <<http://science.sciencemag.org/content/353/6297/394>>.

⁷⁰⁸ Zhou, above n 707.

⁷⁰⁹ NASEM, above n 5, at 5 asserts: "The effects of the genetic modification performed on oocytes or zygotes, once carried out, would not, at this time, be reversible."

develop serious mitochondrial disease". Third, egg B was extracted or embryo B created by the fertilisation of an egg extracted from the ovaries of the woman suffering the mitochondrial disease, that is, the egg without the mitochondria, but, whose nucleus will be inserted in egg A (donor's egg).

Furthermore, ss 3(c) and 6(c) require that no other alteration of DNA or addition of cells should be carried out on the recomposed egg or embryo which was created once the therapy was applied. In this way, this precludes that MRT might serve as a means of performing selective DNA in the nucleus or that the technique is used for other non-therapeutic purposes.⁷¹⁰ This issue was one of the main concerns surrounding the use of MRT given that if not framed appropriately, it is the gateway of entry of other genetic modifications performed with other purposes such as enhancement, selective breeding or gender selection.⁷¹¹

The reconstituted eggs are not deemed to be mitochondrial donor eggs, but rather they belong to the person whose nuclear DNA was used.⁷¹² The purpose of this provision is to guarantee that the person who provides the nuclear DNA retains the control of the egg or embryo.⁷¹³ This legal consideration might reflect genetic reality given that "MtDNA makes up less than 0.25% of the total DNA content of our cell."⁷¹⁴

6.5 The right to know

The HFER 2015 has introduced considerable changes in regard to the information provided to donors or to donors' offspring in cases of mitochondrial modification, restricting the identifying information but providing other particularities, mainly medical, but without disclosing the identity of either the mitochondrial donor or her offspring. Sections 11 to 15 are dedicated to modifying ss 31ZA to 31ZE, with the aim of ensuring that identifying information is not provided under mitochondrial donation. Section 19 is enacted with the same purpose. Section 11 modifies s 31ZA and introduces, after subsection (2), subsection (2A) which contemplates which kinds of information will be provided. The proviso is that any information given should not communicate in any way, either by itself or in conjunction with other information granted to the applicant, anything that would make it possible to identify the donor or any other children born using genetic material from the applicant's mitochondrial donor. Section 12 modifies s 31ZB, adding a subsection (6) in order to make it clear that for the purpose of this section a mitochondrial donor-conceived person is not understood to be related to either the mitochondrial donor or any person born as a result of MRT carried out "using genetic material from the applicant's mitochondrial donor."

The restrictive approach taken by the law in regards to the disclosure of information related to mitochondrial donors contrasts with the full identification given to gamete donors or their progeny, although the rationale behind this differentiation is the role that MtDNA and nuclear DNA play in the perceived characteristics of a person: "The impact of mitochondrial DNA is limited to powering the cells of the body and... it does not have any impact on the physical characteristics and personality traits of any resulting child, which come solely from nuclear DNA."⁷¹⁵

⁷¹⁰ HFEAth, above n 675, at [2.7], at 8, [1.11].

⁷¹¹ Nuffield Council, above n 674, at 82.

⁷¹² HFE Regulations, above n 705, s 17.

⁷¹³ At [7.12].

⁷¹⁴ Butler, J. M. *Forensic DNA Typing: Biology, Technology, and Genetics of STR Markers* (2nd ed.) (Amsterdam and Boston, Elsevier Academic Press, 2005), at 242.

⁷¹⁵ HFE regulations, above n 705, at [7.9]. See also National Academy of Science Engineering and Medicine report, above n 683.

Regulation 18 modifies s 54 of the HFEA 2008 establishing that, when donation of mitochondria applies, the woman who provides the mitochondria used in the creation of the permitted egg or embryo is not considered to be a gamete provider for the purpose of that section. That is, the mitochondrial donor woman is not qualified to apply for a parental order (as in a surrogacy agreement) on the grounds of that donation alone.⁷¹⁶

6.6 Legal determination of parenthood using different models

Under UK law the woman who provided the mitochondria being used by the woman is not considered to be the same as other gamete donors. As noted above, Regulation 12 of the HFER 2015 modifies s 31ZB of the HFEA 2008 to clarify that the mitochondrial donor is not related to any child born, or who may have already been born, following treatment services. As a consequence, the data provided to both donor and child is restricted to information that does not identify. Furthermore, the donor is not considered to be a gamete provider for the purpose of asking for a parental order in a surrogacy arrangement. In addition, s 47 is emphatic in that it uses as its title “Woman not to be other parent merely because of egg donation.” In view of the legal treatment of the mitochondria donor it is not possible that she could be declared as a mother of a child.

MRT implies the donation of eggs from a healthy woman to the one affected by the mitochondrial disease to help her to conceive a child. Despite the fact that the child has genetic material of two women, the woman who provides the mitochondria is considered a mere donor, similar to any other gamete donor. Only the mitochondria donor’s status is not as relevant as that of a gamete donor, which is a reflection of the advice given to government by the HFEA who asserted: “The Authority advises that mitochondria donors should have a similar status to that of tissue donors. Children born of mitochondria replacement should not have a right to access identifying information about the donor when they reach the age of 18.”⁷¹⁷

There are three main methods to determine legal parentage based on the relationship between adults and children:

- (1) The gestational model is the traditional method to ascertain parentage. In this model the mother who gives birth and her spouse are deemed the legal parents; and
- (2) the genetic model, which is based on the DNA connexion to the child or shared DNA with the parents; and
- (3) the intentional model based on the intention to be a parent and to provide for the child.

The intentional model was applied by the Supreme Court of California in 1993 in *Johnson v. Calvert*⁷¹⁸ when confronted with a case where two women claimed motherhood over a child based on their separate genetic and gestational contributions to the procreation of the child. The Court was required to decide who was the legal mother of a child born through a gestational surrogacy contract carried out between Anna Johnson, as the carrier or gestational mother, and Crispina Calvert and her husband as intentional and genetic parents.

The case involved the following: The Calverts were a married couple who wanted to have a child but could not do so alone due to a medical condition of the wife. Therefore they considered using a surrogacy arrangement. In 1990, the Calverts signed a surrogacy contract with Johnson. The arrangement stipulated that Johnson would be impregnated with an embryo created by the genetic

⁷¹⁶ At [7.12].

⁷¹⁷ HFEAth, above n 675, at [2.7], at 8.4, at 5 paragraph 11.3.

⁷¹⁸ *Johnson v. Calvert*, 851 P.2d, 782 (Cal. 1993).

material of the Calverts, and that Johnson would relinquish all parental rights in the resulting child in favour of the Calverts. During the latter stages of the pregnancy, the relationship between the surrogate and intending parents deteriorated, and the surrogate threatened with refusing to give up the child once it was born. The Calverts filed a law suit seeking to be recognised as the parents of the unborn child, and Johnson retaliated with her own suit to be declared as the mother. The two suits were eventually consolidated into one.

In examining California legislation, the Court encountered that under California legislation both women could claim motherhood, although California Law allows only one woman to be declared as the legal mother. Under this condition the Court applied the intentional test and declared Cristina Calvert and her husband to be the legal parents.⁷¹⁹ After this test was applied, California and other states have adopted the test in regulating legal parentage in the context of artificial reproduction technologies. Likewise, the *Uniform Parentage Act* (UPA) in Article 8 also incorporates the intentional test in surrogacy agreement.

The contest of two women over a child was the issue at stake in the conflicting surrogacy case mentioned above where the gestational and genetic mother both claimed motherhood. MRT could generate similar disputes where two genetic women – the mitochondria provider and the nucleus provider – both seek to be declared the child’s mother. The dispute could be theoretically even more complex in surrogacy arrangements where the gestational mother might be added as a further maternal claimant, in addition to the two genetic mothers. To prevent this situation the HFER 2015 amended s 54 of the HFEA 2008 prohibiting a mitochondrial donor from seeking a parental order based on her mitochondrial contribution. Nevertheless, if she is the partner of the woman for whom she provides the mitochondria she will be declared the mother, but not based on the fact of the donation. Section 42 of the HFEA 2008 sets out that a woman in a civil partnership with another woman might be declared to be a parent, subject to other conditions stipulated in the law, if consent was given for the placement of the embryo or artificial insemination of her partner.

As has been explained above, Regulation 17 amends paragraph 22 of Schedule 3 of the HEFA 2008, asserting in paragraph 3B (3B): “For the purposes of this Schedule, in a case where an egg is permitted egg by virtue of regulations under section 3ZA (5) the egg is not to be treated as the egg of the person whose mitochondrial DNA (not nuclear DNA) was used to bring about the creation of that permitted egg.” In short, the UK regulatory scheme precludes that two women can compete for motherhood, or that two women might be declared to be the legal mother on the grounds of the mitochondrial genetic contribution.

Taking into account that the first baby was born in a country without mitochondrial donation regulation, and that MRT would be applied in an international context, it is not possible to discard a situation where, due to the split in the genetic roles over two women, maternity could be disputed by two women or even by three if the child is carried by a surrogate. The case could be one where a healthy woman, woman A, assists through donation with her eggs in the procreation of a child for woman B, who desires to have and to raise her own child but who is affected by mitochondria disease, with the condition that the mitochondrial provider (woman A) will not be the child’s mother. Woman B then makes a surrogate arrangement with woman C. After the baby is born, woman A, a single woman, falls in love with the baby and sues to be declared the baby’s mother. The Court orders a DNA test to decide who is the mother and finds that both A and B are related to the child. Following, *mutatis mutandi*, the argument of the Supreme Court of California in *Johnson v. Calvert*, the Court should agree that “Because two women each have presented acceptable proof of [genetic] maternity, we do

⁷¹⁹ *Johnson v. Calvert*, above n 718.

not believe this case can be decided without enquiring into the parties' intentions as manifested in the agreements between both women."⁷²⁰

Although the Act does recognize genetics as a means of establishing the relationship between a mother and child, when the child's DNA does not coincide with that of one particular woman, but rather with two different women, "she who intended to procreate the child – that is, she who intended to bring about the birth of a child that she intended to raise as her own – is the natural mother."⁷²¹

Applying the intentional test, the legal mother is woman B, who had the initial intention to be the child's mother, to raise the child as her own, and who planned in advance and followed the steps in order to bring the child to life. The result under the intentional test is to declare as the legal parent the intended mother – the woman who initially wanted to be the mother – and not woman B who simply changed her mind at the last moment, but did not have the intention to become a mother. Had woman B known that woman A's participation was not a real donation, she would not have accepted to be assisted by woman A.

Under the genetic model the women who share their DNA with the child are the genetic mothers, but because both women are genetically related with the child, a DNA test is useless to decide the maternity claim, as was revealed when the Court had the test result.

6.6.1 Gestational test

Under the gestational test the woman who carries the baby and gives birth to it is the natural mother. Thus, following the hypothetical case above, if woman B carries her own baby she would be declared to be the mother as she gives birth to the child. In this case, the intentional test and the gestational test have the same outcome. But if woman B agrees with a gestational carrier named C, then in virtue of the gestational test it would be the third woman (C) who would be declared the child's mother, even if she does not intend or desire to be the child's mother, and even though she does not claim motherhood at all. In this case the gestational model fails because it designates as a legal mother a woman who does not want to be the child's mother.

6.6.2 Genetic test

According to this model the women who shared the DNA with the child are considered to be the legal parents, but as we set out above, two women – the mitochondrial donor and the nucleus provider – are related to the baby in the sense that both share DNA with the child, and so both could be declared the mother and are equally important if we consider that procreation required both genes. The outcome of the case applying the genetic model is that the child will have two legal parents and perhaps three if we assume that the sperm provider was not a mere donor. The consequences depend on the expectations of the parties involved in the case. If woman A is a donor, as is assumed in the theoretical example, the result is not the optimal one because A does not want to be designated the child's mother. If it is a conflict between the two mothers, the genetic test could not settle the issue. A different outcome is that both women are designated as mothers if they agree, or are in a partnership, otherwise the Court needs to work out the terms of the custody agreement. This third result entails developing a completely new legal scheme to provide for those cases where there exist three legal parents, which is different to the case of *de facto* parents that is sometimes admitted by the courts and regulations in the USA.

⁷²⁰ HFEAct, above n 675, at [2.7], at 8 n. 51.

⁷²¹ At [2.7], at 8 n. 51.

For same sex couples the designation of both women as legal mothers is already obtained under UK law if they live in civil union. Nevertheless the legal framework to declare three parents already exists in California⁷²² where the legislature allows the Court to recognise rights and obligations to more than two adults over a child if it finds that not doing so could be “detrimental” to the child.⁷²³ Although that declaration is not to be made in the moment of birth or based on the parties intention, but rather it is a recognition that is affirmed by the Court, taking into account the child’s best interests, based on the circumstances and evidences presented when they are deciding the case.

Section I paragraph (c) of the California Senate Bill 274 asserts:

“This bill does not change any of the requirements for establishing a claim to parentage under the *Uniform Parentage Act*. It only clarifies that where more than two people have claims to parentage, the court may, if it would otherwise be detrimental to the child, recognize that the child has more than two parents.”

Therefore, it seems more that the Californian Law allows the recognition of a *de facto* parent-child relationship than allowing the child to have three parents at the moment of birth. In that case, the Californian Law recognises three parents, that could be applied in the MRT context if two women have the intention of bringing a child into being.

In view of this, the intentional model or test is revealed as being the most suitable for deciding the conflicting situations concerning parentage in contests deriving from MRT because the mitochondrial supplier could be considered a contributor of genetic material to the creation of a child or a mere donor according to the intention manifested in the agreement prior to conception.

MRT is a reality in the UK where the HFEA has approved the technique in clinical treatments, and the Newcastle Fertility Centre – a pioneer research institute – has applied to obtain the first licence. According to the Centre the objective is to offer up to 25 MRTs per year, as long as they have enough egg donations.⁷²⁴

6.7 Conclusion

The exploration of MRT regulation in the UK brings to light how the law disenfranchises one of the two women to confer rights or entitlement to the fused egg to the other, thereby predetermining who will be considered the child’s legal mother, without actually ascertaining motherhood. This deprives the mitochondrial donor of the potential claim of parenthood based on the genetic contribution and reducing her contribution to the status of tissue donor on account of the primacy of the nuclear DNA over the mitochondrial DNA. Therefore, if the fused egg is implanted directly in the uterus of the woman with the right to use the fused egg, she will become the legal mother. This situation exposes the fact that entitlement to use the procreative material influences parenthood. The chapter has also examined the use of MRT to bring into life the first healthy baby and the details of the procedure which put forward the safety of the medical intervention and the selection of spindle transfer because it is performed using unfertilized eggs, rather than with fertilized eggs.

⁷²² California Senate Bill No. 274 <http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=2013201405B274>.

⁷²³ At 1.

⁷²⁴ <www.ncl.ac.uk/press/news/2016/12/worldsfirstmitochondriallicence/>.

7. Cross Border Issues and Private International Law

The thesis embarks on an examination of the hurdles that the determination of parenthood encounters in an international context. This is important since the allocation of parenthood in one country might not be recognised in another, creating conflicting outcomes. Therefore, it is crucial to consider the effectivity and certainty of the determination of parenthood, given that disruptions to the determination of parenthood in another country renders the initial allocation inoperable, creating uncertainty and adverse effects for children's rights. Conflict of laws is relevant to the topic of how to allocate parenthood of children born from assisted reproduction, taking into account that the use of these technologies takes place in a cross-border environment.

Until the advent of assisted reproductive technologies, private international law relating to parentage did not materialise due to the fact that the definition of legal parenthood was universal, in so far as the genetic and legal terms coincided, save cases of adoption or rebuttal of the marital presumption of parenthood.⁷²⁵ Nevertheless, new technologies of assisted reproduction are giving rise to an increasing number of applications of conflict of laws to decide the applicable law, and probably set up a more complex scenario for determining parenthood in cross border situations.

In particular, cross border surrogacy gives rise to a clash between the law of the forum country, or *lex fori*, and the country designated by the application of the choice of law rule. The parentage of children born from AHR differs because national laws confer legal parentage to different people involved in the procreative project. The discordance of laws has, in some cases, led to children being parentless and stateless, which has a direct impact on children's human rights. It is likely that the brandishing of public policy exceptions as a measure to exclude the application of the foreign law, when the choice-of-law-rules designate this as the applicable law, equally infringes children's human rights. On the other hand, traditional connecting factors used in determining or deciding which law to apply, such as domicile, residence and nationality are becoming unsuitable for the purposes of appointing an applicable national law, in so far as they are contingent on legal parenthood. The Hague Conference on Private International Law (HCCH) has undertaken the Parentage/Surrogacy project with the aim of resolving the problem created by children born in foreign jurisdictions, in particular the recognition and enforcement of judgments concerning parentage.⁷²⁶ Focusing on this project, and in particular on the situation of children born from surrogacy and other ARTs, this chapter will examine some problematic areas from the perspective of private international law, such as connecting factors and the public policy exception. It is contended that a limitation or restriction on public policy is a condition to guarantee the effectiveness of a future convention.

The thesis embarks on an examination of the hurdles that the determination of parenthood encounters in an international context, given that the allocation of parenthood in one country might not be recognised in another, thereby creating conflicting outcomes. It is important to consider the

⁷²⁵ KM Norrie "Reproductive Technology, Transsexualism and Homosexuality: New Problems for International Private Law" (1994) 43(4) *International and Comparative Law Quarterly* 757-775, at 757 and 758.

⁷²⁶ HCCH Report of the Experts' Group on the Parentage/Surrogacy Project (meeting of 28 January – 1 February 2019) <<https://assets.hcch.net/docs/55032fc1-bec1-476b-8933-865d6ce106c2.pdf>>.

effectivity and certainty of the determination of parenthood given that it is the precursor of children rights. Conflict of laws is relevant to the topic of how to allocate parenthood of children born from assisted reproduction, taking into account that the use of these technologies takes place in a cross-border environment.

Posthumous reproduction constitutes another assisted reproductive technology which might create conflicting outcomes for the determination of parenthood or cross-border issues. For instance, some legal systems do not recognise the mother's deceased partner as the child's father if his gametes were used after his death. Other countries' legislations do deem the mother's deceased partner to be the child's father, even if the child is conceived after the death of the mother's partner. Thus, posthumous reproduction might generate cross border refusal of fatherhood of children conceived posthumously who move from permissive to restrictive countries, although as yet such a case has never eventuated.

7.1 Current practical situation

Some countries around the world prohibit, or have restrictive rules on, surrogacy. As a consequence, some citizens who are unable to have children naturally have chosen to travel to other countries where surrogacy is permitted in order to have access to surrogacy, either altruistic or commercial. Likewise, the restrictions on surrogacy translate or extend to parentage rules, such that countries with restrictive surrogacy laws may consequently decide to not recognise the intending parents as parents, creating a situation where the children concerned are stateless and parentless.⁷²⁷ This situation is being addressed by the HCCH in view of the adverse effects that the lack of recognition of legal parentage recognition has on children's rights. In particular, it is necessary to take into account that the surrogate will have already relinquished the child and is not considered the legal parent in the country of birth. In the same vein, it is necessary to recognise that in some countries, legislations simply omit any legal scheme for transferring parental rights from the surrogate to the parents, or hamper the ability to ascertain parenthood directly by a cumbersome legal requirement that confers parenthood to the surrogate and her partner.

Conferring parenthood in favour of the surrogate and her husband entails allocating parenthood to unintended parents, who neither have planned nor have the intention to raise the child. Hence, in the time between the child's birth and the final acquisition of parental rights and responsibilities, the intended parents are hampered, in legal terms, as far as their ability to take care of the child properly, as they lack entitlement to make decisions concerning the child.

It is herein assumed that having 'legal parents' means having parents who are willing and able to fully exercise the parental rights and responsibilities in relation to the child, that is, the adults who are eager to raise the child. In AHR, where several persons can claim parenthood, designating as a legal parent someone who expects to relinquish (or indeed who may have already surrendered) the child, is a misnomer. On the other hand, in cross-border surrogacy, situations in which the child's birth certificate is not accepted in the parents' country of residence when they arrive home with the child impedes those parents from exercising parental rights.⁷²⁸ This is the case with cross-border surrogacy when the 'legal parent' designated by the application of the rules of conflict of laws is a surrogate in another country who has already relinquished the child, and consequently has also surrendered her rights and responsibilities as a parent. Besides, the surrogate is normally not considered to be the

⁷²⁷ Preliminary Document No 10 of March 2012 for the attention of the Council of April 2012 on General Affairs and Policy of the Conference. Hague Conference on Private International Law, at 4 <<https://assets.hcch.net/docs/d4ff8ecd-f747-46da-86c3-61074e9b17fe.pdf>>.

⁷²⁸ Byrn and Ives, above n 12.

child's legal parent according to the laws where the child was born. All the while, the intending parents are not yet recognised as being the legal parents, and therefore cannot legally exercise the rights and responsibilities of parenthood.

Public policies with objectives that are alien or divorced from the child's welfare should stray into different legal mechanisms, without interfering in the determination of parenthood. Using the determination of filiation or parentage for addressing the problems that might arise from surrogacy creates problems and endangers children. On the other hand, this approach also conflates children's and parent's rights.

The parentage relationship sets up the basis for conferring children rights. In the context of immigration, a study commissioned by the European Parliament Department of Children Rights recommended: "EU [Members States] should adopt a lenient approach in the child's best interests to the recognition of parent-child relationships established abroad (in particular in third States), and the determination of the applicable law to parentage in such cases. The use of alternative connecting factors is recommended as a means of facilitating the determination of the applicable law."⁷²⁹

7.2 Current situation from the perspective of private international law

Currently there is no private international convention dealing with enforcement of judgments concerning parentage, or automatic recognition of parentage, given that all of the Hague Conventions on enforcement of judgments specifically exclude parentage. For instance, the 2018 Draft Hague Convention on the Recognition and Enforcement of Judgements excludes the status or capacity of persons and family matters from the scope of the convention.⁷³⁰ The Convention of 1st of February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters excludes "the status or capacity of persons or questions of family law" in its Article 1.⁷³¹ Likewise, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children does not contemplate the determination of parentage.⁷³²

In the realm of the European Union, there is also a lack of regulation on the matter of enforcement of judgments concerning parentage. Despite the mandate of The Treaty on the Functioning of the European Union, which bestows competence to introduce uniform regulation within the member states,⁷³³ the determination of parentage is a matter left to each country, given that neither the

⁷²⁹ "Children on the Move: A Private International Law Perspective". Study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, at 33 <[http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583158/IPOL_STU\(2017\)583158_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583158/IPOL_STU(2017)583158_EN.pdf)>.

⁷³⁰ See article 2 of the Draft Convention on the Recognition and Enforcement of Foreign Judgments (24-29 May 2018) <<https://assets.hcch.net/docs/23b6dac3-7900-49f3-9a94-aa0ffbe0d0dd.pdf>>.

⁷³¹ Convention on the Recognition and Enforcement of Foreign Judgements in Civil and Commercial Matters (signed 1 February 1971, entered into force 20 August 1979) 1144 UNTS 249 (Hague Judgments Convention).

⁷³² Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (adopted 19 October 1996, entered into force 1 January 2002) 2204 UNTS 95. Article 4.1 (a) excludes "the establishment or contesting of a parent-child relationship".

⁷³³ Article 81 of the Treaty on the Functioning of the European Union (TFEU) Official Journal C 326, 26/10/2012 Treaty of Lisbon, signed on 13 December 2007.

Brussels II bis regulation⁷³⁴ nor the Brussels IIa recast⁷³⁵ apply to the recognition of parentage. Likewise, Brussels I Regulation recast⁷³⁶ of the European Parliament and of the Council, paragraph 2 (e) of Article 1, referring to the scope of the application, rules out “maintenance obligations arising from a family relationship, parentage, marriage or affinity;”,

This omission and the acknowledgement that some children involved in cross-border birth are considered parentless and find themselves in stressful situations, has triggered the commitment of the Hague Convention on Private International Law to the parentage/surrogacy project already mentioned.⁷³⁷

7.2.1 Connecting factors

The fact that parentage is the precursor of children’s rights⁷³⁸ and status, together with the reality that a baby cannot have a domicile or habitual residence by him or herself, unrelated to that of their parents, renders inoperative connecting factors such as domicile, habitual residence or even nationality, where the issue at stake is the child’s legal determination of parenthood. Looking at the conflicting norms on parentage, if the connecting factor is the child’s domicile, residence or even nationality, the applicable law would be that of the place where the child is domiciled. However, the child’s domicile, residence and nationality depend upon the parents’ domicile, and so parentage should first be determined in order to know child’s domicile, residence or nationality. Clearly, this leads to an endless loop.⁷³⁹

The analysis of *Re X and Y (Foreign Surrogacy)*⁷⁴⁰ illustrates why traditional connecting factors that are applicable in conflict of law cases are not suitable for the establishment or recognition of parentage. *Re X and Y (Foreign Surrogacy)* concerned an application for a parental order under English law to obtain parenthood over twins born in Ukraine as a consequence of a surrogacy agreement between a British couple and a Ukraine surrogate. The children were genetically related to the intended father, although intended mother had recourse to donor ova.

If it is assumed that the children’s parents are the British couple, it follows that the children are domiciled in England, and hence English law is applicable. However, in actual fact we have an absurd situation in that under English law the British couple are not the children’s legal parents. On the other hand, if the children’s parents are assumed to be the surrogate and her husband, Ukrainian norms would be applicable. Yet under Ukrainian legislation the surrogate and her husband are not considered to be the children’s legal parents. As the English Court explained, the problem arises from the fact that under the Ukrainian surrogacy legal framework, the British couple were the twin’s legal parents,⁷⁴¹ thus the children were not Ukraine citizens, nor did they have the right to residence there. On the

⁷³⁴ Regulation (EC) No 2201/2003, concerning jurisdiction and the recognition and enforcement of judgement in matrimonial matters and matters of parental responsibility (Brussels IIBis) article 4 (a). and Art. 1 (3) a). respectively.

⁷³⁵ Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast). 2016/0190 (CNS) <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0411&from=EN>>.

⁷³⁶ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on the jurisdiction and enforcement of judgments in civil and commercial matters. (recast) [2012] OJ L351/1.

⁷³⁷ HCCH, above n 726.

⁷³⁸ Hague Conference on Private International Law, “A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements,” Prel. Doc. No 3C paragraph 105.

⁷³⁹ Norrie, above n 725, at 763.

⁷⁴⁰ *Re X and Y (Foreign Surrogacy)*, above n 243.

⁷⁴¹ At [8].

other hand, according to English law the surrogate woman and her husband were the children's legal parents.⁷⁴² Therefore, the children had neither British nationality nor right to residence in the UK, nor did they have Ukrainian nationality or the right to residence in the Ukraine. This situation led the judge to assert: "The effect of all this was of course that these children were effectively legal orphans and, more seriously, stateless."⁷⁴³

Some scholars have suggested discarding domicile as a connecting factor, and have recourse to the law "with which the relationship has the closest and most real connection", bearing in mind that parentage is not merely a status but is also a parent-child relationship.⁷⁴⁴ Nevertheless, recourse to connecting factors other than the personal law or domicile of one of the parties in the relationship does not avoid conflicting outcomes which lead to surrogate born children being parentless, unless the connecting factor leads to a specific country's law regulating surrogacy.

Selecting the child's birth place as a connecting factor in order to decide the law applicable, without accepting renvoi, would give certainty in the selection of the law that is applicable to the substance. For instance, the Rome I Regulation excludes renvoi when referring to the selected law that is applicable.⁷⁴⁵ The selection of a more protective law than what would be determined by the application of normal choice of law rules has been implemented in Rome I. For example, the domicile of the consumer is preferred in questions of liability for wrongful manufacture. This approach in the application of the choice of law rules may be implemented within a convention regarding the enforcement of parentage, taking into account that it would lead to a less disruptive outcome, and it would protect children's filiation and consequently their rights. The only exception to this connecting factor could be based on the best interests of the child, that is, in cases in which the application could lead to a result which is contrary to the child's best interests. In effect, the group of experts of the Hague Convention Parentage Surrogacy Project were of the view that the best option is to use the state in which the child is born as the main connecting factor in international surrogacy arrangements, given that the connecting factor applied for selecting the law in cases of general parentage was not suitable for international surrogacy arrangements (ISAs).⁷⁴⁶ Indeed, selection of the country of birth as a connecting factor to choose the applicable law leads to the country which regulates the practice of surrogacy or other AHR procedure, so the child will not be left parentless.

7.2.2 Public policy

Public policy is a legal mechanism whereby the country forum excludes the application of a foreign law or judgement enforcement which otherwise would have been admitted, according to the forum rules related to the conflict of laws.⁷⁴⁷ The public policy exception excludes the applicable foreign law or the enforcement of foreign judgements when the choice of law rules designate a law which is considered to be contrary to essential values of the state.⁷⁴⁸ The essence of a public policy exception is precisely the defence of national "public law values", "the domestic system of private law" or

⁷⁴² Section 28.2 of the HFEA 1990.

⁷⁴³ *Re X and Y (Foreign Surrogacy)*, above n 243, at [9].

⁷⁴⁴ Norrie, above n 725, at 763.

⁷⁴⁵ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) OJ L 177, 4.7.2008. Article 20 sets out: "The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law, unless provided otherwise in this Regulation."

⁷⁴⁶ HCCH, above n 726, at 4 at [15].

⁷⁴⁷ Alber Venn Dicey et al. *Dicey, Morris and Collins on the Conflict of Laws* (15th edn, London, Sweet & Maxwell/Thomson Reuters, 2012).

⁷⁴⁸ Joost Blom "Public Policy in Private International Law and its Evolution in Time" (2003) 50(3) *Netherlands International Law Review* 373-399.

“international customary and treaty Law.”⁷⁴⁹ However, the way public policy functions, and its underlying values, is complex.⁷⁵⁰ Prevention of infringement of those values that the public policy defends merits the deployment of the exception.

However, courts have also recognised restrictions or limitations in the implementation of the public policy exception in private international law. An unfettered use of the public policy exception, so as to exclude the application of the foreign law or to disregard the enforceability of a foreign judgment, can lead to the destabilization of the private international law system.⁷⁵¹ In this respect, in its resolution concerning cultural differences and public order in private family international law, the Institute of Droit International stated that endemic exclusion of laws from countries of different cultural backgrounds disregards the necessity of harmonising the legal system.⁷⁵²

7.2.3 Limitations of public policy as a solution, and the scope of limitations

Of particular concern are cases where there is a decree or judgment issued by a foreign court (the court in the Surrogate’s country) with jurisdiction in the matter and following procedural guarantees, and yet the forum court (the court in the Intending Parents’ country) brandishes public policy to refuse the recognition or enforcement of the judgement.

In cross border surrogacy, a question arises concerning the purpose of the public policy exception, which denies the enforcement of the judgment and consequently the recognition of the child’s parentage as ascertained abroad, and the effects this produces on the child’s rights, bearing in mind that the consequence of this is that the child might be legally considered parentless. On the one hand, the court in the intended parents’ country is entitled to refuse the legal parentage ascertained abroad. On the other hand, the surrogate and her husband have already relinquished rights over the child, leaving the child parentless. Ultimately, then, the wielding of the public policy exception leads nowhere, and in pragmatic terms is useless. Certainly, such a scenario is not favourable to children nor even to society as a whole.

Likewise, regarding the choice of law rule, it seems to be a problematic and antagonistic result which designates as the law that is applicable to the case a law from a country which does not recognise the parentage of a child born using AHR, or that deems the child’s parents to be people who have already relinquished the child, and who are subject to a foreign jurisdiction with contrary rules on the determination of parenthood. Furthermore, the systematic invocation of public policy in some jurisdictions impedes the application of choice of law, contrary to the public order of the forum of the intended parents’ country.⁷⁵³

At the most recent meeting of February 2019, the Group Of Experts On Parentage/Surrogacy of the Hague Convention met in The Hague in line with “the Conclusions and Recommendations reached by

⁷⁴⁹ At 385. Following strictly the author’s classification there will be a fourth source of public policy content, namely “interprovincial and international transactions”, however as the author acknowledges, it is still encapsulated in the domestic interest.

⁷⁵⁰ At 385 and 398.

⁷⁵¹ Alex Mills “The Dimensions of Public Policy in Private International law” (2008) 4(2) *Journal of Private International Law* 201-236, at 205.

⁷⁵² Institute de Droit International, Ninth commission, Cultural differences and ordre public in family private international law, Rapporteur Paul Lagarde <www.idi-iil.org/app/uploads/2017/06/2005_kra_02_en.pdf>.

⁷⁵³ For instance, case of *Mennesson v. France*, above n 18, at [8] quoting the French Supreme Court Decision, stating that a surrogacy contract “is null and void on public-policy grounds under Articles 16-7 and 16-9 of the Civil Code.” In Spain the public policy exception is grounded on Article 10.1 of Spanish Act 14/2006 of 26 of May on Human Assisted Reproduction Techniques which sets out that surrogacy agreements are null and void. Article 10.2, establishes that the legal mother is the one who gives birth to the child.

the Council on General Affairs and Policy of the HCCH (“CGAP”).⁷⁵⁴ They asserted: “Some experts considered that the public policy exception should not apply if refusal of recognition would render the child parentless.” This recommendation pointed out that the public policy exception needs to be confined and restricted to a convention dealing with surrogacy, insofar as it is the application of public policy which hampers parentage ascertained abroad in favour of intending parents.

The limitation to the use of the public policy exception suggested by the Hague Expert Group tackled the main problem that the application of the Convention would encounter. However, given the controversy surrounding the issue of surrogacy, one should not rule out the objection that children should have legal parents when the law applicable to the case allocates parenthood to a parent who has already relinquished the child.

In most jurisdictions, the forum country designates the surrogate and her partner to be the legal parents, even when they have already relinquished the child. Consequently, according to that determination the forum country does not consider the child parentless. Indeed, the surrogate and her partner might be considered to be the legal parents even the forum country. However, that approach is incongruent with the aim of parenthood. Parenthood confers rights and responsibilities over a child as a way to protect the child. Thus, when the persons who are caring for and raising the child (that is, the intended parents who are acting as *de facto* parents) lack parental responsibilities, the child is precluded from having legal parents.

A second stance on the issue of the public policy exception might be to limit or restrict its use where its application would lead to a result that is contrary to the purposes of the convention. The Hague Convention parentage/surrogacy project offers an opportunity to address the problems that new assisted reproduction technologies may cause in the long run, including other AHR procedures which might create problems with the recognition of parentage. A second example, as seen in the case of posthumous conception, is discussed below. For instance, as was illustrated in chapter 5 of the present thesis, posthumous reproduction might give rise to conflicting outcomes in the determination of parenthood depending on which set of rules are applied. In New Zealand there is no regulation concerning fatherhood of posthumously conceived children. Whereas in the United States, some states deem the child’s father to be the deceased father when the child is conceived posthumously.⁷⁵⁵ Furthermore, in England the HFEA 2008 considers the deceased man to be the child’s father only to the effect of birth registration, but it does not extend the parentage to any other effects that stem from fatherhood, such as nationality, inheritance.⁷⁵⁶ Consequently, this conflicting determination can give rise to a child who is fatherless under the rules of one jurisdiction, and who has a father according to another set of rules in a different country.

Importantly, during the latest meetings, the group of experts reaffirmed the desirability and importance of providing predictability, certainty and continuity of legal parentage in international situations, taking into account the human rights of all parties concerned and the best interests of the child.⁷⁵⁷

⁷⁵⁴ HCCH, above n 726.

⁷⁵⁵ Cynthia E. Frutchman “Tales from the Crib: Posthumous reproduction and ART” (2012) 33(2) *Whittier Law Review* 311-322, at 319.

⁷⁵⁶ Section 39, subsection 3 of the HFEA 2008.

⁷⁵⁷ HCCH, above n 726, at [29].

7.2.4 *Reasons against the application of the public policy exception for the determination of parentage grounded exclusively on the prohibition of the practice under the lex fori*

Given the role that the public policy exception plays in hampering the recognition of judicial decisions or birth certificates concerning parentage of children born abroad, several reasons are suggested to justify restrictions on the application of the exception. Of particular concern are cases where public policy is brandished on the grounds that the practice of AHR is prohibited under the rules of the country where the family locate to, and where they apply for recognition of the birth certificate or the judicial decision regarding parentage.

In the Ninth Commission of the Institute of International Law, adopted on 25 of August 2005, the resolution “Cultural differences and ordre public in family private international Law”, paragraph D, asserts the following:⁷⁵⁸

“States may invoke public policy against foreign laws forbidding the establishment of filiation outside marriage, at least when the child is linked through nationality or habitual residence to the forum State or a State allowing the establishment of that filiation.”

Therefore, it is the public policy doctrine which elicits the applicability of foreign laws which preclude establishment of parentage. The justification for this assertion is that the foreign norm is contrary to the children’s rights embodied in the UNCROC Convention and other human rights conventions, in particular the right not to be discriminated against.

In the case of surrogate born children it is the other way around, that is, it is the public policy exception which precludes the establishment of child’s filiation in favour of the intended parents who, in most of the cases, are the genetic parents as well. Then, applying the words of the Institute of Public Policy *a contrario sensu*, States may not invoke public policy against foreign laws which ascertain parentage or filiation of children born from AHR. The public policy exception in cross border surrogacy entails the infringement of children’s rights, and so the question then arises concerning the limits or constraints of the state to deploy the public policy exception when it contravenes children’s human rights. It is the very application of the exception which implies an infringement of children’s human rights, when the application of the exception would render a child parentless. Thereby, human rights play an ambivalent relationship with public policy or ‘ordre public’, in so far as human rights are considered to be themselves an element of the public policy of the forum, but they may also be in conflict with this same public order.⁷⁵⁹

The restriction of the use of the public policy exception to rule out the application of the foreign law in matters of filiation is grounded on the infringement of the Convention on the Rights of the Child. Placing limitations on the public policy exception based on international human rights is an approach that is coherent with the international applicability and effectivity of human rights. Maintaining the contrary might leave a lacuna or gap in the scope of the treaty, which was not intended when the parties signed the Convention.

As the Institute de Droit International asserted in its 2017 resolution, a judge who invokes the public policy or standard of the forum so as to refuse to apply the foreign law should ensure that the norm imperatives of the forum or public policy do not infringe human rights, in particular the tenet of non-discrimination.⁷⁶⁰ The ever changing nature of the public policy exception leads to it fluctuating, stretching or shrinking according to the evolution of social values. As was contended “no attempt to

⁷⁵⁸ Institute de Droit International, above n 752, at [d].

⁷⁵⁹ Report of The Fourth Commission of The Institute De Droit International on Human Rights and Private International Law, “Droit de L’homme and Droit international Privé, at [80].

⁷⁶⁰ Article 14.

define the limits of that reservation has ever succeed.”⁷⁶¹ Yet, the relevance of human rights treaties, in particular the ECHR, which are binding upon the countries members of the Council of Europe, imposes a limit on the exception.

Likewise, distinguished scholars have noted that “what is usually in question is not the foreign law in the abstract but the result of its enforcement or recognition.” For example, a court may consider a law which allows polygamy to be dishonest, however if such a marriage is valid according to the foreign law where it took place, and if children have been born from it, then it may be convenient to recognise it rather “than to disturb a settled family relationship and deem the children illegitimate.”⁷⁶²

This example is, *mutatis mutandis*, the same postulate as in the case of cross-border surrogacy, where the contract is deemed unlawful in the forum country, although it is valid in conformity with the foreign country. Hence, the parent-child relationship may be recognised, bearing in mind that it is the surrogacy contract, and not the filiation as such that is illegal.

7.2.5 Cross border posthumous reproduction

A second example of cross border issues lies in posthumous conception. New Zealand’s legislation omits any reference to parenthood of posthumously conceived children. As we have seen in chapter 5 of the present thesis on posthumously conceived children, it is not clear whether posthumous born children can have recourse to a declaration of paternity, in order to be able to have a father registered on the birth certificate, and acquire the rest of the rights that having a legally recognised father entails.

Posthumous reproduction constitutes another assisted reproduction technology which might create conflicting outcomes for the determination of parenthood, given that some legal systems do not recognise as a child’s father the mother’s partner if his gametes were used after his death, while other regulations deem the mother’s partner the child’s father, even if the child is conceived after the mother’s partner death. For instance, the Uniform Parentage Act 2012 (USA) established “If a spouse dies before placement of eggs, sperm, or embryos, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child.”⁷⁶³ The aforementioned provision was adopted by six states (Alabama, Colorado, New Mexico, Texas, Utah and Washington) from the 2000 version of the Uniform Parentage Act (UPA).⁷⁶⁴

Section 708 of the current UPA 2017⁷⁶⁵ recognises parenthood of posthumous born children, not only when an individual consents in a record before death to be a parent of the child, but also when there is no such record but clear and convincing evidence exists that the man wanted to reproduce posthumously. In England, parenthood is conferred to children conceived posthumously only by recording the father’s name in the child’s birth certificate,⁷⁶⁶ as long as other conditions are fulfilled, such as the man having given consent to be treated as the child’s father.

In view of the disparities in the regulations concerning parenthood of posthumously conceived children, it is possible that the child could be deemed fatherless, if for example the family moved to another country where posthumous reproduction is not recognised, and that country scrutinizes the parenthood ascertained in the country of origin. Posthumous born children, then, might encounter

⁷⁶¹ Dicey, above n 747, at 5-008.

⁷⁶² At 5-006.

⁷⁶³ Section 707 of the Uniform Parentage Act 2002, above n 403.

⁷⁶⁴ Frutchman, above n 755, at 319.

⁷⁶⁵ UPA, above n 403, s 708. Another condition is that the child is born not later than 45 months after the parent’s death.

⁷⁶⁶ HFEA 2008, s 39(3).

the same problem for the determination of parenthood as surrogate born children, creating discriminatory situations within a given family, depending on whether the child was conceived before or after the death of the biological father. For instance, a child conceived after the father's death may be precluded from having the parent's nationality and inheritance rights, putting the posthumous born child in a disadvantaged position in relation to a sibling conceived before the father's death.

Children do not choose the way in which they come to life, but some children are born as a result of using assisted reproduction technologies. The method of birth selected by their parents should not endanger their rights. The truth, however, is that the way children are born does affect their rights and their identity throughout their lives.

The exportation of gametes to other countries when the home country does not permit the use of the gametes to conceive posthumously for any reason might create cross-border issues. Hypothetically, if a woman goes from a restrictive home country to a permissive foreign country to conceive posthumously, and returns to the home country after the birth of the child, in theory she might encounter problems if the birth certificate is scrutinised. For example, it might happen that the home country refuses to record the father's name, even though the father was recorded in the foreign birth certificate. The same problem might potentially arise if the family moves from a country which recognises the deceased man as a father to one with a policy prohibiting fatherhood of posthumously conceived children.

7.3 Conclusion

This chapter has analysed the legal parentage of children born from AHR from the perspective of private international law, namely the role of the connecting factors and the public policy exception on the implementation of an international convention dealing with parentage. Drawing from the recommendation of the Group of Experts on the Parentage/Surrogacy Project, the chapter has examined why it is, in the context of AHR, that the connecting factors and the public policy exception need to be addressed in a different form to other conventions dealing with enforcement of judicial decisions. If those aspects are addressed a convention on enforcement of judicial decisions concerning legal parentage will introduce certainty in the allocation of parenthood of children born through ART.

8. Models of Parenthood

8.1 Introduction

Advances in embryology, genetics and biotechnology are changing the way humanity reproduces, to the point that the end of sex with reproductive purposes has been forecast for the future.⁷⁶⁷ Artificial eggs and sperm, somatic cell nuclear transfer (SCNT), gene editing (GE) and ectogenesis (EG) are all technologies that will likely promote a setting that is completely different to natural reproduction. There has already been a birth of two babies whose genes were edited in December 2018.⁷⁶⁸ According to the lead researcher, Jiankui He, the intervention was performed to avoid the transmission of HIV (human immunodeficiency virus) in twin girls.⁷⁶⁹ Also, the birth of the first baby with mitochondrial modification has materialised (in April 2016).⁷⁷⁰ The second baby was reported to have been born on the fifth of January 2017 in Ukraine.⁷⁷¹ In vitro derived gametes from mice have been produced in a laboratory using somatic cells and de-differentiating them (reprogramming or reverting them into induced pluripotent stem cells), and then turning them into female and male gametes. Over time this experiment will be able to be replicated in humans.⁷⁷² The “biobag” is a device that successfully sustains and develops premature lambs at a similar rate to controls growing inside the uterus.⁷⁷³ It has been predicted that once the device is refined, it can be used in human pre-neonates.⁷⁷⁴ This new development has incited the debate concerning ectogenesis.

Technological advances such as these will compel the law to reconsider the concept of parenthood and the factors which legally determine parenthood, provoking a decline in the heteronormative model of family.⁷⁷⁵ Indeed, it is now more truthful than ever that technological change is “... turning what once were ‘questions of fate’ into ‘matters of choice’.”⁷⁷⁶ Some of the foreseeable possibilities in the application of in-vitro derived gametes are the creation of children with genetic material of more than two parents (for example the ability for same-sex couples to conceive children genetically related to both of them), or even conception with gametes created from cells of a single person.⁷⁷⁷

⁷⁶⁷ Greely, above n 1.

⁷⁶⁸ The National Academies of Science, Engineering and Medicine. Global Discussion: Proceedings of a Workshop in Brief (2019) <<http://nap.edu/25343>>.

⁷⁶⁹ <www.sciencenews.org/article/gene-edited-babies-top-science-stories-2018-yir>.

⁷⁷⁰ Zhang et al., above n 2.

⁷⁷¹ Coghlan, above n 3.

⁷⁷² N Gleicher “Expected Advances In Human Fertility Treatments And Their Likely Translational Consequences” (2018) 16(1) *Journal Of Translational Medicine* 149.

⁷⁷³ Partridge et al., above n 8.

⁷⁷⁴ Roberts, above n 9.

⁷⁷⁵ The term was used by Michael Warner “Introduction: Fear of a Queer Planet” (1991) 9(4[29]) *Social Text* 3-17, at 6 <<http://sgrattan361.qwriting.qc.cuny.edu/files/2010/09/warnerfearofaqueer.pdf>>. Warner argues that the duty of homosexual (queer) social theory is to confront the pervasive and underlying heteronormativity model. See also LG Berlant *The Queen of America Goes to Washington City: Essays on Sex and Citizenship* (Durham, NC, Duke University Press, 1997). The term ‘heteronormative’ was used to denote the traditional, heterosexual and monogamous family.

⁷⁷⁶ MM Shultz “Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality” (1990) 2 *Wisconsin Law Review*, 297-398 at 299. She refers to an article published in the New York Times in her quotation.

⁷⁷⁷ C Palacios-Gonzalez, L Harris and G Testa “Multiplex Parenting: IVG And The Generations To Come” (2014) 40(11) *Journal of Medical Ethics* 752-758. See also Z Li et al. “Generation Of Bimaternal And Bipaternal Mice

These technological advances “[call] into question the very basis of conception, family and parenthood.”⁷⁷⁸

The issue of human assisted reproduction is clearly a topic that directly affects the determination of parenthood given that it brings together more contenders for parenthood, or a greater selection of persons to whom parenthood can be allocated.⁷⁷⁹ It is also a source of multi-parenthood. This began with artificial insemination, moved on to the fragmentation of the biological roles, and it is now on the verge of opening the doors to asexual conception⁷⁸⁰ and even, potentially, the extracorporeal gestation of the embryo. The discovery that adult cells can be reversed and transformed to “an embryonic-like state” using four factors to induce the reprogramming, a phenomenon called induced pluripotent stem cell (iPSC),⁷⁸¹ has been called the biggest innovation in biology and has challenged the very notion of life. All assisted reproductive technologies (ARTs) involve parties that are not the intended parents or persons who want to raise the child, but rather are providers of procreative material or services. Furthermore, assisted human reproduction is also relevant for family law, since the very structure and make-up of families – parents and their children – is at front and centre of all human assisted reproduction technologies.

All children need to have identifiable legal parents at the moment of birth. Legal parenthood determines who undertakes the rights and obligations concerning the child, as well as being the precursor of children’s rights.⁷⁸² Children’s identification (citizenship, inheritance rights, etc.) derives from legal parenthood. All of this is crucially important for the psychological, social and economic development of the child, and indeed the whole family, in question. The uncertainty regarding legal parenthood may result in multiple negative effects on the potential parents and especially on the vulnerable child, which is a violation of the UNCROC.⁷⁸³ The negative impact that the lack of identifiable legal parenthood entails for children calls for the application or implementation of the best interests of the child when decisions are taken concerning legal parenthood.

After having considered current and potential technologies of human assisted reproduction in a previous chapter, this final chapter purports to apply the three known paradigms of parenthood – gestational, genetic and intentional – to each of the different techniques of assisted reproduction in order to identify and evaluate the suitability of each paradigm for determining parenthood. In each case, the outcome in terms of who are determined by each model to be the parents will be noted, along with any inconsistencies in order to provide an answer to the question of which model, if any, is more suitable for determining parenthood. A matrix has been designed to provide an immediate

From Hypomethylated Haploid Escs With Imprinting Region Deletions” (2018) 23(5) *Stem Cell* 665-676. Chinese researchers were able to breed mice from same sex couples through a combination of two techniques, embryonic stem cells and gene editing, in order to avoid imprinting. See also Annelien L Bredenoord and Insoo Hyun “Ethics of Stem Cell-Derived Gametes Made in A Dish: Fertility For Everyone?” (2017) 9.4 *EMBO Molecular Medicine* 396-398.

⁷⁷⁸ JA Robertson *Children of Choice: Freedom and The New Reproductive Technologies* (Princeton, Princeton University Press, 1996), at 15.

⁷⁷⁹ Hill, above n. 562, at 354.

⁷⁸⁰ AC Smajdor “I am Your Mother and Your Father! In Vitro Derived Gametes and the Ethics of Solo Reproduction” (2017) 25(4) *Health Care Analysis* 354-369. This paper considers creation of life through in vitro derived gametes from cells extracted from just one person.

⁷⁸¹ K Takahashi and S Yamanaka “Induction of Pluripotent Stem Cells from Mouse Embryonic and Adult Fibroblast Cultures by Defined Factors” (2006) 126(4) *Cell* 663-676.

⁷⁸² HCCH, “A Study of Legal Parentage and The Issues Arising from International Surrogacy Arrangements,” Prel. Doc. No 3C at [105].

⁷⁸³ UNCROC, above n 14.

visualization of the outcome of applying the paradigms to the new technologies of assisted reproduction.

The chapter then moves on to analyse the issue of parenthood, taking into account the environments or scenarios which new technologies are engendering in relation to the sharing of procreative material which is not restricted to gametes. The potential of AHR to create human life from a somatic cell, and even to gestate an embryo outside of the uterus, indicates the need to keep procreative material under some sort of control, given that it would be situated in an extracorporeal place, far removed from a human body. This control implies, in other words, awarding the parties an entitlement or right to decide the fate of the procreative material. In order to give effect to this entitlement, the judiciaries in Commonwealth countries have acknowledged or recognised property rights in gametes and even in zygotes,⁷⁸⁴ despite the understandable reluctance to use the term to refer to embryos. Exploring property rights in procreative material through judicial decisions, and examining the contract approach followed by some US courts to resolve disputes over cryopreserved embryos, in this chapter I contend that property rights in conjunction with contract law is the most appropriate model for determining parenthood in new assisted reproduction procedures.

Finally, I have made an attempt to find some semblance of consistency in the determination of parenthood in emerging technologies, which, being an area that undergoes constant change, entails some level of conjecture in the approximation to the subject. However, a model for the determination of parenthood in AHR is suggested. This task appears to be the first comprehensive assessment of parenthood, although it draws from a body of literature on the subject that has come about since the inception of the intentional paradigm.

8.2 Paradigms

Until relatively recently, the allocation of legal parenthood was based on biology. The natural way of conceiving children does not give rise to conflicting determinations. However, innovations on assisted reproduction yield the possibility of different contenders to parenthood due to the separation of the biological components in the procreation process. Those changes have provoked the formulation of three models for resolving competing claims of legal parenthood over children.

The three currently used methods of determining legal parentage are based on the relationships between the adults and children in AHR are;

- (1) the gestational model, which is the traditional method to ascertain parentage, under which the mother who gives birth and her partner (with consent) are deemed to be the legal parents;
- (2) the genetic model, which is based on DNA connexions to the child, or shared DNA with the parents; and
- (3) the intentional model, which is based on the intention to be a parent and to provide for the child.

⁷⁸⁴ JA Robertson "In the Beginning: The Legal Status of Early Embryos" (1990) 76 *Virginia L.R.* 437-441. I use the term 'embryo', however in the process from fertilization to implantation different names are used depending on the development of the embryo. For example, it is known as a zygote from fertilization up until the fourth day of development.

The functionalism paradigm could be added to the previous paradigms.⁷⁸⁵ However, the functional model requires exercising as a parent, or to act as a caregiver. Thus, the functional model as a paradigm is not suitable for allocating parenthood before birth because “it can only be determined ex post.”⁷⁸⁶ However, Shapiro suggested a particular case within the functional paradigm for a family with just one legal parent at birth. The pregnant woman is the one who meets the functional test.⁷⁸⁷

8.2.1 *The intentional model*

The two ‘traditional’ models – gestational and genetic – do not fit easily with the gamut of options corresponding to ART, so this sub-section focusses on only the intentional model. Shultz⁷⁸⁸ pioneered the development of the intentional theory used by the Supreme Court of California in the case of *Johnson v. Calvert*⁷⁸⁹ to resolve the dispute, arguing the need to reconsider the legal framework to allocate parenthood in AHR with legal certainty. The author advocated in favour of ‘individual intentions’ to determine legal parentage in AHR techniques, and analysed in depth the advantages and gender neutrality that intention provides over biological determination, including the opportunity to compensate the encumbrance that childbearing entails for women’s access to labour markets on equal footing. Purvis suggested that intention is a model that provides gender neutrality for the determination of parenthood of children from surrogate contracts and could be implemented using “pre-birth parentage orders”.⁷⁹⁰

Hill⁷⁹¹ affirmed that intended parents are the reason for the procreative connection, “the cause”, whereas the gestational and biological participants are seen as substitute providers to the intention to be parent. Therefore, Hill contended that; “This unique causal relationship with the child should afford the intended parent’s primary status as the parents of the child.”⁷⁹²

Since Shultz’s seminal work there has been an increasing amount of literature analysing the models and their application, not just in relation to surrogacy cases but also in relation to other in-vitro fertilization postulations.⁷⁹³ Purvis suggested that intention is a model that provides gender neutrality

⁷⁸⁵ Pamela Laufer-Ukeles and Ayelet Blecher-Prigat “Between Function and Form: Towards a Differentiated Model of Functional Parenthood” (2013) 20(2) *Geo. Mason L. Rev.* 419, at 436.

⁷⁸⁶ At 436. They also state: “A functional approach to parenthood, on the other hand, relies on the actual care of children. As such, it can only be determined ex post and involves a considerable degree of judicial discretion to determine what parental care actually is, what activities a person must perform, and which behavior to demonstrate in order to gain recognition as someone who functioned as a parent.”

⁷⁸⁷ Julie Shapiro “Counting from One: Replacing the Marital Presumption with a Presumption of Sole Parentage” (2012) 20(3) *American University Journal of Gender Social Policy and Law* 509-523.

⁷⁸⁸ Shultz, above n 776. Shultz also argued in favour of allowing the application of contract law to regulate private family affairs, and contended that the limitations imposed by the extension of contractual law perpetuates the moral views of the majority over the whole society (at 348). The author took issue over the objection of commodification of life and maintained that “Reverence for life and money is not a zero-sum game.” (at 336).

⁷⁸⁹ *Johnson v. Calvert*, above n 718.

⁷⁹⁰ D Purvis “Intended Parents and the Problem of Perspective” (2012) 24 *Yale Journal of Law & Feminism* 210, at 212.

⁷⁹¹ Hill, above n 562.

⁷⁹² At 415.

⁷⁹³ See MB Jacobs “Intentional Parenthood’s Influence: Rethinking procreative autonomy and federal paternity establishment policy” (2012) 20(3) *American University Journal of Gender Social Policy and Law* 489-508. See also JL Dolgin “An Emerging Consensus: Reproductive Technology and the Law” (1998) 23(2) *Vermont Law Review* 225.; R Storrow “Parenthood by Pure Intention: Assisted reproduction and the functional approach to parentage” (2002) 53(3) *Hastings Law Journal* 597, at 600. See also Kirsty Horsey “Challenging Presumptions:

for the determination of parenthood of children from surrogate contracts and could be implemented using “pre-birth parentage orders”.⁷⁹⁴ On a similar theme, Sheldon examined fragmentation, specifically fatherhood, proposing that the question of who is deemed to be the legal father can itself be segmented into several legal questions, the answers to which could designate different men for different paternal roles, such as who should appear on the birth certificate, who should be financially responsible for the child, and who should be granted parental responsibilities and rights.⁷⁹⁵

*Johnson v. Calvert*⁷⁹⁶ was the first legal case that resolved conflicting parenthood over a child born from a gestational surrogacy agreement where there was a full genetic link between both of the intending parents and the child. The Supreme Court of California affirmed that there was no “clear legislative preference in Civil Code section 7003 as between blood testing evidence and proof of having given birth.”⁷⁹⁷ Confronting the dilemma of which woman should be conferred parenthood over the child, the genetic or the gestational contributor, the Court had recourse to intention in order to resolve the conundrum, observing that under California Law⁷⁹⁸ either woman could be declared as a mother, however, but the law only accepted one legal mother.⁷⁹⁹ Finally, the Court applied intention as the decisive paradigm, and decided in favour of the intending mother asserting: “she who intended to procreate the child – that is, she who intended to bring about the birth of a child that she intended to raise as her own – is the natural mother.”⁸⁰⁰

There is almost unanimous consensus regarding the suitability of the intentional paradigm for determining parentage in AHR.⁸⁰¹ The intentional paradigm has also been implemented to vest legal parenthood in surrogacy agreements in several jurisdictions around the world.⁸⁰² However, the majority of the academic discussion examines and applies the intentional test to gametes donation and surrogacy. The intentional model or paradigm is being used to divest the genetic contributor of any rights to the child born from gamete donation. However, the allocation of parenthood is actually premised on the fact that the woman receiving the donation will gestate the embryo.

8.2.2 Applying the different models

Due to the fact that this chapter theorises upon the most suitable paradigm to ascertain parenthood, the matrix below has been constructed as a straightforward method to visualize the result. The different technologies of assisted reproduction are indicated in the rows, and the columns correspond to the three existing paradigms for allocating parenthood, with the parenthood result noted in the respective cells.

Legal Parenthood and Surrogacy Arrangements” (2010) 22 *Child & Fam. L. Q* 449, at 474 she argues in favour of contract law for recording the intentions to ascertain parenthood.

⁷⁹⁴ Purvis, above n 790, at 212.

⁷⁹⁵ Sheldon, S. “Fragmenting Fatherhood: The Regulation of Reproductive Technologies” (2005) 68.4 *Modern Law Review* 523-553, at 530.

⁷⁹⁶ *Johnson v. Calvert*, above n 718.

⁷⁹⁷ At [5].

⁷⁹⁸ California Civil Code, § 7003 subd (1), on the establishing of a relationship between a parent and a child: “(a) Between a child and the natural parent, it *may* be established by proof of having given birth to the child, or under this part.”

⁷⁹⁹ *Johnson v. Calvert*, above n 718.

⁸⁰⁰ At [6][7].

⁸⁰¹ Mary Patricia Byrn and Erica Holzer “Codifying the Intent Test” (2015) 41 *W.M. Mitchell L. Rev.* 130, at 143.

⁸⁰² Trimmings, Katarina, and P. R. Beaumont (eds.) *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing, Oxford and Portland, 2013).

Matrix of determination of parenthood

		Parenthood model		
		Genetic	Gestational	Intentional
Reproduction technique	Natural (sexual)	Mother=Gf Father=Gm	Mother=Bm Father=Bp	Mother=P1 Father=P2
	Full surrogacy	Mother=Gf Father=Gm	Mother=Bm Other parent=Bp	Mother=P1 Other parent =P2
	Partial surrogacy	Mother=Gf Father=Gm	Mother=Bm Other parent =Bp	Mother=P1 Other parent =P2
	Partial ectogenesis	Mother=Gf Father=Gm	Mother=Bm Other parent =Bp	Mother=P1 Other parent =P2
	Total ectogenesis	Mother=Gf Father=Gm	Mother=None Other parent =None	Mother=P1 Other parent =P2
	Mitochondrial modification	Mothers=both Gf and Md Father=Gm	Mother=Bm Other parent =Bp	Mother=P1 Other parent =P2
	In-vitro derived gametes	Mother=several Father=several	Mother=Bm Other parent =Bp	Mother=P1 Other parent =P2
	Posthumous	Mother=Gf Father=None	Mother=Bm Other parent =None	Mother=P1 Other parent =None

Key: Intended parents = P1 and P2, Gamete providers (male and female) = Gm and Gf, Birth mother and partner = Bm and Bp, Mitochondrial donor = Md. 'Several' indicates that any of P1, P2, Gm, Gf, Bm, Bp and Bp might be included as parents.

Notes:

1. Under sexual reproduction, normally the sexual partners are a couple with intention to raise the child. But it could also be the case that it is a child conceived as a consequence of a random encounter. Thus, it is not always clear that the male gamete provider is the birth mother's partner, although in most instances that will indeed be the case. Under sexual reproduction the female is always the gamete provider (Gf) and the birth mother (Bm). She will also normally be an intended parent (P1), although in some cases (e.g. rape) she may not have been intending to be a mother.
2. There may not be two intended parents in all cases, that is, sometimes there is only P1 and no P2.
3. The birth mother (Bm) is the woman who gives birth to the child. That may be a surrogate who is unrelated to the child, or it could be the female gamete provider, or it may be the intended mother. It may also be all three (as in the case of sexual reproduction).
4. In posthumous reproduction, normally Gf, Bm and P1 are all the same woman (the partner of the deceased man). But there is also scope for those roles to be shared among several women.

Clearly the genetic paradigm becomes unsuitable in AHR due to the fragmentation of the paradigm under technologies such as mitochondrial modification and in vitro derived gametes, designating several genetic contributors as legal parents, independently of their willingness to assume the responsibilities of legal parenthood.

Under ectogenesis the gestational paradigm is similarly unsuitable because the prospective child would be without parents, while the genetic paradigm under in vitro derived gametes might allocate parenthood to several people depending on the number of participants in the procreative endeavour.⁸⁰³ Therefore, in vitro derived gametes, mitochondrial modification and ectogenesis all defy the stereotypical model of allocating parenthood based on natural reproduction. The fragmentation of the genetic and gestational roles in AHR render them unsuitable for the determination of parentage.

The intentional paradigm is the most suitable for ascertaining parenthood in AHR. However, the possibility of a scenario of multi-parenthood and the extracorporeal conception of a child, and even the prospect of extracorporeal gestation, is leading to increasingly complex settings that need to be addressed when determining parenthood. Given this indeterminacy in allocation of parental roles under assisted human reproduction within the existing models of parenthood, the thesis now turns to a proposal of a new model. However, before setting out the details of the model, it is worthwhile to first establish the legal background to it.

8.3 State order or contract law

Parentage determination requires state sanction; “Legal parentage is a status that is conferred by a state statute.”⁸⁰⁴ Once a child is born, the State confers him or her parenthood. However, that harsh rule has been battered by surrogacy contracts, which, under certain restrictive conditions, give parental rights to intended parents on the basis of a contract that is signed by the parties, and which records the intentions, the relationships between the parties, and the parental rights as a consequence of the agreement.

Despite state intervention regulating a minimum content contract which guarantees an equilibrium between the parties, it is the contract which actually records the parties’ intentions concerning parentage. For instance, the American Bar Association Model Act Governing Assisted Reproductive Technology (2018 ABA Model) adopted in August 2018 (here-in-after ABA model),⁸⁰⁵ contemplates the intentional paradigm to assign parenthood in surrogacy cases. It establishes a contract to record the parties’ intentions and set out detailed regulations regarding the contract’s content, eligibility of both the intended parents and the surrogate, and the contract’s formalities.⁸⁰⁶ In the case of gestational surrogacy, the model mandates that parents sign a contract between themselves, prior to embryo formation, setting out the intended use of the embryos, disposition of cryopreserved embryos in case of separation of the intended parents, incapacity or death of one of them.⁸⁰⁷

The expression of the intentional paradigm and the requirement to introduce certainty in the main relationship as well as ancillary relationships concerning the surrogacy agreement has led regulators to have recourse to contract law as a means of recording and giving effectivity to the parties’ willingness, and at the same time prompting them to agree on other aspects surrounding the

⁸⁰³ It is also possible that a pregnancy begins with gestation, but is then transferred to ectogenesis due to difficulties with gestation. Such a situation is too ethically complex to go into here, but requires more detailed consideration.

⁸⁰⁴ Byrn and Ives, above n 12.

⁸⁰⁵ 2018 ABA model, above n 410.

⁸⁰⁶ Section 701, at [C]: “A surrogacy agreement may not limit the right of the gestational or genetic surrogate to make decisions to safeguard the gestational or genetic surrogate’s health or that of the embryo(s) or fetus.”

⁸⁰⁷ Section 5.

procedure. Therefore, one arrives at the question of whether or not parenthood by contract will be a better paradigm for ascertaining parenthood in AHR, considering that the AHR advances are making the task of ascertaining parenthood increasingly complex.

However, regulators could also continue to assign legal parenthood by directly choosing between the several contributors, or by establishing a presumption of parenthood in favour of the contributors of procreative material. Nevertheless, that method runs the risk of allocating parenthood to a party that is not eager or prepared to assume the responsibilities of parenthood, and at the same time it might designate several parents without considering their willingness to raise the child.

The use of contract law would not mean that lawmakers could not put in place limitations or regulations in the content or form of the contract, mainly to guarantee children rights, as well as the rights of all parties involved in the procreations process. For instance, the surrogacy contract is substantially regulated in jurisdictions which allow surrogacy.

An illustration of an attempt to allocate legal parenthood in AHR among the different contenders is the case of mitochondrial modification as it was regulated in England. For instance, with reference to mitochondrial modification, Griffiths argues that the technology illustrates the way science and technology strive to enlarge “models of traditional relatedness” and keep the status quo.⁸⁰⁸ Indeed, at least the regulation of the technology is based on the concept of the traditional family, bearing in mind that just one of the two women who contribute to the child’s genetic makeup is entitled to the resulting fused egg. It could be argued that treating the mitochondrial contributor as a donor precludes claims of parenthood based on the genetic link to the child, and that is the rationale behind the equating of the mitochondrial donor to a tissue donor.

Stripping a genetic contributor of parenthood has been a mechanism used by regulators to avoid a scenario of multi-parenthood. For instance, gamete donation represents this stance by regulators, who have routinely divested gamete donors of parental rights, instead vesting them to the individual or couple intending to procreate.⁸⁰⁹ However, the same outcome of allocating parental rights to the parties with the willingness to raise the child and assume the responsibilities of parenthood, can be achieved by contract between the parties. Maternity or first parentage is allocated by gestation, and fatherhood or second parentage by being a partner to the gestational woman. However, usually the law presumes the partner’s consent⁸¹⁰ or requires the partner to sign an informed consent prior to the procedure⁸¹¹ and before insemination or implantation. It is observed that even before stripping a donor from parenthood, he or she must have agreed to donate gametes or embryos.

Margalit states: “The inability of traditional parentage models to satisfactorily address the realities of modern parenthood requires increased reliance on private ordering to determine legal parenthood.”⁸¹² However, the instinctive activity connected to natural procreation and the lack of control over the procreation process has, for centuries, rendered contract law unsuitable for determining parenthood. In addition, the law traditionally enforces moral, social values and public policy through the regulations of family, but in particular procreation. For instance, establishing

⁸⁰⁸ Danielle Griffiths “The (Re) production of the Genetically Related Body in Law, Technology and Culture: Mitochondria replacement therapy” (2016) 24(3) *Health Care Analysis* 196-209, at 198.

⁸⁰⁹ SoCA, ss 19 and 21.

⁸¹⁰ See s 27 of SoCA

⁸¹¹ See, for instance, s 37 of the HFEA requiring consent to the treatment.

⁸¹² Yehezkel Margalit “Towards Establishing Parenthood by Agreement in Jewish Law” (2017) 26 *Am. U.J. Gender Soc. Pol’y & L.* 647, at 650.

astriquent grounds for separation or divorce or deeming children born out of wedlock illegitimate. Society is on the brink of gaining control over procreation, even by natural reproduction, through a variety of contraceptives methods including the male contraceptive pill.⁸¹³

The environment of procreation through AHR entails two premises, namely rational decision and conception outside the human bodies (even one day external gestation should be possible). These are two elements that are absent in natural reproduction, consequently AHR involves a degree of control over the procreative material and the exercise of autonomy. These essential differences render the allocation of parenthood more prone to private order. In addition, the combinations that are possible in AHR make the determination of parenthood by means of legal presumptions all the more unpredictable.

Intention as a result of the bargain between the parties, and expressed by contract, was the breakthrough test suggested by Shultz, yet that model seems to have taken time to be accepted as a means of allocating parenthood in surrogacy cases.⁸¹⁴ However, the model is being used in jurisdictions around the world.

8.4 Contract law and property rights

Apart from surrogacy agreements, the other scenario which is available to examine contract law for deciding on rights between progenitors is the disposition of cryopreserved embryos, in which contract law is accepted and encouraged to decide the fate of an embryo. Contract law gives expressivity and effectivity to the parties' intention through its binding effect, however the object of the contract should be at the disposal of the parties, that is, for the contract to be binding entitlement is a precondition sine qua non to have a binding effect and be enforceable. Obviously, the enforceability of a contract depends on the law. Where a legal system deems a contract void or invalid for any reason it loses the binding force. Until recently, that was the problem with surrogacy agreements and it is still a barrier in some jurisdictions which consider surrogacy contracts void and against public policy.⁸¹⁵ Consequently, entitlement or property rights in the procreative material is the premise or basis to be able to contract over parental rights. That is, if the parties are not entitled to the procreative material, they are precluded from accomplishing intention to be parents through contract.

8.4.1 Entitlement to use the procreative material

New technologies are opening up possibilities to share, exchange and re-design or reprogram genetic material extracted from the human body, which adds value to the procreative material, as well as other tissues detached from the body. This array is creating opportunities to appropriate the material or use it in any form independently of the person from whom it was detached. These realities are casting doubt on the old rule under common law that there are no property rights in a human body. That rule dates from times when the human body, or parts thereof, had no utility to others. Scholars

⁸¹³ <www.livescience.com/65078-male-birth-control-pill-tested-safety.html>. There are also other clinical trials of male contraception <<https://clinicaltrials.ucbraid.org/trial/NCT02927210>>.

⁸¹⁴ Shultz, above n 776, at 323.

⁸¹⁵ For instance, in France this has been put forward in the case of *Menesson*, above n 18.

believe that there is need to create a legal framework to deal with ownership or rights over material or tissue extracted from the human body.⁸¹⁶

Indeed, gene editing in germline is the epitome of re-design⁸¹⁷ which might entail an investment which can amount to hundreds of thousands to millions of dollars, judging by the cost of gene editing in somatic cells with therapeutic purposes. Thus, if a person pays a large amount of money aimed at correcting his or her gametes, or the embryo's genes, it seems reasonable to protect that person from misappropriation of the procreative material or embryo, considering that the purpose of the procedure is to ensure a healthy offspring.

Property rights in the human body or its parts is a vexed debate in contemporary societies due to the fact that parts of cells extracted from the human body can be developed into cell lines or products with commercial value. The non-property rule over human biological material is becoming inoperative and inconvenient in several areas of law. Dworkin and Kennedy have pointed out the need to determine if something is property so as to give effectivity to the legal consequences steaming from that concept asserting:⁸¹⁸

“In some cases, the courts may have to determine whether or not something is property because it is only when that matter is settled that particular legal consequences flow: for example, the precise causes of action available, against whom, and the rights to trace the destination of the property when considering remedies.”

In the same vein Quigley affirms that the clarification of property rights is important in order to give right of possession over tissue for research or other purposes, or over gametes for the purpose of fertilization, or to afford compensation in cases of damage or lost samples.⁸¹⁹

According to Dworkin and Kennedy, the conceptualization of property entails a circular examination. Property depends on certain rights granted to the subject-matter, however the determination of whether or not those rights are bestowed to the 'subject-matter' are contingent upon the qualification that the subject matter is property.⁸²⁰

Knowing whether or not there is a property right or ownership in the human body and its parts, and the nature of the right that procreators enjoy in respect of the embryo, has many practical implications in today's world, for instance to resolve disputes over frozen embryos.⁸²¹ It also has implications related to the ownership of products developed from cell lines, however, in the present thesis the concern is only with property over reproductive material.

Nils Hoppe proposed using the term 'entitlement' understood “as the description of some kind of right to something”, due to it being more appropriate, adaptable, and comprehensive of the complex

⁸¹⁶ See for instance, Nils Hoppe *Bioequity—Property and the Human Body* (Surrey UK and Burlington USA, Ashgate Publishing Company, 2009). See also Paul Matthews “Whose body? People as property” (1983) 36(1) *Current Legal Problems* 193-239.

⁸¹⁷ Germline edition of gametes and embryos could be carried out with either therapeutic or enhancement purposes. The ethical and social issues are not considered here.

⁸¹⁸ G Dworkin and I Kennedy “Human Tissue: Rights in the body and its parts” (1993) 1 *Med. L. Rev.* 291, at 293.

⁸¹⁹ M Quigley “Property in Human Biomaterial: Separating persons and things?” (2012) 32(4) *Oxford Journal of Legal Studies* 659-683, at 661.

⁸²⁰ Dworkin and Kennedy, above n 818, at 301.

⁸²¹ At 292.

medical context in which human tissues are handled, as well as avoiding the negative undertones that the term 'property rights' entails.⁸²²

However, a new strand of interpretation has started to develop in the case law of some countries concerning property rights in bio-reproductive material, recognising the right to control gametes extracted or separated of the human body, and affirming property rights over them.⁸²³

Note that once the procreative material is outside of the human body, there needs to be an entitlement or right to use it, given the potential for misuse of the bio-reproductive material, either on purpose or by mistake. In particular, where there is a mixture of genes such as in mitochondrial modification or in vitro derived gametes there must be an entitlement to use the genetic material, and a right to retain control over it, given the diversity of parts who might contribute to the procreative material.

The term 'reproductive material' is used here to denote any gametes, natural, modified or artificial, or any mixture of them with or without other somatic cells used with procreative purpose. The term is useful to delimit or denote that the matter in consideration here is reproductive, however the term 'tissue' could have been used, given that reproductive material is included within the biological definition of tissue or biological material.⁸²⁴ In fact, the scientific ability to convert a somatic cell into a gamete, or potentially being able to clone from a cell, makes the distinction useful only to denote that the material is intended for reproduction, and in semantic terms.

Under English Law a 'tissue' is defined as "material that has come from a human body and consists of, or includes, human cells."⁸²⁵ Section 53 sets out that "In this Act, 'relevant material' means material, other than gametes, which consists of or includes human cells."⁸²⁶ In New Zealand's legislation, "Human tissue or tissue means material that – (a) is, or is derived from, a body, or material collected from a living individual or from a body; and (b) is or includes human cells."⁸²⁷ However, tissue excludes human gametes and embryos.⁸²⁸ Therefore the terms are conventional rather than medical.

Under a theory of entitlement, the procreative material cannot be used by a third person without being the lawful users. Consequently, the person or persons entitled to use the procreative material in conjunction with the contract expressing the intention to be parents would be allocated parenthood in assisted reproduction. That is, intention without entitlement to use the procreative material cannot result in parenthood.

The concern here is mainly with property rights in procreative material, rather than tissue or biological material in more broader terms, although this is not to say that procreative material is not included

⁸²² Hoppe, above n 816, at 47.

⁸²³ The property right framework, not only in reproductive material, but also in other human biological material as a tissue or body parts is a controversial issue that seem to advance towards the acceptance of property rights in a human body. However statutory limitation on the property right in human body has been suggested. See RN Nwabueze *Biotechnology and the Challenge of Property: Property rights in dead bodies, body parts, and genetic information* (Ashgate Publishing Company, 2007), at 98-99.

⁸²⁴ Dworkin and Kennedy, above n 818, at 293. They assert: "'human tissue' or 'biological material' are used to describe every aspect of a person's being, ranging from body waste (such as urine, faeces, hair, nail clippings), to a list representing an atlas of the human body...".

⁸²⁵ Human Tissue Act 2004 <www.hta.gov.uk/policies/human-tissue-act-2004>.

⁸²⁶ Section 53.

⁸²⁷ Section 7.1.

⁸²⁸ Section 7.2.

within biological material. However, the legal foundation of property rights in procreative material might differ from biological material in general on account of the specific purpose of the former being reproduction, whereas procreative material might have other aims, such as research. Thus, the term 'procreative material' is aimed at singling the term out from other generic uses, and applying it where the use of the biological material is restricted to procreation.

Courts have systematically denied property rights in human tissue which were used as an input into a process to develop a product with commercial applications. In this context the researcher's rights in the developed product pull in the opposite direction to the rights of the person from whom the raw tissue or cells are collected. However, when it comes to reproductive material with procreative purposes, the same conflict of interests does not materialise. Indeed, the increased relevance and economic value of products developed from tissue or biological material is at the core of the controversy over property rights in the human body.

8.4.2 *Property rights in gametes*

To show the relevance of entitlement or control of the procreative material this subsection will briefly examine the case law of several jurisdictions which confer property rights or entitlement over gametes and embryos. First, the acceptance of property rights in gametes will be put forward through the case law of different jurisdictions. Second, property rights or entitlement over embryos will be explored. However, there is a reasonable reluctance to use the term 'property', despite recognising a right to control the fate of the embryo. Once the relevance of having control over procreative material is demonstrated, the thesis will analyse contract law in disposition of embryos, in order to evidence how the law operates in assigning rights over procreative material and the way this model is replicated with AHR.

In the US, in *Re Estate of Kievernagel*,⁸²⁹ a widow asked the Court for permission to have a vial of sperm of her deceased husband (Joseph) which was stored in a fertility facility under a contract which provided "the sperm was Joseph's sole and separate property." The Court denied the petition and on appeal the Court affirmed the judgment and stated: "we [] also agree that Joseph, as the person who provided the gametic material, had at his death an interest, in the nature of ownership, to the extent he had decision making authority as to the use of the gametic material for reproduction."⁸³⁰ The Court denied the appeal because Joseph's intent, reflected in the agreement, was to discard his sperm upon his death.

In *Hecht v. Superior Court (1993)*,⁸³¹ prior to taking his own life, William Kane cryopreserved 15 of his sperm vials in a cryobank under an agreement which set out the obligation of the sperm bank to preserve the sperm until requested by the executor of his estate. In his will Kane appointed his girlfriend, Deborah Hecht, as executor and also bequeathed the sperm to her to use to be impregnated if she wanted.⁸³² Kane's children challenged the will and the parties tried to settle the dispute. In the proceedings, at the request of Kane's children, the estate administrator asked the Court for an instruction to either to destroy the sperm or distribute between 80 and 100% to Kane's children. The probate Court mandated the sperm's destruction and Hecht appealed.⁸³³ After an extensive

⁸²⁹ *Re Estate of Kievernagel*, 83 Cal. Rptr. 3d 311 Ct. App (2008).

⁸³⁰ At 1031.

⁸³¹ *Hecht v. Superior Court (1993)* 16 Cal. App. 4th, at 836.

⁸³² At 840. As cited by *Re Estate of Kievernagel*, above n 829.

⁸³³ At 843. As cited by *Re Estate of Kievernagel*, above n 829.

consideration the Court asserted that Kane “had an interest, in the nature of ownership, to the extent that he had decision making authority as to the use of his sperm for reproduction.”⁸³⁴ Thus the destruction of the semen was overruled.

In England, *Yearworth v. North Bristol NHS Trust*⁸³⁵ involved claims by two men that the bailee had failed to uphold the duty of care, causing their stored sperm to perish. The Court recognised the existence of property interests in preserved sperm samples, breaking down a 19th century rule that there was no property right in the human body and held: “In our judgment, for the purposes of their claims in negligence, the men had ownership of the sperm which they ejaculated.”⁸³⁶ The Court of Appeals rejected the argument that men lacked the ability to “direct” their sperm usage separately from its ownership, and pointed out that “their negative control over its use remains absolute.”⁸³⁷

Interesting the Appellate Court referred to the development in medical science as a motivation to analyse seriously the issue of ownership. The Court departed from previous case law, realising that the stance adopted by the Australian High Court in the case of *Doodeward v. Spence*⁸³⁸ was outdated and relied on an exception to a general principle which denied ownership in a corpse. Thus the Court contended that it was illogical to examine the ownership of the sperm on the basis of whether or not the sperm has been subject to work and skill as to confer a “substantially different attribute”⁸³⁹ from the original one, despite the fact that the analysis of the issue under the tenet set out in *Doodeward v. Spence* would have been a straightforward path to support the declaration of the men’s ownership over the sperm.⁸⁴⁰

The Court, hence, undertook the task of evaluating the case under the parameter of property law and found the following characteristic of property: First, that each man had secreted or emanated the sperm by themselves. Second, the court explored the statutory limitation on the “ability to direct the use” of the sperm, affirming that statutory limitation per se does not abolish ownership and asserted: “their negative control over its use remains absolute.”⁸⁴¹ That is, they can exclude others from using the sperm. Third, the need to have recourse to an authorised fertility provider to store the sperm and the limit of the storage time does not impinge in the absolute negative control of the sperm, in so far as the men have the privilege to order the sperm’s destruction or to store it or maintain its storage. Fourth, the court considered exclusivity, and stated: “no person, whether human or corporate, other than each man has any *rights* in relation to the sperm which he has produced.”⁸⁴²

In Australia, *Re H, AE (No 2)*,⁸⁴³ concerned an application to retrieve the sperm of a deceased man and the subsequent storage and preservation of the samples. After the authorization was granted, the applicant requested from the Court “a declaration that the applicant is entitled to possession of sperm of her late husband extracted shortly after his death.”⁸⁴⁴ The Supreme Court of South Australia held:

⁸³⁴ At 850. As cited by *Re Estate of Kievernagel*, above n 829.

⁸³⁵ *Yearworth v. North Bristol NHS Trust* [2009] EWCA Civ 37, [2010] QB 1, [2009] 3 WLR 118, [2009] 2 All ER 986 CA [2009] All ER (D) 33 (CA).

⁸³⁶ At [45 (f)].

⁸³⁷ At [45 (f) (ii)].

⁸³⁸ *Doodeward v. Spence* (1908) 6 CLR 406.

⁸³⁹ *Yearworth v. North Bristol NHS Trust*, above n 835, at [45 (c)].

⁸⁴⁰ At [45.(c)].

⁸⁴¹ At [45 (f) ii].

⁸⁴² At [45 f) (iv)].

⁸⁴³ *Re H, AE (No 2)* [2012] SASC 177.

⁸⁴⁴ At [1].

“The deceased’s sperm may be treated as property, at least to the extent that there is an entitlement to possession.”⁸⁴⁵ The Court affirmed the property in the sperm, taking into account that “work or skill has been applied to the deceased’s sperm by the preservation of it performed by Repromed.”⁸⁴⁶ That is, the South Australian Court followed the doctrine endorsed by *Doodeward v. Spence*⁸⁴⁷ under which it was possible to have property rights in parts of a human body, as long as there was additional work or skills applied, which transformed the body into something other than a mere corpse.⁸⁴⁸

In the more recent case of *Re Cresswell*,⁸⁴⁹ the Supreme Court of Queensland addressed the issue of whether or not Ms Cresswell had a right of possession of the sperm of her late partner after the Court had granted an authorisation to remove the sperm from the deceased partner. Regarding this point, the Court stated: “By reference to the relief that is sought in the application, I am satisfied that the stored sperm is property capable of possession by the party entitled to that possession in assisted reproductive treatment.”⁸⁵⁰ However, in the footnotes the Court specified; “The recognition of proprietary rights in something does not mean it has all the indicia of other things called proprietary rights: *Zhu v. Treasurer (NSW)* (2004) 218 CLR at 530; *Re Estate of Edwards* at [72]-[78].” Further, the Court appears to have noted that property rights can have limitations.

8.4.3 Disposition of embryos

Courts deploy different language when dealing with disputes concerning embryos, depending on whether the dispute concerns the couple or creator of the embryo claiming against a third party’s holding or storing of the embryo, or whether the quarrel over the embryo is between the procreators themselves, concerning the embryo’s fate. The moral status of the embryo is frequently raised as an argument against the recognition of property rights over the embryo, and courts are reluctant to use the term ‘property rights’ when dealing with cases related to the fate of cryopreserved or frozen embryos. The term ‘entitlement’ might be more palatable to refer to a property right in the context of embryo disposition, however the relationship of control over the embryo still amounts to property. It is not the embryo which is commodified or considered an object, but rather it is the difficulty of applying a concept that is fundamentally entrenched in the law to new entities and to procreative material that now have a different significance when detached from the body.

*Davis v. Davis*⁸⁵¹ involved a dispute between a divorced couple, Junior Lewis Davis, and his ex-wife, Mary Sue Davis, regarding the “custody or control over their seven frozen embryos.” The case went to the Tennessee Supreme Court after having been considered by two courts with contrary results. Given the importance of the Supreme Court judgment, and the deep analysis around crucial issues in the determination of parenthood such as the legal status of the embryos, property rights in the embryos and disputes concerning the stored embryos’ fate, it is pertinent to refer to the judgment on the examination of all of those matters.

⁸⁴⁵ *Re H, AE (No 2)* [2012] SASC 177, at [58].

⁸⁴⁶ At [58].

⁸⁴⁷ *Doodeward v. Spence*, above n 838, at 411 and 414.

⁸⁴⁸ In the same vein, in *Re the Estate of the Late Mark Edwards* [2011] NSWSC 478, the Supreme Court of New South Wales also recognised property in sperm.

⁸⁴⁹ *Re Cresswell* [2018] QSC 142.

⁸⁵⁰ At [165].

⁸⁵¹ *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

The trial court took the stance that the frozen embryos were human beings, and decided the case on the best interests of the child, granting custody to Mrs Davis.⁸⁵² The appellate court granted joint-custody to both parties based on the constitutional right of Mr Davis not to procreate.⁸⁵³ However, the Supreme Court judgment noted that “the decision of the Court of Appeals does not give adequate guidance to the trial court in the event the parties cannot agree.”⁸⁵⁴

Prior to deciding the case the Supreme Court looked at the moral status of the embryos, and the property or control of the embryo. Regarding this last aspect the Court asserted:⁸⁵⁵

“It follows that any interest that Mary Sue Davis and Junior Davis have in the preembryos in this case is not a true property interest. However, they do have an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the preembryos, within the scope of policy set by law.”

Despite the reluctance of the Court to use the term ‘property right’ it recognised “an interest in the nature of ownership,” and the Court spelled out that Mary Sue and Junior have decision making control over the “pre-embryos”.⁸⁵⁶ Indeed the expression ‘property rights’ is rejected by many scholars and courts, and no doubt it is not only convenient not to use the term, but also inaccurate given that many people might have different views in relation to the embryo depending on their ethical position concerning the embryo’s moral status. Nonetheless, leaving aside the ethical or moral concerns there is, undoubtedly, some ‘sticks’ in the bundle of rights⁸⁵⁷ that lead to a recognition of some kind of entitlement, whichever is the name used to designate those rights.⁸⁵⁸

*In Findley v. Lee*⁸⁵⁹ a divorced well-educated couple, Mr Stephen Findley and Ms Mimi Lee, disputed disposition of the embryos created when the wife was diagnosed with breast cancer. Prior to the treatment with IVF the couple signed an agreement called “Consent and Agreement for Cryopreservation and Disposition of Frozen Embryos”, which in one of the clauses referred to the disposition of unused embryos when certain contingencies arise, including divorce. This important judgment touches upon several legal questions, nevertheless in this section the issue of property rights is singled out among others. It is worth noting that the ex-wife, Ms Lee, argued that the agreement was void because she did not give an informed consent. Consequently, her ex-husband asked the Court to call upon UCSF, the clinic where the embryos were stored, which is part of The Regent of the University of California. The Regent and UCSF petitioned the Court to declare that “the

⁸⁵² At [588].

⁸⁵³ At [589].

⁸⁵⁴ At [590].

⁸⁵⁵ At [597].

⁸⁵⁶ At [597].

⁸⁵⁷ Robert C Ellickson “Two Cheers for the Bundle-of-Sticks Metaphor, Three Cheers for Merrill and Smith” (2011) 8(3) *Econ Journal Watch* 215-222. At 215 Ellickson affirms: “Justice Benjamin Cardozo, a premier judicial wordsmith, is conventionally credited with having first likened a set of full property entitlements to a bundle of firewood.”

⁸⁵⁸ Nwabueze, above n 823. At 33 Nwabueze advocates in favour of a paradigm of property as a bundle of rights rather than the ownership model, that is as a right to a thing. For a discussion about the models or concept of property see Anna Di Robilant “Property: A bundle of sticks or a tree” (2013) 66 *Vand. L. Rev.* 869.

⁸⁵⁹ *Findley v. Lee*, 2016 WL 270083 (Cal. Super. 2016).

embryos are property”.⁸⁶⁰ The judgment answer was: “This Court declines to find that the five embryos in this case are property.” The California Superior Court added:⁸⁶¹

“It simply is not necessary in this case to categorize the Embryos as “life” or “property.” The reality is that the Embryos and their creators, Lee and Findley, deserve something more nuanced. Accordingly, the Court finds that based on the evidence presented at trial and the clear language of the Consent & Agreement, the Embryos in this case represent the nascent stage of five human lives. They are not property nor are they a fully formed human being. They are, in the construct of the law, *sui generis* and will be deemed as such in this Statement of Decision.”

Despite the reasonable hesitancy to talk about property or made a declaration, unwarranted in this case, the Court decided the embryo’s disposition in accordance with the contract signed by the parties.

In *Marriage of Dahl and Angle*,⁸⁶² the Oregon Court of Appeals dealt with a dispute over a frozen embryo in a divorce proceeding. In this particular case the Court held that the embryo was property. However, the Court reached that conclusion in order to decide whether or not it had authority in the divorce proceeding to deal with the embryo storage contract under the Oregon Revised Statute, section 107.105. In analysing the definition of property, and the terms of the storage contract, the Court found that the embryo contract elements fit within the broader definition of property. This case illustrates what Dworkin and Kennedy⁸⁶³ claimed, that is, the need to first ascertain that something is property before determining actions or consequences.

The Oregon Court affirmed: “As shown by the agreement, the parties have rights to direct the facility holding the embryos to transfer or dispose of them through implantation, donation to another woman, donation to a research facility, or destruction.”⁸⁶⁴ Thus, the Court recognised elements which characterise or amount to property in the embryo agreement, and deduced it was property. As Nils Hoppe contended: “Ownership merely describes a strong right – it is the exact number and kind of sticks in this bundle of the powers, prescribed by law which define the character, not the label.”⁸⁶⁵

However, the Court was uneasy in using the legal term in that context and asserted:

“We acknowledge that there is some inherent awkwardness in describing those contractual rights as ‘personal property,’ as we discuss in more detail below. However, we nonetheless conclude that the contractual right to possess or dispose of the frozen embryos is personal property that is subject to a ‘just and proper’ division under ORS 107.105. The trial court did not err in treating it as such.”⁸⁶⁶

This apprehension, which seems to be general and reasonable, raises the question of whether it is necessary to come to terms with using the term ‘property’ as a mere legal figure, which is not derogatory, in the sense that it only implies control, or rights over something, or whether it is necessary to invent a new category or term to designate the right to control over any human procreative material in the broader sense. The term ‘bio-right’ is therefore suggested to denote that

⁸⁶⁰ At [3].

⁸⁶¹ At [44].

⁸⁶² *Dahl v. Angle* 194 P.3d 834 (Or.App. 2008).

⁸⁶³ Dworkin and Kennedy, above n 818, at 293.

⁸⁶⁴ *Dahl v. Angle*, above n 862, at [579].

⁸⁶⁵ Hoppe, above n 816, at 50.

⁸⁶⁶ *Dahl v. Angle*, above n 862, at [580].

the person can direct and control the destiny and use of the procreative material. The bio-rights give the person the power to decide over the procreative material.

8.4.4 *Enforceability of contracts concerning the disposition of embryos*

Having identified the need to decide who controls the procreative material, and in particular an embryo, when disputes arise between procreators, we now go on to address briefly the stance taken by the American states and the judiciary concerning the fate of embryos. As was shown in passing when dealing with the property issue, where there exists an agreement between the parties concerning the fate of the embryo, that contract is enforceable and courts will usually rely on it to decide the dispute. Lacking a contract that specifically decides the actions to follow regarding the embryo when divorce occurs, courts rely on the balancing approach of pondering the parties' interests regarding their respective position of using or not using the embryo. Finally, a minority stance endorses a contemporaneous mutual consent approach.⁸⁶⁷ This basically remits the case back to the parties to reach an agreement, and the court orders continued maintenance of the storage until the parties reach a mutual agreement.⁸⁶⁸

In *Findley v. Lee*,⁸⁶⁹ the couple signed an agreement called "Consent and Agreement for Cryopreservation and Disposition of Frozen Embryos" prior to the IVF treatment, one of the clauses of which referred to the disposition of unused embryos should certain contingencies arise, including divorce. Namely, at page 7, referring to the disposition of embryos, the couple initialled next to the words "thaw and discard", and signed the whole document.⁸⁷⁰ Despite that agreement, Ms Lee asked the Court to apply the balancing test, arguing that "the consent and agreement is not valid and should not be enforced, that her informed consent was not properly obtained."⁸⁷¹

In view of the allegation of invalid consent, the judgment dedicated long segments of the decision to examine at length the couple's circumstances and intentions when they signed the agreement, as well as testimonies regarding Lee's fertility.⁸⁷² The Court concluded that the contract was indeed valid, and ordered the fertility facility to dispose of the embryos asserting:⁸⁷³

"Based on the record evidence, the Court finds that the Consent & Agreement is a contract between and among UCSF, Findley and Lee. The term of the agreement in Directive 4, which provides for the disposition of the embryos in the event of divorce is binding between Findley and Lee."

In *Dahl v. Angle*,⁸⁷⁴ both spouses had signed an agreement concerning the disposition of embryos with the storage facility Oregon Health and Science University (OHSU). However, the husband instead requested custody of the embryos, so as to be able to donate them to another couple for implantation, due to moral reasons. The agreement did not specifically refer to options in the case of divorce, but rather to the case of impossibility of reaching an agreement concerning the disposition of the embryos. In that event the spouses selected the wife to be the decision maker. Regarding the disposition of the embryos the agreement expressly discussed selecting to donate them to science or

⁸⁶⁷ See *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000); in *Re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003).

⁸⁶⁸ *Re Marriage of Witten*, above n 867.

⁸⁶⁹ *Findley v. Lee*, above n 859.

⁸⁷⁰ At [9].

⁸⁷¹ At [3].

⁸⁷² At [19].

⁸⁷³ At [20].

⁸⁷⁴ *Dahl v. Angle*, above n 862.

to discard them, without mentioning donation for implantation, the option that the husband now supported.⁸⁷⁵ The Appeal Court concluded that “issuing the order to destroy the embryos, the trial court essentially gave effect to the agreement. Accordingly, we do not disturb that decision.”⁸⁷⁶

The Court of Appeals in *Kass v. Kass* endorsed the contract approach regarding the disposition of zygotes affirming; “the contract should generally be presumed valid and binding.” The Court added:⁸⁷⁷

“Advance directives, subject to mutual change of mind that must be jointly expressed, both minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision. Written agreements also provide the certainty needed for effective operation of IVF programs.”

In *Davis v. Davis*⁸⁷⁸ the Tennessee Supreme Court made it clear that the contract between the parties decides the fate of the embryo, thus, the terms of the contract, if it exists, should be upheld and enforced. The Court asserted that an agreement over the disposition of the embryos “should be presumed valid and should be enforced as between the progenitors.”⁸⁷⁹ The Court placed equal footing on the female and male gamete providers, and made it clear that the parties have control over the embryo. Therefore, the agreement of the parties would have decided the case, had such an agreement been signed. However, as the Court pointed out at the outset, there were two special characteristics in the case at hand: (1) there was at that time no legislation enacted ruling the result of the case, and (2) the parties had omitted to “execute a written agreement specifying what disposition should be made of any unused embryos that might result from the cryopreservation process.”⁸⁸⁰

The effect of these cases is to suggest that entering into a contract is the exercise of freedom, autonomy and commitment. Once a contract is signed, the law attaches to it effectivity and consequences. Unless some exceptional event occurs, then a contract avoids inconvenient changes of mind that both negatively affect the other party and preclude the fulfilment of the contract.

When the parties do not foresee what could be an embryo’s destiny in case of divorce, courts have examined a diversity of the models proposed in the literature. In *Davis v. Davis*, the Court considered several such options. The survival model proposed that the embryos should be implanted either by the parties or by donation to third parties. At the other extreme of the spectrum, under the disposal model, any unused embryos should be simply discarded. Between those extremes, other options have been mentioned by courts such as conferring control of the embryo to the woman, or presumed implicit consent of the IVF clinic to decide over the use of the embryo, for any purpose.⁸⁸¹ The Court in *Davis* continued stating; “there are also the so-called ‘equity models’: one would avoid the conflict altogether by dividing the ‘frozen embryos’ equally between the parties, to do with as they wish; the other would award veto power to the party wishing to avoid parenthood, whether it be the female or

⁸⁷⁵ At [584].

⁸⁷⁶ At [585].

⁸⁷⁷ *Kass v. Kass*, 696 N.E.2d at p. 180.

⁸⁷⁸ *Davis v. Davis*, above n 851.

⁸⁷⁹ At [597].

⁸⁸⁰ At [590].

⁸⁸¹ At [590].

the male progenitor.”⁸⁸² The Court noted that the division of the embryos would be the worst outcome for both parties, because it would not fulfil the desire of either party.⁸⁸³

8.4.5 *The balance approach*

Davis v. Davis was also delineated by the Court’s use of the ‘balance approach’, in which the right to not reproduce outweighs the right to reproduce, unless the party who wants to reproduce has no other means to fulfil this right in which case the embryo might be the only opportunity to have a genetically related child. In the balance approach the Court weighs the right to procreate against the right to avoid procreation, given that the Court contended that “procreational autonomy” is formed by those two rights.⁸⁸⁴ A person who wants to procreate by means of an embryo created with somebody who objects to reproducing implies or entails overriding the decision not to reproduce. In such a case, when there is no contract in effect, a condition that must be met is that the persons who procreate have no other way to reproduce. That approach can be justified given that the lack of an agreement concerning the fate of the embryo could have created expectations for the other party, and at the same time those expectations really do not express a deliberate intention. That ambiguity cannot impinge on the party who wants to reproduce and has no other choice.

It is noted that such a scenario has most commonly arisen in cases where a person with cancer decides to freeze embryos in order to ensure that he or she could have progeny following chemotherapy. Therefore, that expectation deserves significant consideration. When a contract specifically and explicitly contemplates the embryo’s fate, that same expectation does not exist, and the party who wants to reproduce can either bargain with the partner, or decide to use a donor, or freeze some gametes instead of fertilizing all of them.

8.4.6 *The contract approach*

The summary of the Supreme Court’s diverse approaches surrounding the destiny of an embryo evidences that there are moral perspectives influencing the stance adopted concerning who has control of the embryo and which will be the final result. Conciliating those different interests and simultaneously upholding the right to procreate and to avoid procreation, is completely unviable in some cases. The realization of this fact, and the need to respect autonomy and the right to privacy, indicates that in pluralistic societies the best way to attend to the parties’ interests, while still respecting their rights, is through a preconception agreement. When working out the agreement, with informed consent about the possible consequences, the parties weigh up all of the available options and decide between them, coming to an agreement as to the option that provides the best result according to their moral values. Thereby an agreement is also reached concerning the fate of any embryos, which will be compulsory for the procreators, however many they are.

Alenick argues that:⁸⁸⁵

“disputes about the disposition of frozen pre-embryos should be decided based upon a contract between the divorcing spouses entered into before IVF that comports with the procedural and substantive fairness standards for enforcing both a prenuptial and surrogacy agreement.”

⁸⁸² At [591].

⁸⁸³ At footnote 6.

⁸⁸⁴ At [601].

⁸⁸⁵ Ashley Alenick “Pre-Embryo Custody Battles: How predisposition contracts could be the winning solution” (2017) 38(5) *Cardozo Law Review* 1879-1914, at 1882.

Thereby it is suggested that the agreement concerning disposition of embryos should be separate from the form in which informed consent is given to the IVF procedure.⁸⁸⁶ Nevertheless, for practical reasons, several states have modified their legislation, establishing the obligation to introduce specific clauses dealing with disposition of embryos, and even laying down certain legal consequences for the service provider.

An agreement prior to IVF is compulsory under California's Health and Safety Code 125315, which regulates the disposition of human embryos. Under Californian law, the Health and Safety Code § 125315 laid down:⁸⁸⁷

“(a) A physician and surgeon or other health care provider delivering fertility treatment shall provide his or her patient with timely, relevant, and appropriate information to allow the individual to make an informed and voluntary choice regarding the disposition of any human embryos remaining following the fertility treatment. The failure to provide to a patient this information constitutes unprofessional conduct within the meaning of Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code.”

Section 125315 HSC specifies three events in paragraphs 1 to 3, allowing the parties to choose between the options, and they can even agree to other dispositions. The code respects the parties' autonomy and, despite being in a template form, it provides for the parties to make an informed decision, setting out the consequences of what they are signing.

Massachusetts General Laws ANN chapter 111L paragraph 4⁸⁸⁸ sets out:⁸⁸⁹

“(a) A physician or other health care provider who provides a patient with in vitro fertilization therapy shall provide the patient with timely, relevant and appropriate information sufficient to allow that patient to make an informed and voluntary choice regarding the disposition of any pre-implantation embryos or gametes remaining following treatment.”

However, contrary to the California statute, the Massachusetts regulation provides for only four options, and does not contemplate the eventuality of divorce, referring to a general clause regarding the disposition of the embryo, although it seems that the fertility provider is in charge of providing such information. A similar clause is established in New Jersey,⁸⁹⁰ which also does not consider the specific case of separation or divorce.

Other states have clearly separated legal parenthood from embryo implantation, divesting parenthood from the male partner who provided the gametes, asserting that the male partner is not a parent of a child born from an embryo implanted in his partner after separation. This clause allows for the partner to use the embryo, where the man's only opposition can be to avoid the responsibilities of fatherhood. States that have implemented a provision of avoiding legal parenthood are Washington, Colorado,⁸⁹¹ and Texas.⁸⁹² For instance, the Washington Statute was amended in January

⁸⁸⁶ At 1910.

⁸⁸⁷ Section 125315 of the Californian Health and Safety code-HSC, DIVISION 106. Personal health Care <https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=125315.&lawCode=HSC>.

⁸⁸⁸ <<https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXVI/Chapter111L/Section4>>.

⁸⁸⁹ MASS. GEN. LAWS ANN. ch 111L, § 4 (West 2005).

⁸⁹⁰ Section Title 26:2Z-2 - Public Policy Relative to Derivation, Use of Certain Cells of Humans. <<https://casetext.com/statute/new-jersey-statutes/>>.

⁸⁹¹ COLO. REV. STAT. ANN. § 19-4-106 (West 2009).

⁸⁹² TEX. FAM. CODE ANN. § 160.706 (West 2007).

2019 to deny legal parentage in the context of AHR if the gametes or embryos are transferred after dissolution or nullity of the marriage, unless there is an agreement on the contrary.⁸⁹³

Section 706 of the Uniform Parentage Act (UPA) of 2017 stipulates that if a spouse withdraws consent to an AHR procedure before the embryo is implanted, he or she is no longer deemed to be a legal parent, however, nothing is said about the control of the embryo if a dispute arises before implantation.

Once the procreative material is stored under contract with a clinic or provider there is an obligation to perform the contract in accordance with the duties assumed. In this context, where gametes and embryos are frozen and stored so as to ensure the right to procreate, those expectations need to be secured by the law. Whether one refers to a right to use the procreative material, or an entitlement to this material or a property right over it, the issue at stake is that the procreative material cannot be used, modified or disposed of by a person who is not the lawful user. Consequently, the person or persons entitled to use the procreative material, in conjunction with the agreement to be parents, would be allocated parenthood in assisted reproduction. That is, agreement without entitlement to use the procreative material cannot designate a parent. Likewise, procreative material without agreement to be parents cannot render one a legal parent either.

AHR is becoming an activity that will require additional safeguarding. There needs to be an entitlement to use a frozen embryo, for example, if a genetically edited embryo has been created. It might be the only opportunity for a woman or man to have a genetically or biologically related child. For example, if the creation was carried out before a cancer treatment which could render a couple sterile, there would be no other opportunity to reproduce.

Drawing upon the contract approach to embryo disposition, it is proposed that the contract should be used to ascertain parenthood in AHR, giving effectivity to the agreement of the parties regarding the responsibilities towards the child. However, according to the model, that contracted agreement might include not only the fate of an embryo, but it might also include parenthood, and the rights and responsibilities of each party. For instance, an unwillingness to allow another party to have the embryo might be a consequence of the fear of becoming a legal parent and having to assume responsibilities. That was the situation in *Findley v. Lee*,⁸⁹⁴ where, according to the ruling Findley “fears that if Lee is awarded the embryos, she will use any resulting child(ren) to take financial advantage of him.”⁸⁹⁵ Lee had suggested that the agreement concerning disposition of embryos should be kept separate from the form to give informed consent to the IVF procedure.

This approach implies that the parties are able to determine parenthood by contract or overrule the legal default rules for ascertaining parentage. Parenthood by contract can accommodate situations of collaborative reproduction where several persons contribute to the creation to a child, including donors and a gestational mother. Considering that those agreements are legal contracts, they will be enforceable.

⁸⁹³ West’s RCWA 26.26A.625, WA ST 26.26A.625.

⁸⁹⁴ *Findley v. Lee*, above n 859.

⁸⁹⁵ At [3].

8.5 Gene editing

Assuming that gene editing in germlines is likely to be authorised, it needs to be pointed out that gene editing would be the only opportunity for people to reproduce when they need to avoid transmission of an inheritable illness. Taking into account the complexities and costs that this type of procedure entails, it is more relevant than ever to protect the opportunity to reproduce through the allocation of rights in the genetic material involved.

Since the birth of the genetically edited twins,⁸⁹⁶ the World Health Organization (WHO) has set up a group of experts to figure out a framework for the international governance of the technique. The panel will review gene editing in somatic and germline cells.⁸⁹⁷ In its first meeting, the Group suggested implementing a mandatory register to keep control of any research in gene editing being undertaken around the world. The lab will receive a registration number which allows them to publish their research in scientific journals.⁸⁹⁸

Likewise, the US National Academy of Medicine, the US National Academy of Sciences, and the Royal Society of the UK, with the collaboration of science and medical academies globally, have set up an international commission to elaborate “a framework for scientists, clinicians, and regulatory authorities to consider when assessing potential clinical applications of human germline genome editing.”⁸⁹⁹ The review will focus on germline cells from the scientific, medical, and ethical point of view. In particular, they have suggested a requirement to move germline edition from research to clinical use.

In view of this latest development, it is predicted that gene editing in germline will be applied with some safeguards. Being that so, reliance on the technique might increase in view of the proven success of gene editing in somatic cells with therapeutic purposes.

Gene therapy is being researched intensively and currently 17 gene therapies have been approved by the FDA.⁹⁰⁰ Different kind of genes therapies include plasmid DNA, viral vectors, bacterial vectors, human gene editing technology, and patient-derived cellular gene therapy products. In this kind of treatment cells are removed from the patient, genetically modified (often using a viral vector) and then returned to the patient.⁹⁰¹ The fact that it is a unique treatment and the exclusivity conferred to the laboratory by the FDA makes the ‘drugs’ a treatment that can cost from 500 thousand to several million US dollars approximately, depending on the kind of gene therapy.⁹⁰²

Therefore, initially the cost of a germline modification involving either altering the gametes or embryos would be expected to be a very costly treatment, converting the procreative material in an unsubstituted element of procreation for people who rely on therapeutic gene editing.

⁸⁹⁶ <www.sciencenews.org/article/gene-edited-babies-top-science-stories-2018-yir>.

⁸⁹⁷ <www.who.int/ethics/topics/human-genome-editing/en/>.

⁸⁹⁸ <www.who.int/ethics/topics/human-genome-editing/en/>.

⁸⁹⁹ See <www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=5222019&_ga=2.42862437.1566532755.1558457705-978273653.1546549226>.

⁹⁰⁰ <www.fda.gov/vaccines-blood-biologics/cellular-gene-therapy-products/approved-cellular-and-gene-therapy-products>.

⁹⁰¹ <www.fda.gov/vaccines-blood-biologics/cellular-gene-therapy-products/what-gene-therapy>.

⁹⁰² <www.independent.co.uk/life-style/health-and-families/gene-therapy-cost-rare-genetic-diseases-treatment-expensive-research-a8275391.html>.

“A cycle of IVF for a couple using their own gametes costs on average \$12,000 and has a 33 per cent success rate, and the cost of a successful delivery with IVF ranges from \$66,667 to as much as \$800,000, depending on the age of the couple and how many IVF attempts they have made.”⁹⁰³

Cost aside, the fact that the procreative material is outside the human body would lead to the need to protect the genetic material from misuse or error. Furthermore, the potential of using a somatic cell to create life implies further safeguards are in order to avoid involuntary procreation.

8.6 A new model: the bio-accord model

An insightful analysis of the case law reveals that contract law and property rights underpin the allocation of parental rights in surrogacy cases, although in a belied manner which is not a part of the scheme. Together with the exploration of the case law concerning disputes over gametes or cryopreserved embryos, which are more overtly about the issue of property rights, this provides an opportunity to replicate the scheme in the assigning of parenthood in relation to AHR. In fact, more than a formulation, it is the identification of a pattern that demonstrates that this is a suitable means to best allocate parenthood in an environment of fragmented procreation. The union of contract law and property rights is what will here be denoted as ‘bio-accord’. The uneasy ramifications that the term ‘property’ instigates calls for a different name. It also helps to make aware that the entitlement that the law would confer would come with some restrictions.

The development of the intentional paradigm to ascertain parenthood was a breakthrough formulation in legal theory concerning parental rights, and it is very valuable when expressed by contract. However, drawing from that paradigm the present thesis moves on to formulate a ‘bio-accord’ paradigm in assisted reproduction, considering new technological advances that have taken place since the intentional paradigm was formulated as well as other foreseeable advances that might be forthcoming in the future. The intentional model or paradigm was first used to break the link between the genetic and gestational mother in a surrogacy case, where natural gametes were implanted into a third woman to gestate an embryo. Where both the genetic and gestational mother claimed legal parenthood. However, the bio-accord paradigm takes into account artificial gametes and ectogenesis as well as other technologies.

Roosevelt contends that the genetically unrelated partner who has recourse to a third-party donor’s gametes, either sperm or eggs, might simply obtain property rights in the donor’s sperm.⁹⁰⁴ He argues that: “Recognizing parental rights as derived from property rights allows certainty and simplicity in effectuating the intentions of lesbian co-parents.”⁹⁰⁵ Thus, he foreshadowed the two tools underpinning parentage in surrogacy and other ARTs even before it became generally accepted to regulate surrogacy agreements. He asserted: “Not only *should* we begin to recognize parental rights as derived from property rights, we *must*.”⁹⁰⁶ Consequently the bio-accord model here draws extensively from this proposition.

⁹⁰³ Allison K Hoffman “Review of *The New Eugenics: Selective Breeding in an Era of Reproductive Technologies*, by Judith Daar” (2017) 4(3) *Journal of Law and the Biosciences* 671, at 672-673.

⁹⁰⁴ K Roosevelt III “The Newest Property: Reproductive Technologies and the Concept of Parenthood” (1998) 39 *Santa Clara L. Rev.* 79, at 109.

⁹⁰⁵ At 109.

⁹⁰⁶ At 138.

Why use the term 'bio'? Because the new technologies are able to recombine different genetic material into one, and to edit the original genetic material to improve it either for therapeutic purposes or enhancement. Therefore, the genetic paradigm as such is no longer able to designate legal parents between the different people participating in collaborative procreation. Regarding the use of the term 'accord', it means agreement, and therefore it implies a contract, because in collaborative reproduction the parties would need to agree and contract to whom between them would be parents. That contract allocating parental rights and distributing the responsibilities concerning the child needs to be aligned to the best interests of the child.

The use of the word 'procreative material' indicates that the gene providers might be several people. The findings of experts in the field of embryogenesis and other related disciplines have noted that it will be feasible to create in vitro gametes with several contributors, thus, the resulting gametes differ significantly from traditional gametes which designate one and only one male contributor without doubt. Consequently, a second assessment will be necessary to ascertain who will be entitled to the use of the genetic material, or whether some or all of the contributors will be parents. The term 'bio' distinguishes the resulting fused genetic material from the original DNA encoded in every cell of a human being, given that the original DNA denotes the uniqueness of a person or human being in the context of reproduction. On the other hand, bio also serves to denote the entitlement to use the material, namely the bio-right. The person who has the bio-right is the one who control the gametes, bio-material or the embryo's fate.⁹⁰⁷

8.6.1 The combination of contract law and parental rights as a pattern

Owing to the differentiation between the pool of genetic material and the original genetic material, two factors converge, or are necessary to allocate parenthood between the several genetic contributors. The first is entitlement to the procreative material, which may have several genetic contributors, and the other is the contract which selects or designates who between the contributors would be the legal parents. The union or merging of the paradigms gives rise to the bio-accord paradigm. 'Accord' was selected as a term because it means agreement, and obviously that agreement entails consent and intention. If several persons could be designated as parents, they need to come to grips with an agreement concerning parenthood. Are they all going to be parents? If not, which ones among them are willing to assume the responsibilities of parenthood? Should it be the case that several of them agree to be parents, it would be necessary to establish the details concerning the sharing responsibilities towards the child, and sign an agreement to that effect prior to conception.

In the case of in-vitro derived gametes created from a somatic cell by mistake, the lack of a contract recording the intention of the cell provider to be a parent will hamper the law's ability to designate the bio-provider (the person from whom the somatic cell derives) as a parent. It is clear that even the genetic paradigm is not always sufficient to designate a parent, and this leads to the use of the accord, or agreement, in order to be designated as a parent. A person cannot be designated as a parent simply because one of their somatic cells was used to procreate without their intention. Doing so would violate their rights. We would also have to grapple with the question of how to determine parenthood if cells of different people were used to create in-vitro derived gametes.

⁹⁰⁷ 'Bio-right' is used as a term that is more palatable and neutral to refer to procreative material. Hoppe, above n 816, at 5 asserted when referring to human biological material: "It could be suggested that what we are really dealing with is a problem in a terminological dimension rather than one of actual meaning: We feels that the tools provided by everyday language do not adequately encompass the status which the human body enjoys."

The fact that the genetic material can be modified through gene editing or even fused, such as in mitochondrial modification and in vitro derived gametes, makes the genetic paradigm almost ethereal in nature, leading to an allocation of parenthood in favour of several persons, that is multi-parenthood.

In collaborative reproduction a pre-birth registration would be advisable. The register could be kept by the clinic or fertility provider in conjunction to the official register of births, marriages and deaths. The fertility provider would update online all the relevant information concerning the procreative project and in particular; first, the entitlement to the procreative material by the prospective parent or parents; second, the identities of the providers of the procreative material and what modifications have been done in the germline, including gene editing or mitochondrial modification or any other technology; and third, the agreement reached by the parties concerning parenthood and the distribution of parental responsibilities among them. The register would be consistent with the child's right to know their genetic origins, and it is a safety measure to keep track of the germline alteration given the novelty of these procedures. Although the register would have all the information, some of the information would be classified as a private and given only to the parties or governmental agencies for health purposes.

For instance, consider a pre-birth registration of an ectogenesis agreement, using in-vitro derived gametes obtained from somatic cells. The provider or providers must authorise the use of their material with reproductive purposes, that is, they must agree to either becoming parents or entitling the right to use the procreative material to become parents to others. This entitlement to the biological material in conjunction with the agreement would avoid creating a child without legal parents, for example through ectogenesis or misuse or misappropriation of procreative material. The lack of both entitlement to procreative material and a pre-birth agreement concerning parenthood would create disputes in a setting of collaborative reproduction. Therefore, the bio-accord model is aimed at avoiding disputes of parenthood.⁹⁰⁸

In this context it would be possible for a legislator to impose a cap on the number of people who will be designated as the child's legal parents. It is also advisable that the register of pre-birth records includes the contract between the parties signed by them before the clinic or service provider that undertakes an assisted reproductive procedure. The agreement would be sent to the register, and then taken into account once the baby is born. The agreement would establish the responsibility of each party in the upbringing of the child. Nevertheless, as a default position, a rule of proportionality between the parties could be set out. Regarding the number of parents, having several parents may be redundant for benefitting a child who already has other caregivers and people able to provide for him or her, and so probably it is sensible to establish a cap in the number of parents beyond which an additional parent would not add any beneficial effects for the child.

The use of contract law does not mean that the law would not regulate substantive aspects of the contract, as already happens with surrogacy cases. Included within the scope of regulation could be the possibility of establishing default clauses in the contract or regulating the different options available to the parties. For instance, the contract could contain clauses which guarantee parties' rights, and overall children's rights. For the sake of clarity, it should be said that the contract would not alter the rights and obligations toward the child as derived from parenthood. It would simply allow

⁹⁰⁸ Shultz, above n 776. At 301 Shultz affirms that "Among the most difficult specific issues is how to resolve competing claims to parenthood of children born through artificial reproductive techniques." This was written almost 30 years ago, when assisted reproduction was just starting to be used.

the parties to allocate parenthood and distribute responsibilities between them, in particular in a scenario of multi-parenthood.

This model respects children's rights, and so it is in the benefit of the child, because it guarantees parents to children at birth, it respects children's rights flowing from parenthood, and it avoids disputes based on the lack of entitlement to use the genetic material or the allocation of parenthood. That legal certainty accrues to the child's wellbeing, insofar as it designates as parents the ones who are eager to care for the child, and the parties would be subject to their own terms.

8.6.2 *Applying the bio-accord model to technologies of assisted reproduction*

In this subsection, the application of the bio-accord model to the determination of parenthood to three forms of AHR in mitochondrial modification, in vitro derived gametes and ectogenesis will be considered, and in the case of mitochondrial modification, a comparison is drawn with the regulation of the procedure in England. The analysis purports to demonstrate that the model is fit for ascertaining parenthood under those technologies.

a) Mitochondrial modification

Mitochondrial replacement therapy (MRT) is an in-vitro fertilization procedure that allows a woman with faulty mitochondria to have healthy genetically related children, and avoid transmitting the illness to her descendants, using a special method that involves the genetic material of two different women and a man. As a result, the child born from the procedure has DNA from three parents.

Two eggs are fused to bypass the mitochondrial illness. If the eggs contain genetic material of two women, the genetic test cannot allocate parenthood without expressly excluding one of the two women. This reality provoked the HFEA to choose the woman who provided the ovum nucleus to confer entitlement to the resulting fused eggs,⁹⁰⁹ thereby considering the mitochondrial provider to be a mere tissue donor,⁹¹⁰ stripping her of any right to the fused eggs. That decision was based on the primacy of the DNA in the nucleus over the genes in the mitochondria, due to the role of the nuclear DNA in shaping the physical characteristics of a person. Therefore, it is not a true genetic test in which the genes directly and unequivocally point to a particular person as a parent. Yet the striking difference between a gamete donor and a mitochondrial donor lies in the lack of genetic information that is passed to the off-spring in the latter procedure, whereas the former procedure respects the children's right to know their origins. The decision to not give that information to a child born with mitochondria modification was taken on the grounds that the nucleus contains the main genetic information while the mitochondria contains 37 genes "(around 0.1 per cent of our genes in total)."⁹¹¹ However, the exact role of the mitochondria and its influence are still being studied by scientists.⁹¹²

⁹⁰⁹ HFE (Mitochondrial Donation) Regulations 2015, above n 705. Regulation 17 amends paragraph 22 of Schedule 3 of the HFEA Act 2008, asserting in paragraph 3B; "For the purposes of this Schedule, in a case where an egg is permitted egg by virtue of regulations under section 3ZA (5) the egg is not to be treated as the egg of the person whose mitochondrial DNA (not nuclear DNA) was used to bring about the creation of that permitted egg."

⁹¹⁰ In Section 11, the last paragraph asserts that the "mitochondrial donor in respect of a person who was or may have been born in consequence of treatment services using such a permitted egg or such a permitted embryo is the person whose mitochondrial DNA (but not nuclear DNA) was used to create that egg or embryo."

⁹¹¹ Nuffield Council, above n. 675, at [1.6].

⁹¹² At [1.6].

In addition, determining that some genes are more important than others is not really such an objective measure, because in fact a human being needs all of them. The child could not be born without the entire genome. The relevance of the mitochondria is in the procedure itself because the woman providing the nucleus cannot rely on her own mitochondria to have a healthy child. Bearing in mind that all the genome or bundle of genes are necessary to create life, selecting between several contributors to allocate parenthood might be a complex task with asymmetrical results. On which grounds should it be determined that some genes should prevail over others?

The regulation of mitochondrial modification in England entitles the woman who provides the nucleus to the resulting eggs. Notice that the legislation avoids using the word 'property' expressing:⁹¹³

"For the purposes of this Schedule, in a case where an egg is permitted egg by virtue of regulations under section 3ZA (5) the egg is not to be treated as the egg of the person whose mitochondrial DNA (not nuclear DNA) was used to bring about the creation of that permitted egg."

Therefore, the legislation uses a negative phrase instead of a positive one, although the result is the same, that is, the egg is to be treated as the egg of the person whose nuclear DNA is used. In short, the nuclear DNA provider is entitled to the egg.

Where procreative material is outside of the human body and fused, as is the case of mitochondria, and where there is a contract between the parties, the law needs to award control to one of the two women. That control implies entitlement, despite the reluctance of the provision to use any word which has a connotation of property. Yet, the mitochondrial provider is deprived of any rights over the eggs, and subsequently from parental rights as well.

Examining the same procedure under the bio-accord model, the result is the same; the woman in need of the mitochondria to conceive a healthy child would have acquired the rights over the procreative material (the healthy eggs), due to having signed a contract allocating parental rights to the woman providing the nucleus, who is also the one who desires to raise the child. After all, one woman donates an egg,⁹¹⁴ albeit the nucleus is extracted and discarded from the mitochondrial donor's eggs in the process of mitochondrial replacement. On the other hand, in theory it would also have been possible for the mitochondrial contributor to be involved in the child's life.

b) In vitro derived gametes

In vitro derived gametes is a technology that is still in development. However, some of the feasible possibilities are to create a child with multiple genetic contributors.⁹¹⁵ Under this technology, the genetic test alone cannot designate a legal parent with certainty. Thus, consequently the designation again leads to a result of multi-parenthood.

The use of in vitro derived gametes obtained from induced pluripotent stem cells means that a somatic cell, for instance, skin cells, are taken and transformed in order to procreate.⁹¹⁶ Therefore, there is no inextricable link between gametes and procreation from which to deduce an underlying intention. In

⁹¹³ HFE (Mitochondrial Donation) Regulations 2015, above n 695. Regulation 17 amends [22] of schedule 3 of the HFEA Act 2008 [3B].

⁹¹⁴ Hoppe, above n 816, at 16. Hoppe noted that donation implies property rights in order to support the gift, in other words, we cannot give what we do not owe.

⁹¹⁵ Palacios-Gonzalez, Harris and Testa, above n 777.

⁹¹⁶ Z Li et al., above n 777. Chinese researchers were able to breed mice from same sex couples through a combination of two techniques, embryonic stem cells and gene editing, in order to avoid imprinting.

the case of misuse or mistake of a somatic cell with reproductive purposes, the implication is that a procreative intention is not a straightforward inference. In this case, the genetic material encoded in every cell of the human body cannot designate a child's parents. However, if the procreation entails entitlement to use the procreative material as a precondition, such a scenario might be avoided. Likewise, if a contract is required to vest or ascertain parental rights, the cell's provider cannot be legally deemed to be the parent.

c) Ectogenesis

Ectogenesis is an emerging technology that has made inroads into real applications, at least partially. Scientists suggest that the use of a "bio-bag" to complete the development of premature human embryos will be available soon in clinical trials. Bearing in mind that the experiment with lambs amounted to 22-24 weeks of a human embryo,⁹¹⁷ the viability of an embryo would be approximately half the term of a complete development or pregnancy.

Leaving the question of viability aside, complete ectogenesis has consequences for parenthood. Who would be the legal parents of a child who grows outside the human uterus? Neither the gestational nor the genetic paradigm work in such a case. The first is obviously redundant for ascertaining parenthood, because the gestational paradigm leads to one considering a machine to be the legal mother. On the other hand, the genetic paradigm is also not appropriate given that it could designate as parents persons who are mere donors and do not want to raise the child. Furthermore, if the gametes used are in-vitro derived with several contributors of genetic material, the determination of parenthood will require a test to establish who are the genetic parents, and still the test may well allocate parenthood in favour of several people with no desire to become a parent. The genetic test becomes unhelpful for allocating parenthood. Here then, the only test that is fit for purpose is the bio-accord, with a joint contract and bio-right allocation before procreation.

Partial ectogenesis (PE) raises a number of ethical and social questions. For instance, it touches upon the abortion debate.⁹¹⁸ Concerning parenthood, PE affects the definition of parents in New Zealand's legislation. Section 5 defines as a mother the woman who gives birth to a child.⁹¹⁹ Thus the question arises as to whether or not the embryo is a child when it is extracted from the uterus undeveloped and premature form prior to being placed in the biobag? If the answer is positive, then the definition of mother stands in its actual wording. On the other hand, if the foetus is not considered a child because of its underdeveloped condition, the outcome would be that the foetus has no legal mother, at least until it is considered a mature foetus.

However, the answer to the question has further consequences. If, once outside the uterus, and whatever is the stage of development, the foetus is a child, then it has personhood and all of the rights and privileges of a person. On the other hand, if it is not a person, what kind of legal protection might

⁹¹⁷ Partridge et al., above n 8.

⁹¹⁸ For instance, Nuffield Bioethics set out that partial ectogenesis "is also relevant to the abortion debate, as it potentially enables both a pregnant woman's right to choose abortion and the fetus' right to life to be satisfied, by providing an alternative womb for the fetus to develop in, making the fetus 'viable' earlier." <<http://nuffieldbioethics.org/future-work/future-work-topics-2015/topic-summary-artificial-wombs-ectogenesis>>.

⁹¹⁹ Section 5 of SoCA states: "A child born to a woman during her marriage, or within 10 months after the marriage has been dissolved by death or otherwise, shall, in the absence of evidence to the contrary, be presumed to be the child of its mother and her husband, or former husband, as the case may be." It does not refer to a child born from an AHR procedure.

be afforded to it? The difference lies in the fact that the embryo cannot survive if it is not connected to the ectogenesis device.

It has been suggested that partial ectogenesis might be used to assist a woman who wants to terminate the pregnancy.⁹²⁰ Being that so, who will be the child's mother once the child is born? Would it not be better to confer adoption of the foetus as it is, instead of placing the baby, once mature, under institutional care? In partial and total ectogenesis the question arises of at which stage of its development is an embryo or foetus to be considered a person? And of course, the related question which is of interest to the present thesis, at which stage of development should parenthood be conferred?

d) Other considerations

The bio-accord model needs to be applied pre-emptively, before conception. Thus, if the contract is made before conception, it would be feasible, in theory, to move parenthood to the moment of conception in AHR, although that stance could be problematic in natural reproduction. In theory, it would be possible for legislators to divest parenthood from some of the contributors of the genetic material, however doing so would restrict the ability of a genetic parent to have access to the child or to become a parent, even when that person does want to assume the responsibilities of parenthood.

Stringent regulation is needed in order to be justified as being in the child's best interests and to explain the reason why it would be detrimental to the child to have more than two parents who are willing to undertake the task of his or her upbringing.⁹²¹ It also implies setting up criteria in order to divest some willing contributors of the entitlement of legal parenthood. Are some genes more relevant than others? Is the act of providing the majority of genes an appropriate factor, and what about partial ectogenesis in which the child is gestated both in the machine or bio-bag and in the woman's uterus? A moderate approach to the regulations of parenthood, endorsing and accepting the prospects that new technologies offer of creating new family formations, would boost procreative liberty. Robertson argues that procreative choice should be conferred the status of "presumptive primacy",⁹²² placing a high threshold upon overriding this freedom.⁹²³ Autonomy has been conceived of as a negative right, that is, as an obligation of government not to place burdens in the path to procreation, however some have contended that it should be a positive right.⁹²⁴

On the other hand, a restrictive approach might be circumvented by travelling to another, more permissive country, as is happening in cross border surrogacy. Cross border surrogacy has brought the law's circumvention as a phenomenon driven by globalization and the possibility of obtaining lawfully in a foreign country what domestic laws preclude. Since there is no foreseeable likelihood that this trend will change, it is predictable that the same event might occur with other technologies, should they be offered in other countries. Hence AHR and the spill-overs they generate are not limited to some countries alone.

⁹²⁰ Nuffield Bioethics, above, n 918.

⁹²¹ See Tim Bayne and Avery Kolers "Towards a Pluralistic Account of Parenthood" in S Gilmore *Parental Rights and Responsibilities* (pp. 103-124; London, Routledge, 2017). They argued in favour of pluralism in parenthood

⁹²² Robertson, above n 778, at 24.

⁹²³ At, at 34. However, he warns that nontherapeutic enhancement or cloning may not deserve the protection of the procreative liberty.

⁹²⁴ K Mutcherson "Reproductive Rights without Resources or Recourse" (2017) 47 *Hastings Center Report* S12-S18.

Gene editing is likely to be used with therapeutic purposes, either with gametes or embryos, which represents a unique opportunity for people with genetic diseases to reproduce. Consequently, in this scenario the party suffering the genetic disease needs to ensure the right to reproduce will be not hampered by the other party or parties, should they change their minds. Likewise, if a woman or man becomes infertile for any reason after creating an embryo, he or she would also be deprived of any other opportunity to reproduce.

e) Strengths and weaknesses of the bio-accord model

The bio-accord model will be helpful in intricate settings that can be envisaged for the future, such as in vitro derived gametes or ectogenesis. In ectogenesis, a contract assuming parenthood and responsibilities is necessary given that the gestation and procreation is done extracorporeal. Once the act of procreation is disconnected and detached from the body, there is no direct connexion between giving birth and parenthood. Additionally, if the conception is achieved with in vitro derived gametes, for instance, it enters into a sphere of ambiguity as far as allocating parenthood is concerned, which renders contract law the best option for conferring parenthood and protecting the interests of the future child.

It also serves for a better flow of information between the parties and more respect for children's rights and needs. It is unthinkable to spend time and money in conceiving a child by AHR if the parties are really not committed to raising the child to the best of their abilities. This assertion is closely aligned with a case involving a dispute over frozen embryos upon divorce. But it could also be extrapolated to conception by AHR, given that in AHR there is no reason to impinge upon the autonomy of any one party, above all if that intromission implies the imposition of parenthood.

A principal strength of the model is that it encapsulates a whole range of assisted reproductive technologies in an increasingly complex procreative scenario where genetic material is detached, combined, and fused. On the other hand, entitlement is a tool for keeping the procreative material under control once it is detached from a human body. This is particularly important when unfertilized procreative material or embryos are stored for later use, or treated prior to storage, given that it may be the only opportunity for that person to procreate.

On the other hand, one weakness of the model is that the identification of the legal parents is done individually before conception rather than being a single rule that applies in the same way to all cases as the genetic and gestational paradigms do. A system that uses a generic rule would break down in some complex cases which either identify the wrong people as parents or does not identify any parents, while the bio-accord model avoids those situations it does so at the cost of the formality of a contract.

8.7 Embryo disposition in New Zealand

In New Zealand there are no guidelines dealing with embryo disposition when a gamete provider withdraws consent prior to implantation of the embryo, in particular when a couple splits up. A consultation process was carried out in 2015 in which ACART put forward advice to the Minister of Health on the requirements for informed consent in the context of assisted reproductive technologies,⁹²⁵ which encompassed, among other questions, what would happen if a couple are

⁹²⁵ <<https://www.health.govt.nz/publication/informed-consent-and-assisted-reproductive-technology-proposed-advice-minister-health-consultation>>.

unable to agree about the fate of the embryo after a cool-off period of 1 year? Should the embryo be disposed of or not? However, so far, no guidelines have been published.

Regarding property rights in gametes, there is no case law considering property rights in gametes of living persons. Property rights in a dead person's gametes have been denied, as was discussed earlier in the present thesis.⁹²⁶ Nevertheless, the technological advances in the procreation process would create the necessity to confer property rights in procreative material or conceptualize a new method to award control and certain rights over the procreative material.

8.8 Conclusion

The advance of AHR and the emerging technologies will require that the law allocates parentage beyond the traditional paradigms, which are based on genetic or gestational roles, and will probably abandon the heteronormative model of family.⁹²⁷ Technologies such as in vitro derived gametes or ectogenesis defy the stereotypical models of allocating parenthood, that is, the genetic, the gestational and the intentional models. Therefore, exploring case law which resolved gametes and embryo disputes, as well as surrogacy agreements, the scheme underpinning the vesting of rights is revealed. This examination evidences that there is some unease with using the term 'property right' in reference to biological material, in particular, embryos. However, it is suggested that recognising property rights in procreative material is not disrespectful, but rather it is the acknowledgment of the central role that property plays in conferring rights, and in the case at hand, over procreative material. Once procreation arrives to the extracorporeal realm, and procreative material is combined, there needs to be a right to control and use it. Drawing from the extensive literature regarding surrogacy and reproductive technologies, this thesis suggests a determination of parenthood in AHR through the bio-model which is based on the conjunction of property rights and contract law. The bio-accord model has been demonstrated as suitable for allocating parental rights to children born as a result of new and emerging ARTs, and it guarantees autonomy to the parties involved in the procreative endeavour. As a consequence, children would have as their legal parents those adults who are willing to raise and take care of them.

⁹²⁶ See chapter 5 on posthumous reproduction.

⁹²⁷ The term was used by Berlant, above n 775. The term heteronormative was used to denote the traditional, heterosexual and monogamous family. See also Warner, above n 775.

9. Conclusion

Thirty years after Steptoe and Edward had achieved a quantum leap in AHR with the birth of the first baby conceived by IVF, the first babies with edited genes were born in 2018, and the WHO began to work on a framework for the governance of gene edition both in somatic cells and germline. The magnitude of this most recent event, and the impact in accelerating the use of AHR, is enormous and implies a giant leap for the development of the future of humanity. The possibility of being able to alter the genome of an embryo is now a reality.

Advances in biology and embryology, in conjunction with developments in computer science and artificial intelligence, might make the use of assisted reproduction, rather than sex, a reality for many people as a means of bringing humanity progeny into the world.⁹²⁸ The spread of these technological innovations, and new developments yet to come, will lead the law down the path of having to reconsider the determination of parenthood in assisted reproduction as an exception to natural reproduction, and instead regard assisted reproduction and natural reproduction as alternative and equal methods of reproduction, including technologies which interfere with the traditional roles within the natural cycle of bringing a child to life.

The time has come to face today's reality and also the foreseeable reality of the future. When genetic/gestational surrogacy began, the approach of regulators was to restrict the use of the technique and the determination of parenthood as a means of discouraging people from using assisted reproduction.⁹²⁹ However, 30 years later that approach has not only been shown to be incorrect, it has been ineffective, as other technologies of assisted reproduction have been developed and are in use.

New technologies have created more contenders to parenthood than the traditional mother and father,⁹³⁰ and have rendered the biological link alone unsuitable for ascertaining parenthood. So far, the intentional base test stands out as the better option for ascertaining parenthood. Although this test was most clearly formulated in relation to surrogacy cases, in practical terms the paradigm was used to divest mere biological contributors of a claim of parenthood claim in cases of gamete donation.

The present research is aimed at providing a model to allocate parenthood in the context of AHR. The applications of the different paradigms to determine parenthood to actual and potential ARTs is the principal focal point of the present thesis. This study has also reviewed existing work and literature on legal parenthood and has analysed New Zealand's regulation on legal parenthood. In addition, it has explored the regulation of guardianship bearing in mind that it vested guardians with the rights and responsibilities of raising the child. The brief historical examination of the evolution of legal guardianship and illegitimacy has traced discrimination in the legal determination of parenthood. However, in contemporary societies, the UNCROC calls for conferring parentage to children from the moment of birth.

⁹²⁸ Greely, above n 1.

⁹²⁹ Brazier Report, above n 200. Referring to the Warnock Report, [2.23] contended that: "The majority clearly hoped that by stringent measures to outlaw any assistance in creating surrogacy arrangements, surrogacy would wither on the vine."

⁹³⁰ Shultz, above n 776.

9.1 Significance

This thesis is the first to evaluate in detail legal parenthood under both actual and potential ARTs, applying the different paradigms to different technologies of assisted reproduction to visualize the results in each case. It has examined in detail current technologies of assisted reproduction such as mitochondrial modification and posthumous reproduction. It has also briefly considered partial ectogenesis and in-vitro derived gametes. However, in the latter cases only predictable consequences of the application are indicated, due to the fact that the techniques are following different paths in the development process.

The thesis adds to the current literature of allocating parentage to surrogate born children. Although other models were suggested to allocate parenthood to children born from surrogacy in New Zealand, such as pre-birth orders, the thesis suggested a different method of vesting legal parenthood in the actual New Zealand surrogacy framework. This model is a novelty in New Zealand legal context.

After having examined both current and future technologies the thesis applied the three known paradigms – genetic, gestational and intentional – to investigate which one is more suitable, or if a new one would be more appropriate. From that exercise, and drawing upon the models or paradigms, the thesis has arrived at a new paradigm called ‘bio-accord’. That model is a new construction, which recognises collaborative reproduction taking place in AHR. The model is able to capture and encapsulate a whole range of technologies of assisted reproduction, because the basis for recognising parenthood is not an isolated paradigm, but rather it couples contract law and entitlement to the procreative material, and these features are brought together as bio-accord. While genetics can be separated and then fused and transformed, and gestation could be shared with either a person or a machine, neither of the paradigms of gestation or genetics alone cannot designate a parent. Similarly, intention alone cannot make anybody a parent, because the user needs to be entitled to use the biological material and be authorised by the other participants through their consent, in order to ascertain parenthood. If it is true that humanity is heading towards an era involving the end of sex as a reproductive enterprise, this by necessity means the end of parenthood based on traditional roles. What the future will bring is unknown, yet there is a tendency towards the increasing reliance on AHR to procreate.

9.2 Other findings

The analysis of the case law in England has demonstrated that legal parentage does not serve as a tool for enforcing compliance with the law. Other means of enforcement, using indirect measures are also possible, such as fines, preclusion of social benefits, deductions, imposition of higher taxes, preclusion of enjoying parental leave, etc. Indirect measures are not devoid of controversy, although they do ensure respect for children’s basic rights.

9.3 Future directions for research

One future direction for research is connected to the limitation of the present thesis. As affirmed in the introduction, the moment at which personhood is granted to the embryo is a question that needs to be addressed if total or partial ectogenesis is used. Even gene editing and the ability to change the embryo’s fate demand some kind of protection and responsibility towards the embryo, namely if the technique is used with purposes other than therapeutic.

If partial ectogenesis is used to assist a woman in the abortion process parentage should be considered at which moment the embryo or premature baby would be adopted or whether or not it is better to confer parenthood directly to the person/s willing to raise the child.

Regarding property rights in procreative material it may be necessary to examine in greater depth the bio-rights, or property rights on procreative material. Should the law place limitations on the bio-rights? Which would be the kind of sticks in the bundle regarding procreative material?

In the New Zealand context, the Care of Children Act s 20 uses gendered language in the wording of the provision, and becomes dysfunctional when a same-sex couple apply to a court to clarify their status as a child's guardians. Additionally, the recognition of same-sex couples as a child's parents may require a more neutral denomination, such as the generic term 'parent' (as in SoCA), instead of 'mother' and 'father'. Or maybe a new term could be coined to overcome the dual denomination based on gender. The exploration of gender equality in other laws related to parenthood, included the laws concerning birth registration deserves to be explored.

A generic term would overcome the traditional reliance on heterosexuality that is embodied in dual denomination of parentage according to gender. Neutrality would also help to overcome any discrimination and stigma suffered by children who do not belong to traditional families. The legal status of same-sex couples calls for a unique denomination of parentage in order to avoid implicit discrimination in the dual denomination.

Contract law and property rights united into the bio-accord model, come across as to the best option to vest legal parenthood, given that it promotes autonomy and certainty in determination of parenthood, allocating parenthood to willing parents, even before conception takes place. The bio-accord model overcomes the limitations of the presumption of parenthood, or donor's parental rights deprivation, in a scenario of collaborative reproduction. Enforceability of the contract entered into by people entitled to use the procreative material provides for the vesting of parenthood in collaborative reproduction. The advantage of this model is that property rights guarantee the legitimate control of the procreative material, and the contract always designates the parents that are eager to raise the child. The allocation of legal parenthood in favour of the person or persons who will be upbringing the child is in the best interests of the child. The child's parents will be committed to the child's wellbeing, providing the right to an identity, nationality and the rest of rights stemming from parenthood since the very moment of birth. The use of contract law does not mean that lawmakers cannot put in place limitations or regulations in the contract form or content, mainly to guarantee children rights, as well as the rights of all parties involved in the procreation process. For instance, surrogacy contracts are significantly regulated in jurisdictions in which they are permitted.

In view of the transformation of the reproductive process in ART, the reconfiguration of the allocation of parenthood is imminent as the technologies evolve towards more choices and more individual control over the reproductive process, and as the link between biology and parenthood becomes more equivocal and ambiguous. The bio-accord model provides certainty in the allocation of parenthood in all situations and contributes to the best interests of the child

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