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THE ROLE OF NON-GENETIC PARENTS IN A SURROGATE-BORN CHILD'S IDENTITY: AN ARGUMENT FOR REMOVAL OF THE GENETIC LINK REQUIREMENT

ABSTRACT

For the court to grant a parental order recognising intended parents as legal parents of a surrogate-born child, the gametes of at least one of the intended parents must have been used to create the embryo, under s54(1)(b) and s54A(1)(b) HFE Act 2008. In the Law Commission and Scottish Law Commission's consultation paper, there was a provisional proposal to remove the genetic link requirement in cases of medical necessity. However, this proposal was not included in the Law Commissions' Final Report, instead recommending the retention of the requirement for a genetic link in almost all circumstances.

This article contends that the Law Commissions' recommendation should be reconsidered in light of the child's right to identity. By reviewing how identity has been used by the courts when determining whether to grant a parental order, as well as a developing interpretation of Article 8 of the UNCRC and ECHR, it can be asserted that the identity of surrogate-born children necessitates recognition of the relationship between child and intended parent(s), irrespective of a genetic link. On this basis, it is argued that there should be the possibility for intended parents to establish legal parenthood following surrogacy without the requirement for a genetic link.

KEY WORDS

Children's rights; genetic link; human rights; identity; private life; surrogacy

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INTRODUCTION

When a child has been born a result of a surrogacy arrangement, in England & Wales and Scotland it is necessary for intended parents to apply for a parental order to remove the surrogate's legal parenthood and to have the intended parent(s) recognised as the legal parent(s). The requirements for a parental order to be granted are contained within s54 and s54A of the Human Fertilisation and Embryology Act 2008 (the HFE Act). These requirements have been subject to judicial and academic scrutiny and there has been a high level of judicial creativity in the interpretation and application of several of the s54 requirements to allow legal parenthood to be recognised even in circumstances where the strict wording of the legislative requirements have not been met.[1] The basis upon which the court has justified deviation from the precise wording of the s54 requirements is to ensure the lifelong welfare of the child, a statutory obligation since 2010,[2] and through the process of reading down the statute in order to ensure compliance with the European Convention on Human Rights (ECHR).[3] The extent to which these requirements have been liberally interpreted, and on some occasions disregarded, led to a view, acknowledged by the Law Commission of England & Wales and Scottish Law Commission (the Law Commissions) that the s54 requirements required reform.[4]

[1] For example, the significant case of *Re X (A Child) (Parental Order: Time Limit)* [2014] EWHC 3135 (Fam); [2015] Fam 186 relating to s 54(3).
[2] Adoption and Children Act 2002 s 1, inserted into s54 HFE Act 2008 through the Human Fertilisation and Embryology (Parental Orders) Regulations 2010.
[3] Human Rights Act 1998 s 3; *Re X (A Child) (Parental Order: Time Limit)* (n 3).
[4] Law Commission and Scottish Law Commission, *Building Families through Surrogacy: A New Law, A Joint Consultation Paper* (Law Com No 244, 2019) 12.

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One lesser analysed parental order requirement is S54(1)(b) and s54A(1)(b) HFE Act - that the child must be genetically related to at least one of the intended parents. This means that in gestational surrogacy arrangements, which involves the surrogate carrying a child that is not genetically related to her, double gamete donation – being the use of donated egg and sperm to form the embryo – would prohibit a parental order being granted. In traditional surrogacy arrangements, whereby the surrogate's own eggs are used, the use of donor sperm would also prevent the granting of a parental order. In the case of a single intended parent applying for a parental order under s54A, the gametes of that intended parent must have been used.

Looking at how the genetic link requirement is perceived by international bodies, the Principles for the protection of the rights of the child born through surrogacy (Verona Principles), developed by the International Social Service state that it is generally in the best interests of the child to have at least one genetically related intended parent,[5] but there is no authority upon which this proposition is based. Further, although not taking an explicit position on the requirement, the Experts' Group on the Parentage/Surrogacy Project (established under the Hague Conference on Private International Law) specified that requiring a genetic link could act as a safeguard when developing a Protocol on the recognition of legal parentage established aboard following surrogacy.[6] However, it is not specified how a genetic link requirement would safeguard, nor what it would be safeguarding against. As will be discussed later in the article, the European Court of Human Rights (ECtHR) have also prioritised the

[5] International Social Service – General Secretariat, 'Principles for the Protection of the Rights of the Child Born through Surrogacy (Verona Principles)' 14.
[6] Experts' Group on the Parentage / Surrogacy Project, 'Final Report "The Feasibility of One or More Private International Law Instruments on Legal Parentage"' 33.

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requirement for a genetic link when considering potential violations of the Article 8 right to private and family life of surrogate-born children and intended parents. These international bodies attach significance to the genetic link between intended parent and child, but often without a clear articulation of why such a requirement is important. Domestically, there has been little judicial scrutiny of this requirement; this may be attributable to the fact that intended parents with no genetic link to the surrogate-born child would be aware upon seeking legal advice that a parental order application would be unsuccessful and so do not attempt to make the application Further, it is an expectation under the Human Fertilisation and Embryology Authority (HFEA) Code of Practice for clinics to have made intended parents aware of the genetic link requirement during consultations,[7] meaning they would be aware that a parental order application would not be successful. Equally, however, the lack of judicial debate in relation to the genetic link requirement may demonstrate that circumstances where intended parents engage in surrogacy without the intention for at least one of them to be genetically related to the child are not common.

The genetic link requirement is where the courts have differentiated parental orders from adoption, with Theis J in *AB & CD v CD* stating that the purpose is to 'create legal parenthood around an already concluded lineage connection'.[8] Nonetheless, the requirement for a genetic link between an intended parent and surrogate-born child can be seen as problematic in relation to the identity rights of the child. This article aims to analyse this requirement, and the Law Commissions' provisional proposals and final recommendations, from this identity-rights angle. Taking a doctrinal

[7] Human Fertilisation and Embryology Authority, 'Code of Practice 9th Edition' (2021) para 14.3.
[8] *AB & CD v CT (Parental Order: Consent of Surrogate Mother)* [2015] EWFC 12; [2016] 1 FLR 41 [70].

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approach, contrasting case law, from both the ECtHR and domestic courts, is reviewed, finding inconsistencies between two seemingly competing areas of law: the s54(1)(b) genetic link requirement and the emerging concept of the child's right to identity in terms of recognition of their relationship with the intended parent(s).

Part I will establish a meaning of 'identity' using the United Nations Convention on the Rights of the Child (UNCRC), as well as the European Convention on Human Rights (ECHR) and its associated case law. Whilst it is more widely accepted that the concept of identity encapsulates the right to know birth origins, including the identity of individuals with a potential 'parental' status, there is emerging recognition that the surrogate-born child's identity is also reliant on the relationship with their intended parents.

Part II analyses the domestic case law to assess how the judiciary have understood identity in relation to the recognition of the relationship between the intended parents and child. It will be advocated that, unlike the case law of the European Court of Human Rights (ECtHR), domestic parental order cases have not always clearly distinguished between the genetic parent and the non-genetic parent as they apply to the child's identity. As such, it concludes that the retention of the genetic link requirement is out of line with the judicial understanding of the importance of both intended parents for the child's identity.

Given that, in most cases, at least one intended parent will be genetically related to the child, the s54(1)(b) requirement may seem unproblematic from a practical perspective. However, there are possible situations where the intended parent(s) do lack a genetic link to the child which would prevent the granting of a parental order,

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contrary to the identity rights of the child. Part III will explore some of these possible situations as examples of why the law needs to be reformed.

Finally, Part IV reflects on the Law Commissions' provisional proposals and final recommendations in relation to the genetic link requirement and double donation to assess whether law reform will address the identity issues posed by the current requirement.

8. IDENTITY IN A SURROGACY CONTEXT – THE INTERNATIONAL RIGHTS FRAMEWORK

A. The UNCRC

When the UNCRC was drafted, it was the first time that 'identity' was recognised as a standalone right of an individual, let alone a child. Initially proposed as a response to the unlawful removal of children in Argentina by the militia in the 1980s, it was clear at the point of drafting that the concept of identity did not have a settled definition across States.[9] However, included within the wording of Article 8, in which the right of a child to preserve his or her identity is recognised, an indicative aspect of a child's identity that would require preservation is 'family relations'. In circumstances where a child has lived since birth with their intended parents, it is clear to see that such a familial dynamic would fall within the definition of family relations. Tobin and Todres' articulation of identity comprises both 'historical elements' that are fixed, such as family heritage and biological identity, as well as 'dynamic attributes', which may develop and change over time, such as gender identity and political affiliation.[10] Whilst a biological

[9] United Nations Economic and Social Council, 'Report of the Working Group on a Draft Convention on the Rights of the Child' E/CN.4/1986/29.
[10] John Tobin and Jonathan Todres, 'Article 8. The Right to Preservation of a Child's Identity' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (OUP 2019) 285.

link to an intended parent would be a historical element of the child's identity, the lived reality of the child with their intended parents could be seen as a dynamic attribute, irrespective of a genetic link, which is no less significant in terms of identity and thus the State's obligation to protect it. It is the dynamic attributes of a child's identity that could be argued to necessitate legal recognition of the child as the legal child of the intended parents.

However, the limitations of the UNCRC establishing this concept as an enforceable right must be acknowledged. Despite the success of the UNCRC in reaching near-global consensus on the rights that should be afforded to children,[11] it has been argued that many States 'pay no more than lip service to the Convention'[12] – this may be due, in part, to the aspirational nature of some of the rights, but there is also no enforcement mechanism linked directly to the UNCRC. Whilst there is no international court linked to the Convention and many signatory States, such as the UK, fail to incorporate the UNCRC into domestic law, there remains no judicial oversight of how States ensure the rights of the child are met. The Committee on the Rights of the Child (CRC) has an important function in holding States to account through the periodic reporting system, but the findings and recommendations are not binding and thus cannot compel State action.

Notwithstanding these concerns, it was acknowledged in *Neulinger v Switzerland*[13] that, in the context of the ECHR, the UNCRC forms part of international law that Member States must comply with, particularly in relation to the paramountcy of the

[11] The United States is the only State yet to ratify: United Nations Human Rights Office of the High Commissioner, 'Status of Ratification Interactive Dashboard' (*OHCHR.org*, 9 February 2021) <https://indicators.ohchr.org/> accessed 1 January 2023.
[12] David Archard, *Children: Rights and Childhood* (3rd edn, Routledge 2014) 59.
[13] *Neulinger v Switzerland* (2012) 54 EHRR 1087.

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child's best interests.[14] Although the Council of Europe is not legally bound to the UNCRC, all members of the Council of Europe are also parties to the UNCRC. The ECtHR has for many years referred to the UNCRC when making decisions, demonstrating that the 'court is open to considering arguments based on the [UNCRC], to the extent that they can be used to assist it in interpreting relevant provisions of the [UNCRC]'.[15] Member States of the Council of Europe must ensure compliance with the UNCRC as part of their obligations under the ECHR, as well as the Convention rights within the ECHR itself. Therefore, the case law of the ECtHR, as well as the ECHR Article rights themselves, are significant in establishing an understanding of a child's right to preservation of identity.

B. The ECHR

Article 8 of the ECHR has two distinct notions: the right to family life and the right to private life. As the case law of the ECtHR demonstrates, if the surrogate-born child is living with the intended parents, it is likely that they will be able to demonstrate family life, thus necessitating that the State preserve their relationship. However, establishing family life alone does not provide a sufficient basis to require the State to recognise the legal parenthood of intended parents for two reasons. First, the ECtHR have stated that it is possible to preserve family life in ways other than establishing a legal parent-child relationship between the intended parents and the child.[16] However, these alternative methods of preserving the relationship between the child and

[14] ibid [131-135].
[15] Philip Alston and John Tobin, 'Laying the Foundations for Children's Rights: An Independent Study of Some Key Legal and Institutional Aspects of the Impact of the Convention on the Rights of the Child' (Unicef Innocenti Insight 2005) 17.
[16] As seen in cases such as *Valdis Fjölnisdóttir and others v Iceland* App no 71552/17 (18 May 2021).; *Mennesson v France* App no 65192/11 (ECtHR, 26 June 2014).

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intended parents, such as foster care[17] and adoption,[18] do not recognise the formative role that the intended parents had in the creation of the child, thus failing to acknowledge the significance of the intended parents on the child's identity. Secondly, there may be circumstances where family life cannot be established, yet a child's identity would seemingly require recognition of their relationship with the intended parents, for example where the period of cohabitation between intended parents and child has not been sufficient to satisfy family life.[19]

It is the notion of private life that has been primarily utilised by the ECtHR in surrogacy cases, firmly establishing that private life encompasses identity, including legal recognition of the parent-child relationship. However, the case law also demonstrates that priority is given to genetic relatedness, thus potentially leaving non-genetic intended parents in a more precarious position in terms of being recognised as the legal parents.

1. *Genetic intended parents*

The priority to genetic relatedness was seen in the reasoning of the first ECtHR judgment to address surrogacy, *Mennesson v France*[20], where the Court held that France had exceeded its margin of appreciation in refusing to legally recognise the relationship between the intended father and twins born through surrogacy.[21] In relation to the children's identity, it was stated that an implicit aspect of private life was the ability to 'establish the substance of his or her identity, including the legal parent-

[17] *Valdis Fjölnisdóttir and others v Iceland* (n 19).
[18] *D v France* Application No. 11288/18 (ECtHR 16 July 2020).
[19] Foreseen in *Re X (A Child) (Parental Order: Time Limit)* (n 3).
[20] *Mennesson v France* (n 19); The same reasoning and outcomes were seen in *Foulon & Bouvet v France* Apps no 9063/14 and 10410/14 (21 July 2016). and; *Laborie v France* App no 44024/13 (19 January 2017).
[21] Subsequent ECtHR cases have affirmed this approach: *Foulon & Bouvet v France* (n 23); *Laborie v France* (n 23).

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child relationship',[22] with a 'special dimension' to the case arising from the intended father being the genetic father.[23] Wells-Greco has referred to this reasoning in the judgment as feeding into the 'traditional narrative' by giving primacy to genetic ties and filiation,[24] given that the ECtHR referred only to the intended father as being linked to the child's identity owing to that 'special dimension' of genetic relatedness. The failure to consider other individuals who have formed part of the child's identity, such as the surrogate, any gamete donor, and non-genetic intended parent, has been argued to take away from a 'holistic approach' to considering the rights of the child.[25] Nonetheless, the case was significant in laying the ground from a human rights perspective, acknowledging that a refusal to recognise legal parenthood of a genetic parent following a surrogacy arrangement was a violation of Article 8.

2. *Non-genetic intended parents: failure to consider identity*

The later cases of *Paradiso & Campanelli v Italy*[26] and *Valdis Fjölnisdóttir and others v Iceland*[27] demonstrate that in the absence of a genetic link between either intended parent and child, there is no absolute right to have the relationship between the intended parents and child recognised. In *Paradiso*[28], an Italian couple had entered a surrogacy arrangement in Russia and owing to an error at the clinic, the intended father was not genetically related to the child as had been intended. In *Valdis*[29], the

[22] *Mennesson v France* (n 19) [99].
[23] ibid [100].
[24] Michael Wells-Greco, *Status of Children Arising from Inter-Country Surrogacy Arrangements* (Eleven International Publishing 2016) 370.
[25] Claire Achmad, 'Children's Rights to the Fore in the European Court of Human Rights' First International Commercial Surrogacy Judgments' (2014) 6 European Human Rights Law Review 638, 643.
[26] *Paradiso & Campanelli v Italy* App no 25358/12 (24 January 2017).
[27] *Valdis Fjölnisdóttir and others v Iceland* (n 19).
[28] *Paradiso & Campanelli v Italy* (n 29).
[29] *Valdis Fjölnisdóttir and others v Iceland* (n 19).

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surrogacy arrangement between the Icelandic couple and surrogate took place in the USA using donated gametes. In both cases, therefore, there was no genetic link between the child and either intended parent, and the ECtHR found there had not been a violation of Article 8 in the States' refusal to recognise the relationship between the intended parents and children. However, it is not possible in either case to ascertain the court's reasoning from the perspective of a right to private life, and therefore identity, of the child.

First, in *Paradiso,*[30] the child had been removed from the care of the intended parents and it was consequently held that they could not bring the case on behalf of the child – due to the child not being a party to the case, their individual Article 8 rights were not considered. This was described by Tesfaye as a 'domino effect' whereby the evaluation of the court shifted from the best interests of the child to the illegality of the parents' conduct.[31] Contrastingly, in *Valdis*[32]*,* the authorities had placed the child in the foster care of the intended parents, thus meaning that family life had been established. Despite this finding of family life, however, it was held that Iceland had struck a fair balance in refusing to recognise the Californian birth certificate in the interests of the State in maintaining a prohibitive stance on surrogacy.

Secondly, in *Valdis,*[33] the court merely stated that the arguments raised for an alleged breach of private life were the same as that of family life, and thus came to the same conclusion that there had been no breach.[34] The failure of the ECtHR to consider the

[30] *Paradiso & Campanelli v Italy* (n 29).
[31] Meiraf G Tesfaye, 'What Makes a Parent? Challenging the Importance of a Genetic Link for Legal Parenthood in International Surrogacy Arrangements' (2022) 36 International Journal of Law, Policy and the Family 1, 8.
[32] *Valdis Fjölnisdóttir and others v Iceland* (n 19).
[33] ibid.
[34] ibid [76].

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specific impact on private life, rather than family life, of the child in *Valdis* is disappointing given that in *Paradiso* reference had been made to how private life does relate to the child's identity.[35]However, even without being able to consider the extent to which identity formed a part of the reasoning of the court, the judgments do solidly confirm the priority being given to genetics by the ECtHR.[36]

The concurring opinion of Judge Lemmens in *Valdis* emphasised that the concepts of family and private life were distinct, particularly in surrogacy cases where private life concerns the recognition of the legal relationship between intended parents and child, to allow the child 'to establish details of its identity as an individual human being'.[37] However, he ultimately agreed with the majority that there was no reason to reach a different conclusion on the basis of private life, and thus supported the finding there had been no violation of Article 8.[38] Of significance, however, was his assertion that 'for the children the impact is the same, whether or not one or both of their intended parents has a biological link with them',[39] seemingly recognising that the private life of the child may necessitate recognition of the relationship with intended parents even in circumstances where neither intended parent is genetically related to the child.

3. Second intended parents lacking a genetic link: parasitic claims and identity

Having considered the approach of the ECtHR when neither intended parent has a genetic link to the child, it is necessary to contrast this with the approach adopted when

[35] *Paradiso & Campanelli v Italy* (n 29) [161]; For an in-depth analysis of the extent to which the child's identity should have factored into the Valdis judgment, see: Lydia Bracken, 'Cross-Border Surrogacy Before the European Court of Human Rights: Analysis of Valdís Fjölnisdóttir And Others v Iceland' [2021] European Journal of Health Law 1.
[36] For further analysis of the priority given to genetics in the Valdis case, see: Julian W März, 'What Makes a Parent in Surrogacy Cases? Reflections on the *Fjölnisdóttir et al.* v. *Iceland* Decision of the European Court of Human Rights' (2021) 21 Medical Law International 272.
[37] *Valdis Fjölnisdóttir and others v Iceland* App no 71552/17 (18 May 2021) (Judge Lemmens) [4].
[38] ibid [5].
[39] ibid [4].

one intended parent has a genetic link and the other does not. A string of more recent cases and an Advisory Opinion have dealt with the recognition of the relationship between a non-genetic intended parent and child. The Advisory Opinion, requested by the French Court of Cassation and issued in 2019, explored issues beyond the *Mennesson*[40] judgment in determining whether, and how, recognition of the relationship between the non-genetic intended mother and child in a gestational surrogacy arrangement should be given effect where the parental status of the genetic father has already been established. The ECtHR stated that the margin of appreciation afforded to States must be reduced where an important issue of an individual's identity is at stake, therefore meaning that the right to respect for private life, within the scope of Article 8, requires there to be the possibility of recognition of the relationship between the child and non-genetic parent.[41]

This recognises that 'not only biological truth but also relational and emotional aspects contribute to developing one's private life and personal identity'.[42] However, the means by which recognition is given was held to be within the State's margin of appreciation, thus meaning adoption proceedings would be satisfactory,[43] unlike biological fathers who receive recognition in *ab initio.*

Whilst the Advisory Opinion is just that – advisory – and does not create precedent, the same approach was subsequently adopted in *DB & Others v Switzerland.*[44] In this

[40] *Mennesson v France* (n 19).
[41] European Court of Human Rights Grand Chamber, 'Advisory Opinion Concerning the Recognition in Domestic Law of a Legal Parent-Child Relationship between a Child Born through a Gestational Surrogacy Arrangement Abroad and the Intended Mother' (*Request no. P16-2018-001, 10 April 2019*) [46].
[42] Alice Margaria, 'Parenthood and Cross-Border Surrogacy: What Is "New"? The ECtHR's First Advisory Opinion' (2020) 28 Medical Law Review 412, 424.
[43] Confirmed in *C and E v France* App nos 1462/18 and 17348/18, (ECtHR, 19 November 2019).
[44] *DB and Others v Switzerland* App nos 58817/15 and 58252/15 (ECtHR, 22 November 2022) (French judgment machine translated 6th March 2023).

case, involving a same-sex male couple, the court found that the inability for the non-genetic intended parent to adopt the child interfered with the private life of the child and was contrary to his best interests given that it 'may place him in legal uncertainty as to his identity in society and deprive him of the possibility of living and developing in a stable environment'.[45]

More recently, in *KK v Denmark,*[46] it was held that the inability of the intended parents to adopt (due to payments having been made to the surrogate) was a breach of the children's right to private life, despite the fact that the intended mother had parental responsibility for the children, because of the 'legal uncertainty regarding [the children's] identity within society'.[47] These decisions demonstrate that States which have no mechanism to recognise the parent-child relationship for a non-genetic intended parent will be in breach of their obligations under Article 8 ECHR on the basis of the child's identity contained within private life..However, by stating that the method and criteria for providing recognition remains within the margin of appreciation[48] means that - unlike the position of the genetically related intended father where the relationship requires recognition in *ab initio*[49] - there is still the possibility that recognition of the relationship could be refused. As seen in the case of *AM v Norway,*[50] where the court upheld the right of the intended genetic father to refuse to consent to the adoption by the non-genetic intended mother, this therefore means that non-genetic intended parents are at a disadvantage in their ability to have their relationship

[45] ibid [88].
[46] *KK and Others v Denmark* App no 25212/21 (ECtHR, 06 December 2022).
[47] ibid [72].
[48] Confirmed in *C and E v France* (n 48).
[49] *Mennesson v France* (n 19).
[50] *AM v Norway* App no 30254/18 (ECtHR, 24 March 2022). The father refused to give consent to adoption by the intended mother due to a relationship breakdown prior to the birth of the child.

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with the child recognised, despite comments in the Advisory Opinion about how non-genetic parents are a formative part of the child's identity[51] and the concurring judgment in *Valdis as* to how the impact for the child is the same irrespective of whether there is a genetic link or not. [52]

These decisions of the ECtHR have been significant in establishing minimum obligations upon States following surrogacy arrangements,[53] confirming that a surrogate-born child's right to identity within private life necessitates recognition of their relationship with their intended parents. However, what is also clear from the case law is that priority is given to genetic relatedness; if the intended parents have no genetic link to the child, there is no absolute right to have the parent-child relationship recognised. First, if there is no genetic link with either intended parent, there appears to be no appreciation of those parents impact on the child's identity and private life.[54] Secondly, if there is a genetic link with one intended parent, the non-genetic intended parent's ability to be recognised as the legal parent is dependent upon their connection with the genetic parent[55] and the domestic processes in place to formalise the relationship.[56] However, there is growing recognition of how non-genetic intended parents are still formative to the child's identity[57] and resultantly the continued distinction on the basis of genetics can be questioned.

[51] European Court of Human Rights Grand Chamber (n 46) [40].
[52] *Valdis Fjölnisdóttir and others v Iceland* (n 41) [4].
[53] Whilst the cases have involved cross-border arrangements, it has been persuasively argued that the reasoning of the ECtHR should apply equally to domestic arrangements: Andrea Mulligan, 'Identity Rights and Sensitive Ethical Questions: The European Convention on Human Rights and the Regulation of Surrogacy Arrangements' (2018) 26 Medical Law Review 449.
[54] *Paradiso & Campanelli v Italy* (n 29); *Valdis Fjölnisdóttir and others v Iceland* (n 19).
[55] *AM v Norway* (n 55).
[56] European Court of Human Rights Grand Chamber (n 46); *C and E v France* (n 48).
[57] *DB and Others v Switzerland* (n 49); *KK and Others v Denmark* (n 51).

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Having ascertained the role of non-genetic intended parents on the child's identity in an international rights context, it is necessary to consider the extent to which this has been applied in domestic surrogacy cases.

II. IDENTITY IN DOMESTIC CASE LAW

In order to ascertain the extent to which the concept of the child's identity factors into decision making in s54 cases, a systematic review of reported parental order cases was undertaken. There will be significantly more parental order cases that are unreported, mainly being those that are not directed to the High Court, such as domestic surrogacy arrangements where the s54 requirements are not in question. Many of these unreported cases are likely to involve surrogacy arrangements where the child is genetically related to only one of the intended parents; it is obviously not possible to assess the judicial approach taken in these unreported cases. However, given that most of the parental orders will have been granted, it can be assumed that the court are satisfied that the welfare of the child is met by recognising the intended parents as the legal parents, which – as will be argued in the next section of the article – also accords with the identity of the child.

Given that the focus of this article is on the importance attributed to the role of genetics with regards to the identity of the child, the review of reported parental order cases was limited to cases where only one intended parent was genetically related to the child – therefore cases included in the analysis are traditional surrogacy arrangements, with the surrogate's eggs and intended father's sperm being used, and gestational surrogacy arrangements with one intended parents gametes being used

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with either donated sperm or eggs.[58] Once this scoping was complete, a further review was undertaken on the extent to which the term 'identity' or 'identities' was referred to in the judgments, allowing an assessment of how the concept of identity was applied to the allocation of parenthood to both the genetic and non-genetic intended parent.

A. Identity undefined

Whilst identity was a relatively prevalent term used in the judgments, there was often an inconsistent or ill-defined use of the word, with a tendency to refer to the necessity of recognising the relationship with the intended parent but without providing a clear legal basis as to why or how. In *AB & CD v CT*[59] Theis J stated that the parental order would 'more accurately reflect the child's identity', in a way that an adoption order would not.[60] Here, we see an assumption that identity factors into a decision relating to a parental order, but without any articulation of what is meant by identity.

Other cases that refer to identity without a legal basis appear to link it to the importance of parenthood reflecting the reality of the child's life in being a part of the family. In *J v G*[61] it was stated by Theis J that a parental order would ensure the child's 'security and identity as lifelong members of the applicants' family',[62] with further elaboration in *Re C (A Child)* that without such an order the child would be left 'without full legal membership of any family'.[63] More recently, in *Re X (A, B v C)*,[64] Theis J stated that

[58] One case included in the analysis is *A v P* [2011] EWHC 1738 (Fam); [2012] Fam 188, where it was unknown whether the intended mother was genetically related to the child or not as gametes from both her and a donor had been used.
[59] *AB & CD v CT (Parental Order: Consent of Surrogate Mother)* (n 11).
[60] ibid [71].
[61] *J v G (Parental Orders)* [2013] EWHC 1432 (Fam); [2014] 1 FLR 297.
[62] ibid [27]; this language was subsequently applied in *LB v SP* [2016] EWFC 77 [50].
[63] *Re C (Parental Order)* [2013] EWHC 2413 (Fam); [2014] 1 FLR 654. [34].
[64] *Re X (A, B v C)* [2020] EWFC 81.

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the parental order would ensure the birth certificate confirmed the child's 'identity as the applicants' child… which, in my judgment, reflects the reality of X's life',[65] with *X v B*[66] also referring to how the parental order would reflect 'who he is and who his parents are'.[67] Russell J in *Re A (Infants)*[68] affirmed this approach by stating that the issuing of revised birth certificates would confirm the children's 'lifelong identities'.[69]

These cases demonstrate an appreciation from the judiciary of how legal parenthood is perceived as an important aspect of an individual's identity, particularly as it relates to their status within a family unit and who the parents are. However, there was no articulation of the legal basis upon which the right to identity can be asserted – as such, it cannot be said that the child's identity rights, as a substantive legal right, were formative in the decision of the court.

B. Identity defined and applied

Notwithstanding the limitations of the aforementioned cases in their articulation of identity, there have been a limited number of parental order cases that have referred to the concept of identity, as well as its legal basis, in a manner which makes it possible to analyse the extent to which genetic and non-genetic parents can be seen to be formative in a child's identity.

A v P[70] is a significant case, being the first reported s54 case to explicitly consider identity as a substantive right of the child under the ECHR and UNCRC. In determining

[65] ibid [40].
[66] *X v B* [2022] EWFC 129; [2022] 4 WLR 113.
[67] ibid [26].
[68] *Re A (Infants)* [2016] EWFC 33.
[69] ibid [33].
[70] *A v P* (n 63).

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whether a parental order could be granted where the intended father died prior to the application being made, Theis J stated:

> If the consequences of a purposive construction of s54(4) is that the child's identity with his biological father is preserved and the child's identity is linked to both Mr and Mrs A the court may consider itself bound to arrive at such a conclusion on the combined reading of Article 8 ECHR and Article 8 of the UNCRC.[71]

This judicial statement explicitly links the child's identity to both intended parents, thus requiring recognition of the relationship between the intended parents and children. Of particular significance in this case, it was unknown whether the intended mother was the genetic parent or not (as both her own and donor gametes had been used). Nonetheless, irrespective of that genetic link, the child's identity was linked to her as the intended mother. Not only is this case significant in articulating identity as a substantive right of the child under Article 8 ECHR and UNCRC, but in also acknowledging that the potentially non-genetic parent formed a part of the child's identity. However, the judgment did not articulate the basis upon which the child's identity was linked to the intended parent, and is therefore of limited use in developing an understanding of the non-genetic parent's significance on a child's identity, except in acknowledging that the relationship does invoke identity under Article 8 of both the UNCRC and ECHR.

A further case that can be seen as significant in developing an understanding of how identity is used by the judiciary when determining parental order cases is *Re F & M*[72]

[71] ibid [28].
[72] *Re F & M (Children) (Thai Surrogacy: Enduring Family Relationship)* [2016] EWHC 1594 (Fam); [2016] 4 WLR 126.

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which explicitly referred to Article 8 UNCRC, stating that a parental order was the only effective mechanism to ensure the child's identity. Russell J said that the 'applicants have a relationship with the children as their parents (P is their biological as well as their physiological and emotional parent), and it is necessary to make the parental orders to give legal effect and recognition to the children's identities'.[73] Here, explicit reference was given to the intended father, as the genetic father, in relation to the child's identity. However, there was no attempt to define the basis upon which the non-genetic parent was linked to the children's identity to therefore necessitate recognition. Again, the case refers to how both intended parents required recognition to meet the children's identities but with the absence of express consideration of the non-genetic parent's role.

Drawing closely on the judgment in *A v P,*[74] in *Re X (A Child)*[75] Sir James Munby P stated that s54 went to the 'very identity of the child as a human being'.[76] In the judgment, there was explicit articulation as to the significance of parenthood on the 'legal, practical and psychological reality' of the child's identity, with it stated that the 'commissioning father is his biological father and all parties intended from the outset that the commissioning parents should be his legal parents'.[77] This judgment expressly articulated that a biological parent is formative in the child's identity through the genetic link. However, unlike the previously mentioned cases, in this case there was also a focus on the intention for both intended parents to be the legal parents.

[73] ibid [47].
[74] *A v P* (n 63).
[75] *Re X (A Child) (Parental Order: Time Limit)* (n 3).
[76] ibid [54].
[77] *Re X (A Child) (Parental Order: Time Limit)* (n 3) [7].

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This therefore links the child's identity to the non-genetic intended parent through their intention to be a parent.

In further exploring the legal basis for asserting a right to identity in this case, Sir James Munby P- considered Article 8 ECHR, stating that identity was an important aspect of private life, as well as family life.[78] This confirmed that, even absent family life being established, recognition of the intended parents as the legal parents would be required based on the child's identity. Indeed, more recent cases have relied on this judgment, linking the child's identity to their private life, thus allowing a parental order to be granted absent a finding of family life in circumstances where a genetically related intended parent has died prior to the birth of the child.[79]

The three aforementioned cases clearly established, on the basis of the UNCRC and ECHR, the surrogate-born child's right to identity in legally recognising their relationship with the intended parents. However, the latter two cases seemed to prioritise the genetic link with the intended father when asserting the child's identity rights. Other than the indirect reference to how the non-genetic intended parent formed a part of the child's identity through their intention to be a parent in *Re X (A Child),*[80] there is little explicit consideration of how a non-genetic intended parent is also linked to the child's identity.

The case of *D v ED*[81] is an important case in filling this gap. In this case, there was a clearer articulation of how a non-genetic intended parent forms a part of the child's identity, thus necessitating recognition as a legal parent. It was stated by Russell J

[78] ibid [61].
[79] *Re X (Surrogacy: Death of an Intended Parent Prior to Birth)* [2020] EWFC 39 (Fam); [2020] 2 FLR 1326; *X v W* [2022] EWFC 34.
[80] *Re X (A Child) (Parental Order: Time Limit)* (n 3) [54].
[81] *D v ED (Parental Order: Time Limit)* [2015] EWHC 911 (Fam); [2016] 2 FLR 530.

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that the non-genetic parent 'played a full part in the process of their conception', as the applicants were the 'planned and intended parents from before conception and since the day on which they were born', these facts being stated as 'fundamental to these children's very existence and identity'.[82] This case clearly grounds the non-genetic intended parent as formative in the child's identity on the basis of their intention to be a parent, their role in the conception of the child, and their performance as a social parent to the child. Whilst this may have been implicit in the earlier cases, *D v ED*[83] is noteworthy for its explicit consideration of the role of the non-genetic parent and the significance of that on a child's identity.

Therefore, in requiring a genetic link with at least one intended parent under s54(1)(b), the legislation can still be seen as prioritising genetics in the allocation of parenthood, which 'reflects the continuing influence of the binary, two-parent model and the nuclear family on the legal framework'.[84] However, the case law itself has not always been explicit in showing a distinction or difference in how the judges perceive the intended parents' significance on the child's identity depending upon the genetic link, or absence of.

In some cases, the judiciary have linked the child's identity to the non-genetic intended parents on the basis of their intention to become parents[85] and role in the commissioning of conception.[86] In many other cases, however, the judiciary have

[82] ibid [62].
[83] ibid.
[84] Alan Brown and Katherine Wade, 'The Incoherent Role of the Child's Identity in the Construction and Allocation of Legal Parenthood' [2022] Legal Studies 1, 10.
[85] *Re X (A Child) (Parental Order: Time Limit)* (n 3).
[86] *D v ED (Parental Order: Time Limit)* (n 88).

been satisfied that the child's identity requires a parental order to be granted without explicit differentiation between intended parents on the basis of genetic link at all.

To date, the reported case law has concerned two intended parents, with a genetic link between the child and one of the intended parents. It is highly unlikely that s54A would be able to be read down to allow a single intended parent without a genetic link to obtain a parental order given that Parliamentary intention to require a genetic link was clear.[87] However, the reasoning seen in the judgments as to the significant role of a non-genetic intended parent on a child's identity provides a basis for arguing that a single intended parent should be recognised as equally important to the child's identity, even if they do not have a partner, living or deceased, with a genetic link.

Based on this, the continued requirement for a genetic link between an intended parent and the child can be questioned. In acknowledging the fundamental role that the non-genetic intended parent plays, recognition is given to the significance of intention in the determination of parenthood, moving away from the traditional notion that parenthood is a concept necessarily grounded in biology.[88] In this regard, it can be argued that the domestic judicial approach to the child's identity from the available reported cases is more inclusive, and less grounded in biology, than the ECtHR.

III. POTENTIALLY PROBLEMATIC SITUATIONS

As stated at the outset of the paper, judicial scrutiny of the s54(1)(b) requirement is minimal, suggesting that the requirement for a genetic link is perceived as absolute in

[87] Alan Brown and Katherine Wade, 'Parental Orders for Deceased Intended Parents: Re X (Foreign Surrogacy: Death of Intended Parent) [2022] EWFC 34' [2022] Medical Law Review 744, 748–749.
[88] For further arguments in favour of intentional parenthood see: Kirsty Horsey, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements' in Stephen Gilmore (ed), *Parental Rights and Responsibilities* (1st edn, Routledge 2017).

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the granting of a parental order. Indeed, unlike many of the other s54 requirements, it was clear at the time that the provisions of the HFE Act were being debated, and the inclusion of provision for surrogacy suggested, that Parliament intended parental orders to only be available in cases where there was a genetic link, being the distinguishing factor between an adoption order and parental order.[89] However, there are circumstances where intended parents may lack a genetic link to the child thus meaning a parental order cannot be granted, operating against the identity of the child. The one obvious limitation of the requirement for a genetic link is that a single intended parent who is infertile, or two intended parents who are both infertile, are excluded from being able to become legal parents through surrogacy by obtaining a parental order. However, there are other circumstances which may invoke problems in relation to this requirement which warrant consideration. The proceeding sections will examine circumstances whereby the genetic link requirement may not be satisfied, preventing a parental order being granted despite the role of the intended parents on the child's identity.

A. Exclusionary to doubly infertile couples or infertile individual hoping to access surrogacy

Stakeholders in the Law Commissions' consultation commented that the requirement for a genetic link could be considered as discriminatory on the basis of disability, given that couples who are both infertile will not be able to become legal parents of the surrogate-born child, as well as single-parent status, because single intended parents who are infertile are excluded from applying.[90] This can be contrasted with how legal

[89] HC Deb 2 April 1990, vol 170, col 945,
[90] Law Commission and Scottish Law Commission (n 6) 278–279; Law Commission and Scottish Law Commission, *Building Families through Surrogacy: A New Law - Volume II: Full Report* (Law Comm No

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parenthood is determined following other reproductive technologies. When an individual or couple undertake in-vitro fertilisation (IVF), there is no requirement for the intended parent(s) to have a genetic link to the child. The HFE Act provides that, irrespective of a genetic link, the woman who gives birth is the legal mother[91] and her spouse or partner, again irrespective of a genetic link, will be the child's father or second parent.[92] It was acknowledged that the operation of the provisions of the HFE Act may cause a sense of unfairness, particularly for single women, given a woman could become a parent through IVF to a child without a genetic link if she is able to carry the foetus to term, but would not be able to establish legal parenthood of a child if she was not able to carry a pregnancy.[93] Given the view that 'founding families is not a matter of genetics, but of love and commitment', as we do not minimise the role of parents in adoption or in cases of IVF and donor conception where there is an absence of genetic link, neither should we do so in the surrogacy context.[94] This argument carries further weight upon analysis of how non-genetic parents can be seen as formative in a child's identity.

B. Clinical error resulting in lack of genetic link

Although the chances of a clinical error resulting in incorrect gametes being used may be low, it is a possibility and not just a hypothetical risk. For example, in *Leeds Teaching Hospitals NHS Trust v A,*[95] incorrect sperm was used in fertility treatment resulting in an intended father being unable to obtain legal parenthood. Further, in the

411, 2023); For more on the potential discrimination caused by the genetic link requirement, see Brown and Wade (n 94).
[91] Human Fertilisation and Embryology Act 2008 s 33.
[92] ibid s 35-37 and s 42–44.
[93] Law Commission and Scottish Law Commission (n 6) 279.
[94] Amel Alghrani and Danielle Griffiths, 'The Regulation of Surrogacy in the United Kingdom: The Case for Reform' (2017) 29 Child and Family Law Quarterly 165, 176.
[95] *Leeds Teaching Hospitals NHS Trust v A* [2003] 1 FLR 412.

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aforementioned case of *Paradiso*,[96] it had been the intention for the intended parent's own sperm to be used but upon a court-ordered DNA test, it was found there was no genetic link between the parent and child. It remained unknown as to how the error at the clinic arose.[97]

Where the intention is for both intended parents to be genetically related to the child, a clinical error meaning one of the gametes is not used as intended would not be fatal to the granting of the parental order; the intended parents would still be able to satisfy s54(1)(b) and a parental order be granted in line with both the child's welfare and the child's identity in having their relationship with the intended parents recognised.

However, in the case of a single intended parent or where the gametes of only one intended parent was intended to be used, the failure of that intended parent to be able to demonstrate a genetic link to the child would be fatal to the ability to obtain a parental order in accordance with s54(1)(b), despite the fact that the child's conception and birth arose entirely out of the intention of that intended parent to become the legal parent. Similarly, if the clinical error was that the wrong embryo was used, neither intended parent would have a genetic link to the child. The Law Commissions relied on statistics which indicate only one quarter of surrogacy arrangements involve two parents who are genetically related to the child,[98] thus this risk applies to the majority of arrangements.

Considering this situation in the context of establishing family life in the ECtHR, Iliadou argues that drawing a distinction on the basis of genetics alone is arbitrary in that 'it allows the claims of biological parents but denies those of non-biological parents

[96] *Paradiso & Campanelli v Italy* (n 29).
[97] ibid [31].
[98] Law Commission and Scottish Law Commission (n 6) 279.

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where there is fraud or negligence on the clinic's part'.[99] A similar argument of arbitrariness applies in retaining the requirement for a genetic link under domestic law if it is accepted that non-genetic intended parents play an equal role in the surrogacy arrangement and process.

C. Overseas surrogacy arrangements where a genetic link is not required

The prevalence of overseas surrogacy arrangements, where intended parents cross borders to engage with a surrogate in another jurisdiction is not known, given exact figures are difficult to collate and not all intended parents who engage with surrogacy overseas will go on to apply for a parental order. However, it is acknowledged that overseas arrangements are increasing in number, and, relying on information provided by Cafcass, it appears that they now account for up to half of parental order applications.[100] There may be multiple motivations for intended parents to engage with surrogacy in another jurisdiction, such as perceived certainty relating to legal processes and allocation of parenthood, eligibility criteria for intended parents, and availability of surrogates.[101]

The difficulty, however, with intended parents crossing borders to engage with surrogacy is the differing regulations that may apply relating to establishing filiation.

[99] Marianna Iliadou, 'Surrogacy and the ECtHR: Reflections on Paradiso and Campanelli v Italy' (2019) 27 Medical Law Review 144, 151.
[100] Law Commission and Scottish Law Commission (n 6) 62; My Surrogacy Journey, 'Surrogacy Trends for UK Nationals; Our Exclusive Findings' (*My Surrogacy Journey*, 8 March 2021) <https://www.mysurrogacyjourney.com/blog/surrogacy-trends-for-uk-nationals-our-exclusive-findings/> accessed 27 June 2023.
[101] Rita D'Alton-Harrison, 'Regulating International Surrogacy, "the Elephant in the Room": Some Reflections on Reform from a UK Study' (2019) 31 47, 50; Vasanti Jadva, Helen Prosser and Natalie Gamble, 'Cross-Border and Domestic Surrogacy in the UK Context: An Exploration of Practical and Legal Decision-Making' (2021) 24 Human Fertility 93, 98; Claire Fenton-Glynn, 'International Surrogacy Arrangements: A Report' (Cambridge Family Law 2022) 8; Surrogacy UK, 'Surrogacy in the UK: Further Evidence for Reform' Second Report of the Surrogacy UK Working Group on Surrogacy Law Reform (December 2018) 39.

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Regardless of how the State where the child was born allocates parenthood, upon returning to the UK it is necessary for the intended parents to establish legal parenthood within this jurisdiction. This means that in countries which recognise the intended parents as the legal parents from birth, there may be a misconception that the intended parents would be treated as the legal parents in the UK. There have been multiple s54 cases where the court have had to liberally interpret the 6-month time limit to allow parental orders to be granted to children born overseas in circumstances where the intended parents did not become aware of this requirement until, sometimes, many years down the line.[102]

This issue is exacerbated by diverging approaches to access to fertility treatment. In some jurisdictions, such as Greece and California, double donation in surrogacy arrangements is permitted,[103] thus meaning intended parents can legally establish a parent-child relationship resulting from surrogacy without the requirement for a genetic link. If the intended parents did not obtain information about the legal processes required to then establish legal parenthood upon returning to the UK, they may engage with this arrangement not realising that they would not have parental status without obtaining a parental order. Unlike the time limit under s54,[104] the requirement for a genetic link is absolute and for intended parents engaging with surrogacy using double donation overseas, they would not be able to establish legal parenthood through a parental order. In such circumstances, the courts may order alternative measures, but

[102] For example: *Re X (A Child) (Parental Order: Time Limit)* (n 3); *A and another v C and another* [2016] EWFC 42; [2016] All ER 186.
[103] Law Commission and Scottish Law Commission (n 6) 278.
[104] HFE Act 2008 s 54(3).

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these fall short of the 'transformative'[105] effect of a parental order which recognise the importance of the non-genetic intended parent(s) on the child's identity.

D. A non-genetic intended parent dies prior to birth/parental order

Despite the precise statutory wording of many of the s54 requirements being framed in the present tense (for example, the applicants 'must be' married, civil partners or in an enduring family relationship[106] and the child must be living with the applicants 'at the time of the application and the making of the order'[107]), these provisions have been liberally interpreted or read down in order to allow a parental order to be granted in cases where an intended parent has died prior to the child's birth or the parental order application.

In *A v P,*[108] Theis J relied primarily on the right to family life under Article 8 to allow a parental order to be granted in circumstances where the intended father died prior to the application. This was possible on the basis that the child had lived with the intended father for a period of time before death, thus establishing family life. In the later case of *Re X (Surrogacy: Death of an Intended Parent),*[109] it was not possible to rely on family life given the intended father had died prior to the birth of the child – instead, private life was fundamentally important in this case with it being stated that the child's right to private life extended to recognition of her identity as the child of the intended father,[110] an approach similarly adopted in the more recent case of *X v W*.[111]

[105] *AB v CD and Others* [2018] EWHC 1590 (Fam); [2018] 4 WLUK 178 [76].
[106] HFE Act 2008, s 54(2).
[107] ibid, s 54(4)(a).
[108] *A v P* (n 63).
[109] *Re X (Surrogacy: Death of an Intended Parent Prior to Birth)* (n 86).
[110] ibid [89].
[111] *X v W* (n 86).

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These cases demonstrate willingness to read down the s54 requirements based on the child's Article 8 rights, with a particular focus on identity. Significantly, in cases where parental orders have been granted in circumstances where an intended parent is deceased, the deceased parent has also been the genetic parent. In line with the ECtHR approach, we see recognition of the relationship between the intended father and child on the basis that the genetic link is a fundamental aspect of the child's identity, encompassed within the right to private life.

Had the court not interpreted the s54 requirements to allow the intended fathers to be recognised as the legal parent, the non-genetic intended parent would not have been able to satisfy the s54(1)(b) requirement in order to become the legal parent. Brown and Wade have described the court's failure to acknowledge this fact as 'striking', questioning whether it goes against the intention of the legislation to, in effect, allow a single intended parent with no genetic link to obtain a parental order.[112] Although the non-genetic intended parent would have been able to establish family life with the children having cared for them since birth, this in itself would not have been sufficient for a parental order had the legislation not been read in such a way as to allow the deceased intended parent to be recognised as the child's legal parent. Therefore, the focus on the genetic link between the intended parent and the child can be questioned on the basis of the best interests of the child; particularly in the cases of *Re X*[113] and *X v W,*[114] the children's lived realities had only ever been with the non-genetic intended parent, , yet if the court had not interpreted s54(1)(b) to allow the deceased intended parent to be recognised as the legal parent, that lived reality would not have been able

[112] Brown and Wade (n 94) 5.
[113] *Re X (Surrogacy: Death of an Intended Parent Prior to Birth)* (n 86).
[114] *X v W* (n 86).

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to be reflected in legal parenthood. This argument is further supported by the court's emphasis on how both intended parents, irrespective of a genetic link, are formative in the child's identity.

These cases, however, also lead to a further question in relation to non-genetic intended parents and the extent to which they are formative in the child's identity: what if it had been the non-genetic parent that died prior to parenthood being established? There is a significant factual difference – with the implementation of s54A, a single intended parent can apply for a parental order where they are genetically related to the child, meaning the court would not need to read down the statutory provisions as was done in the previous cases involving deceased intended parents. Thus, in the case of the non-genetic intended parent dying, the other intended parent would still be able to secure their legal relationship with the child under s54A, without requiring the deceased intended parent to be recognised. It can be hoped, however, and is likely, that the inclusive approach being adopted by the courts as to how intended parents form part of the child's identity would still allow a deceased non-genetic intended parent to be recognised as the legal parent. To find otherwise would be to see the court giving prevalence to the biological notion of parenthood and identity in surrogacy situations; something evident in the ECtHR approach, but which has yet to be explicitly distinguished in the context of parental orders in England and Wales.

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IV. THE PROPOSALS

The Law Commissions published their joint consultation paper and provisional proposals in relation to the law on surrogacy in 2019,[115] and the Final Report and draft bill was published in March 2023.[116] It has been recommended that intended parents could be recognised as legal parents from birth (subject to the surrogate's right to withdraw her consent) under a new pathway, with the retention of the parental order pathway for international surrogacy arrangements and those who 'fall off', or are not eligible for, the new pathway. For the purposes of this article, the provisional proposals and subsequent recommendations relating to the genetic link requirement are scrutinised.

The 2019 consultation paper, in considering the requirement for a genetic link, stated that:

> …surrogacy is more appropriately characterised by the shared intention of the intended parents and surrogate to create a child that the intended parents will raise as their own. Neither that intention, nor the intended parents' acceptance of their role as parents to the baby, is defined by the existence of a genetic link.[117]

This demonstrates recognition that intention is potentially more significant than genetics when determining parenthood following surrogacy. Whilst this assertion seemed to recognise the formative role that a non-genetic intended parent has in the child's existence and identity, the provisional proposal to retain the genetic link requirement in most circumstances seemed contrary to this recognition and led to the

[115] Law Commission and Scottish Law Commission (n 6).
[116] Law Commission and Scottish Law Commission (n 97).
[117] Law Commission and Scottish Law Commission (n 6) 281.

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view that this aspect of the report was 'tarnished by inconsistency'.[118] In the Final Report, the Law Commissions departed from the provisional proposal and have recommended that the genetic link requirement be retained, further supporting the argument that there is inconsistency in the value being afforded to non-genetic parents.

A. Genetic link requirement under the new pathway

One of the key provisional proposals in the consultation paper related to the requirement for a genetic link under the new pathway. It was provisionally proposed that the requirement for a genetic link be retained except in circumstances of medical necessity.[119] Therefore, if both the intended parents (or an intended parent as a single individual) are medically infertile, they would still have been able to be recognised as the legal parents under the new pathway.

Whilst this would have been a positive development, in removing the absolute requirement for a genetic link, it can be argued that the proposal fell short from a child's identity perspective. By limiting to medical necessity, priority was still being given to genetic relatedness which would not reflect the significance of non-genetic parents on the child's identity. This exception also had the potential for intended parents who need to pursue double donation to feel inferior to those that can provide genetic material, as they would have been treated as an 'exception' to the seemingly prioritised status of having a genetic link.

However, in light of consultation responses to these provisional proposals, the approach of the Law Commissions to the genetic link requirement changed in the Final

[118] Lydia Bracken, 'Surrogacy and the Genetic Link' (2020) 32 Child and Family Law Quarterly 303, 312.
[119] Law Commission and Scottish Law Commission (n 6) 284.

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Report. The medical necessity exception to the requirement for a genetic link has been removed, thus meaning that in all but very exceptional circumstances (as will be discussed in section c), there must be a genetic link between the child and an intended parent. The reason for this shift in position was seemingly based on the framing of when double donation would have been available (the 'medical necessity' exception), as opposed to there being a legitimate basis for retaining the genetic link requirement in general.

There were concerns raised during consultation around the extent to which double donation could risk commodification of children and a blurring of a line between surrogacy and adoption. However, it appears that the most compelling consultation responses that led the Law Commissions to depart from their provisional proposal related to the framing of the exception around 'medical necessity', acknowledging that it would be 'difficult to identify precisely who should be covered by this concept'.[120] Without a clear definition of what medical necessity would encompass, there were concerns that the exception would be uncertain and risk inconsistency in approach as to when double donation would have been permissible. Because the Law Commissions only consulted on removing the genetic link requirement in cases of medical necessity, and not on double donation more generally, they were not in a position to recommend removal of the requirement in broader circumstances.[121]

Nonetheless, the Law Commissions did state that the UK Government 'may wish to consider whether a policy permitting double donation in surrogacy agreements could be introduced'.[122] This suggests that the Law Commissions saw value in the

[120] Law Commission and Scottish Law Commission (n 97) 162.
[121] ibid.
[122] ibid 163.

consultation comments advocating for the removal of a genetic link requirement but did not feel it was within their remit to make recommendations that were not based on the consultation questions. With explicit an endorsement by the Law Commissions for the Government to review this position, it may be that the debate about the genetic link requirement can continue, thus not closing the door on the ability for a surrogate-born child's identity to be considered when introducing new legislation.

B. *Genetic link requirement in international arrangements*

The Law Commissions had provisionally proposed retaining the requirement for a genetic link in all international surrogacy arrangements.[123] As international surrogacy arrangements would be excluded from the new pathway to parenthood, those that engage with surrogacy overseas would still be required to obtain a parental order to be recognised as the legal parents, with the provisional proposal being to retain the genetic link requirement . The justification for retaining the requirement in international arrangements was to limit the risk of child trafficking, to ensure the child was in fact conceived in a surrogacy arrangement, and with an aim to ensure the right of the child to know their biological origins (on the basis that, if the arrangement takes place in a country that permits anonymous gamete donation, the requirement for an intended parent to have a genetic link means the child will know at least half of their genetic heritage).[124]

Whilst the reasoning for retaining the requirement for a genetic link in international arrangements was well-intentioned, this approach can be critiqued from a child's rights perspective. For the child, their lived reality and social parentage would be the same

[123] Law Commission and Scottish Law Commission (n 6) 284.
[124] ibid 283–284.

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regardless of where the surrogacy arrangement took place. However, this provisional proposal would have created a two-tier standard which could act contrary to the best interests and rights of the child, where some surrogate-born children could have their family relationship secured through recognition of their intended parents, whilst others could not. Despite the legitimate concerns arising around international surrogacy arrangements, it is arguable that taking a different approach to the genetic link requirement based on where the arrangement took place undermines the child's right to identity. If the intended parents required donated gametes or embryos due to medical necessity, this would have been permitted practice both in the UK, under the provisional proposals, and in some jurisdictions that permit double donation, yet the legal framework would have operated to the detriment of the child's identity if born overseas.

Nonetheless, the issues posed in treating domestic and international surrogacy arrangements differently based on where the arrangement took place falls away in light of the subsequent decision by the Law Commissions to recommend retaining the genetic link requirement in domestic arrangements. However, if the Government were to review the requirement, as suggested by the Law Commissions, it would be important to ensure that children born through international surrogacy arrangements are not disadvantaged in terms of their identity being recognised: parity in approach is important, especially given the significant number of children born as a result of international surrogacy arrangements.[125]

[125] My Surrogacy Journey (n 107).

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C. *Genetic link requirement in parental order cases (outside of new pathway)*

The final provisional proposal and recommendation involving the genetic link requirement relates to cases that fall under the parental order pathway. The provisional proposal was to retain the requirement for a genetic link in cases but for medical necessity under the parental order pathway, with an exception in cases where there has been a relationship breakdown resulting in a non-genetic intended parent applying for the parental order without the genetic parent being involved.[126] This provisional proposal was carried into the Final Report, absent the reference to medical necessity as previously discussed. The Law Commissions recommended that a single intended parent without a genetic link should be able to apply for a parental order where there was a genetic intended parent at the time that the arrangement was entered into. Without this exception, the Law Commissions were of the view that 'the actions of the intended parent with the genetic link could prevent the outcome that is in the best interests of the child, if the child's welfare would best be served by the making of the parental order'.[127]

This exception to the genetic link requirement was by no means unanimously supported by consultees, with various consultation responses advocating for the genetic intended parent to still be compelled to be recognised as the legal parent. However, the Law Commissions took the view that such an approach, in 'making the absent genetic parent a legal parent against their will', could act contrary to the welfare of the child.[128] Therefore, in these limited circumstances following a relationship breakdown, a non-genetic intended parent would be able to obtain a parental order.

[126] Law Commission and Scottish Law Commission (n 6) 286.
[127] Law Commission and Scottish Law Commission (n 97) 263.
[128] ibid 264.

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The ability for a non-genetic intended parent to apply for a parental order in such circumstances is important from an identity perspective because the non-genetic intended parent is formative in the child's existence, regardless of the involvement of the genetic parent.

However, it can be argued that this exception may need to apply more broadly to capture other eventualities where there may not be a genetic link. For example, as outlined previously, there may be circumstances where the intended parent(s) lack a genetic link resulting from a clinical error, or there are conceivably situations where the intended parent who was originally going to be the genetic parent may subsequently become infertile and unable to provide gametes. In such cases, using the same reasoning as to how the non-genetic intended parent has been formative in the child's identity, the lack of a genetic link should not be fatal to their ability to obtain a parental order. It can be argued that it would be better to make the proposed exception more encompassing and broadly phrased. By making the exception broader, it would hopefully prevent the courts from having to deviate from the precise statutory wording on the basis of the child's best interests and identity rights, as has been the case with the current s54 requirements. Such an exception could be framed around a 'legitimate expectation' of parenthood, whereby intended parents had the honest intention at the start of the process to meet the requirement, but due to circumstances outside of their control, the genetic link is lacking. This would cover situations, as envisaged by the Law Commissions, in relation to relationship breakdown but could also apply to desertion by one intended parent or mistakes during the treatment process which result in incorrect gametes being used.

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CONCLUSION

It has been argued that the genetic link requirement under s54(1)(b) and s54A(1)(b) is becoming untenable as the understanding of the role of non-genetic intended parents on the child's identity continues to develop. At an international level it is still possible to see priority being given to genetic relatedness, but the judgments of the ECtHR are increasingly acknowledging the importance of the child's identity under Article 8 and the role that non-genetic parents play in this. In domestic s54 cases, the concept of identity has been used, albeit to an inconsistent level, to justify the need for a parental order to be granted. The idea that non-genetic intended parents are formative to the child's identity through their role in the commissioning of conception and as the planned parents from before birth[129] may not always be explicit in the court's reasoning, but the use of 'identity' as a concept when discussing parenthood does not draw a distinction between the intended parents on the basis of genetic link, suggesting that prevalence is not being given to biology in the same way as is the case in the ECtHR judgments.

Any reform of the law pursuant to the Law Commissions' project and recommendations must prioritise the rights of the child – and it is essential that the significance of the child's identity, as a component of their private life, is at the fore. As such, the law should not undermine the importance of the formative role a non-genetic intended parent plays by retaining the requirement for a genetic link: to affirm this requirement would be to weaken the value of the judicial commentary as to the significance of the non-genetic parent in the child's identity.

[129] *D v ED (Parental Order: Time Limit)* (n 88).

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