BEST INTERESTS AS A RULE OF PROCEDURE: REFLECTION ON DIFFERENT REGULATORY RESPONSES TO SURROGACY

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Abstract

This paper examines the extent to which the best interests of the child, under Article 3 UNCRC, has been utilised as a rule of procedure when developing legislative responses to surrogacy. Three jurisdictions are examined which have adopted vastly different regulatory responses to surrogacy: Sweden, impliedly prohibiting surrogacy; England and Wales, permitting surrogacy on an unenforceable basis; and California, providing for enforceable surrogacy agreements. Through analysis of the development of the legislation in each jurisdiction, it is argued that the concept of best interests carries a significant risk of being a term of empty rhetoric and seeks to reinforce the value of using child's-rights impact assessments to ensure a child-centric approach to surrogacy regulation.

Keywords

Best interests; surrogacy; children's rights; UNCRC.

[A] INTRODUCTION

Surrogacy is a divisive topic, evident from the range of regulatory responses to the practice: whilst some jurisdictions aim to prevent surrogacy through prohibitive legislation, other countries accept surrogacy as a legitimate form of reproduction and expressly permit and regulate the practice. There are many rights and interests to consider when regulating surrogacy, including those of the surrogate and intended parents (IPs). As legislation is drafted by adults, these adult-centric concerns are often at the forefront of debates on the legitimacy, or otherwise, of surrogacy. This paper considers the rights of the surrogate-born child, and in particular the right of the child to have their best interests (BI) as a primary consideration. Article 3 United Nations Convention on the Rights of the Child 1989 (UNCRC) dictates that in all actions concerning children, their BI must be a primary consideration: given that the purpose of a surrogacy arrangement is to bring about the birth of a child, implementing a legislative response to surrogacy is an action concerning both potential and existing children.

The UNCRC is the most widely ratified human rights Convention in the world, with only the U.S.A. failing to ratify. Article 3 has been granted *jus cogens* status in international law, thus becoming customary international law (Supaat 2014). Therefore, non-ratification does not prevent a State being obliged to comply with Article 3, and it's 'special status' means it must be applied in all aspects of a child's life (Kilkelly 2006: 41). However, BI is an inherently flexible notion and the application of the principle is vulnerable to manipulation by decision-makers. Particularly considering the divisive nature of surrogacy, it is possible for the concept of BI to be used to advance normative and prejudicial arguments under the guise of children's rights. This paper examines how the BI principle has been used by decision makers when legislating for surrogacy to examine whether the laws are truly child-centric.

The article begins by outlining the extent of a state's obligation under Article 3 UNCRC to guarantee the BI of child as a primary consideration, before proceeding to interrogate how the concept of BI has been used to develop legislative responses to surrogacy across different regulatory approaches. The regulation of surrogacy includes both the ability for intended parents to lawfully undertake surrogacy within their home country, as well as how the law attributes legal parenthood to the intended parents. When considering Article 3 as a rule of procedure, it is not concerned with the

individual decisions to be made by clinicians as to whether treatment should be provided (which has been subject to criticism: for example, see Jackson 2002). Instead, the obligation under Article 3 as a rule of procedure in determining the regulatory response to surrogacy is to consider the best interests of children who have been, or may be, born of surrogacy generally.

England and Wales permits surrogacy on an unenforceable and altruistic basis, with the ability for IPs to establish legal parenthood. Sweden does not allow treatment for surrogacy domestically, although there are judicial mechanisms by which IPs who engage with surrogacy can become legal parents. California, often regarded as one of the most surrogacy-supportive states, adopts an intent-based model for parenthood, enabling IPs to obtain legal parenthood from birth following a gestational surrogacy arrangement. The article examines and critiques the development and rationale of these regulatory responses from a BI perspective, concluding that unless a more consistent application of Article 3 is adopted across states, any BI justification for regulatory responses to surrogacy – whether permissive or prohibitive – fails from a child's rights perspective.

[B] BI AS A RULE OF PROCEDURE

Article 3(1) UNCRC states "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".

Although surrogacy arrangements are entered into by adults, how the law responds once a child has been born will inevitably concern the surrogate-born child. Therefore, the legislature are obliged to have the child's BI as a primary consideration when implementing surrogacy legislation. This obligation applies also to judicial bodies: this is significant because legislation can be informed by previous judicial decisions, and the courts will be left to interpret and apply the legislation once implemented.

There has been academic debate as to what is meant by a 'primary' consideration: the wording of BI as being ***a*** primary consideration (as opposed to ***the*** primary consideration) acknowledges that Article 3 cannot "trump" other considerations that must be given equal attention and weight in decision-making (Hodgkin and Newell 2007: 35). However, where there are competing interests, the Committee on the Rights of the Child (CRC) expect Article 3 to have a "larger weight", demonstrating that BI

must have priority when implementing legislation that will impact upon children (UN Doc CRC/C/GC/14: 2). Therefore, Article 3 does not demand that a specific decision most supportive of the child's best interests be made. If other competing rights or interests mean that ultimately a different regulatory response is adopted, less supportive of the child's BI, this remains within a State's discretion. The obligation under Article 3 does not require a certain outcome, but rather demands that BI are scrutinised, and prioritised, as part of the decision-making process.

The UNCRC does not define BI, and the CRC confirmed that the concept is "flexible and adaptable" and "should be adjusted and defined on an individual basis" (UN Doc CRC/C/GC/14: 9). Given the vast cultural differences across signatory states, it is likely that the application of BI when developing legislation will vary considerably, something acknowledged shortly after the adoption of the UNCRC (Alston 1994; McGoldrick 1991). Further, there may be differing approaches to BI not only across different political and cultural spheres, but also within one jurisdiction (Sutherland 2016: 38), risking the concept being used in an inconsistent and subjective manner. As argued by Taylor (2016: 57), the vague definition of BI could undermine children's interests given the ability for decision-makers to manipulate the definition to serve their own agenda. Notwithstanding this, Eekelaar and Tobin (2019: 95) have argued that the lack of a "precise formula" is beneficial because it ensures a genuine assessment of BI rather than decisions being based on a rule or presumption.

Therefore, the indeterminacy of BI could operate both in a positive and negative manner when regulating surrogacy. The flexibility of the concept allows the term to "expand and adapt to new developments over time" (Gerber and O'Byrne 2016: 89), meaning that a holistic understanding of BI could result in the legislative approach developing as societal norms and policy positions shift. However, the concept of BI risks, I argue later in this paper, being used as a veil to advocate for a legal response to surrogacy that is not truly-child centric.

Rule of procedure

The CRC articulate Article 3 as a substantive right, a fundamental interpretative legal principle and a rule of procedure, ensuring that the BI of the child is at the centre of state authorities' decision-making at all stages (UN Doc CRC/C/GC/14: 2). In examining how BI has factored into the development of regulatory responses to surrogacy, Article 3 as a rule of procedure is examined throughout this paper. The

CRC's General Comment provides a framework that allows for a substantive assessment of how BI was incorporated into legislative decision-making.

As to how BI can be guaranteed as a rule of procedure, the CRC state that "the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned" and further that States should explain "what has been considered to be in the child's BI; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases" (UN Doc CRC/C/GC/14: 4).

The CRC advocate for the use of a Child's Rights Impact Assessment (CRIA) for all proposed policy and legislative decisions to support the implementation of Article 3 as a rule of procedure. CRIAs have been defined as "a tool for translating… Article 3… into practice in a concrete, structured manner" (Sylwander 2001), through an "iterative process in which the impact of a proposal or policy is systematically evaluated in relation to children's rights" (Payne 2020). Although there is no prescribed approach to a CRIA, the European Network of Ombudspersons for Children (2020) have produced templates on the process that should be followed, including identifying positive, negative and neutral impacts of the proposed decision on children.

The use of CRIAs may result in different regulatory responses, depending upon the subjective value attributed to the separate factors going into the assessment, as has been discussed in relation to the domestic welfare standard in England & Wales (Reece 1996). It is therefore possible that various regulatory responses to surrogacy would be deemed as equally consistent with the BI of the child under Article 3. This is not necessarily problematic: BI under Article 3 cannot necessitate a certain regulatory response given that the standard must be flexible and adaptable, considering the cultural and social context. More problematic is where there is not transparency as to what has factored into the decision-making process, devaluing Article 3 by enabling BI to be used as a cloak for advancing arguments that are not truly child-centric.

It is therefore possible to assess the extent to which domestic legislative bodies have followed Article 3 as a rule of procedure when developing surrogacy legislation. As the following sections will demonstrate, the BI concept has been used to justify legislation

to varying extents across different jurisdictions, exposing the vulnerability of the principle as a substantive right of the child.

[C] ENGLAND & WALES: A PERMISSIVE APPROACH

The law on surrogacy

In England & Wales, surrogacy has been regulated since 1985 with the enactment of the Surrogacy Arrangements Act (SAA) which aimed to prevent commercial surrogacy through making agreements unenforceable and limiting the ability to negotiate or advertise for surrogacy services. The SAA focuses on the regulation of the surrogacy arrangement itself, making no reference to the surrogate-born child. The Human Fertilisation and Embryology Act (HFE Act), introduced in 1990 and amended in 2008, deals with the effects of a surrogacy arrangement by providing a mechanism for IPs to obtain legal parenthood of the surrogate-born child. The *mater semper certa est* presumption applies in England and Wales, meaning the woman who gives birth is the child's legal mother: the surrogate will always be the child's legal mother at birth. If the surrogate is married, her spouse will be the legal father or second parent. To remove the surrogate's (and her spouse's, if applicable) parental status, IPs must apply for a parental order (PO) under s54 or s54A HFE Act 2008. The regulatory response to surrogacy is therefore permissive, but there are prohibitions on commercial aspects and surrogacy arrangements are not enforceable meaning parenthood must be established via a judicial mechanism.

BI in the development of the HFE Acts

The HFE Act 1990 received royal assent on 1st November 1990, with the UK signing the UNCRC in April 1990 and ratifying it in December 1991, meaning the UNCRC was in its infancy. Nonetheless, the BI concept was invoked during the debates leading up to the implementation of the Act. However, the phrase, alongside the concept of the child's welfare, was principally used in conjunction with another proposition: that a child should be born into a traditional nuclear family with a mother and father. To take a few examples, "the provision of AID to single women, unmarried couples and lesbian couples… seems to me to be highly undesirable from the point of view of the resulting children" (HL Deb 7 Dec 1989) and "in the BI of the child born, treatment should be given only to married couples or to a man and woman living together in a stable relationship" (HC Deb 2 Apr 1990). This exemplifies how the BI or welfare of the child

was used to advance arguments for inclusion (or exclusion) of provisions from the 1990 Bill without a systematic analysis of how the provisions would in fact impact on the BI of the child. There was a noticeable lack of authority or evidence upon which the suggestion that permitting single individuals or unmarried couples to access artificial reproduction would be contrary to the BI of children. This lack of objective consideration of BI allowed an allegedly child-centric approach to be used to advance arguments that often reaffirmed traditional normative family values.

There was limited consideration of the PO provisions to enable IPs to obtain legal parenthood. The amendment was introduced following an MP advocating for parental responsibility to be granted to IPs following surrogacy (HC Deb 2 Apr 1990). Other than this intervention of behalf of constituents, there was no discussion in the Commons as to the provision and it passed without debate in the House. In the Lords, debates on the surrogacy provisions were equally limited. In response to a proposal to remove the surrogate's parental status, the Lord Chancellor stated that to remove the certainty in the law as to motherhood could not be in the BI of the child (HL Deb 20 Mar 1990). However, there was no attempt to substantiate the claim that a different allocation of motherhood would be contrary to the child's BI.

Other than the Lord Chancellor's statement, there was a lack of consideration of the BI of the child in relation to surrogacy. As such, it cannot be asserted that POs were implemented in accordance with Article 3 as a rule of procedure: there was no assessment of how enabling IPs to obtain a PO would accord with the BI of the child, and references to BI relating to the parenthood provisions more generally lacked an objective analysis of how this was being measured.

By the time the HFE Act 1990 came to be reviewed, resulting in the 2008 Act, the UNCRC had been ratified for over 15 years; it is therefore not surprising that the debates more explicitly referenced the rights of the child, both generally and in the context of the UNCRC. However, there continued to be unsubstantiated use of the BI concept.

As the Archbishop of York drew attention to at the early stages of the Bill, the Parliamentary Joint Committee had called for an ethical framework to ensure decisions were based on the welfare of the child, but this framework was missing throughout the Bill's passage (HL Deb 19 Nov 2007). This would have aligned with the

CRC's guidance of utilising a CRIA when implementing legislation, and would have enabled the legislature to more explicitly, and objectively, assess the BI of the child. During the House of Commons Committee stage, it was stated that despite an acceptance that the rights of the child are paramount, "in all honesty, I have not seen that as a theme in our debates throughout our consideration of the Bill" (HC Committee 10 Jun 2008), demonstrating that the regular references to the welfare and BI of the child did not mean that those factors were indeed at the forefront when reflecting on the Bill. Instead, many individuals framed their arguments in the context of the child's welfare, BI, and rights without any evidence to support their propositions. For example, repeated assertions that allowing same-sex individuals to become parents would be contrary to the BI of the child, without substantive evidence, clearly advances a personal belief or value, cloaked in more acceptable language. This demonstrates a limitation to the passage of the Act from an Article 3 perspective because it is not possible to ascertain the true extent to which the BI of the child was a factor in the decision-making process.

As regards POs, it was proposed that the eligibility requirements be retained, with one amendment to extend the category of applicants from spouses to include civil partners and unmarried couples. The definition of 'enduring family relationship' for non-married applicants was subject to debate, but it was decided that it should be for the Family Court to determine the scope, in line with the BI of the child (HC Committee 12 Jun 2008). This acknowledged the view that the BI of the child should be the determining factor when deciding whether applicants met the eligibility criteria for a PO, and that the judiciary would be best placed to make that determination.

As with the 1990 Act, the debates on POs were very limited in comparison with other elements of the Bill. One proposed amendment was to remove the attribution of legal parenthood to the surrogate's husband, allowing a male IP to be the legal parent from birth. During this debate, both those supporting and contesting the amendment based their arguments on the child's BI. In support of the amendment, it was said to be in the child's BI for the IPs to be able to make decisions relating to the child's welfare from birth, rather than vesting that decision-making in the surrogate and her husband who would not be the primary caregivers. In opposing the amendment, it was stated to be contrary to the child's interests for there to be complications in ascertaining who should be responsible for the child in the event of a dispute (HC Committee 10 Jun

2008). This again highlights the difficulty of arguments based on the child's BI when it is a broad term that can be manipulated to apply to a specific angle of an argument.

Due to the limited scrutiny and debate relating to surrogacy in the Bill and the complexity of the issues raised, it was stated that the practice of surrogacy should be dealt with elsewhere from the Bill and a commitment was given to do so upon the completion of the HFE Bill through Parliament (HC Committee 12 June 2008). However, the Government's commitment to review the regulation of surrogacy did not take place after the Act, with the issue only again being considered some 11 years later through the Law Commission and Scottish Law Commission's (2023) joint project on surrogacy.

Therefore, there was a lack of meaningful consideration as to how the parenthood provisions in the legislation would secure the BI of surrogate-born children, falling short of Article 3 as a rule of procedure. Where there was reference to the PO provisions, the parliamentary debates demonstrated the BI concept being used as empty rhetoric to advance arguments that were not child-centric or to enable paternalistic notions to be advanced. It is therefore difficult to assert that the BI of the child was a primary consideration during the passage of the Bills.

[D] SWEDEN: A PROHIBITIVE APPROACH

The law on surrogacy

Whilst there is no explicit prohibition on surrogacy in Sweden, the practice is not permitted within healthcare, meaning that IPs would need to act outside of a clinic setting (i.e. home insemination) or enter a cross-border arrangement. The *mater semper* presumption applies in Sweden and the surrogate's spouse, if applicable, will be the legal father. There are no specific provisions in Sweden to transfer legal parenthood following surrogacy, meaning that IPs are reliant upon adoption provisions.

Research undertaken by Arvidsson found that, despite the disruptive and timely nature of adoption proceedings, all participant IPs were able to secure legal parenthood following surrogacy (2019: 75). However, Supreme Court Case Ö 5151-04 (2006) demonstrates the precarity of adoption following surrogacy, where a genetic intended mother was unable to obtain parenthood due to the surrogate and intended father withdrawing consent to the adoption. As the legal mother, the surrogate's

consent was an absolute requirement, without which the intended mother could not have any form of recognition with the child. This case "highlights a sense of unfairness between two equally-contributing parties" because the genetic intended father was able to become a legal parent, with no recognition of the genetic contribution of the intended mother (Stoll 2019: 139).

The dissenting judgment opined that consent should not have been an obstacle to the adoption which would have achieved "consistency between the genetic and actual parenthood and the legal parenthood", aligning with Article 3 UNCRC (Supreme Court Case Ö 5151-04: 7-8). Furthermore, the intended mother based her application on the BI of the child, but the majority decision did not consider this. By basing the judgment solely on the admissibility of the application, there was a failure to consider the BI of the child, and the judgment can be critiqued in light of Article 3.

By not regulating surrogacy or its consequences, Stoll (2013: 238) argues that the State is failing in its obligation to protect the interests of surrogate-born children.

BI in potential law reform

Despite criticisms of failing to legislate for surrogacy, opportunities to change the regulatory framework have not been taken. In 1985, the view of the Insemination Inquiry, and adopted in the legislation, was that surrogacy was an "undesirable phenomenon" (SOU 1985: 5). There have been various motions, proposals and reports relating to the permissibility, or otherwise, of surrogacy since 1985. However, the Inquiry into Increased Opportunities for the Treatment of Involuntary Childlessness (the Inquiry) had a wider remit and led to constitutional amendments so is the focus of this paper. The 2016 report, 'Different Paths to Parenthood' (SOU 2016: 11), concluded that surrogacy should continue to not be permitted domestically, and this was subsequently endorsed by the Law Council Referral in 2018.

The Inquiry stated that permitting commercial surrogacy would not be in the BI of the child, although there was no discussion as to how the child's interests would be risked by a commercial model. However, there was greater consideration of the child's BI in relation to altruistic surrogacy.

In favour of permitting altruistic surrogacy, it was posited that allowing the practice domestically would ensure children could benefit from the identifiable donor system in Sweden, minimising the number of children born through overseas surrogacy who

cannot access donor information. This ability to access origin information was equated with being in the BI of the child (SOU 2016: 11: 411). However, despite this positive BI consideration, the Inquiry were ultimately of the view that altruistic domestic surrogacy should not be permitted. There were various arguments framed around the BI of the child to support this conclusion.

First, it was stated that there remained too much of a knowledge gap to be sure that surrogacy is compatible with the BI of the child, in relation to both the surrogate-born child and the existing children of the surrogacy (SOU 2016: 11: 415). It was stated that, of the effects of surrogacy, "we know virtually nothing about this, while the risk of harm seems obvious" (SOU 2016: 11: 415). The conclusion that the 'identity development and long-term family relationships' for the child were unclear, demonstrates that the Inquiry were considering BI in relation to family functioning and self-identity.

Without explicit consideration of what was meant by the "obvious" risk of harm, it is not possible to ascertain what was factored into the alleged BI assessment, and highlights the inherent risk of BI being employed as empty rhetoric used to support a pre-existing bias against the practice. Furthermore, there is no empirical evidence that surrogate-born child suffer harm from the nature of their birth and, on the contrary, a longitudinal study has found that surrogate-born children are well adjusted (Golombok & Ors 2013). The Inquiry did acknowledge the findings of the study, but stated that the small scale of the investigation meant that solid conclusions could not be drawn (SOU 2016: 11: 412). Whilst the study was small scale, it does fill the alleged knowledge gap as to the effect on surrogate-born children, meaning the argument for maintaining prohibition on this basis lacks support.

Another concern raised as to BI by the Inquiry related to the impact on the child should the arrangement go wrong, and the surrogate change her mind. It was stated that in such cases, it would not be in the BI of the child to have uncertainty as to parenthood, which would need to be resolved in court. There were two possible approaches discussed: that the surrogate be able to change her mind, or that the court determine who should be the child's parent. Both outcomes, in the view of the Inquiry, could operate against the BI of the child because adult interests would be taking priority over the BI of the child, or the court would be bound to decide in accordance with the BI of

the child, undermining the surrogate's interests in being able to change her mind (SOU 2016: 11: 442).

However, this use of BI to justify a retained prohibition on surrogacy can be critiqued. Even without permitting surrogacy, such disputes can arise as seen in the Supreme Court Case Ö 5151-04 (2006): if consent to adoption is refused, the court cannot make an adoption order, and the BI of the child cannot be a primary consideration in the decision. Therefore, if the current prohibition on surrogacy can result in decisions that do not guarantee Article 3, the hypothetical situation of a disputed surrogacy arrangement should the practice be permitted would not be any worse in relation to the BI of the child than the present framework.

In addition to the maintained prohibition on domestic surrogacy, there was also consideration of the law following cross-border surrogacy. It was acknowledged that enabling IPs easier recognition of parenthood and entry into Sweden following a cross-border arrangement would provide greater security and certainty for the child, in accordance with their BI. However, the Inquiry also opined that the principle of the BI of the child could not require Sweden to implement constitutional amendments contrary to the policy stance that surrogacy should not be permitted. Whilst acknowledging that, based on the child's BI, it was arguably necessary to introduce special rules for when surrogacy has taken place overseas, the Inquiry decided not to legislate specifically on this matter due to concerns that it could encourage greater numbers of IPs to undertake cross-border surrogacy. The reference to BI in relation to cross-border arrangements therefore demonstrates the tension between the need to consider the BI of children that have been born of surrogacy, and the perceived BI of children generally in the maintained prohibition on the practice.

However, the approach of the Inquiry in this regard can be critiqued. The CRC's guidance on what BI as a rule of procedure requires states that BI needs to be ***balanced*** against broader issues of policy (UN Doc CRC/C/GC/14: 4). By asserting that the BI of the child cannot take precedence over the public policy stance on surrogacy prevents any balancing exercise taking place. Subsequent case law since the Inquiry has seen a more liberal judicial approach being taken to recognition of parenthood following cross-border surrogacy, with the decisions justified on the BI of the child (Supreme Court Case Ö 3462-18 (2019); Supreme Court Case Ö 3622-19 (2019)). These cases indicates that the continued prohibition on the practice, and

attempts to restrict cross-border arrangements, are ineffective in light of the child's BI.

Therefore, despite attempts to justify the recommendations based on the BI of the child, the approach of the Inquiry can be seen as inadequate from an Article 3 perspective. Some of the BI arguments lacked substantive underpinning or failed to adequately acknowledge counter-arguments. This suggests that the concept was used to justify the continuation of an existing anti-surrogacy policy, without a holistic BI assessment being undertaken. By retaining a prohibition on surrogacy, there is a risk that where arrangements take place across borders or outside of the regulated framework, the BI of the child will not be able to be a primary consideration in the determination of parenthood.

[E] CALIFORNIA: AN INTENT-BASED APPROACH

The law on surrogacy

Surrogacy law in California stems from case law, with the legislature codifying the existing judicial approach to the allocation of parenthood following surrogacy. Therefore, unlike England and Wales and Sweden, it is necessary to reflect on the judicial approach to BI before looking at the legislative response.

The first case to consider parenthood following gestational surrogacy was *Johnson v Calvert* (1993), where both the surrogate and genetic intended mother were seeking recognition as the child's mother. The court interpreted the parenthood rules under the Uniform Parentage Act 1975 to mean that maternity could be established both by giving birth and being genetically related to the child. With two potential mothers, the court decided to "break the tie" by recognising she who intended to create the child, and raise it as her own, as the legal mother. As stated by the majority, "but for [the IPs] acted-on intention, the child would not exist… no reason appears why [the surrogate's] later change of heart should vitiate the determination that [the intended mother] is the child's natural mother" (*Johnson*: 93). This case established the intent-based approach to determining parenthood following gestational surrogacy, which has been said to reflect the child's best interest because refusing to recognise the surrogate as a mother was an "attempt to eliminate confusion and uncertainty in the child's life" (Lawrence 1991: 555).

This intent-based approach was subsequently applied in the case of *Re Marriage of Buzzanca* (1998) which involved double gamete donation, thus differentiated from *Johnson* on the basis that the IPs could not rely on their genetic link as a claim to be legal parents. The appeal court held that the provisions of the Family Code whereby a husband is the legal father of a child unrelated to him when the wife undergoes fertility treatment were analogous with this case, stating "both contemplate the procreation of a child by the consent to a medical procedure of someone who intends to raise the child but who otherwise does not have any biological tie" (*Buzzanca*: 1418). As such, given the IPs initiated and consented to the procedure to procreate the child, they, and not the surrogate, were the legal parents.

Referring to *Johnson*, the court stated that the case was not limited to determining maternity between a surrogate and genetic mother, but to any situation where a child would not have been born without the intention of the IPs (*Buzzanca:* 1425). Therefore, *Buzzanca* demonstrated a departure from *Johnson*'s approach of intent being used to "break the tie" (given there was no tie to break) towards a test of intent alone. The decision of *Buzzanca* was subsequently applied to a surrogacy arrangement involving same-sex male IPs (O'Hara and Vorzimer 1998: 37).

The Californian Family Code was amended in 2012 through AB 1217, codifying the precedent of the *Johnson* and *Buzzanca* cases that "even without a genetic link or a link by virtue of giving birth, the parties who intended to bring the child into the world are the child's legal parents" (Assembly Committee on Health 2012: 3). Under §7962, assisted reproduction agreements between IPs and gestational surrogates are presumptively valid and can be lodged with the court, rebutting any presumption that the surrogate and her spouse (if applicable) are the parents of the child.

BI in the case law and legislation

Whilst in *Johnson* and *Buzzanca,* the intent-based model can be argued to have aligned with the child's BI, the judgments demonstrate that the decisions were not based on a BI assessment. Given that the legislature amended the Family Code based on the judicial decisions, the use of BI in the judgments requires interrogation.

In the majority judgment of the *Johnson* appeal, very little reference was made to the child or their interests other than acknowledging that a rule recognising the IP as the legal parent would "best promote certainty and stability for the child" (*Johnson:* 95).

More so than merely failing to consider the child's BI, the majority were highly critical of the suggestion that the child's BI should be the standard for determining parenthood. It was stated that such an approach would be a "repugnant specter of governmental interference in matters implicating our most fundamental notions of privacy, and [confused] concepts of parentage and custody". Further, "by voluntarily contracting away any rights to the child, the gestator has, in effect, conceded the BI of the child are not with her" (*Johnson:* footnote 10). By treating the determination of parenthood as a separate process to custody disputes, the court posited that the child's interests should not be a factor in the allocation of parenthood.

Kennard J dissented based on concerns that the decision would create a precedent preventing a BI assessment from taking place – in his view, whilst intent was relevant to the child's BI, it should not have been determinative (*Johnson*: 118). The case did indeed set such a precedent, and the concerns Kennard J cited came to be realised in the case of *CM v MC* (2017), discussed later in the paper.

In *Buzzanca,* other than re-affirming the position in *Johnson* that intent would align with the BI of the child in ensuring stability and certainty (*Buzzanca*: 1428), the judgment itself had very limited reference to the BI of the child. The court held that even if a BI approach had been adopted, the outcome would have been the same because the intended mother was the only parent the child had known (*Buzzanca*: footnote 21). This demonstrates the judicial view that an intent-based determination of parenthood aligns with the child's BI, albeit that this was not the basis for the decision.

When the legislature came to update the Family Code, it was stated that the amendments were to align the legislation with the case law (Senate Judiciary Committee 2012). By framing the provisions as aligning with the case law, and that case law explicitly stating that the basis for parenthood should be intent and not BI, it cannot be asserted that there was consideration given to the surrogate-born children's BI in the development of the legislation. On the facts of *Johnson* and *Buzzanca*, the intent-based model may have aligned with the child's BI in providing legal certainty and ensuring their lived reality aligned with their legal status. However, the Article 3 right of the child to have their BI as a primary consideration as a rule of procedure was not met in the development of the case law or legislation. Instead, the intent-based model explicitly disregarded the BI of the child, favouring certainty for the IPs.

Without articulation in the judgments as to how such a model would meet the BI of surrogate-born children, it is not possible to assess what factors would weigh in favour, or against, an intent-based model from the child's perspective.

Furthermore, by failing to consider the BI of surrogate-born children in determining parenthood, the concern of Kennard J in *Johnson* may be realised whereby parenthood is attributed to an IP in circumstances where this would not be in the child's BI. *CM v MC* (2017) is one such an example, illustrating that under Californian law, anyone can 'contract for a child… regardless of their parental fitness' (Demopoulos 2018: 1768). MC, a gestational surrogate, attempted to challenge the allocation of parenthood to a single male IP after becoming aware of worrying personal and home circumstances (and an alleged request by the IP to abort one of the foetuses), seeking a declaration that she was the legal mother.

One of the bases for her appeal centred on the children's constitutional rights, claiming that §7962 permitted a denial of the surrogate-child relationship based on intention, without any regard to the IP's fitness to parent or the BI of the child. However, the court reject this argument on the basis that it would undermine surrogacy agreements generally and would be inconsistent with the principle in *Johnson:* the determination of parenthood is separate to custody disputes where decisions must be based on the child's BI, and as such §7962 did not conflict with the children's rights (*CM v MC:* 31). The surrogacy agreement was upheld, and the IP was the legal parent.

This case demonstrates how §7962 and the intent-based model can lead to circumstances where the child's BI are ignored (Richardson 2019: 178). UNICEF and Child Identity Protection (2022) are critical of pre-birth clauses allocating parenthood because appropriate BI determinations cannot take place. Although the Californian judiciary are of the view that intent should prevail, from an Article 3 perspective such an approach cannot be endorsed and should be avoided.

Therefore, the Californian approach to enforceable gestational surrogacy arrangements does not meet the standard required of Article 3 as a rule of procedure. The judiciary were explicit in their position that the BI of the child should not be the determining factor when allocating legal parenthood, and the legislature when codifying the law sought to re-affirm this judicial stance. This means there was no attempt to ensure the BI of surrogate-born children was a primary consideration when

deciding the best approach to regulating surrogacy. Although in many cases the intent-based model will align with the child's BI, *CM v MC* is a clear example of how intent alone cannot guarantee Article 3.

[F] CONCLUSION

Article 3 as a rule of procedure requires the BI of the child to be a primary consideration when developing regulatory responses to surrogacy. The concept of BI is an inherently flexible notion, evidenced in the jurisdictions examined in the paper. This leads to concerns that legislation can be purported as ensuring the BI of the child without a substantive basis. It is imperative that BI remains a fluid concept, allowing for legislation to be developed that is culturally and contextually appropriate. However, this does not mean that BI can continue to be used in the unsubstantiated manner evidenced in this paper. For example, Sweden have maintained a prohibitive stance to domestic surrogacy, justified by the BI principle, whilst in England and Wales, the implementation of the current law, enabling IPs to secure legal parenthood by way of a PO, was similarly justified, and critiqued, on the child's BI.

Contrastingly, the intent-based model in California was not developed based on the child's BI, with the judiciary explicitly taking the view that BI is not relevant to the determination of parenthood. However, attributing legal parenthood is a decision directly affecting the child meaning Article 3, with its *jus cogens* status, demands the BI of the child be a primary consideration. A model which allocates parenthood without the ability for an individualised BI assessment therefore cannot be advocated from a child rights perspective.

It is imperative that when developing regulatory responses to surrogacy, there is a systematic and transparent assessment of proposals from a BI perspective, utilising CRIAs. Without this, there is the risk that disparate practices can continue to be justified from an alleged child-centric perspective without a substantive basis. The BI of the child will not demand a certain regulatory response to surrogacy. However, a systematic approach to BI will ensure that States are more transparent as to the competing interests or policy considerations that are truly driving the regulatory response to surrogacy, rather than cloaking their rationale in BI language. Therefore, consistent use of CRIAs would satisfy Article 3 as a rule of procedure and legitimise

the legislative process, minimising the extent to which the notion of BI is used as empty rhetoric to advance prejudicial or normative values.

Contributor Profile

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