Children's Rights in International Commercial Surrogacy: Exploring the challenges from a child rights, public international human rights law perspective

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10 Multiple Potential Parents But a Child Always at the Centre

Balancing the Rights and Interests of the Parties to International Commercial Surrogacy Arrangements

Abstract

As has been demonstrated throughout the preceding chapters of this study, due to the nature of ICS, this method of family formation often brings the rights and interests of the child into conflict with those of the other core parties to ICS arrangements. As a result, rights need to be balanced against each other in the ICS context, to establish the balance to be struck amongst competing rights and interests. This Chapter hones in on the balancing of rights and interests of the child with those of other core parties to ICS: surrogate mothers, genetic donor parents and commissioning parents in ICS. This Chapter argues that rights balancing exercises will be necessary in relation to these core parties throughout the course of ICS arrangements, and that the child's rights and best interests must be accorded priority once born, given their particular stage in life and their vulnerability in comparison to the other core parties. In keeping with the preceding chapters in this study, while recognising the indivisible, interdependent and interrelated nature of children's rights, this Chapter draws attention to the child's rights most at risk in ICS, focusing on the need to respect the best interests of the child in all ICS situations. It proposes that along with this approach, the principle of human dignity must guide rights balancing in ICS, to strike an overall balance between the child's rights and best interests and the rights and interests of other core parties where necessary.

Main Findings

- ICS is a method of family formation bringing the rights and interests of children born through ICS into conflict with other core parties to ICS, namely surrogate mothers, genetic donor parents and commissioning parents. The rights and interests of surrogate mothers and commissioning parents can also clash. Therefore, rights balancing exercises are necessary throughout ICS arrangements.
- In balancing competing rights and interests between unborn children and surrogate mothers in ICS, the surrogate mother's rights and interests will likely outweigh those of the child she carries. This is especially so when the surrogate mother's health or life are at risk during pregnancy.

- In ICS, protecting and giving effect to the child's identity preservation and health rights and best interests should outweigh genetic donor parents' rights to privacy.
- A right to be a parent does not exist under international human rights law. In balancing the rights and interests of children born through ICS with those of their commissioning parents, the child's rights and best interests should be treated as paramount.
- In balancing the rights and interests of surrogate mothers and commissioning parents, in the prenatal stage of ICS arrangements, the surrogate mother's rights to reproductive autonomy, health and survival will likely outweigh the commissioning parents interests; however, once a child is born in ICS, the child's best interests should be paramount in the balancing of rights and interests.
- Overall, the concept of human dignity should guide all actions and decisions in ICS. However, once a child is born in ICS, their rights and best interests should be accorded most weight in the balancing of rights.

Contextual notes

- Little scholarly work exists on rights balancing in the ICS context; this Chapter is relevant to judicial decision-makers, executive government decision-makers, legislators and policy-makers.
- This Chapter will remain relevant as long as ICS continues to be practiced, and in particular in the absence of any international regulation governing ICS or any international consensus on ICS.

1 Introduction

An alternative method of family formation in the 21st Century, international commercial surrogacy (ICS) raises profound questions relating to the balancing of competing human rights, given the involvement of multiple parties with rights and interests at stake. By their nature, ICS arrangements always involve multiple potential 'parents', but most significantly from a child rights perspective, there is always a child (or children, when multiple births occur) at the centre. After all, ICS arrangements are founded on the common intention of commissioning parents to create a child with the involvement of a surrogate in a different state from that which commissioning parents themselves reside in.[1]

1 For a discussion of the drivers of ICS and the parties involved in ICS, see C. Achmad, 'Understanding international commercial surrogacy and the parties whose rights and interests are at stake in the public international law context', *New Zealand Family Law Journal*, (2012) 7:7, 190-198.

Given their conception and birth through ICS, the child is inherently vulnerable to potential violations of their rights under the United Nations Convention on the Rights of the Child (CRC)[2] which can be triggered before and after birth.[3] The child's rights in ICS can also conflict with the rights and interests of other core parties to ICS. As Gerards notes, "the dilemma of deciding 'hard cases' has become even more relevant in recent decades – the growing importance of fundamental rights and the increasing complexity and 'multi-levelness' of modern legal orders has resulted in ever greater numbers of 'hard cases' to be brought before the courts."[4] Certainly, ICS cases can and should be understood as 'hard cases', in large part due to the complexity of the conflicting rights and interests involved. This conflict presents a challenge to protecting children's rights and a practical challenge for decision-makers dealing with ICS on a case-by-case basis (such as judges and government ministers) in the absence of international agreement on or regulation of ICS; for policy-framers developing national approaches to ICS; and for actors at the international level devising long-term or best-practice international approaches to ICS.[5]

1.1 Focus and scope of this paper

This paper focuses on the core parties to ICS (the child; surrogate mother; commissioning parents) and considers how the competing rights and interests of children conceived and born through ICS arrangements, women acting as surrogates, genetic donor parents and commissioning parents can be balanced and weighed against each other. As Bainham notes, "It now seems clear that both children and parents possess rights and that the task for any legal system is to achieve a proper balance between them."[6] However, rights balancing is not a precise art; it is an area of human rights law and practice lacking comprehensive tools assisting with and applying to weighing competing rights and interests in situations such as ICS. Although the author's body of work

2 1989 United Nations Convention on the Rights of the Child, 1577 UNTS 3.

3 For discussion of the ways in which challenges to the child's rights can be triggered pre-birth and pre-conception, see: C. Achmad, 'Unconceived, Unborn, Uncertain: Is Pre-birth Protection Necessary in International Commercial Surrogacy for Children to Exercise and Enjoy Their Rights Post-birth?', (2016) submitted for publication to *International Journal of Children's Rights*; appearing as Chapter 6 of this doctoral thesis.

4 J.H. Gerards, ''Hard cases' in the law', in A. in 't Groen, H. Jan de Jonge and E. Klasen et al (eds.), *Knowledge in Ferment: Dilemmas in Science, Scholarship and Society* (2007), 121 at 123.

5 E.g. the Expert Group appointed by the Hague Conference on Private International law appointed to explore solutions to the private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements, and the Expert Group appointed by the International Social Service preparing principles for protecting children in international surrogacy.

6 A. Bainham, *Children: The Modern Law* (3rd ed.), (2005), at 123.

does not focus on research specifically concerning rights balancing in ICS (this is a topic deserving of a doctoral study of its own), it is an important issue to be highlighted as a component of the author's doctoral thesis concerning the child's rights in ICS. Therefore, this paper is not a comprehensive study of rights balancing in ICS, but instead aims to introduce the concept of rights balancing as important in all ICS situations. In doing so, this paper draws on the author's research throughout the course of her doctoral study. It does not deal exhaustively with the issue of rights balancing in ICS; in some respects, it raises questions relating to this aspect of ICS which will require future attention, outside of the doctoral thesis.

Drawing on the public international human rights law framework, this paper particularly focuses on the child's CRC rights, given the child's heightened vulnerability in ICS situations. Recognising that the child's rights are indivisible, interdependent and interrelated in nature,[7] ICS raises particular risks to the child's rights to identity preservation, family environment, nationality, health and their safety and wellbeing.[8] Where relevant, this paper draws on opinions of UN treaty bodies and jurisprudence from domestic courts and the European Court of Human Rights (ECtHR).[9] Consideration of such jurisprudence assists in analysing how competing rights and interests in ICS might be balanced. The case-law referenced in this paper is either directly relevant given it addresses a situation involving surrogacy, or, given the fact-dependent nature of decisions in the human rights field, the decision's relevance by analogy to ICS.

The concept of the best interests of the child[10] is also of particular importance to this paper's discussion. As the Committee on the Rights of the Child states in its General Comment on the best interests of the child, "[T]he child's best interests shall be applied to all matters concerning the child or children, and taken into account to resolve any possible conflicts among the rights enshrined in the Convention or other human rights treaties. Attention must be placed on identifying possible solutions which are in the child's best interests."[11]

Bearing the above in mind, this paper discusses rights balancing in ICS in relation to the following four aspects:

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7 United Nations Committee on the Rights of the Child, General Comment No.14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para 1), UN Doc. CRC/C/GC/14 (2013) at [16](a).

8 As discussed in Chapters 3 and 5 of this thesis, and elaborated on in Chapter 7 (nationality) and Chapter 8 (identity).

9 Because the ECtHR remains the supranational human rights court with the most advanced jurisprudence on rights balancing. The ECtHR is required to assess applications to determine if a fair balance has been struck between the competing rights and interests at play. See J.H. Gerards, 'Fundamental Rights and Other Interests: Should it Really Make a Difference?', in E. Brems (ed.), Conflicts between Fundamental Rights, (2008), 680.

10 Art. 3, CRC, *supra* note 2.

11 UN Committee on the Rights of the Child, *supra,* note 7 at [33].

- Balancing the rights and interests of the unborn child with those of the surrogate mother;
- Balancing the rights and interests of the child with those of non-commissioning parent gamete donors (genetic parents);
- Balancing the rights and interests of the child with those of the commissioning parents; and
- Balancing the rights and interests of the surrogate mother with those of the commissioning parents.

The balancing of the child's rights with those of their commissioning parents forms the central discussion of this paper, given the reality that this is often one of the main points of conflict in ICS situations. While placing a central focus on the child, this paper concludes by assessing the prospects for an overall balancing of rights and interests between the four core parties as rights-holders in ICS. In doing so, it considers how best in practice to strike a balance between the range of competing – and often irreconcilable – rights and interests in this fraught and burgeoning area of family formation.

2 Balancing the Rights and Interests of the Unborn Child with those of the Surrogate Mother

The question of whether an unborn child can be said to have rights or interests is an ambiguous area of law.[12] Strong arguments exist in support of and against human rights attaching to children before birth. For example, the European Court of Human Rights (ECtHR) Grand Chamber has consistently held (since *Evans v. United Kingdom*[13]) that an embryo has no right to life under Article 2 of the ECHR;[14] the majority of states recognise human rights as attaching from birth onwards. However, preambular paragraph nine of the CRC leaves open the possibility of pre-birth human rights protection, despite not requiring it.[15] Many of the child's CRC rights are at risk before birth in ICS, vulnerable to decisions and actions taken by other core parties to an ICS arrangement[16] while the child is in utero and before conception.[17] The main

12 See discussion in Achmad, *supra* note 3, at 135ff of this thesis.

13 *Evans v. United Kingdom,* Decision of 10 April 2007, Judgment (Merits), Court (Grand Chamber), App. No. 6339/05.

14 Ibid., at [56].

15 Preambular para. 9, CRC, *supra* note 2 imports the following wording from the Declaration of the Rights of the Child: "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth."

16 E.g. commissioning parent(s), surrogate mother.

17 For discussion of the ways in which the child's rights are made vulnerable as a result of the actions and decisions of other core parties to ICS before the child's conception and once the child is in utero, see Achmad, *supra* note 3, at 135-138 of this thesis.

CRC rights at risk due to actions and decisions occurring during these pre-birth stages in ICS are the child's right to preserve identity,[18] to as far as possible know and be cared for by his or her parents,[19] health rights,[20] and the right to be free from discrimination[21] and not to be sold or trafficked.[22] Therefore, it is necessary to consider how the situation of an unborn child in ICS may be balanced with the rights and interests of his or her surrogate mother. For example, to what extent does a surrogate's rights and interests outweigh the fact she is carrying an unborn child with the potential to become a human being? This is relevant in ICS situations where the surrogate decides she no longer wants to carry the child and might harm the child, or seeks an abortion; where the surrogate's health is endangered during pregnancy; and where the surrogate engages in risky behaviour (for example, alcohol or drug abuse) during pregnancy which might harm the unborn child.

2.1 Leading decisions of the European Court of Human Rights and United Nations Human Rights Committee concerning abortion relevant by analogy to rights balancing in ICS

Analysis of some leading case-law concerning abortion is illustrative of the balancing of rights and interests which can be extended by analogy to rights balancing between the unborn child and surrogate in ICS situations. The balancing of rights and interests has occurred in a number of non-ICS cases where pregnant women have been prevented from accessing abortion. In *Tysiąc v. Poland*[23] (ECtHR), a woman was prevented from having a legal abortion despite a medical condition which meant that through pregnancy, her already partial blindness greatly deteriorated to near complete blindness.[24] It was

18 Art. 8(1), CRC, *supra* note 2: "States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference."

19 Art. 7(1), CRC, *supra* note 2: "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality *and as far as possible, the right to know and be cared for by his or her parents*." (emphasis added)

20 Art. 24, CRC, *supra* note 2.

21 Art 2(1), CRC, *supra* note 2 stipulates that States Parties to the CRC shall ensure the rights set forth in the CRC to each child within their jurisdiction without discrimination of any kind.

22 Art. 35, CRC, *supra* note 2: "States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form." The sale of children is defined by Art. 2(a) as "any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration nor any other consideration." See United Nations General Assembly, Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, UN Doc. A/RES/54/263 (2000).

23 *Tysiąc v. Poland*, Decision of 20 March 2007, Fourth Section Judgment, App. No. 5410/03.

24 Ibid., at para. [65].

because of this risk to her health that she sought an abortion.[25] On the facts, the Court found a violation of Article 8 of the European Convention on the Protection of Fundamental Rights and Freedoms (ECHR),[26] as "[T]he refusal to terminate the pregnancy had exposed her to a serious health risk".[27] The Court thus recognised the health of the mother as paramount, with her rights and interests outweighing the existence of the unborn child she carried and its potentiality to become a human being.

Following *Tysiąc*, the ECtHR Grand Chamber held in *A., B. and C. v. Ireland* that there is no absolute right to abortion (and that this is not conferred by Article 8 ECHR).[28] This decision concerned three women who had become unintentionally pregnant. Irish law prohibits abortion for health and well-being reasons, but allows a woman to travel overseas for abortion in instances where she risks being directly affected by this prohibition[29] and there is a constitutional right to abortion in situations where a real and substantial risk exists to the woman's life. The Grand Chamber applied *Vo v. France*[30] in *A., B. and C. v. Ireland*, holding that "[S]ince the rights claimed on behalf of the foetus and those of the mother are inextricably interconnected, the margin of appreciation accorded to a State's protection of the unborn necessarily translates into a margin of appreciation for that State as to how it balances the conflicting rights of the mother."[31] However, the Grand Chamber said this margin of appreciation is not unlimited and a "prohibition of abortion to protect unborn life is not therefore automatically justified under the Convention on the basis of unqualified deference to the protection of prenatal life or on the basis that the expectant mother's right to respect for her private life is of a lesser stature."[32]

The Grand Chamber therefore held that in instances where real and substantial risk to the pregnant woman exists, lack of access to lawful abortion in Ireland amounted to a State failure to implement this constitutional right.[33] One of the three applicants seeking an abortion in *A., B. and C. v. Ireland* was in remission from a rare form of cancer and feared for her life because of the risk pregnancy could trigger relapse. The Grand Chamber found a violation of this applicant's Article 8 ECHR right to respect of private and family life,

25 Ibid., at para. [77].
26 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14, 4 November 1950, ETS 5, Art. 8, right to respect of private and family life.
27 Ibid.
28 *A, B and C v. Ireland,* Decision of 16 December 2010, Judgment (Merits), Court (Grand Chamber), App. No. 25579/05, at [214].
29 Ibid., at [239].
30 *Vo v. France,* Decision of 8 July 2004, Judgment (Merits), Court (Grand Chamber), App. No. 53924/00.
31 *A, B and C v. Ireland*, *supra* note 28, at [237].
32 Ibid., at [238].
33 Ibid., at [250ff].

as she was unable to establish her right to a legal abortion via the medical services available in Ireland or through the Courts.[34] In assessing whether there had been an appropriate balancing of competing interests involved in relation to the other applicants, the Grand Chamber found no violation of their rights, holding that "the impugned prohibition in Ireland struck a fair balance between the right of the first and second applicants to respect for their private lives and the rights invoked on behalf of the unborn."[35] The ECtHR subsequently applied its decision in *A., B. and C. v. Ireland* in *P. and S. v Poland*.[36]

The Human Rights Committee (HRC) is the United Nations treaty body that has issued the leading views on situations involving the balancing of rights and interests between pregnant women and unborn children. Although this body of decisions remains small, among those communications it has considered on their merits is that of a young rape victim who was refused an abortion.[37] The HRC said the failure to provide the abortion constituted a violation of Article 7 ICCPR,[38] causing her mental and physical suffering.[39] Another communication considered on its merits by the HRC concerned refusal of a therapeutic abortion on an adolescent according to her wishes (the foetus having been diagnosed with anencephaly, inevitably meaning its death upon birth), in circumstances where the pregnancy constituted a medically certified life threatening risk.[40] The Committee said refusal was unjustified, violating Article 17 ICCPR.[41]

2.2 Striking a balance between the rights and interests of the unborn child and the surrogate in ICS

The ECtHR and UN treaty body decisions discussed above demonstrate that in situations which may arise in ICS – such as a surrogate mother seeking an abortion for medical (including psychological) reasons – the balance of rights

34 Ibid., at [263].
35 Ibid., at [241].
36 Confirming the view that Article 8, ECHR does not confer the right to abortion, but the prohibition of abortion when sought on health and/or well-being grounds falls within the scope of Article 8. (at para 96)
37 UN Human Rights Committee, Communication No. 1608/2007 of 28 April 2011, UN Doc. CCPR/C/101/D/1608/2007.
38 No one shall be subjected to cruel, inhuman or degrading treatment or punishment.
39 UN Human Rights Committee, *supra* note 38 at [9.2].
40 UN Human Rights Committee, Communication No. 1153/2003 of 22 November 2005, UN Doc. CCPR/C/85/D/1153/2003.
41 No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. One Committee member dissented, asserting Article 6, International Covenant on Civil and Political Rights (right to life) was also violated given the girl's life was gravely endangered. See: United Nations General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

and interests is likely to weigh heavily towards the surrogate. This will mean the unborn child's future rights and interests will be subordinated to the surrogate's rights and interests, in order to protect her health and wellbeing, and potentially, her right to life.[42] In ICS situations where a surrogate does not seek an abortion but a risk to her health or life presents during pregnancy, weighing the rights and interests at play between the surrogate and the unborn child in favour of the surrogate is also an appropriate balance to strike. This will be especially the case when the risks to the surrogate mother's health are serious and pose long-term detrimental effects to her health and well-being (as was the case in *Tysiąc v. Poland)*. Such a balance upholds the mother's right to health[43] and safeguards her reproductive autonomy[44] and right to life recognising that she is a living rights-holder.

To not strike a balance in favour of the surrogate in such ICS situations would in effect prioritise the potentiality of an unborn human being and its associated future rights and interests over the life of an existing human being with rights and interests. This would be inconsistent with fundamental human rights principles and concepts, including human dignity.[45] As will be discussed below shortly, in ICS situations where the surrogate wants to take particular actions concerning the unborn child, her rights and interests are likely to also conflict with those of the commissioning parents. Therefore, a further layer of rights balancing will be required, for example, in cases of surrogate-proposed abortion in ICS. Additionally (as discussed below in Section 5), this may occur in reverse, where commissioning parents seek to abort a child in ICS.

An alternative set of circumstances in which the rights and interests of the surrogate mother may require balancing in relation to the existence of the unborn child in ICS is where the surrogate engages in behaviour which may be harmful to the unborn child's health. Such circumstances can be envisaged where a surrogate decides she is not going to follow through with the ICS

42 Under Article 6, ICCPR, every human being has the inherent right to life.

43 Article 12, International Covenant on Economic, Social and Cultural Rights: Everyone has the right to the enjoyment of the highest attainable standard of physical and mental health. See: United Nations General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3.

44 E.g. as safeguarded by Art. 16(1)(e), United Nations General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, 1249 UNTS 13.

45 As made clear in the Universal Declaration of Human Rights (see: preamble; Art. 1). See: United Nations, Universal Declaration of Human Rights, 1948. The principle of human dignity is re-stated in the other core international human rights treaties, e.g. the preamble of CEDAW: "Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity."

arrangement and becomes harmful towards the unborn child she carries[46] or in instances where the surrogate engages in practices during pregnancy recognised as harmful to foetal health. A leading case relevant by analogy is *Winnipeg Family and Child Services v. G*,[47] in which the Canadian Supreme Court considered the case of a pregnant woman with various substance addictions; two of her previous three children were born brain damaged as a result of her substance abuse. Canadian child protection authorities sought to have the woman admitted to drug therapy to prevent further damage to the unborn child. However, despite the potential damage to the foetus, the Court held authorities could not force her to undergo treatment to prevent foetal harm.[48] The balance is clearly struck in favour of the woman in this case, with the judgment upholding her right to reproductive autonomy, even in situations where there is evidence of harm or likely harm to an unborn child being carried in that woman's body.

This focus on the autonomy of the woman is consistent with the abortion case law already discussed. Yet the motivation underlying the balance is quite different; in the abortion jurisprudence, the motivation for striking a balance favouring the woman derives from seeking to protect her and uphold her right to health, reproductive autonomy and human dignity. However, *Winnipeg v. G* appears to favour the woman's rights and interests squarely on the basis of her autonomy rights. In doing so, such an approach fails to take a step towards preventing harm not only to the unborn child, but to the woman herself.

It is questionable whether this balance would be struck similarly in the case of an ICS surrogate who either actively tries to harm the child she carries, or who engages in behaviour which may cause harm to the unborn child. Akin to the abortion situation already discussed, this may be particularly questionable given the added layer of competing rights and interests of the commissioning parents in ICS arrangements. Indeed, unless a guardian is appointed to advocate for the future rights and best interests of the unborn child in an ICS arrangement, the unborn child does not have any personal agency to advocate for his or her future rights and best interests. However, in instances where commissioning parents view the surrogate as acting in a way potentially harmful to the unborn child she is carrying for them (either by omission or direct actions), they could, for example, argue for enforced measures in relation the surrogate on the basis that there are particular actions she should be

46 L.B. Andrews notes however from her interviews with (non-ICS) surrogates, that this is highly unlikely to occur, given the great care that surrogates demonstrate towards the surrogate child: "There is thus no reason to believe that surrogacy inevitably, or even in a significant minority of cases, would lead to the child being harmed by the surrogate's lack of concern for the child's well-being." See L.B. Andrews, 'Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood', (1995) 81 *Virginia Law Review* 2343, at 2354.

47 *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925.

48 Ibid., at [4].

undertaking or activities she should refrain from in order to protect the unborn child intended for them.

3 Balancing the rights and interests of the child with those of genetic donor parents

The rights and interests of children and their genetic donor parents may also conflict in ICS in one main respect, due to the privacy rights of genetic donor parents[49] and the identity[50] and health[51] rights of children conceived and born. Not all ICS arrangements will involve genetic donor parents (as sometimes commissioning parents are able to use their own gametes to create an embryo). However, when genetic donor parents are involved (i.e. who are not also commissioning parents), this rights conflict only becomes a rights balancing issue in instances where they act anonymously, or do not want to be contacted by or know their genetic children created through ICS.

3.1 A conflict between the genetic donor parents' privacy right and the rights and best interests of the child in ICS

In such instances, can genetic donor parents legitimately maintain their right to privacy? Although in the context of gamete donation for non-ICS assisted reproductive technology (ART), donors have in the past been able to maintain their right to privacy, there is now general acceptance that anonymous gamete donation is to be avoided in ART given the evidence of negative impacts for children of not knowing their genetic origins, in particular on their identity formation and understanding,[52] and their ability to know their genetic health

49 Art. 12, UDHR, *supra* note 45; Art. 17, ICCPR, *supra* note 41.

50 Art. 8, CRC, *supra* note 2.

51 Art. 24, CRC, *supra* note 2.

52 See for discussion: Clark, 'A Balancing Act? The Rights of Donor-Conceived Children to Know Their Biological Origins' (2012) 40(3) *Georgia Journal of International and Comparative Law,* 619; M. Cowden, 'No Harm, No Foul: A Child's Right to Know Their Genetic Parents', (2012) 26(1) *International Journal of Law, Policy and the Family* 102; and S. Golombok and F. Tasker, 'Socioemotional Development in Changing Families', in M.E. Lamb and R.M. Lerner (eds.), *Handbook of Child Psychology and Developmental Science, Vol 3: Socioemotional Processes* (7th ed.), (2015), 419 at 441. Golombok and Tasker also note at 446 that "Children whose parents disclose their donor conception at an early age seem to integrate this information into their developing sense of self, whereas some donor offspring who find out about their donor conception in adolescence or adulthood report enduring psychological distress. Those who are aware of their donor conception may wish to search for their donor and donor siblings. Their main motivation is curiosity and the wish to incorporate information about their family background into their life story in order to develop a more complete sense of who they are."

history.[53] Indeed, the Committee on the Rights of the Child has been clear that anonymous gamete donation is inconsistent with the child's rights and best interests and should be avoided in the context of ART.[54]

It is worth considering that some contemporary legislative frameworks governing donor conception – such as that in the Netherlands[55] – establish a system of phased or gradual provision of donor information to donor conceived children. Under the Dutch legislation, non-identifying donor information including the donor's physical characteristics, education, occupation, and some information on social background and personal characteristics[56] can be provided to the child once they are 12 years of age and upon their request;[57] to the child's legal parents (at their request) before the child reaches 12 years of age; and medical data important to the healthy development of the child can be provided at the request of the child's doctor (no restriction specified concerning the child's age).[58] Identifying information (first and surnames, date of birth and place of residence[59]) is not available to the child until they reach 16 years, and only with the donor's written consent.[60] The Dutch legislation places the burden of requesting identifying information on the child,[61] and in instances where the donor does not want to disclose information, a balancing exercise is required to consider whether serious reasons exist for non-disclosure that outweigh the consequences for the child of not knowing the identifying information.[62]

However, even such a system of phased provision of identity information about genetic donor parents such as that established by the Dutch legislation does ultimately recognise that donor conceived children should have access to identifying information about their genetic parents. It remains difficult to envisage circumstances where the child's right to preserve their identity would not outweigh a donor's interests in non-disclosure. This is especially so given the significant, lifelong impact that not knowing full, identifying information about their genetic parent(s) may have on the child both in child and adulthood. Indeed, as the ECtHR has acknowledged, "an individual's interest in

53 M. Cowden, 'No Harm, No Foul: A Child's Right to Know Their Genetic Parents', (2012) 26(1) *International Journal of Law, Policy and the Family* 102 at 107.
54 See e.g. UN Committee on the Rights of the Child, Concluding observations regarding Denmark, 15 February 1995, UN Doc. CRC/C/15/Add.33, at [11].
55 Wet donorgegevens kunstmatige bevruchting 2002 (Artificial Insemination (Donor Information) Act 2002.
56 Ibid., Arts. 2(1)(a) and (b).
57 Ibid., Art. 3(1)(b).
58 Ibid., Art. 3(1)(1).
59 Ibid., Art. 2(1)(c).
60 Ibid., Art. 3(2).
61 Ibid., Art. 3(2).
62 Ibid., Art. 3(2).

discovering his or her parentage does not disappear with age, quite the reverse."[63]

3.2 Striking a balance between the rights and interests of the child and genetic donor parents in ICS

It is, therefore, difficult to maintain that genetic donor parents should have an absolute right to privacy in relation to the children who are born in ICS through their gamete donations. The involvement of genetic donor parents in ICS is clearly based on their own choice to donate gametes. In doing so, they are aware that their gametes may lead to the existence of a child through ICS, and as such permanently connect themselves into the child's life by virtue of the establishment of a genetic bond. Arguably, they cede their privacy right on this basis, with the awareness of the consequence that the child may wish to have contact with and know them as their genetic parent. The child's rights to preserve their identity and to attain the highest standard of health have a potentially large impact on the child's own lifetime outcomes; knowing their genetic origins and their genetic health history will likely positively impact their life in many ways. They will be able to form a full view of their personal narrative and understand where they came from. Consequently, they will have the opportunity to form their own identity informed by the genetic element, and will also be able to have the choice to proactively act on any genetic health history information indicating genetic disorder.

Knowing identifying information about their genetic donor parents will enable the child to at least attempt to know these people if the child wishes to do so, in order to preserve this aspect of their identity and gain a full understanding of their identity concerning its genetic aspect. Protecting the child's rights by ensuring they can know the identity of their genetic donor parent(s) is therefore consistent with a holistic approach to their rights and is in their best interests;[64] as a result, the balance should weigh in favour of the child's rights, rather than upholding the genetic donor parents' right to privacy.

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63 *Godelli v. Italy*, Decision of 25 September 2012, Second Section Judgment (Merits and Just Satisfaction), App. No. 33783/09. The ECtHR found a violation of Article 8, ECHR on the basis that the applicant, who was abandoned at birth and subsequently adopted, had been unable to find out the identity of her birth mother (who had declined to have her identity disclosed). At the time of the judgment, the applicant was 69 years old and argued she had suffered severe damage because she was unable to know her personal history through accessing identifying or non-identifying information about her birth mother; she argued that as a result, a balance had been struck entirely in favour of her birth mother's interests. The Court found that by preventing the applicant from accessing any identity related information, Italy had not struck a fair balance to achieve proportionality between the applicant's right to identity (and therefore access information about her origins) and her birth mother's right to remain anonymous.

64 UN Committee on the Rights of the Child, *supra* note 7.

Recognising this, ideally anonymous genetic donors should not involve themselves in ICS (and future regulation of ICS should guard against this). However, in instances where they do anonymously become genetic parents in ICS or seek to maintain anonymity (that is, refusing the disclosure of identifying information), decision-makers should take active steps wherever possible to uphold and enforce the child's rights to identity and health (consistent with their overall best interests) and recognise these as outweighing the genetic donor parents' privacy right.

4 Balancing the rights and interests of the child with those of the commissioning parents

As already alluded to above, in ICS situations, the rights and best interests of the child will, in some instances, need to be balanced with the rights and interests of the commissioning parents. This may seem contradictory, given that it is the commissioning parents who seek to bring the child into the world and if commissioning parents did not take steps to undertake an ICS arrangement, the child would not come into existence. Regardless of whether or not the child is genetically related to their commissioning parents, it is important to remember that the whole enterprise of ICS is premised on the wishes of commissioning parents to build a family with children or to add more children to their family. However, in considering these two groups, it is quickly apparent that the child's rights and interests may in fact conflict with those of the commissioning parents in ICS; indeed, it is this conflict that presents the central balancing exercise necessary in ICS.

4.1 The rights and best interests of the child in conflict with the rights and interests of the commissioning parents in ICS

Given the deliberate, planned nature of creating a child through ICS, Davis' observation regarding parenthood becomes particularly apt: "The decision to have a child is never made for the sake of the child, for no child then exists. We choose to have children for myriad reasons, but before the child is conceived, those can only be self-regarding. The child is a means to our ends. […] But morally the child is first and foremost an end in herself."[65] However, often, it is the wishes of commissioning parents and how these manifest in practice in ICS arrangements through their decisions and actions that cause a conflict with the child's rights and best interests. In most ICS arrangements, this conflict arises without any negative intention from commissioning parents,

65 D.S. Davis, *Genetic Dilemmas: Reproductive Technology, Parental Choices and Children's Futures* (2nd ed.), (2010), at 43.

but as a result of the decisions and actions they take. For example, the commissioning parents may use anonymous donor gametes to conceive a child through ICS, thus placing their interest in having a child in conflict with the child's right to preserve their identity. This exemplifies what Davis describes as a parental decision that limits choices for the child as they grow up into adulthood,[66] "insufficiently attentive to the child as an end in herself. By closing off the child's right to an open future, they define the child as an entity who exists to fulfil parental hopes and dreams, not her own."[67] A further example of a possible conflict is whether or not the commissioning parents are committed to caring for any child born through their ICS arrangement, regardless of whether the child is male or female, born with a disability or serious health condition, and if there are multiple births through the arrangement.

From a child rights perspective, the core focus when balancing the rights and interests of these groups should be on ensuring the paramountcy of the child's rights and best interests, to ensure they are upheld and not subordinated to the rights or interests of their commissioning parents. In addition to what the Committee on the Rights of the Child has stated regarding how the child's best interests principle should be taken into account in resolving rights conflicts and to reach solutions, the Committee makes clear that the child's special situation based on their dependency, maturity, legal status and voicelessness[68] necessitates treating the child's best interests as a primary and sometimes paramount consideration, beyond being treated as being at the same level as all other considerations.[69] Therefore, in instances where the child's rights and best interests conflict with the rights of other persons, as is the case in the scenarios raised in this paper, the Committee says that these conflicts must be "resolved on a case-by-case basis, carefully balancing the interests of all parties and finding a suitable compromise."[70] Moreover, where harmonisation of these conflicting rights and interests is not possible, the Committee asserts that "authorities and decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best."[71]

However, before considering how the competing rights and interests of the child and commissioning parents might be balanced in ICS, it is useful to consider whether there is a right to be a parent or to have children, as well

66 Ibid., at 5.
67 Ibid., at 44.
68 UN Committee on the Rights of the Child, *supra* note 7, at [37].
69 Ibid., at [37]-[38].
70 Ibid., at [39].
71 Ibid.

as the concept of involuntary childlessness. These present two factors sometimes underlying the actions and decisions of commissioning parents in ICS and bringing them into conflict with the child's rights and best interests.

4.2 Is there a right to have a child?

This question is analysed below from two key angles, namely whether a right to a genetic child or to adopt exists.

4.2.1 Is there a right to a genetic child?

The aforementioned case of *Evans v. United Kingdom* is arguably the leading authority on this question. Ms. Evans desired genetic children but required surgery to remove her ovaries, so she and her then-partner had embryos created and stored. However, they subsequently separated; Ms Evans wished to proceed to undergo embryo implantation (no eggs were separately frozen) but her ex-partner withdrew his consent to use of the embryos, seeking their destruction. Ms Evans sought to prevent their destruction but her claims were rejected by the UK courts.[72] The Grand Chamber of the ECtHR held that Article 8 ECHR encompasses the right to respect for an individual's decision to become or not become a parent,[73] and moreover held that the right to respect for the decision to become a genetic parent falls within the scope of Article 8.[74] Balancing the competing rights and interests of the parties to the IVF treatment (Ms Evans and her ex-partner) was therefore required. As White and Ovey note, "There was a clash of rights here: between respect for the private life of the woman who chose to become pregnant, and the private life of the man to choose not to become a parent with a woman with whom his relationship had ended."[75]

The Grand Chamber said that the interests must be balanced fairly; hers should not carry greater weight than his.[76] It held that a fair balance had been struck and that the applicable UK legislation requiring continuing consent for use by every person donating gametes was not inconsistent with Article 8 ECHR (there was no Article 8 violation).[77] However, the joint dissenting opinion propounds the view that there was a failure to strike a fair balance between the parties, as upholding the ex-partner's view effectively cancelled out Ms

72 For discussion, see N. Hammond, *Case Commentary: Evans v the United Kingdom,* 1-2 (2007), available at http://www.ccels.cardiff.ac.uk/archives/issues/2007/hammond.pdf
73 *Evans v. United Kingdom, supra* note 13, at [71].
74 Ibid., at [72].
75 C. Ovey and R.C.A. White, *Jacobs & White The European Convention on Human Rights,* 2014, at 400.
76 Ibid., at [90].
77 Ibid., at [79].

Evan's view, and it was impossible under the legislation to strike a balance between the competing interests.[78] Indeed, despite *Evans v. UK* standing for the principle that there is no absolute right to become a parent to a genetic child (even in a situation such as this, where there is no other chance of a person becoming a genetic parent), what the dissenting opinion highlights is the acute complexity in striking balance in these types of cases where competing rights and interests collide.

An earlier case from the English jurisdiction, *R v. ex parte Blood*[79] (UK Court of Appeal) involved a similar situation, however, Mrs Blood's husband was in a coma and she sought permission to use his semen via 'artificial insemination by husband' (AIH) to have a child genetically related to her and her husband. The UK Human Fertilisation and Embryology Authority refused permission; Warnock notes the Authority was strongly of the view that "posthumous children were bound to suffer psychological trauma".[80] The UK Court of Appeal further ruled Mrs Blood could not seek AIH in the UK as written consent from her husband was required under the relevant legislation and this did not exist. However, the Court considered Ms Blood could have the sperm exported for AIH outside the UK (within the European Union).[81] Therefore, she underwent AIH in Belgium and successfully had a child, fulfilling her desire to have a child who was genetically related to both her and her husband.[82] Similarly in Australia, in *Jocelyn Edwards; Re the estate of the late Mark Edwards*[83] the New South Wales Supreme Court granted a woman permission to use her dead husband's sperm to enable a genetic child to be born, in the absence of his written consent. The Court struck this balance even though the regular requirement under NSW law is written consent from the donor for the use of their gametes.[84]

The governing law in both *Edwards* and *Blood* also required written consent of the donor. Despite this, in both cases there was an absence of consent but the Courts, to differing extents, facilitated an avenue whereby the woman could be enabled to have a child genetically related to her husband. In both cases there had been a long-term marital relationship, and the husband was unable to consent – in *Blood* due to him being comatose, and in *Edwards* due to him

78 *Evans v. United Kingdom, supra* note 7, Joint Dissenting Opinion of Judges Turmen, Tsatsa-Nikolovska, Spielmann and Ziemele, at [7].

79 *R v. ex parte Blood*,[1997] 2 All ER 687.

80 M. Warnock, *Making Babies: Is there a right to have children?*, (2002), at 4.

81 BBC News, *Widow Allowed Dead Husband's Baby*, available at http://news.bbc.co.uk/onthisday/hi/dates/stories/february/6/newsid_2536000/2536119.stm

82 J. Laurance, *Diane Blood Tells of Joy at Dead Husband's Child, The Independent*, 29 June 1998, available at http://www.independent.co.uk/news/diane-blood-tells-of-joy-at-dead-husbands-child-1168283.html Mrs. Blood had a second child using her late husband's sperm in 2002, also through a Belgian clinic. See: http://www.theguardian.com/uk/2002/feb/09/health.healthandwellbeing and http://news.bbc.co.uk/2/hi/uk_news/england/2139525.stm

83 *Jocelyn Edwards; Re the estate of the late Mark Edwards*, [2011] NSWSC 478.

84 Ibid., at [151].

being deceased. However in the *Evans* case discussed earlier, one of the living adults who had donated material to create the embryo had withdrawn consent; the balancing exercise in *Evans* was therefore different to that in *Edwards* and *Blood* (refusal to consent, not absence of consent). The balance in *Evans* was equally weighed between the man and the woman, with the outcome being that consent from both parties was required for the use of the embryos. However, something not comprehensively considered by the ECtHR in *Evans* is the rights balancing exercise regarding how allowing use of the embryos by one genetic parent against the express wishes of the other could negatively impact on any child born as a result. Such a child could potentially grow up believing they were unwanted by one genetic parent, and may also not have a chance to know that parent, which would be inconsistent with the child's best interests. Given the impact that the decision in *Evans* would have had on any future child born as a result of use of the embyros, more comprehensive consideration of the future child's situation would have led to a holistic rights balancing approach.

Since its decision in *Evans*, the ECtHR has largely maintained a consistent position concerning the issue of respect for decisions to have genetic children: this is an issue falling under Article 8 ECHR and although it falls within the state's margin of appreciation, the appropriate balance must be struck. In *Dickson v. United Kingdom*,[85] the Grand Chamber held that the refusal of access to artificial insemination facilities to a prisoner and his wife amounted to a violation of Article 8; in a matter of such significance to the applicants, the Grand Chamber held the UK had not struck a fair balance between the competing private and public interests involved.[86] In assessing whether the appropriate balance had been struck, the Grand Chamber found it important that this was the couple's only realistic opportunity to have a child together.[87] In making this assessment, the Grand Chamber said the state's margin of appreciation will be restricted "where a particularly important facet of an individual's existence or identity is at stake (such as the choice to become a genetic parent)".[88] Regarding the potential birth of a child through the provision of access to artificial insemination facilities to the applicants, the Grand Chamber said "the State has a positive obligation to ensure the effective protection of children. However, that cannot go so far as to prevent parents who so wish from attempting to conceive a child in circumstances like those of the present case, especially as the second applicant was at liberty and could have taken care of any child conceived until such time as her husband was released."[89]

85 *Dickson v. United Kingdom*, Decision of 4 December 2007, Grand Chamber Judgment, App. No. 44362/04.
86 Ibid., at [85].
87 Ibid., at [72]
88 Ibid., at [78].
89 Ibid., at [76].

Therefore, in the Grand Chamber's view, any potential concerns for the future child's welfare was not a factor preventing access to artificial insemination to enable the applicants to exercise their decision to try to become genetic parents.

In Australia, a similar case to *Dickson* was the subject of a decision on appeal in the Victorian Civil and Administrative Tribunal. In *ABY & ABZ v. Secretary to the Department of Health & Anor (Human Rights),*[90] ABY and his partner alleged a breach of their human rights as they were denied ART treatment based on his status as a convicted, sentenced child sex offender.[91] What makes this decision particularly interesting is the Tribunal's consideration of the risk of harm to a child born through ART treatment being made available to the applicants. The legislation governing decisions regarding access to ART treatment includes the guiding principle that "the welfare and interests of persons born or to be born as a result of treatment procedures are paramount";[92] the Tribunal articulated the test to be applied as follows:

> 'This decision will be based on all the evidence that comes before it, including any evidence of factors potentially adverse to the well-being or best interests of the child […] A consideration of what constitutes the best interests of a child could include the physical, sexual, emotional and developmental well-being of a child. The part of the decision which pertains to considering the best interests of the child will first involve recognising, on the evidence before the decision-maker, any potential identifiable and established risk factors as supported by research and expertise in the field. Secondly, it must be decided either that these factors present a real risk of harm when applied to all of the circumstances in an individual case, and therefore a barrier to treatment arises, or that they do not, and therefore no barrier exists'.[93]

Therefore, the Tribunal stated that "The best interests and welfare of a child born as a result of a treatment procedure extend beyond the question of whether any such child would be at risk of sexual harm at the hands of ABY"[94] and said that it "must be satisfied that approving treatment is in the best interest of any child that will be born as a result".[95] The Tribunal was explicit that this requirement for the treatment to be consistent with the best interests of any child born as a result of the treatment and the welfare and interests of such children must be paramount.[96] It said it must "determine whether

90 *ABY & ABZ v. Secretary to the Department of Health & Anor (Human Rights)* [2013] VCAT 625.
91 Ibid., at [4].
92 s.5(a), Assisted Reproductive Treatment Act 2008 (Victoria).
93 *ABY & ABZ v. Secretary to the Department of Health & Anor*, *supra* note 90, at [31].
94 Ibid., at [32].
95 Ibid.
96 Ibid., at [33].

the treatment procedure is in the best interests of the child to be born."[97] Through a comprehensive analysis of the potential identifiable and established risk factors (including, for example, those associated with the offences for which ABY was convicted and sentenced), considering the opinions of expert witnesses, and taking into account protective and mitigating factors and "all matters relevant to the welfare and interests of the child"[98] the Tribunal reached the view that "to the extent that we have found that there are identifiable or established risk factors, […] there is no real risk of harm to a child to be born to ABY and ABZ as should constitute a barrier to treatment."[99] Ultimately, the Tribunal found that "there is no barrier to treatment, and that the carrying out of a treatment procedure is consistent with the best interests of a child who would be born as a result of the treatment procedure."[100]

A more recent ECtHR decision encompassing consideration of whether there is a right to a genetic child is the Grand Chamber's decision in *S.H. and Others v. Austria*.[101] The applicants were two couples experiencing infertility in different ways (both spouses were infertile in the situation of the first couple,[102] whereas in that of the second couple, only the woman was infertile[103]). Both couples were unable to access in-vitro fertilisation (IVF) in Austria, given applicable Austrian law prohibits donor sperm use in IVF, only allows the use of artificial insemination when introducing sperm into the reproductive organs of a woman,[104] and absolutely prohibits ovum donation.[105] The applicants claimed these prohibitions, which effectively barred them from being able to have a child who was genetically related to at least one of them, amounted to a breach of their Article 8 ECHR right to respect for private and family life.

The Grand Chamber confirmed that Article 8 encompasses "the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose", as such a choice to do so is an expression of private and family life.[106] In reaching this view, the ECtHR applied *Dickson* (the notions of private and family lives incorporate the right to respect for the decision to become genetic parents[107]). The Grand Chamber said the margin of

97 Ibid., at [124].
98 Ibid.
99 Ibid., at [127].
100 Ibid., at [128].
101 *S.H. and Others v. Austria,* Decision of 3 November 2011, Judgment (Merits and Just Satisfaction), Court (Grand Chamber), App. No. 57813/00.
102 Ibid., at [11].
103 Ibid., at [12].
104 The prohibition exists under s3(1) Fortpflanzungsmedizingesetzof 1992 (Austrian Artificial Procreation Act), with the only exceptions provided under s3(2) of the Act.
105 s3(1) Fortpflanzungsmedizingesetzof 1992: ova may only be used for the woman from whom they originate.
106 *S.H. and Others v. Austria, supra* note 101, at [82].
107 Ibid., at [81], citing *Dickson v. United Kingdom*.

appreciation afforded to the State concerning gamete donation IVF is wide, based on lack of consensus among Member States and that IVF raises "sensitive moral and ethical issues against a background of fast-moving medical developments".[108] It held the margin of appreciation had not been exceeded in respect of either couple; there had been no breach of Article 8 (overturning the earlier decision of the First Section).[109] In his separate opinion, Judge de Gaetano asserted that "While there is no doubt that a couple's decision to conceive a child is a decision which pertains to the private and family life of that couple (and, in the context of Article 12, to the couple's right to found a family), neither Article 8 nor Article 12 can be construed as granting a right to conceive a child *at any cost*. The "desire" for a child cannot, to my mind, become an absolute goal which overrides the dignity of every human life."[110] With *S.H. and Others*, the ECtHR reinforces the view that a desire to have genetic children does not equate to a stand-alone right to have children, but that respect for a decision to try to have genetic children is encompassed in the Article 8 right to respect for private and family life, although States are free to regulate ART treatment under their margin of appreciation. As such, the right to respect for a decision to try to have genetic children can be limited.

Applying the case law discussed on whether there is a right to a genetic child to the ICS context, there cannot be understood to be a right to a genetic child *per se*. Therefore, arguments that ICS should be available at all costs in order to ensure access to genetic children are weak. Moreover, the best interests and rights of the child must be safeguarded. As ICS is not a practice provided or funded by governmental authorities, it is unlikely that claims of discriminatory treatment or availability of ICS will hold up if brought before the Courts or other adjudicative bodies; essentially, the current ICS market is governed by market forces, meaning those who can afford ICS can access the market.

4.2.2 Is there a right to adopt?

Turning to consider whether to be a right to adopt to become a parent exists, leading jurisprudence is again found in the ECtHR. The ECtHR declared inadmissible early applications concerning a right to adopt;[111] however, more recently the ECtHR has considered the merits of a number of cases addressing

108 Ibid., at [97].

109 In its decision of 1 April 2010, the First Section found that the fulfilment of the wish for a child should not be precluded by ART that is provided on a discriminatory basis (at [93]). It found that the different treatment was disproportionate and without justification, amounting to a violation of Art. 14, ECHR (prohibition of discrimination) read in conjunction with Art. 8, ECHR (at [85] and 94]).

110 *S.H. and Others v. Austria, supra* note 101, Separate opinion of Judge de Gaetano, at [2].

111 E.g. *X v. Belgium and the Netherlands*, Decision of 10 July 1975, Commission DR 7, 75, App. No. 6482/74 and *Di Lazzaro v. Italy*, Decision of 10 July 1997, Commission DR 90-B, 134, App. No. 31924/96.

this issue. Lestas posits that the ECtHR's willingness to assess this issue goes to the general ambit of rights protected under the ECHR.[112] In a number of instances, this line of cases has concerned claims of discrimination on the basis of sexual orientation (applicants arguing their sexual orientation has prevented them adopting). For example, in *E.B v. France*,[113] the Grand Chamber found the applicant had been discriminated against based on her sexual orientation as a lesbian, which interfered with her application to adopt a child.[114] However, in making this finding the ECtHR noted the *Conseil d'Etat* had appropriately taken into consideration whether being brought up by the applicant was consistent with the child's best interests (and this was found to be the case).[115] As Lestas elaborates, the significance of *E.B. v. France* is that it affirmed that adoption issues fall within the ambit of Article 8, when undertaking an examination of alleged discrimination under Article 14.[116] It is also worth noting that in the earlier decision in *Fretté v. France*,[117] the ECtHR's Former Third Section restated the importance of remembering that adoption is "providing a child with a family, not a family with a child",[118] thereby highlighting adoption as a means of child protection, and one that must only be pursued if it is in the best interests of the child, as made clear under Article 21 of the CRC.

The Grand Chamber has since dealt with this issue in *X and Others v. Austria*.[119] This was an application from two unmarried women living in a long-term relationship and the child of one of the applicants. It concerned the Austrian courts' decision to refuse granting the woman who was not the child's biological mother the right to adopt the child without severing the child's relationship with his biological mother (second-parent adoption). The Grand Chamber found a violation of Article 14 ECHR in conjunction with Article 8, based on the different treatment of the applicants compared with unmarried heterosexual couples seeking adoption of the other partners' child. It said that "[…] the Government has failed to adduce particularly weighty and convincing reasons to show that excluding second-parent adoption in a same-sex couple, while allowing that possibility in an unmarried different-sex couple, was necessary for the protection of the family in the traditional sense

112 G. Letsas, 'No Human Right to Adopt?', (2008), 1 *UCL Human Rights Review* 151-152.
113 *E.B. v. France*, Decision of 22 January 2008, Judgment (Merits and Just Satisfaction), Court (Grand Chamber), App. No. 43546/02.
114 Ibid., at [98].
115 Ibid., at [95].
116 G. Letsas, *supra* note 112, at 152.
117 *Fretté v. France,* (2002) 38 EHRR 438.
118 Ibid., at [42].
119 *X and Others v. Austria,* Decision of 19 February 2013, Judgment (Merits and Just Satisfaction) Court (Grand Chamber), App. No. 19010/07.

or for the protection of the interests of the child. The distinction is therefore incompatible with the Convention."[120]

However, the ECtHR made clear that Member States are not obliged under the ECHR to extend the right to second-parent adoption to unmarried couples,[121] and moreover explicitly stated that there is no guaranteed right to adopt under Article 8 ECHR.[122] In reaching its decision, regarding the rights of the child the ECtHR highlighted Articles 3 and 21 of the CRC, asserting "[…] the existence of *de facto* family life between the applicants, the importance of having the possibility of obtaining legal recognition thereof, the lack of evidence adduced by the Government in order to show that it would be detrimental to the child to be brought up by a same-sex couple or to have two mothers and two fathers for legal purposes, and especially their admission that same-sex couples may be as suited for second-parent adoption as different-sex couples – cast considerable doubt on the proportionality of the absolute prohibition on second-parent adoption in same-sex couples […] the considerations […] would seem rather to weigh in favour of allowing the courts to carry out an examination of each individual case. This would also appear to be more in keeping with the best interests of the child".[123] Despite this statement, the joint partly dissenting opinion strongly criticised the majority judgment for not giving centrality to the child's best interests in its judgment.[124]

Like *S.H. and Others v. Austria* regarding genetic children, the leading jurisprudence on adoption therefore confirms that where the possibility to adopt is made available, this opportunity should be offered without discrimination, but regardless, the ECtHR line of cases discussed in this section underscores that there is no right to adopt. Extending this position by analogy to the ICS context, the argument that there can be said to be no absolute right to have a child via ICS is a strong one. Furthermore, drawing on the adoption jurisprudence, by extension it is clear that in ICS too, the child's rights and best interests must always be taken into consideration in decisions affecting them.

4.3 The concept of 'involuntary childlessness'

The consideration of the two lines of case law above demonstrates that there cannot be understood to exist a right to be a genetic parent or to be an adoptive parent. However, some people view ICS as their best (and perhaps final

120 Ibid., at [151].
121 Ibid., at [136].
122 Ibid., at [135].
123 Ibid., at [146].
124 *X and Others v. Austria, supra* note 119, joint partly dissenting opinion of Judges Casadevall, Zimele, Kolver, Joèiëne, Ðikuta, de Gaetano and Sicilianos, at [8].

or only) chance to become a parent,[125] and this can be identified as a core motivator for ICS commissioning parents who genuinely seek this.[126] Thus a further issue which must be briefly touched upon regarding whether there can be said to be a right to become a parent is the concept of 'involuntary childlessness', a term used to describe the state of affairs that leads commissioning parents to turn to ICS.[127] Smith-Cavros uses the term to describe individuals who are "unwillingly childless",[128] noting that with ICS, "Scenarios to achieve parenthood that were once impossible are made a possibility."[129] Palattiyl describes involuntary childlessness as the inability to conceive when individuals want to, and identifies ICS as a method addressing infertility and involuntary childlessness.[130]

Do individuals have a right not to be in a state of involuntary childlessness, and therefore to have a child and be a parent? Arguably, a broad interpretation of the right to found a family under Article 16(1) of the Universal Declaration of Human Rights covers building a family with children. However, it would be stretching the limits of such a broad interpretation to extend this to equate to an absolute right to have genetic or biologically related children, especially when there are other means available to found a family with children, such as adoption.

General Comment 19 of the UN Human Rights Committee[131] provides some guidance on this issue, in relation to Article 23 of the International Covenant on Civil and Political Rights (which builds on Article 16(1) UDHR).[132] The Human Rights Committee states that "The right to found a family implies, in principle, the possibility to procreate and live together."[133] Based on this statement, it is clear that the possibility of procreation should be respected

125 Australia is reported to have the largest number of commissioning parents who are engaging in ICS. See: M. Cooper et al (eds.), *Current Issues and Emerging Trends in Medical Tourism*, (2015) at 147.

126 However, it should not be ignored that some commissioning parents enter into ICS arrangements motivated by intentions which run directly counter to international human rights law norms and standards, e.g. to create a child for the purpose of sexual exploitation, sale or trafficking, as discussed later in this paper at section 4.4.

127 E.g., E. Smith-Cavros, 'Fertility and Inequality Across Borders: Assisted Reproductive Technology and Globalization', (2010) 4:7 *Sociology Compass* 466, at 468; G. Palattiyil, E. Blyth et al., 'Globalization and cross-border reproductive services: Ethical implications of surrogacy in India for social work', (2010) 53:5 *International Social Work* 686, at 688.

128 Smith-Cavros, *supra* 127 at [468].

129 Ibid.

130 Palattiyil and Blyth et al, *supra* note 127, at 688.

131 UN Human Rights Committee, General Comment No. 19: Protection of the family, the right to marriage and equality of the spouses (Art. 23) 27 July 1990.

132 Article 23(1), ICCPR, *supra* note 41: "The Family is the natural and fundamental group unit of society and is entitled to protection by society and the State."; Article 23(2), ICCPR: "The right of men and women of marriageable age to marry and found a family shall be recognised."

133 UN Human Rights Committee, *supra* note 131, at [5].

and protected (and this aligns with other provisions in international human rights law establishing the right to reproductive autonomy and health[134]), but this does not correlate with an absolute right to have a child. Although reproductive health and freedom must be respected and protected,[135] and where it is made available by states, access to medical treatment to achieve the end of having a child should be made available without discrimination, there is nothing in international human rights law establishing an absolute right to have a child. Despite this, the desire of many involuntarily childless individuals to have a child and become parents will continue to motivate them to choose to undertake ICS, regardless of whether or not there is a right to do so.

4.4 Inserting the child's rights into the picture

The desire of commissioning parents to have a child is the key driver behind ICS arrangements. As this desire can sometimes obscure the focus on upholding the child's rights in ICS and undertaking decisions in the child's best interests, steps must be taken to ensure these are safeguarded. The child's rights and best interests must be balanced against any rights and interests of the commissioning parents; however, the child's rights and interests – as the most vulnerable party of the two, lacking agency to advocate for their own interests during infancy and early years, and given the special nature of childhood[136] – must be inserted into the centre of the picture, especially given the range of potential rights violations that children are vulnerable to within ICS. As Michael Freeman asserts, "Children easily become victims",[137] and further, "Children are particularly vulnerable and need rights to protect their integrity and dignity."[138]

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134 E.g. Art. 16(1)(e), CEDAW, *supra* note 44; Art. 11(1)(f), CEDAW: protection of health and safety in working conditions, including safeguarding of reproductive function; also N.B. the right to the highest attainable standard of health (Art. 12, ICESCR) includes "the right to control one's health and body, including sexual and reproductive freedom". See Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), (2000), UN Doc. E/C.12/2000/4, at [8]. N.B. the World Health Organisation defines health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity." Constitution of the World Health Organisation, Preamble, (1946).

135 Among other things, the Committee on Economic, Social and Cultural Rights states that "Reproductive health means that women and men have the freedom to decide if and when to reproduce". See Committee on Economic, Social and Cultural Rights, General Comment No. 14, ibid., at fn. 12.

136 As noted in preambular para. 4, CRC, *supra* note 2, and UN Committee on the Rights of the Child, *supra* note 7, at [37].

137 M. Freeman, "Taking Children's Rights More Seriously", (1992) 6 *International Journal of Law and the Family* 54.

138 Ibid., at [55].

In ICS, it is crucial that the following statement by the Committee on the Rights of the child is at the forefront of all decisions and actions concerning the child: there must be "a consciousness about the place that children's interests must occupy in all actions and a willingness to give priority to those interests in all circumstances, but especially when an action has an undeniable impact on the children concerned."[139] Furthermore, as the ECtHR has observed in a judgment concerning adulterine children, a key principle when balancing the rights and interests of children with adults is that children cannot be blamed for circumstances for which they are not responsible, but for which their parents are.[140]

It is crucial therefore in ICS to acknowledge that adults do not necessarily always have children's best interests at heart.[141] In extreme ICS cases, adults may not act consistently with the best interests of the children they commission, for example in cases where those children are created for the purpose of sale, illegal adoption, trafficking or with other sinister intentions in mind (for example, sexual exploitation or other forms of child abuse). Decision-makers in ICS must remain alert to this possibility, and weigh rights and interests with this in mind. But in the more usual run of ICS cases, the commissioning parents may simply not think to place the interests and rights of the child they commission at the forefront of their concerns, given their own overriding wish for a child. Furthermore, commissioning parents may not realise their own interests will not always align with the child's rights and best interests in ICS, and they may not know actions are necessary to be taken or avoided in order to ensure the protection of the child's rights, consistent with their best interests. Due to such a lack of foresight or focus, issues such as statelessness and identity preservation may become problematic and lead to violations of the child's rights under the CRC and other international human rights instruments.

4.5 Striking a balance between the rights and interests of the child and the commissioning parents in the specific situation of ICS

A balance must be struck between these competing rights and interests, bearing in mind the primacy of the best interests of the child. It may be necessary for a balancing of competing rights and interests between commissioning parents and children in ICS situations to be undertaken on a case-by-case basis by key decision-makers such as social workers, government ministers and judges. When framing future policies and legislation governing ICS or applicable to

139 UN Committee on the Rights of the Child, *supra* note 7, at [40].

140 *Mazurek v. France,* Decision of 1 February 2000, Judgment (Merits and Just Satisfaction), Court (Third Section), App. No. 34406/97, at [54].

141 Ibid.

ICS situations, policy-makers and legislators will also need to consider the appropriate balance to be struck between commissioning parents and children born through ICS. Analysis of selected jurisprudence relevant by extension to some of the rights and interests of children born from ICS arrangements is helpful when considering rights balancing between commissioning parents and children. This is presented below in section 4.5.1, before examining how the child's rights and best interests have been balanced with commissioning parents' rights and interests in leading ICS jurisprudence (section 4.5.2).

4.5.1 Selected jurisprudence relevant to the balancing of commissioning parents' and children's rights and best interests in ICS

Firstly, on issues of welfare and best interests, the UK High Court decision *In the Matter of TT (a Minor)*,[142] considered a traditional domestic surrogacy arrangement which broke down with the surrogate refusing to give up the child, T, following birth. T is the genetic child of the commissioning father and the surrogate. The commissioning father contested the surrogate's actions in the UK High Court, at which time T was 5 months old. The Court refused granting a residence order to the commissioning father, instead ordering T reside in the surrogate's (genetic mother) care. Baker J. accepted the surrogate's submission that during the course of her pregnancy, she changed her mind about handing over the baby,[143] and said that in considering the case, the Court's paramount consideration was the child's welfare.[144] Baker J. adopted the approach previously applied in Re P (Surrogacy: Residence);[145] the question to be asked was "which home is T most likely to mature into a happy and balanced adult and to achieve her fullest potential as a human?"[146] Baker J. said

> 'On balance, I have reached the clear conclusion that T's welfare requires her to remain with her mother. In my judgment, there is a clear attachment between mother and daughter. To remove her from her mother's care would cause a measure of harm. It is the mother who, I find, is better able to meet T's needs, in particular her emotional needs. […] I am less confident that Mr. and Mrs W would respect the relationship between T and her mother were they to be granted residence.'[147]

The Court's reasoning places central focus on what was in T's best interests, weighing these in relation to her commissioning/genetic father's interest in having T in his full-time care. In doing so, the Court held that preserving the

142 *In the Matter of TT (a Minor),* [2011] EWHC 33 (Fam).
143 Ibid., at [34].
144 Ibid., at [54].
145 Re P (Surrogacy: Residence), [2008] 1 FLR 177.
146 *In the Matter of TT (a Minor), supra* note 142, at [57].
147 Ibid., at [73].

child's attachment with the surrogate/genetic mother, and preventing the harm that might have been caused by removing her from this relationship outweighed the interests of the commissioning father. A number of factors concerning the father's behaviour were considered by the Court, and seen to indicate that he and his wife were less equipped to protect T's needs,[148] especially her emotional needs.[149] Taking a holistic, lifetime approach to the balancing exercise, the Court not only considered in whose care T's best interests would be best protected in the short-term, but also attached importance to the question of in whose care T would be more likely to achieve her full human potential as she developed from childhood to adulthood. This judgment is a clear example of a decision-maker prioritising the child's best interests over those of their commissioning parents (and in particular in this instance the commissioning/genetic father) on the basis of reasoning weighing in favour of T remaining in the care arrangement that was already established with her surrogate/genetic mother. As Gerards notes, individual rights can be restricted if good (that is, convincing) reasons exist to do so;[150] this decision demonstrates how a balancing of rights can result in a restriction of a commissioning parent's rights in favour of prioritising the child's rights and best interests. Lastly, it is important to note that the Court safeguarded T's right to preserve her identity in relation to her genetic father by making a contact order in his favour.

Leading ECtHR child abduction jurisprudence is also worth highlighting in relation to balancing the child's rights and interests with their commissioning parents' interests in ICS. President Costa notes, "In the Strasbourg case-law, the principle of giving priority to safeguarding the best interests of the child is firmly established",[151] and the best interests of the child must be considered on a case-by-case basis as part of a balancing exercise.[152] Indeed, in many judgments, the ECtHR has been explicit regarding this balancing exercise; for example, in *Yousef v. The Netherlands*,[153] the ECtHR reiterated that "in judicial decisions where the rights under Article 8 of parents and those of a child are at stake, the child's rights must be the paramount consideration. If any balancing of interests is necessary, the interests of the child must prevail."[154]

148 Ibid., at [35]-[52].
149 Ibid., at [69]-[70].
150 Gerards, *supra* note 4, at 132.
151 J.P. Costa, *The Best Interests of the Child in the Recent Case Law of the European Court of Human Rights*, Speech to the Franco-British-Irish Colloque on Family Law, (14 May 2011), at 2.
152 Ibid., at 5.
153 *Yousef v. The Netherlands*, Decision of 5 November 2002, Judgment (Merits), Court (Second Section), App. No. 33711/96.
154 Ibid., at [73]. This application concerned the claim of a genetic father to be recognised as a child's legal parent; the Court ultimately found that the correct balance had been struck between the rights of the applicant and the child, holding that the Netherlands had not violated Article 8, ECHR in refusing to recognise the applicant as the child's legal father.

In this respect, ECtHR child abduction jurisprudence is perhaps the most relevant line of case law with relevance to the balancing of the child's rights and interests with their commissioning parents' interests in ICS. In *Neulinger and Shuruk v. Switzerland*,[155] the Grand Chamber was not convinced it would be in the best interests of the abducted child who was at the centre of the application to return to Israel from Switzerland. The child was highly integrated into Swiss society with his mother; removing him to Israel would cause him significant disturbance, a fact which in the Grand Chamber's view, needed to be weighted heavily in the balancing of rights and interests.[156] The Grand Chamber said it had to weigh any benefit that the child would receive from being returned to Israel against any disturbance it might cause him;[157] it found that return to Israel would not provide circumstances conducive to the child's well-being.[158] Also relevant in this balancing exercise was the fact that the child's father's right of access had been subject to restrictions before the child's abduction; furthermore, if the child's mother was made to return to Israel, this would trigger disproportionate interference with her right to respect for family life. In reasoning consistent with the CRC, the Grand Chamber said "there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount".[159] Thus whilst balancing and striking a fair balance between competing interests, the child's best interests must be protected and upheld and treated as the most important consideration.

In another leading child abduction judgment, *X v. Latvia*,[160] the Grand Chamber stated the best interests of the child "do not coincide with those of the father or the mother",[161] and it again held that the best interests of the child must be the primary consideration in the decision-making process on whether the child should be returned, in this instance from Latvia to Australia. It observed that "The decisive issue is whether the fair balance that must exist between the competing interests at stake – those of the child, of the two parents, and of public order – has been struck, within the margin of appreciation afforded to States in such matters, taking into account, however, that the best interests of the child must be of primary consideration and that the objectives of prevention and immediate return correspond to a specific conception of 'the best interests of the child'."[162] In a concurring opinion, Judge

155 *Neulinger and Shuruk v. Switzerland*, Decision of 6 July 2010, Judgment (Grand Chamber), App. No. 41615/07.
156 Ibid., at [151].
157 Ibid., at [148].
158 Ibid.
159 Ibid., at [135].
160 *X v. Latvia*, Decision of 26 November 2013, Judgment (Merits and Just Satisfaction), Court (Grand Chamber), App. No. 27853/09.
161 Ibid., at [100].
162 Ibid., at [95].

Pinto de Albuquerque significantly asserted that there is "universal acknowledgement of the paramountcy of the child's best interests as a principle of international customary and treaty law, and not a mere 'social paradigm'".[163]

Issues relating to the child's right to preserve their identity (Article 8 CRC) require significant attention in the rights balancing exercise in ICS situations, given the range of ways in which this right is open to violation.[164] The third party submissions by the German Government in *S.H. and Others v Austria* argued the concept of "split motherhood" that may eventuate for children born from some ART arrangements was contrary to the child's welfare,[165] leading to identity-related difficulties for the child.[166] The German Government asserted "Splitting motherhood into a genetic and a biological mother would result in two women having a part in the creation of a child. […] the resulting ambiguousness of the mother's identity might jeopardise the development of the child's personality and lead to considerable problems in his or her discovery of identity.[167] Applying this to the ICS situation, this view highlights that the child's right to preserve identity must be weighed against the rights and interests of the commissioning parents who seek a child through ICS, to establish whether on balance the child's right to preserve their identity will be protected. As it is in the child's best interests to be able to enjoy and exercise their identity preservation right, significant weight must attach to this in the rights balancing exercise. For example, it should be assessed if the commissioning parents plan to, or are taking active steps to protect the child's right to identity preservation and to ameliorate any potential negative impacts of ICS on this right. If commissioning parents do take active steps such as ensuring that information about the child's genetic parents (in ICS situations involving gamete donors) and surrogate mother is collected and preserved, and if they intend to share this with the child as they grow up, this may weigh in favour of the commissioning parents. This could be seen to evidence that they have actively sought to protect the best interests of the child, by ensuring their right to preserve their identity is upheld, as opposed to not having considered nor sought to protect the child's identity preservation right.

163 *X v. Latvia, supra* note 160, concurring opinion of Judge Pinto de Albuquerque.

164 As discussed in sections 2 and 5 C.Achmad 'Answering the "Who am I?" Question: Protecting the Right of Children Born Through International Commercial Surrogacy to Preserve Their Identity Under Article 8 of the United Nations Convention on the Rights of the Child', submitted for publication to *Human Rights Law Review;* appearing as Chapter 8 of this doctoral thesis.

165 *S. H and Others v. Austria, supra* note 101, at [53].

166 Ibid., at [53].

167 Ibid., at [53].

4.5.2 Selected ICS jurisprudence balancing commissioning parents' and children's rights

Moving beyond jurisprudence which is helpful by analogy in the ICS context, some ICS judgments issued by domestic courts and the ECtHR are instructive regarding approaches to balancing the rights and best interests of the child in relation to commissioning parents in ICS.

In dealing with a number of ICS cases which have come before them in order to regularise the parental relationship between children born through ICS and their commissioning parents, domestic courts in demand-side ICS states have largely focused on the welfare and best interests of the child as the factor to be given the most weight in balancing the competing rights and interests of the child and their commissioning parents. For example, in *X and Y (Foreign Surrogacy)*, the UK High Court held that the welfare of the child was of paramount importance in considering whether to make a parental order in favour of UK commissioning parents who commissioned twins through ICS in Ukraine.[168] This approach has been characteristic of the UK High Court in ICS cases since,[169] as well as in domestic ICS decisions of courts other jurisdictions which have dealt with applications concerning ICS, such as in Australia.[170] This highlights that the child's rights must be given precedence when competing with those of commissioning parents, in order to reach a balance that is consistent with the child's best interests.

In the ECtHR jurisdiction, in its first decision concerning ICS, *Mennesson v. France*, the ECtHR (Fifth Section, Chamber) reiterated that in determining whether a fair balance has been struck between the competing interests involved, "it must have regard to the essential principle according to which whenever the situation of a child is in issue, the best interests of that child are paramount".[171] Furthermore, the ECtHR emphasised "the importance to be given to the child's interests when weighing up the competing interests at stake".[172] Although the commissioning parents' and children's rights and interests were in direct conflict in this case, the ECtHR found that the twins (born through ICS in the USA) and their commissioning parents had experienced a range of impacts on their right to respect for family life as a result of the

168 *X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), at [24].

169 E.g. *Re L (A Minor)* [2010] EWHC 3146 at [9]-[10]; *Re X and Y (Children)* [2011] EWHC 3147 (Fam) at [40]; *Re C (A Child)* [2013] EWHC 2413 (Fam) at [30]ff; *Re WT* [2014] EWHC 1303 (Fam) at [38]ff; *R and S v T (Surrogacy: Service, Consent and Payments)* [2015] EWFC 22 at [42]; *A and B (No 2 – Parental Order)* [2015] EWHC 2080 (Fam) at [85]ff.

170 E.g. the Family Court of Australia in *Ellison v Karnchanit* [2012] Fam CA 602 was clear to point out that "irrespective of how State law views the applicant's actions, the children have done nothing wrong" (at [90]). The Court discusses the principle of the child's best interests throughout the judgment and applies this principle as central to its reasoning.

171 *Mennesson v. France*, Decision of 26 June 2014, Judgment (Merits and Just Satisfaction), Court (Fifth Section), App. No. 65192/11, at [81].

172 Ibid., at [101].

lack of recognition in French law of the legal parent-child relationship (thereby not recognising the twins as French citizens and not recognising the legal parent-child relationship lawfully established in the USA).[173] However, despite this, as the twins' were able to live in the care of their commissioning parents in France, and as it had not been impossible for them to overcome the practical obstacles arising from the lack of French recognition,[174] the ECtHR found no violation of their right to respect for family life.

However, the twins' right to respect for their private life had been violated. The ECtHR said that

> 'the effects of non-recognition in French law of the legal parent-child relationship between children thus conceived and the intended parents are not limited to the parents alone, who have chosen a particular method of assisted reproduction prohibited by the French authorities. They also affect the children themselves, whose right to respect for their private life – which implies that everyone must be able to establish the substance of his or her identity, including the legal parent-child relationship – is substantially affected. Accordingly, a serious question arises as to the compatibility of that situation with the child's best interests, respect for which must guide any decision in their regard.'[175]

The ECtHR found the fact that the commissioning father was the twins' genetic father was of particular significance, as genetic parentage is an element of identity.[176] As such, "it cannot be said to be in the interests of the child to deprive him or her of a legal relationship of this nature where the biological [genetic] reality of that relationship has been established and the child and parent concerned demand full recognition thereof";[177] the uncertainty faced by the twins as to the possibility of being recognised as French nationals would likely have negative impacts on the "definition of their personal identity".[178] Overall, while the ECtHR said that there was "a serious restriction on the [twins'] identity and right to respect for private life"[179] amounting to a violation of their Article 8 ECHR right to respect for private life, there was no corresponding violation of their commissioning parent's rights.

In *Paradiso and Campanelli v. Italy*,[180] the ECtHR (Second Section, Chamber) again dealt with an application concerning ICS. Unlike in *Mennesson*, in this case, the commissioning parents, not the child born through ICS, were the applicants to the ECtHR (with the ECtHR finding they did not have standing

173 Ibid., at [87]-[89].
174 Ibid., [92].
175 Ibid., at [99].
176 Ibid., at [100].
177 Ibid.
178 Ibid., at [97].
179 Ibid., at [100].
180 *Paradiso and Campanelli v. Italy*, Decision of 27 January 2015, Judgment (Merits and Just Satisfaction) Court (Second Section), App. No. 25358/12.

to bring applications on behalf of the child[181]), and there was a clearer conflict of rights and interests between the commissioning parents and child. The child was born through ICS in Russia; the Italian authorities had refused to recognise his Russian birth certificate and register his birth in the Italian civil register. He had no genetic link to either commissioning parent,[182] (despite the applicants having intended a genetic link with the commissioning father[183]) and had remained in their care for his first six months of life, creating "*de facto* family life between the applicants and the child."[184] However, given these facts and the large amount of money paid by the applicants in relation to the ICS arrangement, the child was removed from the applicants and placed in state care,[185] with contact between the child and the applicants prohibited.[186] Like in *Mennesson*, the ECtHR stated that in considering whether a fair balance has been struck between the competing interests involved, "it must have regard to the essential principle according to which whenever the situation of a child is in issue, the best interests of that child are paramount".[187]

Ultimately, the ECtHR found a violation of Article 8 ECHR in relation to the action of the Italian authorities to remove the child from the applicants and place him in state care. The Article 8 violation rested on the ECtHR's view that the action was not proportionate, namely, the child's interests were not sufficiently taken into account by the Italian authorities.[188] In making this finding, the ECtHR noted with particular concern that "the child received a new identity on April 2013, which means that he had no official identity for more than two years. It is necessary, however, to ensure that a child is not disadvantaged on account of the fact that he or she was born to a surrogate mother, especially in terms of citizenship or identity, which are of crucial importance (see Article 7 of the United Nations Convention on the Rights of the Child)."[189]

Paradiso has been referred to the Grand Chamber; in this respect, it is important to highlight the joint partly dissenting opinion of Judges Raimondi and Spano. The dissenting judges found that there had been no violation of Article 8. They said the applicants' *de facto* family life was based on a tenuous link – without a genetic connection, and with possible illegal conduct underpinning *de facto* family life.[190] Moreover, they asserted "When the youth court decided to remove the child from the applicants, it took into account the harm that he would undoubtedly sustain but, given the short period that

181 Ibid., at [50].
182 Ibid., at [70].
183 Ibid., at [76]-[77].
184 Ibid., at [69].
185 Ibid., at [22]-[23].
186 Ibid., at [23].
187 Ibid., at at [75].
188 Ibid., at [81]-[87].
189 Ibid., at [85].
190 *Paradiso and Campanelli v. Italy*, *supra* note 181, joint partly dissenting opinion, at [3].

he had spent with them and his young age, it considered that the child would surmount this difficult stage in his life. Having regard to those factors, we have no grounds to doubt the adequacy of the elements on which the authorities relied in concluding that the child ought to be taken into the care of the social services. It follows that the Italian authorities acted in accordance with the law, with a view to preventing disorder and protecting the rights and health of the child, and maintained the fair balance that should be struck between the interests at stake."[191]

5 Balancing the Rights of the Surrogate with the Rights and Interests of the Commissioning Parents

Another nexus where competing rights and interests require balancing in ICS is when there is a conflict between the surrogate and the commissioning parents before the child is born. Despite the different views which exist concerning whether ICS amounts to commodification of women who act as surrogates,[192] commissioning parents are in part paying for a surrogate (who is sometimes also genetically related to the child) to carry and bring a child to term for them; this may lead to a power imbalance and raise conflicts over actions and decisions concerning the pregnancy and future child.

5.1 A power imbalance in favour of commissioning parents in ICS

Given that the commissioning parents are paying the surrogate to bring a child to term, to some extent the commissioning parents hold a concentration of power in the relationship. This may manifest in commissioning parents exerting pressure over the surrogate to act in accordance with their interests prior to and during pregnancy and post-birth. They may want the surrogate to undergo certain medical procedures or treatments whilst pregnant, or they may seek to dictate her lifestyle and wider health choices (such as her diet) during her pregnancy. The interests of commissioning parents can therefore impinge on the surrogate's rights to reproductive autonomy and bodily integrity. In instances where commissioning parents or one commissioning parent is genetically related to the child, this may also cause the commissioning parents to argue that they have certain rights regarding the child while he or she is in utero and following birth, based on this genetic link. They may use the

191 Ibid., at [12].

192 Strong arguments exist in this respect, see e.g. K. Schanbacher, 'India's Gestational Surrogacy Market: An Exploitation of Poor, Uneducated Women', (2014) 25 *Hastings Women's Law Journal* 21; and S. Reddy and T. Patel, '"There are many eggs in my body": Medical markets and commodified bodies in India', (2015) 26.3-4 *Global Bioethics* 218.

existence of this link to support their view that the surrogate should take or avoid particular actions during her pregnancy.

Another potential conflict which may arise is that the commissioning parents may seek to have a foetus terminated if prenatal testing indicates the child is likely to be born with a disability or serious health condition, or in instances where there is a multiple pregnancy and commissioning parents do not want a multiple birth. Another course of action commissioning parents might seek to take in such instances is that they may end up reneging on the ICS arrangement and abandoning the child following birth. An example of commissioning parents seeking an abortion arose in a domestic surrogacy in Canada. Prenatal testing detected the foetus (who was genetically related to the commissioning parents) would likely be born with Down Syndrome.[193] The surrogate initially refused abortion, but later acquiesced to the commissioning parents' request.[194] In this situation, the surrogate's acquiescence was likely triggered by a clause in the contract signed by the parties stating that if she made such a decision in the event that the commissioning parents sought abortion, the commissioning parents would be absolved from all responsibility in relation to the child.[195] Whether such a contractual clause is legally defensible is questionable, given that it arguably breaches rights safeguarded under both CEDAW and the CRC. Further, given the surrogate's own family situation, she was unable to entertain the prospect of raising the child herself.[196] As Baylis comments on this case, "The child is seen by the commissioning parents as a product, and in this case a substandard product because of a genetic condition".[197]

It is also important to recognise that the effect of the stance taken by the commissioning parents in this case reduced the surrogate to a commodified carrier, whose reproductive autonomy they sought to curtail based on the child's health status. Therefore, the surrogate's reproductive autonomy and right to health was arguably infringed, as her choice over whether to abort the child or continue the pregnancy appears to have been largely removed. Weighing the competing human rights and interests at stake, the surrogate's reproductive autonomy should not be completely subordinated to the views and wishes of the commissioning parents, but rather, should carry greater weight as the most vulnerable party (aside from the child) in comparison with the commissioning parents.[198] Galloway is correct in observing that here,

193 T. Blackwell, 'Couple urged surrogate mother to abort foetus because of defect', *National Post*, (6 October 2010), available at http://life.nationalpost.com/2010/10/06/couple-urged-surrogate-mother-to-abort-fetus-because-of-defect/

194 Ibid.

195 Ibid.

196 Ibid.

197 Ibid.

198 K. Galloway, 'Theoretical Approaches to Human Dignity, Human Rights and Surrogacy', in P. Gerber and K. O'Byrne (eds.), *Surrogacy, Law and Human Rights* (2015), at 28.

the surrogate has the least power and the most at stake regarding human dignity, and therefore a balancing of rights should weigh to protect her. However, it is true that in such situations if the surrogate's rights and interests were found to outweigh those of the commissioning parents, the question of who would care for the child would come into sharp focus, without a clear answer. This reality would be particularly difficult from a practical perspective if upon birth, the commissioning parents and the surrogate all refused to assume responsibility for the child. In such a situation, the child would be left completely vulnerable without any parental protection from the people directly responsible for bringing him or her into the world, inconsistent with their best interests and wider rights under the CRC (for example, to know and be cared for by their parents and to preserve their identity).

5.2 A power imbalance in favour of the surrogate in ICS

Conversely, a concentration of power may lie with the surrogate in ICS. This can stem from the position that in many jurisdictions, because she is the woman who carries and gives birth to the child, she is recognised as the child's legal mother. The case of *Paton v. United Kingdom*[199] highlights that in the context of abortion, the balance is usually struck in favour of pregnant women in instances when another party, for example the legal father of the unborn child (in ICS situations, this would more likely be the commissioning parents) opposes the abortion. In *Paton,* the then European Commission on Human Rights held that the legal father of an unborn child could not interfere with the decision of its mother to have an abortion if she chose to.[200] In dismissing the application made by the would-be father, the Commission said

> 'having regard to the right of the pregnant woman, [the Commission] does not find that the husband's and potential father's right to respect for his private and family life can be interpreted so widely as to embrace such procedural rights as claimed by the applicant, i.e. a right to be consulted, or a right to make applications, about an abortion which his wife intends to have performed on her.'[201]

The concentration of power with the surrogate is strongly rooted in the reality that she carries the child(ren) that the commissioning parents greatly desire to have and parent. As Baroness Hale observed regarding gestational parenthood in the case of *Re G (Children),*[202] the conceiving and bearing of a child "brings with it, in the vast majority of cases, a very special relationship

199 Ibid.
200 *Paton v. United Kingdom* (1980) 2 EHRR, at [26].
201 Ibid., at [27].
202 *Re G (Children)* [2006] UKHL 43.

between mother and child, a relationship which is different from any other."[203] Building on this notion, Mr Justice Baker asserted in the English ICS case of *D and L (Surrogacy)*[204] that "[T]he act of carrying and giving birth to a baby establishes a relationship with the child which is one of the most important relationships in life."[205] Indeed, in ICS the commissioning parents rely completely on the surrogate to bring the child to term and to relinquish the child to them upon birth. Given this, the surrogate may be able to make demands of the commissioning parents to take certain actions or provide her with certain things while she carries the child, and she may seek to make relinquishment of the child contingent upon certain demands being met.

Further, the surrogate might have particular views about actions relating to the child while in utero and once born. For example, she may want particular medical testing of the child in utero, as occurred in the case of *In the Matter of TT (a Minor)*[206] (domestic surrogacy), where commissioning parents opposed an amniocentesis as they feared it may detrimentally affect foetal health;[207] the surrogate proceeded with the test which led to a major breakdown in her relationship with the commissioning parents.[208] In instances of ICS where the pregnancy does not go as planned or if the surrogate has a disagreement with the commissioning parents, she may seek to terminate the pregnancy. Equally, the surrogate may refuse to terminate the pregnancy if she disagrees with the wishes of commissioning parents in instances where they seek termination. Given the fact that she carries the child within her body, the surrogate's reproductive autonomy and right to bodily integrity and health will, before the child's birth, carry more weight when balanced with the commissioning parents' interests in having the child, even in instances where the child is genetically related to one or both commissioning parents, or in instances where the child has no genetic link to the surrogate or the commissioning parents. This is because the surrogate's human rights as living, autonomous person will very likely outweigh the commissioning parents' interests relating to the potential future child that the surrogate carries within her body.

Before the child's birth through ICS, the greatest concentration of power arguably sits with the surrogate, in light of the fact that she may decide not to relinquish the child or children to the commissioning parents following birth. This is always a risk faced by commissioning parents in ICS, even if the parties have signed an agreement or contract stating that the child is to be provided to the commissioning parents following birth. The child is always in a position of risk in this respect, given the potential of the child being used

203 Ibid., at [34].
204 *D and L (Surrogacy)* [2012] EWHC 231 (Fam).
205 Ibid., at [25].
206 *In the Matter of TT (a Minor), supra* note 142.
207 Ibid., at [14].
208 Ibid.

as a bargaining chip or being caught in a custody battle in their first weeks and months of life, and even before birth.

5.3 Domestic jurisprudence relevant to the balancing of commissioning parents' and surrogates' rights and interests in ICS

Although many ICS arrangements occur without a conflict between the rights and interests of the surrogate and commissioning parents manifesting, some ICS cases heard in domestic courts to date illustrate that these issues can arise through ICS. Some further judicial decisions concerning domestic surrogacy arrangements are also worth highlighting in relation to the balancing of rights and interests between commissioning parents and surrogates in ICS. These decisions show that following a child's birth, the balance between the surrogate's and commissioning parents' competing rights and interests will shift in ICS, with the existence of the child meaning the best interests of the child must become the paramount consideration in striking the balance between the rights and interests of these parties.

In *Re W and B and H (Child abduction: surrogacy) (No. 2),*[209] the UK High Court dealt with the breakdown of an ICS arrangement between a British surrogate (no genetic link) and US commissioning parents. The surrogate changed her mind about the arrangement and left the US, returning to the UK where she gave birth to twins, refusing to provide them to the commissioning parents. This case is significant as it shows that despite the reality that in ICS surrogates are not usually genetically related to the child or children they carry, this does not necessarily mean surrogates always relinquish children following birth. The UK High Court held the twins should be returned to the US where the commissioning parents lived, and where it had always been intended the children would live and grow up. Moreover, they were genetically related to their commissioning father. Therefore, the intention of the commissioning parents, and the genetic link to the commissioning father were factors outweighing the surrogate's wish to retain the children in her care. Similarly, in the case of *Re N (a Child)*[210] concerning a domestic surrogacy situation, the UK Court of Appeal said the central question to be addressed was which one of the two possible residential upbringings available to the child – with the commissioning parents, or with the surrogate and her husband – would deliver the best outcomes for the child and be most beneficial to him, where he would be "most likely to mature into a happy and balanced adult and to achieve his fullest potential as a human".[211] Therefore, the child's best interests were the central arbiter, not the rights and interests of the adult parties.

209 *In the Matter of W and W v H (Child Abduction: Surrogacy) (No 2)*, [2002] 2 FLR 252.
210 *Re N (a Child)*, [2007] EWCA Civ 1053.
211 Ibid., at [12].

Two landmark US cases in which surrogates have failed to relinquish a child to commissioning parents require brief mention. *In the Matter of Baby M*, the New Jersey Supreme Court held that on the basis of the child's best interests, custody of the child should go to the commissioning parents.[212] However, the Court noted with concern that the surrogate's interests were largely subordinated to the interests of those it viewed as being in control of the commercial surrogacy transaction, namely the commissioning parents.[213] In the later case of *Johnson v Calvert,* the Supreme Court of California held that in the case of a gestational surrogate who refused to surrender the child to the commissioning parents, the intent of the parties had to be assessed in order to balance rights and interests appropriately. As the Court said regarding the commissioning parents, "But for their acted-on intention, the child would not exist",[214] and if the surrogate had manifested her own intent to be the child's mother after birth, she would not have been used as a surrogate.[215] Therefore, quite a different approach can be said to be taken by the US courts when it considers situations such as these, in contrast to the UK judgment *In the Matter of TT (A Minor*) (previously discussed in section 4.5.1). In *TT,* the Court, in finding the child should remain with the surrogate who refused to relinquish the child, placed its full focus on the rights and best interests of the child. It is implicit, however, in the *TT* ruling that the child had already formed an attachment to the surrogate mother, that the surrogate had also formed an attachment to the child. Therefore, the Court found that the surrogate's rights and interests outweighed those of the commissioning parents, and that her interests aligned with the child's best interests. Furthermore, the Court in *TT* found that the surrogate mother would be better able to fulfil the child's needs and interests when balanced against what the commissioning parents would be able to provide.[216]

5.4 The surrogates' right not to be exploited through ICS

Considering the balancing of rights and interests between the surrogate and commissioning parents, the rights and interests of the surrogate not to be exploited through ICS (including respect for her right to health and reproductive autonomy), must be weighed against the interests of the commissioning parents in having a child. For example, it is arguable that the Indian practice of implanting up to five embryos at one time into a surrogate (in many states,

212 *In the Matter of Baby M*, 537 A.2d 1227 (N.J. 1988).
213 Ibid., at [276]-[280].
214 *Johnson v Calvert,* S023721, 5 Cal. 4th 84 (1993), at 13.
215 Ibid., at [10].
216 *In the Matter of TT (a Minor), supra* note 142, at [70].

embryo implantation is limited to one per time)[217] to increase the chances of conception through ICS to meet the desires of commissioning parents and 'guarantee' a child is exploitative.[218] The outcome of such a large number of embryos being implanted is a higher likelihood of multiple births, which can increase medical risks to mother and child.[219] However, it may be the case that Indian surrogates do not know, or are not routinely informed that this is a potential outcome of multiple embryo implantation.[220] Even in instances where surrogates are made aware of this practice and provide their consent in an ICS setting, it arguably still amounts to exploitation of the surrogate given the health risks it exposes her to.

A balancing of rights and interests may also come into play when the surrogate's life is endangered because of an ICS pregnancy. In such cases, a rights-based approach requires that the surrogate must have the ultimate say in whether she wants to terminate the pregnancy, in order to protect her own life. This is because she is a living human being and her rights and human dignity must be protected, despite the existence of the unborn child she carries and the interests of the commissioning parents in ensuring that child is born. In such situations, commissioning parents – whose main interest is in the survival of the child – may seek to prevent the surrogate from exercising such a choice. Such actions would arguably lead to a breach of the surrogate's right to health and reproductive autonomy.

6 Conclusion: Overall balancing of rights in ICS

6.1 A general approach to rights balancing in ICS according priority to the child's rights and best interests

Bainham makes the following observation which can be applied to the ICS context:

> 'It is quite impossible to evaluate the claims of children without considering their interaction with the claims of others, whether parents or others in the community. The very notion of children possessing rights implies the existence of legal or moral

217 H. Brenhouse, 'India's Rent-a-Womb Industry Faces New Restrictions', *Time,* June 5, 2010, available at http://www.time.com/time/world/article/0,8599,1993665,00.html

218 Ibid. Indeed, under s.23(2) of the Draft Assisted Reproductive Technologies (Regulation) Bill 2010, it is stipulated that the number of embryos allowed to legally be implanted will be limited by regulations under the Bill.

219 P. Singer and H. Khuse (eds.), *Bioethics: An Anthology* (2nd ed.), (2006), at 86.

220 W. Chavkin and J. Maher (eds.), *The Globalization of Motherhood: Deconstructions and Reconstructions of Biology and Care*, (2010), at 11.

> duties in *someone*, or indeed everyone, and this raises immediately the issue of the interests of the adult world which can often clash with children's interests.'[221]

This paper has highlighted the various friction points in ICS which may necessitate a balancing of competing rights and interests. Key decision-makers in ICS such as social workers, medical professionals, government decision-makers and judges will need to undertake rights balancing exercises on a case-by-case basis, considering the particular facts involved. Rights balancing exercises may be required at numerous points in time, in order to decide the appropriate course of action in relation to the child's rights and best interests *vis-à-vis* the core adult parties to the ICS arrangement. It is due to the nature of ICS as a method of family formation involving multiple potential parents, and the reality that rights and interests will potentially conflict throughout the course of ICS arrangements (prior to conception and pregnancy; during pregnancy; post-birth), that rights balancing will always be required in ICS situations.

What is apparent from the discussion presented in this paper, including in particular, much of the jurisprudence from the ECtHR and domestic courts discussed, is that where a child is concerned – as is the case in all ICS situations – the rights and interests of that child, once they are born, should be accorded the most weight in balancing competing interests. This is due to the child's vulnerable position in comparison to the other core parties to ICS, and the child's need for protection in order for their rights and interests to be given effect. The child is the one core party in ICS arrangements who can definitively be said to have come to the situation without any underlying motivation. Children born through ICS do not choose to be born through ICS. On the other hand, commissioning parents are motivated to instigate ICS arrangements by their desire for a child; if it was not for commissioning parents, there would be no ICS arrangement. The surrogate also generally makes a choice to become involved in the ICS arrangement, perhaps motivated by a desire to help others or by the potential for monetary gain.

Unlike the core adult parties to ICS arrangements, the child cannot protect or advocate for their own rights and interests. However, the rights and principles established by the CRC have near universal endorsement from states, including the best interests of the child principle. Taking an approach to rights balancing in ICS which places priority on the child's rights and best interests is not only consistent with the CRC, but arguably required pursuant to the best interests of the child principle. Placing priority on the child's rights in the balancing of rights and interests in ICS will help to ensure that actions and decisions taken in the course of these arrangements will have a positive impact on the child's situation, consistent with their rights and best interests, both in the immediate short-term in their infancy, as well as into the future as they grow up.

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221 Bainham, *supra* note 6, at 98.

Therefore, in terms of rights balancing in ICS, the below approach succinctly captured by Bainham is appropriate in ICS:

> 'Increasingly, it is likely that the trend will be to admit the co-existence of independent rights and interests for children and parents whilst emphasising the *primacy* of the rights and interests of children.'[222]

Importantly however, as has also been illustrated through the discussion in this paper, Bainham notes that this approach should not presuppose that children's interests should always necessarily be given precedence over adult interests. He says there should be an assessment of which rights and interests should be regarded as more significant or serious, and they might be designated as the primary rights and interests, therefore to be accorded priority.[223] In the ICS context, this means according priority to the child's rights to preserve their identity, to health, to know and be cared for by their parents as far as possible, to grow up in a family environment, and to be free from discrimination and any form of abuse or exploitation. Taking such an approach is also consistent with the non-exhaustive, non-hierarchical list of elements suggested by the Committee on the Rights of the Child that "could be included in a best interests assessment by any decision-maker having to determine a child's best interests."[224] The Committee says that determining the child's best interests must be aimed at ensuring the full and effective enjoyment of CRC rights and the holistic development of the child;[225] it is also important to recognise the evolving capacities of the child, and that "decisions should assess continuity and stability of the child's present and future situation."[226] As Gerards further observes, in conflicts between fundamental individual rights (such as those safeguarded by the ECHR) and other individual interests, often more weight will be placed on the fundamental right, despite the importance of the other competing interests.[227] Gerards herself notes such a distinction is essentially artificial.[228] Therefore, it may well be that in many ICS situations, such an exploration of competing rights and interests will lead to the child's rights and best interests being accorded priority in reaching an appropriate balance. But they must first be viewed and balanced on a case-by-case basis against the rights and legitimate interests of the commissioning parents and particular-

222 Ibid., 124.
223 Ibid.
224 UN Committee on the Rights of the Child, *supra* note 7, at [50]. The elements included by the Committee are: the child's views; the child's identity; preservation of the family environment and maintaining family relations; care, protection and safety of the child; situation of vulnerability; the child's right to health; and the child's right to education. See [52]-[79].
225 Ibid., at 82.
226 Ibid., [84].
227 J.H. Gerards, 'Fundamental Rights and Other Interests: Should it Really Make a Difference?', in E. Brems (ed.), *Conflicts between Fundamental Rights*, (2008), 680 at 688.
228 Ibid., 690.

ly the surrogate mother, whose rights and interests may in some cases be accorded priority.

6.2 Striking an overall balance in the four situations of competing rights and interests in ICS discussed in this paper

While acknowledging that rights balancing must occur on a case-by-case basis in each individual ICS situation, addressing the particular circumstances and facts involved, some final comments can be made concerning the possible balance to be struck in the four situations of competing rights and interests discussed in this paper. These final comments are made bearing in mind the general approach outlined in section 6.1, of taking the child's rights and best interests as the key arbiter in ICS rights balancing.

Where genetic donor parents' privacy rights and children's identity and health rights conflict in ICS, the balance should weigh in favour of protecting the child's rights. This is consistent with the best interests of the child given the likely positive lifetime impact of preserving the child's identity and health rights, as has been recognised by the Committee on the Rights of the Child and reflected in the broad international consensus concerning past experiences of anonymous donor conception. It is thus important that these rights of the child (Article 8 and 24 CRC rights) are accorded priority and significant weight in the balancing of competing rights and interests between ICS genetic donor parents and children born through ICS. Moreover, there is a strong argument that in becoming an ICS genetic donor parent, donors cede their privacy right to maintaining their anonymity in relation to their genetic offspring born through ICS. This is due to the choice that ICS genetic donor parents make to contribute their genetic material to creating a child with whom they will share a genetic link, and who is entitled to exercise and enjoy their rights and have their best interests protected.

It is also clear that although a decision to try to become a parent and found a family is one which must be respected and those who make it treated without discrimination, no absolute right to a child or to become a parent exists under international human rights law. Therefore, the rights and interests of commissioning parents in ICS cannot be held to automatically outweigh those of the children conceived and born through ICS resulting from their desires, decisions and actions. It must also be remembered that all ICS arrangements are based on the choice and intention of commissioning parents to have a child through ICS, and that they have a responsibility under Article 18(1) CRC to treat the best interests of the child as their basic concern. As such, when making decisions and taking actions in ICS that will affect the child or the future child once he or she is born, commissioning parents should ensure that the child's actual or future best interests guide any decision that will affect him or her. However, in ICS, commissioning parents will not always act in the child's best

interests and consistent with the child's rights. In instances where the commissioning parents' interests do not coincide with the child's rights and best interests, it is the child's rights and best interests which must be the paramount consideration in balancing a conflict of rights and interests with those of their commissioning parents. For example, even in situations where one or both commissioning parents share a genetic link with the child, if there are factors weighing negatively against the commissioning parents regarding protection of the child's rights and best interests – such as if safety and welfare concerns exist regarding the care and family environment the commissioning parents will provide – the child's rights and best interests must be the determining factor, outweighing the rights and interests of the commissioning parents.

In situations concerning unborn children in ICS, the rights and interests of the surrogate mother should, however, be accorded precedence when balanced against those of the potential future child and the commissioning parents, in order to ensure her rights to health – including reproductive autonomy – and life are not violated. Whilst the rights and best interests of the future child must be considered, along with respect for the interests of the commissioning parents (such as their desire for a child), in balancing the rights and interests of future children and commissioning parents against those of the surrogate in ICS, they should not be accorded greater weight in situations where the surrogate's rights and interests are at risk. In such situations, the protection of the surrogate's health and life must outweigh the other rights and interests at stake, especially in contrast to the child in-utero, who does not fully attract human rights until birth.

Despite this, in situations where the pregnant surrogate engages in actions or decisions unnecessarily endangering the foetus and therefore, the potential future child (that is, without a medical reason necessitating her action or decision), the balance is likely to switch in favour of the commissioning parents and future child. Appointing a guardian representing the unborn future child is a mechanism which could usefully give voice to the future child and ensure their rights and best interests are inserted into any rights balancing exercise in ICS.[229] Once a child is born through ICS, in instances where there is a conflict of rights and interests between the surrogate and commissioning parents, the child's rights and best interests must be treated as the paramount concern. Again, it is likely that ensuring the involvement of a guardian representing the child's rights and best interests in ICS following the child's birth could be a mechanism with a protective effect for the child, especially in instances where there is a conflict of rights and interests between any of the parties.[230]

Any rights balancing exercise in ICS requires contending with a complex web of intertwined and overlapping competing rights and interests. However,

229 Achmad, *supra* note 3, at 164-165 of this thesis.
230 Ibid., at 165 of this thesis.

there is always a child at the centre of ICS arrangements. Despite the competing rights of core parties to ICS, all actions and decisions in ICS must be guided by the principle of human dignity, and wherever possible uphold and protect the child's rights and ensure that the child's best interests are the key arbiter. By focusing on the vulnerability of the child and other core parties where appropriate and striking a balance to achieve decisions and take actions that best serve the child both presently and into the future, it is likely that this will lead to outcomes best serving all core parties to ICS in the long-term.