

# STRENGTHENING CHILD RIGHTS PROTECTIONS IN PROPOSED LEGISLATION RELATING TO (CROSS-BORDER) ANONYMOUS USE OF GAMETES IN ASSISTED REPRODUCTIVE TECHNOLOGY, SURROGACY AND ADOPTION IN SWITZERLAND

## Legal Memorandum<sup>1</sup>

### INTRODUCTION

This memorandum addresses child rights concerns regarding proposed amendments to the Civil Code; those proposed amendments may be, at least in part, a response to decisions from the European Court of Human Rights (ECtHR).<sup>2</sup> The proposed amendments address “the adoption of a child of a spouse or partner conceived through private sperm donation, (possibly anonymous) sperm donation or other medically assisted procreation methods authorized abroad, including surrogate motherhood.”<sup>3</sup> The stated goal of the amendments is to “simplify and speed up” the process to avoid a period of time when “the child, who has only one parent, is not fully protected legally.”<sup>4</sup> This memorandum particularly focuses on the situation of children born from :

- use of anonymous gametes in assisted reproductive technology (ART) in cross-border situations, in a context where anonymity is currently forbidden in Switzerland
- foreign surrogacy arrangements, in a context where domestic surrogacy is illegal in Switzerland.

In the above situations, it should be noted, that donations can be made « privately » (outside a medical framework) which may remain anonymous and surrogacy arranged in countries where it is not authorized.

This memorandum builds on a short analysis of the legal flaws of the *K.K. and others v Denmark* 2022 decision provided by Child Identity Protection (CHIP). We regret that this 4-3 judgment was not appealed to the Grand Chamber, who might have issued a different decision in alignment with overarching international standards.<sup>5</sup>

Nonetheless, we herein propose ways for Switzerland, in its proposed amendments, to balance treaty and human rights obligations to the UN Convention on the Rights of the Child (UNCRC), the Optional Protocol on Sale and Sexual Exploitation (OPSC), and the 1993 Hague Intercountry Adoption Convention, with the various decisions of the ECtHR on Article 8 of the European Convention on Human Rights and other standards.<sup>6</sup> These human rights obligations

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<sup>1</sup> This memorandum was prepared by David Smolin with assistance by Christina Baglietto, Laurence Bordier, Nigel Cantwell, Mia Dambach and Katarina Trimmings: <<https://www.child-identity.org/who-we-are/>> for Child Identity Protection, a Swiss based international NGO [www.child-identity.org](http://www.child-identity.org). See also Child Identity Protection, 'Maud de Boer-Buquicchio, CHIP president, invited to speak to Committee on Surrogacy', 23 May 2023, <<https://www.child-identity.org/maud-de-boer-buquicchio-chip-president-invited-to-speak-to-committee-on-surrogacy/>>.

<sup>2</sup> D.B. AND OTHERS v. SWITZERLAND, nos 58817/15 and 58252/15, judgment of 22 November 2022, ch. 79 and K.K and others decision v Denmark (*Application no. 25212/21*) *K.K. AND OTHERS v. DENMARK (coe.int)*

<sup>3</sup> Amendments to the Civil Code (Facilitated adoption of spouse's or partner's child), Explanatory report on the opening of the consultation process (2024), page 2. *Faciliter l'adoption de l'enfant du conjoint ou du partenaire (admin.ch)*

<sup>4</sup> Id.

<sup>5</sup> The text of the Legal Memorandum is available at: Child Identity Protection, 'Children's Rights in Surrogacy', 29 April 2023, <<https://www.child-identity.org/childrens-rights-in-surrogacy/>>.

<sup>6</sup> Convention pour la protection des Droits de l'Homme et de la dignité de l'être humain à l'égard des applications de la biologie et de la médecine\* ratified by Switzerland in 2008 ? See Preamble and Art 1 which mentions

have been clarified by various recommendations by the UN CRC Committee,<sup>7</sup> the UN Special Rapporteur on the sale and sexual exploitation,<sup>8</sup> the Verona Principles<sup>9</sup> and UNICEF/CHIP.<sup>10</sup>

## CHILD RIGHTS CONCERNS

Use of third party human reproductive material in its anonymous format is inherently contradictory to the child's right to know ones origins (Art. 8 CRC), which is why the Swiss government has forbidden such practices since the 1998 legislation.<sup>11</sup> For over 25 years, the Swiss legislative framework<sup>12</sup> includes a number of safeguards to ensure that the use of ART occurs in a context where intending parents are counselled, medical practitioners are trained and children have access to their origins from 18. The use of sperm has to occur with the explicit consent of the donor for its intended use, limited to potentially 8 siblings and is not to be remunerated.<sup>13</sup> In addition, a national ethical committee has a supervisory role of all ART practices.<sup>14</sup> **Such safeguards are not systematically guaranteed in the use of cross-border ART, which is particularly risky in the case of anonymous gametes.**

Surrogacy arrangements are prohibited and even punishable through criminal sanctions under Art.31 of the Federal Law on Assisted Medical Procreation.<sup>15</sup>

<sup>1</sup> Quiconque applique une méthode de procréation médicalement assistée à une mère de substitution est puni d'une peine privative de liberté de trois ans au plus ou d'une peine pécuniaire.

<sup>2</sup> Est puni de la même peine quiconque sert d'intermédiaire à une maternité de substitution.

The activities of intermediaries are also clearly subject to these sanctions. Such a position is linked to the Swiss government's view that surrogacy is inherently contradictory to human rights, which is why such punishments exist in the first place.

**It can be said that international commercial surrogacy arrangements are inherently risky, because both commercial and cross-border aspects facilitate and magnify multiple rights violations. Hence, children come to Switzerland from commercial surrogacy arrangements**

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Les Parties à la présente Convention protègent l'être humain dans sa dignité et son identité et garantissent à toute personne, sans discrimination, le respect de son inté- grité et de ses autres droits et libertés fondamentales à l'égard des applications de la biologie et de la médecine.

<sup>7</sup> See e.g., U.N. Committee on the Rights of the Child, 'Concluding Observations on the Report Submitted by India Under Article 12, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography', U.N. Doc. CRC/C/OPSC/IND/CO/1 (June 13, 2004); U.N. Committee on the Rights of the Child, 'Concluding Observations on the Second Periodic Report of the United States of America Submitted Under Article 12 of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography', U.N. Doc. CRC/C/OPSC/USA/Co/2 (July 2, 2013); U.N. Committee on the Rights of the Child, 'Concluding Observations on the Combined 5th and 6th Periodic Reports of Georgia', U.N. Doc. CRC/C/GEO/CO/5-6 (June 25, 2004); U.N. Committee on the Rights of the Child, 'Concluding Observations on the Report Submitted by the Russian Federation Under Article 12 (1) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography', U.N.Doc. CRC/C/OPSC/RUS/CO/1 (July 3, 2018); U.N. Committee on the Rights of the Child, 'Concluding Observations on the Combined 3rd and 4th Reports Submitted by the United States of America Under Article 12 (1) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography', U.N.Doc. CRC/C/OPSC/USA/CO/3-4 (July 12, 2017); and U.N. Committee on the Rights of the Child, 'Concluding Observations on the Report Submitted by India Under Article 12, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography', U.N.Doc. CRC/C/OPSC/IND/CO/1 (July 7, 2014).

<sup>8</sup> Special Rapporteur on the Sale and Sexual Exploitation of Children, 'Thematic Report A/HRC/37/60, 15 January 2018', presented at the 37th session of the Human Rights Council [hereinafter '2018 SR Report'], <<https://www.ohchr.org/en/documents/thematic-reports/ahrc3760-report-special-rapporteur-sale-and-sexual-exploitation-children>>.

<sup>9</sup> International Social Service, 'Principles for the Protection of the Rights of the Child Born Through Surrogacy', February 2021, <[https://bettercarenetwork.org/sites/default/files/2021-03/VeronaPrinciples\\_25Februairv2021.pdf](https://bettercarenetwork.org/sites/default/files/2021-03/VeronaPrinciples_25Februairv2021.pdf)>.

<sup>10</sup> Child Identity Protection and UNICEF, 'Key Considerations: Children's Rights & Surrogacy, Briefing Note', February 2022, <<https://www.unicef.org/media/115331/file>>.

<sup>11</sup> 1998 Loi fédérale sur la procréation médicalement assistée <https://www.fedlex.admin.ch/eli/cc/2000/554/fr> (Entry into force in 2001)

<sup>12</sup> 1998 Loi fédérale sur la procréation médicalement assistée <https://www.fedlex.admin.ch/eli/cc/2000/554/fr>

<sup>13</sup> Part 4, 1998 Loi fédérale sur la procréation médicalement assistée <https://www.fedlex.admin.ch/eli/cc/2000/554/fr>

<sup>14</sup> Commission nationale d'éthique » art. 1 al. 3 LPMA; <https://www.nek-cne.admin.ch/fr/page-daccueil-nek-cne#:~:text=La%20Commission%20nationale%20d'ethique,relevant%20de%20la%20médecine%20humaine>.

<sup>15</sup> 1998 Loi fédérale sur la procréation médicalement assistée <https://www.fedlex.admin.ch/eli/cc/2000/554/fr>

**which are typically directed and facilitated by profit-seeking intermediaries, where the child was conceived through anonymous gamete donation, the child's identifying information was not preserved, no best interests of the child determination was made, where the child may have been sold, and the surrogate mother may have lacked autonomy in regard to her health care decisions and consent to transfer parentage.<sup>16</sup> Such children are in need of more protection than other children, not less.**

**The above prohibitions in existing Swiss law exist to protect children's rights, and other parties from such rights violations.**

We recognize the expressed concerns that surrogate-born children not be disadvantaged, and that the rights of the child be protected, including the rights of children to private life under the ECHR as outlined by the ECtHR decisions.

The expressed concern with temporary legal uncertainty in the status of the child in relationship to a genetically unrelated intending parent is given disproportionate attention by the proposed amendments. After all, typically the child is being raised by both intending parents in a household and is far too young to comprehend their formal legal status. Such a nebulous harm certainly does not justify sacrificing the child's rights to identity, right to a best interests of the child determination, and right not to be sold. The loss of these rights indeed constitutes a much more unequal treatment of the surrogate-born child, as compared to other Swiss children, than these temporary uncertainties which are common in many legal contexts, such as children living with a parent and a step-parent or children living with extended families such as grandparents. In these situations, children can have the benefit of decisions with regards to "parental responsibility" such as guardianship and curator as foreseen in Swiss laws.

Thus, we view the proposed amendments, contrary to their intention, as making significantly worse the legal and child rights situation of children born through surrogacy in foreign jurisdictions and brought to Switzerland.

## **SAFE AND ROBUST LEGAL PARENTAGE**

We advocate safe and robust granting of legal parentage.

Safe parentage requires precisely the kind of extensive investigations and best interests of the child determinations denied to children born through ART and surrogate-born children by the proposed amendments. Intending parents who have intentionally obtained children through contract-based, commercial surrogacy arrangements, and have intentionally evaded Swiss prohibitions of use of anonymous gametes and surrogacy, should have to undergo at least as much scrutiny as others, not less.

As such, the automatic granting of parentage through adoption seems contradictory to Swiss law on adoption, especially when in-built protections are missing. Adoption typically includes a number of protections absent in the proposed amendments, such as preserving identity information, establishing the suitability of prospective adoptive parents and obtaining the

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<sup>16</sup> See SR 2018 Report (supra note 7); David M. Smolin & Maud de Boer-Buquicchio, 'Surrogacy, Intermediaries and the Sale of Children', in K Trimmings, S Shakargy & C Achmad (eds.) Research Handbook on Surrogacy and the Law (Edward Elgar Publishing, 2024), p. 54; and California Family Code, §§ 7960-62.

consent of birth parents without payment to avoid sale (e.g. free and informed consent). Moreover, in international arrangements, the approval of competent authorities (*a priori*) is a pre-condition for recognition.

Robust parentage provides strong protection for identity rights, which include all aspects of the child's identity, including gamete donors and surrogate mothers. The child's identity by way of legal parentage should also be free from any aspects indicating that it was bought. Intending parents should be required to provide as comprehensive information as possible related to the identity of the child, which should be preserved for the benefit of the child.

By contrast, the proposed amendments are more likely to facilitate an amputated identity, shorn of the child's rights to information as to gamete donors and surrogate mothers, free from sale.

### **PATERNITY AND MATERNITY MAY BE AWARDED TO INTENDING PARENTS WITHOUT LEGITIMIZING, ENFORCING, OR RELYING ON FOREIGN COMMERCIAL AGREEMENTS WHICH ARE IN SUBSTANCE CONTRARY TO SWISS LAW AND PUBLIC POLICY**

We do not believe that the pathway of legitimizing the use of foreign gametes and/or international surrogacies in violation of Swiss domestic law is appropriate or necessary, even in view of the decisions of the ECtHR. The ECtHR decisions do not require Switzerland to recognize or enforce foreign surrogacy agreements, nor foreign judgments or orders based on such agreements. Switzerland has some flexibility under the ECtHR decisions as to how, under Swiss law, the right to private life of the child is protected.

Parentage should be determined according to genetic relationship, the relationship between a genetic intending parent and intending parent, the living situation of the child, the post-birth and post-payment wishes of the surrogate mother, and all factors relevant to the best interests of the child. Due to the deficient, amputated identity provided to children in most permissive commercial surrogacy jurisdictions, parentage orders in permissive commercial surrogacy jurisdictions should *not* be recognized or enforced in Swiss courts.

### **PREVENTION**

The Swiss government should be more proactive in seeking to prevent, through deterrence, that which the government prohibits by law. Hence, Swiss intending parents engaging in such illegal conduct and seeking to evade Swiss law should be made a part of an investigation of the intermediaries who facilitated such surrogacy arrangements. Swiss intending parents should be required to turn over all contracts and communications with intermediaries, as well as document all payments made. Switzerland should focus its enforcement efforts on all profit-seeking intermediaries that target and enter into contracts and arrangements for surrogacy with Swiss residents. By focusing on intermediaries, this would result in the effective application of Art.31 of the Federal Law on Assisted Medical Procreation and also support the Swiss public policy position relating to surrogacy.

## CONCLUSION

It is contradictory for Swiss law to facilitate quicker and easier ways for Swiss residents to evade and violate Swiss law. It seems equally contradictory to obligations under the CRC and other international standards.<sup>17</sup>

Indeed, the Committee on the Rights of the Child in 2021 “welcomed” Swiss initiatives to ensure “that children conceived by medically assisted reproduction have access to information regarding his or her biological origins, in line with its previous recommendations.”<sup>18</sup> Yet, the proposed amendments would directly undercut these prior achievements.

The claims that these proposed amendments would protect the rights of the child, particularly regarding identity, do not bear scrutiny. Instead of safeguarding the child’s identity rights, they provide an incomplete/amputated identity, depriving the child of access to information about gamete donors and surrogate mothers. Subjecting children to contract-based, market-based, international commercial surrogacy arrangements is not a child protection measure; facilitating such arrangements through a regularized, speedy, quasi-administrative and bureaucratic process facilitates violations of the rights of the child.

We recommend that the proposed amendments *not* be adopted, at least as applied to anonymous use of gametes in ART and surrogacy arrangements.

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<sup>17</sup> Convention pour la protection des Droits de l'Homme et de la dignité de l'être humain à l'égard des applications de la biologie et de la médecine\* ratified by Switzerland in 2008 ? See Preamble and Art 1 which mentions  
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<sup>18</sup> Committee on the Rights of the Child, Concluding observations on the combined fifth and sixth periodic reports of Switzerland CRC/C/CHE/CO/5-6  
[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FCHE%2FCO%2F5-6&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FCHE%2FCO%2F5-6&Lang=en)