

# STRENGTHENING CHILD RIGHTS PROTECTIONS IN PROPOSED LEGISLATION RELATING TO (CROSS-BORDER) ANONYMOUS USE OF GAMETES IN ASSISTED REPRODUCTIVE TECHNOLOGY, SURROGACY AND SECOND PARENT 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 second parent adoption 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; and
- 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). Supervision of such cases can be difficult especially when donations are anonymous and surrogacy is not authorized.

This memorandum builds on a short analysis provided by Child Identity Protection (CHIP) of the *K.K. and others v Denmark* judgment by the ECtHR in 2022. We regret that this judgment, decided with a narrow majority (4 to 3), was not referred to the Grand Chamber, which might have reached a different conclusion more aligned with overarching international standards.<sup>5</sup>

Nonetheless, we hereby propose ways for Switzerland, in its proposed amendments, to balance its treaty and human rights obligations under the UN Convention on the Rights of the Child (UNCRC), the Optional Protocol on Sale of Children, Child Prostitution and Child Pornography (OP-SC), and the 1993 Hague Intercountry Adoption Convention, with the various decisions of the ECtHR on Article 8 of the European Convention on Human Rights, as well as other relevant standards.<sup>6</sup> These human rights

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<sup>1</sup> This memorandum was prepared by David Smolin with assistance by Christina Baglietto, Laurence Bordier, Maud de Boer-Buquicchio, 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

obligations have been clarified through various recommendations by the UN CRC Committee,<sup>7</sup> the UN Special Rapporteur on the Sale and Sexual Exploitation of Children,<sup>8</sup> the Verona Principles<sup>9</sup> and guidance from UNICEF/CHIP.<sup>10</sup>

## CHILD RIGHTS CONCERNS

The use of third party human reproductive material in its anonymous format is inherently contradictory to the child's right to know their origins (Art. 8 CRC). This conflict is one of the reasons why the Swiss Parliament has prohibited such practices since its 1998 legislation.<sup>11</sup> For over 25 years, the Swiss legislative framework<sup>12</sup> has included a number of safeguards to ensure that the use of ART in Switzerland occurs in a context where intending parents are counselled, medical practitioners are trained and children have access to their origins from age 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.<sup>14</sup> **Such safeguards cannot be systematically guaranteed in the use of cross-border ART, which is particularly risky in the case of use of anonymous gametes.**

Surrogacy arrangements are strictly prohibited in Switzerland and are subject to 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 reflects the objective of Federal Law on Assisted Medical Procreation, Art.1 of which states:

Elle assure la protection de la dignité humaine, de la personnalité et de la famille; elle interdit l'application abusive de la biotechnologie et du génie génétique.

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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 intégrité 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\\_25February2021.pdf](https://bettercarenetwork.org/sites/default/files/2021-03/VeronaPrinciples_25February2021.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'éthique,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>

In other words, the law seeks to protect human dignity and the family by prohibiting “abusive use” of biotechnologies.

**While it may be unclear whether these prohibitions should be interpreted as apply solely to domestic arrangements, the public policies behind them extend seamlessly to cross-border contexts. International surrogacy arrangements inherently carry heightened risks, as their commercial and cross-border dimensions amplify the likelihood of multiple rights violations. These violations often occur in arrangements facilitated by profit-seeking intermediaries, where the child may have been conceived through anonymous gamete donation, resulting in the loss of the child’s identifying information. Typically, no best interests of the child determination is conducted (cf. Verona Principles). Moreover, such arrangements can involve instances where the child is effectively sold, the surrogate mother is denied autonomy over her health care decisions, and the intending parents are themselves subject to exploitative practices. Under such arrangements, the surrogate mother often has limited, if any, legal rights either before or after birth, to seek parental responsibility or at least visitation, as the contract is treated as creating an irrebuttable transfer of the child.<sup>16</sup>**

**Such children are in need of greater protection than other children, not less. The current Swiss law prohibitions exist to protect children’s rights, and other parties from such rights violations.**

We recognize the concerns that surrogate-born children should not be disadvantaged, and that the rights of the child be protected, including the rights of children to respect for private and family life under the ECHR, as confirmed by the ECtHR.

However, the concern about temporary legal uncertainty about the status of the child in relation to a genetically unrelated intending parent appears to be given disproportionate weight in 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. Issues related to immigration, nationality and succession law can be addressed in favour of the child, without the need to facilitate the granting of second-parent adoption (e.g. kinship care arrangements under the 1996 Hague Convention and succession are not exclusively based on filiation laws).

Hypothetical harms related to temporary legal uncertainty not experienced by the child certainly do not justify sacrificing the child’s rights to identity, the right to a best interests of the child determination, and the right not to be sold. On the contrary, the loss of these rights, as discussed below, constitutes a much more greater inequality in the treatment of surrogate-born children, as compared to other Swiss children, than do these temporary uncertainties, which are common in many legal contexts, such as children living with a parent and a step-parent or with extended families such as grandparents. In these situations, children can have the benefit of decisions with regards to “parental responsibility” made by a third party, such as a curator, as foreseen in Swiss laws.

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

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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.

## SAFE AND ROBUST LEGAL PARENTAGE

We advocate for the safe and robust granting of legal parentage.

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

We understand that competent authorities will continue to have an assessment role if the amendments are accepted, with a judicial process in place. However, introducing simplified and accelerated procedures for granting second-parent adoption (i.e. the process can begin following the birth without waiting until the child turns one) seems contradictory to Swiss adoption law, especially when several in-built protections are missing. Adoption typically includes a number of protections, such as:

1. preserving all identity information;
2. establishing the suitability of prospective adoptive parents before the adoption;
3. obtaining the consent of birth parents without payment to avoid sale (e.g. free and informed consent); and
4. in international arrangements, the approval of competent authorities (*a priori*) is a pre-condition for recognition (i.e. certificate of conformity that the State of origin produces as a guarantee for the receiving State).

### Preservation of all identity information

In principle, details of the birth parent(s) and any gamete donor are recorded on the court file. For Swiss nationals, the civil status registry is obliged to record relevant data. However, there is no national register to centralise this information, which makes access too difficult. While some may hold the view that it is through the second-parent adoption process that identity information can be collated and preserved, this can only occur if and when donor details and/or information about the surrogate mother is preserved in the State of origin. Indeed, according to the amended Civil Status Registry Law, which entered into force in November 2024, intending parents are required to provide as comprehensive information as possible related to the identity of the child “*so long as the information is available*”.<sup>17</sup>

In practice, a court in Switzerland cannot rectify a situation when the information simply does not exist. Switzerland here is allowing for the opportunity to have anonymous gametes used and/or no details about the surrogate mother provided. Even if, in principle, the court could refuse a second-parent adoption when this vital information is missing, this to date has not occurred. In these situations, Switzerland is not enforcing its own public policies prohibiting anonymity and surrogacy within the country.

### Establishing the suitability of the second-parent prospective adoptive parent(s) (PAP)

Fast-tracking the process of establishing the suitability of the PAP(s) seems contrary to the interests of children. A safe evaluation and preparation process takes time. This should include the views of the

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<sup>17</sup> Civil status registry law (amended) - <<https://www.bj.admin.ch/bj/fr/home/aktuell/mm.msg-id-101598.html>> – this enters into force on 11 November 2024 ; in particular look at Art. 8a(j) which codifies the existing practice of putting in the registry all relevant information on the genetic and biological parentage of children born through ART or surrogacy abroad [si elles sont connues et ne figurent pas dans les données de filiation (art. 8, let. g), les données relatives à la filiation génétique et biologique d'un enfant conçu à l'étranger par maternité de substitution ou par don d'ovules ou de sperme;]; also of interest (but not related to surrogacy) see art. 15a and 58(2)

PAP(s) regarding the current prohibitions on donor anonymity and surrogacy, as well as how they plan to explain their actions to the child. It is important to ensure that any second-parent PAP understands the importance of the child's right to identity and is willing to share all information with them. Suitability assessment should also include questions about any missing information and/or when sale may have occurred (see section on prevention below).

### **Obtaining the consent of birth parents without payment to avoid sale**

We understand that the competent authority will seek to obtain consent as part of the second-parent adoption process. However, the question is what actions the competent authorities are willing to take in commercial arrangements where payment exists for the consent to transfer the child. To date, it appears that no court has taken any specific action on this in second-parent adoption cases related to ART and surrogacy, even though such cases are highly likely to fall within the definition of sale of children (Art. 2a OPSC). However, in intercountry adoption cases such questioning of consent has occurred.

### **International cooperation prior to entering into an arrangement**

Such cooperation does not seem feasible given the opposing approaches of States that prohibit donor anonymity and surrogacy (e.g. Switzerland) and those that permit them. The aim of the certificate of conformity is for the State of origin provides a guarantee that the adoption occurred in accordance with international standards and is acceptable to the receiving State.

Robust parentage provides strong protection for identity rights, which include all aspects of the child's identity, including full prohibition on the use of anonymous gamete donors and the preservation of all details about the surrogate mother. By contrast, the proposed amendments are more likely to facilitate an amputated identity, shorn of the child's rights to information about gamete donors and surrogate mothers, and 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 legitimizing the use of foreign gametes and/or international surrogacies in violation of Swiss domestic law is appropriate or necessary, even in the light of the jurisprudence 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. Under the case law of the ECtHR, Switzerland retains some discretion as to how the right to respect for private and family life of the child is protected under Swiss law.

Parentage should be determined based on the genetic relationship, the relationship between a genetic intending parent and the other intending parent, the child's living situation, 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 and amputated identity provided to children in most permissive commercial surrogacy jurisdictions, parentage orders issued in permissive commercial surrogacy jurisdictions should *not* be recognized or enforced in Swiss courts, as confirmed by the Federal Tribunal.

### **PREVENTION**

The Swiss Parliament should take a more proactive approach to deterring conduct prohibited by law. Hence, Swiss intending parents engaging in such prohibited conduct and seeking to evade Swiss law should be made a part of an investigation of the intermediaries who facilitated such surrogacy

arrangements. This could form part of the suitability assessment of the second-parent PAP. Swiss intending parents should be required to disclose all contracts and communications with intermediaries, as well as provide detailed documentation of all payments made. Switzerland should focus its enforcement efforts on all profit-seeking intermediaries that target Swiss residents and enter into surrogacy contracts and arrangements with them. By focusing on intermediaries, Switzerland would ensure the effective application of Art.31 of the Federal Law on Assisted Medical Procreation and also reinforce its public policy stance on surrogacy.

## CONCLUSION

It is contradictory for Swiss law not to apply its national prohibition on use of anonymous gametes and recourse to surrogacy in cross-border contexts, as the public policy and child rights rationales underlying these prohibitions fully apply to such arrangements. This inconsistency also appears to contradict obligations under the CRC and other international standards regarding the right to identity and the prohibition of sale.<sup>18</sup>

Indeed, in 2021, the Committee on the Rights of the Child “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>19</sup> Yet, the proposed amendments would directly undercut these prior achievements. The proposed reforms represent a missed opportunity, as they fail to go far enough by excluding anonymous donor arrangements from the scope of the law.

The claims that these proposed amendments would protect the rights of the child, particularly regarding identity, do not withstand scrutiny. Instead of safeguarding the child’s identity rights, the amendments provide an 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 strongly 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>18</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  
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>19</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)