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The Best Interest Principle in the Context of Assisted Reproduction Legislation**

ABSTRACT: This article explores the application of the best interest of the child principle within the context of Assisted Reproductive Technologies (ART). While the principle is well-established in international family law, the rapid advancements in ART - encompassing practices such as in vitro fertilization (IVF), surrogacy, and genetic screening - raise new legal, ethical, and social questions. The article examines how traditional interpretations of the best interest principle must evolve to address the rights and welfare of unborn and intended children conceived through ART. It further investigates the complex relationships between prospective parents, surrogate mothers, donors, and children, and how legal frameworks should adapt to prioritize the welfare of children in ART arrangements. Adopting a multidisciplinary lens that incorporates law, ethics, medicine, and cultural perspectives, this inquiry argues that safeguarding the welfare of children conceived through ART requires a shift from adult-centric regulation to genuinely child-focused policies. It concludes that the future of reproductive law depends on legal frameworks capable of balancing scientific innovation with an uncompromising commitment to the dignity, identity, and well-being of every child—long before birth and throughout their lives.

KEYWORDS: Best Interest of the Child, Assisted Reproductive Technologies (ART), Surrogacy, In Vitro Fertilization (IVF), Child Welfare, Children's Rights, Reproductive Autonomy.

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1. Introduction

The principle of the best interest of the child is a foundational element of international family law and human rights, embedded in various legal frameworks and global agreements. This principle mandates that any decisions or actions related to children must prioritise their welfare and protection. However, the evolving field of assisted reproductive technologies (ART) introduces new complexities, particularly concerning unborn and intended children, those yet to be conceived or born but planned through medical intervention. The application of the best interest principle to these children raises both legal and ethical questions.

Although firmly entrenched in international child protection law, the best interest principle is now being tested by the expanding practice of ART, which pushes the boundaries of its traditional interpretation. This study aims to lay a theoretical foundation for applying the principle in the evolving realm of ART. It examines how existing legal and ethical norms must adapt to the unique demands of ART, where the interests of unborn children have to be factored into arrangements involving donors, biological parents, and surrogates.

In an era where parenthood can begin in a petri dish and family bonds are brokered through science, what does “child welfare” really mean? The notion of safeguarding a child’s well-being is evolving quietly yet profoundly amid the rise of assisted reproductive technologies. Once, child welfare primarily concerned protecting a living child from harm and neglect; now it compels us to consider the fate of a child who might still be a frozen embryo, a line of genetic code, or a promise in a surrogacy contract. Even the drafters of international law dimly foresaw this shift – the UN Convention on the Rights of the Child (UNCRC) notably calls for protecting children “before as well as after birth”. But implementing that ideal in the age of in vitro fertilization (IVF), gestational surrogacy, and preimplantation genetic screening is anything but straightforward. Time-honored principles like the “best interests of the child” – enshrined in Article 3 of the UNCRC as a primary consideration in all actions concerning children – now face unprecedented questions when applied before a child has even been born. As reproductive medicine pushes the boundaries of creation, the meaning of child welfare itself is quietly being redefined by technology and necessity.

This new era of technological reproduction brings to light a central tension at the heart of law and ethics. On one side stands reproductive autonomy – the freedom of individuals and couples to make intimate decisions about having children, including the use of IVF, surrogacy arrangements, or genetic selection of embryos. This autonomy is grounded in fundamental human rights and personal liberty. Yet on the other side is an equally compelling mandate of child-centered ethics: the insistence that the welfare of the child-to-be must guide and sometimes limit these decisions. International child rights advocates remind us that the child's best interests should remain the paramount consideration in such contexts, just as they are for any child already born. In practice, this means questions increasingly arise about how far would-be parents' choices should be constrained for the sake of the future child. Should an IVF clinic deny treatment if a prospective parent's circumstances might jeopardize the future child's welfare? Can a surrogacy contract or a genetic selection decision be deemed unacceptable because it conflicts with the hypothetical best interests of an intended child? These dilemmas illustrate a clash between adult autonomy and an ethic that places the child's welfare at the center of reproductive decision-making. The collision of these values – the right to reproduce versus the responsibility to safeguard offspring – sets the stage for a nuanced debate that law and society can no longer avoid.

Applying the “best interest of the child” principle to children who do not yet exist presents a conceptual and practical challenge. By definition, an unborn or intended child has no voice, no legal personhood, and an unknowable future – yet decisions in the present may shape that future irrevocably. Law and ethics struggle with this paradox. In some jurisdictions, regulations on assisted reproduction explicitly invoke the future child's interests to justify limits on parental choice, such as criteria for embryo selection or access to fertility treatments. The idea is seductively simple: prevent harm by acting in the unborn child's best interests. However, philosophers have long pointed out the non-identity problem – the notion that a child who will likely have a life worth living cannot be said to be “harmed” by being brought into existence. Indeed, some even argue that non-existent entities cannot hold interests at all, making any appeal to an unborn child's “welfare” inherently fraught. How can it be in a child's best interest to never be born? And if a decision ensures one possible child is never conceived (perhaps to avoid a genetic disease), is that a victory for child welfare or a troubling overreach of state power? The unborn child

occupies a liminal space in legal theory – anticipated as a subject of rights and protection, yet not fully a person before the law. This ambiguity complicates every attempt to weigh the best interests principle in reproductive choices. We are, in a sense, trying to safeguard the well-being of a shadow: a future person who cannot advocate for themselves and whose very existence depends on the outcome of our choices. Balancing such intangibles requires grappling with ethical gray zones and unanswered questions.

Amid these complexities, this article seeks to chart a clearer path forward. It advances a legal and ethical framework for assisted reproduction that is grounded in the bedrock principles of international child rights law, particularly the UNCRC. In the pages that follow, we aim to reconcile the drive for reproductive freedom with an unwavering commitment to child welfare, even at life's earliest stages. Drawing on the Convention's mandate that the child's best interests be a primary consideration, as well as broader international human rights norms, we propose guidelines for decision-making in IVF, surrogacy, and genetic screening that keep the future child in focus without unduly infringing on parental liberties. The discussion synthesizes insights from law, ethics, and emerging medical practice to show how a child-centric approach can be realized for unborn or intended children. In doing so, it strives to fill the current gaps in legislation and policy – offering a coherent framework that anticipates new technological realities while ensuring that the rights and welfare of every child, even before birth, remain paramount. This approach aspires to honor the promise of the “best interest” principle in an era of technological reproduction, guiding us toward a future where innovation in creating families goes hand in hand with an enduring respect for the welfare of the child.

The urgency of this inquiry is heightened by the global rise in ART and the varying degrees of legal oversight across jurisdictions. Technologies such as in vitro fertilisation (IVF), surrogacy, and genetic editing challenge conventional notions of parentage and prenatal care. They also broaden the scope of children's rights by extending protection to the period before conception.

This study seeks to outline a comprehensive framework for applying the best interest principle to safeguard the welfare of intended children in the rapidly advancing field of assisted reproduction. Through an examination of international treaties such as the United Nations Convention on the Rights of the Child (UNCRC) and relevant case law, this study

provides a legal foundation to address the complex ethical and practical issues raised by ART.

Moreover, the study adopts a multidisciplinary approach—integrating ethical theories, cultural perspectives, and medical practices—to provide a holistic analysis of how the best interest principle can be realised for unborn, intended children. In doing so, it contributes to ongoing debates in international family law and child protection by proposing pathways that anticipate future technological and legal developments. Throughout, the overarching goal is to ensure that the rights and welfare of every child, even before birth, remain of paramount importance.

In the context of family law and reproductive rights, applying the best interest of the child principle, as articulated in the UNCRC, presents unique challenges for unborn children conceived through ART. While the principle is clear and straightforward when applied to born children, its extension to the unborn, particularly those conceived via ART, exposes critical gaps and ambiguities in both legal interpretation and ethical discourse.

The core challenge in applying the best interest of the child principle to unborn children in the context of assisted reproduction lies in the complex nature of ART itself. Technologies, such as IVF, surrogacy, and genetic screening, raise profound questions regarding the rights and welfare of the child prior to birth. Current legal frameworks focus on the rights of prospective parents, whereas the rights of the unborn child are either inadequately addressed or remain vulnerable to interpretation. This oversight can lead to ethical and legal dilemmas, particularly in decisions concerning genetic screening, use of donor gametes, and surrogacy arrangements. Furthermore, the application of this principle is complicated by issues of donor anonymity, the commodification of reproductive elements, and the rights of surrogates, all of which may conflict with the child's best interests. These complexities are exacerbated by the international variability in ART regulations, where different jurisdictions balance parental rights, donor and surrogate rights, and child welfare in diverse ways.

2. The Best Interest of the Child Principle

The term “best interest of the child” is widely recognised; however, its precise definition remains elusive and ambiguous. This fundamental concept, which is crucial in the field of child protection, has a long history

in legal and social discourse. However, its significance was substantially amplified when it was formally embedded into the UNCRC.¹ Despite its pervasive use, there remains a lack of clarity regarding what constitutes the best interest in various contexts, underscoring the need for a more defined and operational understanding of both legal and practical applications. Although essential, this concept suffers from a degree of indeterminacy that challenges its effective implementation, particularly as new societal and technological issues arise.

The UNCRC is more than just a list of children's rights. While it certainly outlines these rights in detail, its impact is much broader. The UNCRC introduced a significant shift in how children are viewed legally and socially. In earlier times, as seen in documents such as the Geneva Declaration of 1924² and the Declaration on the Rights of the Child of 1959,³ children were mainly seen as beings who needed protection and care; they were more like objects of concern than individuals with their own rights.

However, since the UNCRC was adopted in 1989, this perspective has changed dramatically. Children are now recognised as individuals with their own rights. This is not merely a symbolic change. The UNCRC, ratified by nearly every country in the world, legally enforces this view by establishing clear principles and rights for children. This broad acceptance underscores the strength and seriousness of the CRC's approach, firmly placing children as rights-holders in international law. This evolution marks a critical advancement in how we understand and protect children's rights globally.

The new legal status of children as active rights-holders is primarily grounded in two interconnected articles of the UNCRC: Article 3, which focuses on the best interests of the child, and Article 12, which emphasises the child's right to express opinions on all matters affecting them. Together, these articles not only uphold the right of children to have a say in decisions impacting their lives, but also ensure that their best interests are always considered in such decisions. These articles serve dual roles in

¹ UN General Assembly, Convention on the Rights of the Child, United Nations, Treaty Series, vol. 1577, p. 3, 20 November 1989 [Online]. Available at: <https://www.refworld.org/legal/agreements/unga/1989/en/18815> (Accessed: 6 June 2024).

² General Assembly of the League of Nations, Declaration of the Rights of the Child, 26 September 1924.

³ UN General Assembly, Declaration of the Rights of the Child, A/RES/1386(XIV), UN General Assembly, 20 November 1959.

the UN CRC. They are recognised as two of the four foundational principles of the Convention, underscoring their importance in the overall framework. However, they are also distinct rights in their own right:

1. The right for a child's best interests to be assessed in any decision or action that affects them.⁴
2. The right for a child to be heard, ensuring that their opinions are not only expressed but also given due consideration.⁵

This dual recognition emphasises not only the procedural aspect of involving children in decisions that affect them but also the substantive right of having their best interests as a primary consideration. This approach represents a significant shift towards acknowledging and respecting children as individuals with agency and rights, aligning legal practices with the evolving understanding of children's roles in the society. These rights, as outlined in Articles 3 and 12 of the UNCRC, are granted not only to individual children but also collectively to all children defined by their age, such as those under 18.

Despite the adoption of the CRC by the United Nations 35 years ago, numerous questions remain regarding the real-world impact of these rights. Specifically, it remains unclear how this recognition of children as rights-holders has influenced national legislation, relevant legal frameworks, and various other contexts. There is an ongoing debate and inquiry into whether these rights are fully integrated and respected at the national level, and how these legal principles are applied in practical settings affecting children. The effectiveness of the CRC in bringing about substantive changes in the treatment and rights of children across different countries continues to be a critical area of research and discussion.

When we delve into the concept of what is best for children in legal terms, it is evident that the phrase "best interest" is relatively new to our legal systems. Previously, the focus was on "the well-being of the child", but this has evolved into what we now know as the "best interest" principle, which is articulated in Article 3 of the UNCRC. This marks it as a thoroughly modern concept within legal discussions—a concept that, despite its importance, has not yet been fully explored in academic circles.

The definition of "best interest" is still somewhat unclear and can be applied in different ways, making it a flexible yet complex tool in legal contexts. It is particularly useful when addressing specific legal challenges

⁴ Article 3.

⁵ Article 12.

or when refined and expanded through court decisions. However, its broad and adaptable nature implies that careful interpretation is required to ensure that it effectively protects children's welfare.

2.1 The evolution of the Principle of the Best Interest of the Child

The concept of "the best interest of the child" originated long before children were formally recognised as having specific human rights. Originally, the reference to "the best interest" served as a guiding standard for decision-making concerning children, especially in contexts where explicit rights were not yet established. This standard was inherently broad and somewhat vague, yet it provided a fundamental benchmark for evaluating actions and interventions affecting children.

Historically, the principle of best interests has been applied to justify a variety of actions, ranging from mundane to transformative. For instance, in late 19th century England, Dr. Barnardo's advocacy for the transition from residential placements to foster care is a notable example of the principle in action.⁶ This move, considered progressive at the time, was predicated on the belief that foster care settings would better serve the developmental and emotional needs of children than institutional environments, illustrating the early application of the best interests standard to promote child welfare. Such historical instances highlight the longstanding reliance on the best interest principle as a crucial consideration in shaping child welfare practices, even in the absence of formally articulated children's rights.

However, the application of the "best interest" principle has not always led to outcomes that would be considered acceptable by today's human rights standards. Throughout several decades in the mid-20th century, measures such as forced adoption and forced migration were often justified under the guise of acting in the best interests of children. These actions, which are now recognised as severe violations of human rights, reflect the darker implications of how broadly and ambiguously the principle can be interpreted. The concept of acting in the "best interest" of the child has, at times, been used to justify actions that are now widely condemned from a human rights perspective. This is particularly evident in historical policies and initiatives that involved the large-scale removal of

⁶ Barnardo's UK. (2012). The history of Barnardo's. Retrieved from [Online]. Available at: http://www.barnardos.org.uk:80/what_we_do/who_we_are/history.htm (Accessed: 10 May 2024).

children from their parents for placement in various forms of alternative care, both domestically and abroad, under the guise of offering them “a better life”. Reflecting on these instances is crucial, as they are now universally recognised as abuse, although they were once promoted as beneficial for the children involved.

One example of such misguided practice can be found in the history of forced adoption in Australia, as detailed in a Senate committee report in February 2012.⁷ This report preceded a national apology for these practices issued by then Prime Minister Julia Gillard in 2013.⁸ From the late 1940s to the early 1980s, an estimated 150,000 babies born to unwed mothers were forcibly adopted in Australia. This policy, endorsed by the government and supported by various churches and charities, was justified on the grounds that it was in the children’s best interests. The rationale was that children born to individuals deemed to be of low moral standard or living in poverty would have better lives if adopted by infertile couples with a higher social standing.⁹

The Senate report illustrates how the principle of the best interests of the child was exploited to legitimise these practices. It mentions how beliefs regarding social standing and moral criteria were used to manipulate decisions affecting the lives of many, with devastating effects on children and their biological families. An adoptee quoted in the report summarizes the situation succinctly saying, “My true mother was told to give me away because it was in the best interests of the child”.¹⁰

The concept of acting in the “best interest” of children has historically been used to justify the systematic removal of indigenous children from their families in both Australia and the USA. This practice, framed as a means of educating and improving the lives of these children,

⁷ Australian Senate, Community Affairs References Committee. (2012). Commonwealth contribution to former forced adoption policies and practices. Commonwealth of Australia: Canberra.

⁸ Gillard, J., 2013. National Apology for Forced Adoptions. Parliament House, Canberra. Retrieved from [Online]. Available at: <http://resources.news.com.au/files/2013/03/21/1226602/365475-aus-file-forced-adoptions-apology.pdf> (Accessed: 10 May 2024).

⁹ Australian Senate, Community Affairs References Committee. (2012). Commonwealth contribution to former forced adoption policies and practices. Commonwealth of Australia: Canberra.

¹⁰ Para 4.7. Australian Senate, Community Affairs References Committee. (2012). Commonwealth contribution to former forced adoption policies and practices. Commonwealth of Australia: Canberra.

was deeply intertwined with broader governmental policies aimed at assimilation in the United States and absorption in Australia. Throughout the 19th and 20th centuries, such policies led to a disturbingly systematic approach to stripping indigenous children of their cultural roots under the guise of protection and improvement.¹¹

In the United States, the assimilation agenda evolved post World War II into policies such as termination and relocation. The era of Indian boarding schools continued, but child removal increasingly occurred through social workers who took Native American children from homes they judged as unfit, placing these children in white foster care systems. This practice was rationalised as a necessary measure to integrate children into mainstream society, albeit through methods that stripped them of their cultural identities.¹²

In Australia, similar practices were evident with the removal of Aboriginal children, famously known as part of the Stolen Generations. The child removal efforts were officially portrayed as welfare initiatives aimed at transforming Aboriginal children into “decent and useful members of the community”. Under this policy, entities, such as the New South Wales Aborigines Protection Board, were endowed with the authority to take custody of Aboriginal children if deemed in the best interest of the child’s moral or physical welfare. This language of benevolence masked the profound harm and cultural dislocation inflicted on the children and their communities.¹³ In both countries, these practices, ostensibly aimed at benefiting children, have since been widely recognised as acts of cultural genocide. The legacy of these policies continues to affect indigenous communities deeply, prompting calls for justice, reconciliation, and the re-evaluation of what truly constitutes the “best interest” of a child within such historical and cultural contexts.

A similar strategy was adopted in Switzerland, where Jenisch-travelling communities experienced systematic child removal from their families from the late 1920s to the early 1970s.¹⁴ This practice was rationalised as being for the children’s own good. In 1926, the *Œuvre des enfants de la grand-route* (Action for travelling children), in collaboration with various charitable organisations and backed by the Confederation,

¹¹ Haskins and Jacobs, 2002.

¹² Marten, 2002, pp. 227–229.

¹³ Haskins and Jacobs, 2002.

¹⁴ Cantwell, 2014, pp. 7-9.

initiated the forced removal of approximately 800 Jenisch children. These children were placed with foster families or confined in psychiatric hospitals and even prisons with the stated objective of assimilating them into a sedentary lifestyle. This policy remained unchecked until 1973 when the affected individuals successfully brought these practices to an end with the aid of media exposure.

The underlying belief that such drastic measures were in the best interests of children justified not only the forced removals within Switzerland but also set a precedent that such forced migration could be deemed acceptable. This mindset underscores a broader historical pattern in which state and societal interventions, claimed to benefit children, often resulted in severe disruptions to their lives and cultural identities. The case of Jenisch children in Switzerland is a poignant example of how the notion of best interest can be manipulated to support harmful policies that, in retrospect, are recognised as grave injustices.

The United Kingdom has a particularly troubling history of forced child migration, serving as the origin of some of the most severe cases of long-term displacement of children to other countries. According to an in-depth examination by a Parliamentary Committee, approximately 150,000 children were subjected to this practice during the 19th and 20th centuries.¹⁵ Most (approximately two-thirds) were sent to Canada, whereas the rest were dispatched to Australia, New Zealand, and other British dominions or colonies. Notably, child migration to Canada ceased after the Second World War, but between 1947 and 1967, 7,000–10,000 children were sent to Australia and 549 to New Zealand.¹⁶

The Committee's report acknowledges that the best interest principle was sometimes cited as a justification for these migrations, although it was likely used to obscure other more dubious motivations. The report outlines that the motivations behind child migration policy were complex and not solely humanitarian. There was indeed a philanthropic intent to rescue children from destitution and neglect in Britain, coupled with a desire to shield them from the moral dangers associated with their home environments, such as having mothers who were prostitutes. However,

¹⁵ UK Parliament Select Committee on Health. (1998). Third Report, para. 11. [Online]. Available at: <http://www.publications.parliament.uk/pa/cm199798/cmsselect/cmhealth/755/75502.htm> (Accessed: 10 May 2024).

¹⁶ Ibid.

economic factors also played a significant role. Child migration relieved Britain of the financial burden of child welfare and was seen as beneficial to receiving countries, where these children were often regarded as future members of a trained workforce. In reality, many of these children were exploited as cheap labour.

Furthermore, the report reveals that it was mostly the charitable and religious organisations that sustained the child migration policy, often driven by the financial necessity of keeping their institutions in the colonies viable. Despite the varied justifications for the practice, the report ultimately describes the policy of forced child migration as “a bad and, in human terms, costly mistake” and draws concerning parallels between these historical practices and modern-day intercountry adoptions. This comparison underscores the enduring need to scrutinise the motives and outcomes of child relocation policies to ensure that they truly serve children’s best interests and do not repeat past mistakes.

These historical examples highlight the potential dangers of misusing the best interests principle as a blanket justification for drastic interventions in children’s lives. They underline the need for vigilance and a more nuanced approach to ensure that such principles truly serve the welfare of children and do not simply reflect broader societal prejudices or the interests of more powerful groups.

Conversely, the principle of “best interest” has also been employed constructively in legal contexts, particularly in family law. Courts in many countries have used this principle as a critical criterion in deciding custody and access arrangements during parental divorce proceedings. This underscores the principle’s intended role in safeguarding children’s welfare, ensuring that their needs and well-being are prioritised in legal decisions that profoundly affect their lives.

The significant emphasis placed on the best interest principle in the UNCRC is both undeniable and deeply fascinating. It is somewhat challenging to account for how Article 3 of the UNCRC was comprehensively framed. To understand this, it is essential to review historical texts on children’s rights. The 1924 Declaration of the Rights of the Child,¹⁷ also known as the Declaration of Geneva, which is often regarded as the foundational international text concerning children’s rights, does not mention the best interest of the child at all.

¹⁷ General Assembly of the League of Nations, Declaration of the Rights of the Child, 26 September 1924.

However, the situation began to evolve with the subsequent 1959 Declaration on the Rights of the Child,¹⁸ which is considered to have enshrined the concept, although in reality, it only explicitly mentions best interests in two specific and relatively narrow contexts. First, the best interests of the child are deemed “the paramount consideration” in the crafting of laws designed to enable the child’s development across various dimensions—physical, mental, moral, spiritual, and social.¹⁹ Second, the declaration advises parents and other caregivers to regard the child’s best interests as “the guiding principle” in their upbringing efforts.²⁰

This perspective, focusing primarily on lawmakers and primary caretakers, shaped Poland’s initial proposal for a convention in 1978, which later influenced the development of the UNCRC. This historical context highlights the evolution of the best interest principle from non-existent in early declarations to a cornerstone of contemporary international child rights law, as encapsulated in the UNCRC. The broad, all-encompassing phrasing of Article 3 in the UNCRC marks a significant expansion from these earlier, more limited references, reflecting a growing global consensus on the importance of prioritising children’s welfare in all aspects of the society.

The initial draft proposed by Poland for the UNCRC was ultimately rejected as the foundation for the treaty, leading to a significant revision in the following year. This revised proposal unexpectedly set the stage for a substantial expansion of the best interest principle within the UNCRC.²¹ It now proposed that the best interests of the child should govern “all actions concerning children”, whether these actions were undertaken by parents, guardians, social or state institutions, especially by courts of law and administrative authorities, and it maintained that these interests should be considered as “the paramount consideration”.

During the drafting process, this formulation underwent some changes—most notably, the references to parents and guardians were relocated, legislators were explicitly included among the actors responsible for considering children’s best interests, and “the paramount” was

¹⁸ UN General Assembly, Declaration of the Rights of the Child, A/RES/1386(XIV), UN General Assembly, 20 November 1959.

¹⁹ Principle 2.

²⁰ Principle 7.

²¹ United Nations Commission on Human Rights (UNCHR), Working Papers of the 34th Session (7 February 1978) E/CN.4/L.1366.

moderated to “a primary consideration”. However, the discussions around the profound shift in perspective that this expanded scope represented were surprisingly limited. The drafters came closest to addressing these issues in response to a last-ditch, unsuccessful effort by the Venezuelan delegate, who sought clearer guidelines for implementing this principle in practice.²² Consequently, the comprehensive scope of Article 3 as it stands today was established, with little debate regarding its broader implications.

The definitive formulation of the principle was solidified in the 1989 UNCRC, specifically within Article 3. This article lays down a foundational principle that defines modern approaches to child welfare and legal standards: the principle of the best interests of the child. According to this principle,

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration”.²³

This wording not only mandates that children’s best interests be prioritised in all decisions affecting them, but also broadens the scope of this consideration to include a variety of entities that might influence a child’s life. Whether it is through the actions of courts, policies of social welfare institutions, or laws passed by legislative bodies, this principle demands that all such actions uphold the child’s best interests as a central concern. By explicitly including both the public and private sectors, Article 3 ensures that the protective umbrella it casts over children is comprehensive, leaving no area where the best interests of the child are not to be considered.

The principle of the best interest of the child is not only a cornerstone of the UNCRC, but has also been incorporated into other significant international legal frameworks. Notably, this principle is articulated in the UN Convention on the Rights of Persons with Disabilities (Article 23 (2)),²⁴ which underscores the importance of considering children’s best interests in contexts involving persons with

²² OHCHR, *Legislative History of the Convention on the Rights of the Child* (OHCHR/Save the Children, 2007).

²³ UN General Assembly, *Convention on the Rights of the Child*, United Nations, Treaty Series, November 1989, vol. 1577, p. 3.

²⁴ UN General Assembly, *Convention on the Rights of Persons with Disabilities: resolution/adopted by the General Assembly, A/RES/61/106*, 24 January 2007.

disabilities. Similarly, the Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption (Article 4 (b))²⁵ emphasises that the best interest of the child should be a primary consideration in intercountry adoption processes.

This concept is a fundamental legal principle used to moderate the extent of authority that adults, whether parents, professionals, teachers, medical doctors, or judges, hold over children. It is predicated on the understanding that adults are tasked with making decisions on behalf of children primarily because children lack the experience and judgment needed to make such decisions themselves. This principle serves as a crucial check on adult authority, ensuring that decisions impacting children prioritise their welfare and rights above all else. By mandating that children's best interests are at the forefront of all relevant decision-making processes, this principle advocates a protective and respectful approach to handling matters affecting the most vulnerable population.

It is clear from exploring the evolution of the principle that it has been extensively developed even beyond its initial articulation in the UNCRC. This development is evidenced by a range of supplementary instruments associated with the Committee on the Rights of the Child. These include various General Comments, Days of General Discussion, and Protocols to the UNCRC that collectively enhance and elaborate the application of the best interest principle. Notably, General Comment No. 14 stands out as a pivotal document in this regard.²⁶

General Comments are crafted by the CRC Committee to provide clarity on the normative contents of specific rights under the Convention or to address significant themes pertinent to the Convention's framework. These documents offer an interpretation and detailed analysis of particular articles of the CRC, focusing on both the rights stipulated and the measures necessary for their implementation. As authoritative interpretations, the General Comments set forth the expectations for State parties as they work towards fulfilling the obligations imposed by the CRC.

²⁵ Hague Conference on Private International Law, Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, 33, Hague Conference on Private International Law, 29 May 1993

²⁶ Committee on the Rights of the Child (2013) General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1). CRC/C/GC/14. United Nations.

General Comment No. 14, adopted during the Committee's 62nd session, specifically addresses the right of the child to have his or her best interests taken as a primary consideration, as prescribed in Article 3 of the CRC. The Comment defines the steps required for the consideration of the child's best interests in judicial and administrative decisions and in the broader context of law. General Comment No. 14 provides a structured framework for assessing and determining what constitutes the best interest of the child. It intentionally refrains from prescribing fixed solutions, recognising that what may be deemed in the best interest of a child can vary widely depending on the specific circumstances and over time. The primary aim of General Comment No. 14 is to enhance the understanding and application of the right of children to have their best interests assessed and taken as a primary or, in some cases, the paramount consideration. This objective seeks to create a change in attitudes towards recognising children as active holders of rights.

2.2 The Best Interest Principle in Different Environments

When assessing the best interests of the child, it is crucial to consider the full spectrum of the child's rights. Beyond the standards set by the UNCRC, there are additional legal frameworks at the international, regional, and national levels that may influence such determinations. According to Article 41 of the CRC, whenever a discrepancy exists between standards, the higher standard must always prevail.

Relevant international and regional instruments include general human rights, international humanitarian law, refugee law, and other child-specific conventions. Moreover, non-binding guidelines, often referred to as soft law, such as the General Comments issued by the Committee on the Rights of the Child and conclusions from the UNHCR Executive Committee (Conclusion No. 107),²⁷ serve as important interpretative tools that help in understanding and applying these principles.

At the national level, laws and court decisions provide tailored guidance on these general principles. Historically, within domestic legal frameworks, the principle of the best interests of the child has often been specifically applied to matters such as custody disputes and adoption proceedings. However, the Committee on the Rights of the Child has vigorously advocated the integration of this principle, along with other

²⁷ Executive Committee of the High Commissioner's Programme, Conclusion on Children at Risk No. 107 (LVIII) - 2007, No. 107 (LVIII), 5 October 2007.

foundational principles of the CRC, into all relevant areas of domestic legislation such as education, health, and justice. The Committee emphasises that these principles should be implemented in such a manner that they are justiciable, meaning they can be directly invoked and enforced in courts.²⁸

Furthermore, the Committee has pointed out that proper adherence to the CRC requires a comprehensive review of existing national legislation and administrative procedures. This review aims to identify and amend any laws and regulations that do not adequately reflect the best interest principle. This process ensures that all legal and administrative frameworks are aligned with the intent and objectives of the CRC.

Since its adoption in 1989, the principle of the best interests of the child has been a cornerstone in numerous legal instruments related to children's rights within the Council of Europe. This principle is prominently featured in several key conventions, including the European Convention on the Exercise of Children's Rights,²⁹ European Convention on the Adoption of Children,³⁰ and Lanzarote Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse.³¹ These documents underscore the Council's commitment to integrate this principle across various aspects of children's rights.

Moreover, various bodies within the Council of Europe that focus on issues related to children's rights have acknowledged and emphasised the importance of considering the best interests of the child in their deliberations and actions. A notable example is the work of the Venice Commission, which has actively examined how children's rights are represented in the constitutions of member states. This review was aimed at assessing both the direct and indirect influences of the rights outlined in the UNCRC. Following its review, the Venice Commission went a step further by recommending that member states enshrine the principle of the

²⁸ UN Committee on the Rights of the Child (CRC), General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, CRC/GC/2003/5, 27 November 2003.

²⁹ Council of Europe, European Convention on the Exercise of Children's Rights, ETS 160, 25 January 1996.

³⁰ Council of Europe, European Convention on the Adoption of Children (Revised), Council of Europe, 2008, (CETS No. 202).

³¹ Council of Europe, Council of Europe Convention on the Protection of children against sexual exploitation and sexual abuse, CETS No.: 201, 12 July 2007.

best interests of the child in their national constitutions, providing a strong constitutional guarantee for this fundamental principle.

The principle of the best interests of the child has fulfilled several critical functions within the framework of the Council of Europe's efforts to protect and promote children's rights. First, it serves to integrate various rights associated with children, ensuring that these rights are considered holistically rather than in isolation. Second, it helps in balancing conflicting rights, providing a framework to navigate situations where different rights might intersect or come into conflict. Last, it guides the implementation of these rights, ensuring that all measures and actions taken in respect of children's rights are aligned with their best interests.

Moreover, the principle of the best interests of the child serves several crucial functions within the legal framework of children's rights, the primary function of which is the integration of various rights. This principle acts as a tool to bolster and reinforce existing children's rights by providing a broader context within which these rights can be interpreted and applied. A notable illustration of this is the approach to prohibiting corporal punishment. While the UNCRC itself does not explicitly ban corporal punishment, the prohibition has been effectively established by combining Article 19 of the UNCRC, which calls for protection against all forms of violence, with the principle of the best interests of the child. This synthesis has empowered the Council of Europe to advocate strongly against corporal punishment, leading to its full prohibition in more than half of the member states. This progress underscores the role of the best interest principle in extending and enhancing the protective measures afforded to children under international law.

The Council of Europe Commissioner for Human Rights frequently employs the best-interest principle to strengthen and clarify existing rights. Through his recommendations, the Commissioner provides practical guidance on how the principle can be operationalised to genuinely serve children's best interests. This guidance is particularly vital in situations involving migrant children, where national laws and procedures may not sufficiently safeguard their welfare. By emphasising that children should be treated primarily as children, regardless of their migration status, the Commissioner advocates for all actions and decisions by the state authorities to prioritise the best interests of these vulnerable groups. Furthermore, he actively campaigned against the forced return of children to countries where their safety and well-being could not be guaranteed. In

his efforts to address statelessness among children, the Commissioner leveraged the best interest principle, arguing that it is clearly in a child's best interests to possess citizenship from birth. He emphasises the responsibility of states to ensure that no child born within their borders is left stateless, illustrating how the best interest principle can guide policy and legislative changes to protect and promote children's rights effectively.³² These applications of the best interest principle demonstrate its broad scope and pivotal role in shaping policies that profoundly impact children's lives across Europe.

The second critical function of the best interest principle is its role in balancing conflicting rights. This task is particularly common in judicial settings where rights may appear to be at odds with one another, a challenge frequently addressed by the European Court of Human Rights. Although the European Convention on Human Rights³³ does not explicitly refer to the best interests of the child, the Court has consistently interpreted the Convention as aligning with Article 3 of the UNCRC. This approach underscores the Court's commitment to prioritising the best interest of the child as a fundamental consideration in its deliberations.

The Court has recognised the international consensus that the best interest of the child should be paramount in all decisions affecting children. In practice, this often involves adjudicating between the competing interests of children, their parents, and broader public order considerations. For example, in family law cases, the Court might need to weigh the benefit to a child of maintaining family ties against the potential benefits of growing up outside the family environment. In such instances, the best interest principle provides crucial guidance for navigating these complex scenarios and achieving a balance that most effectively serves the child's welfare.

Similarly, the European Committee of Social Rights frequently encounters situations where it must balance conflicting rights involving children. This Committee systematically incorporates the best interest principle into its evaluations of children's rights issues. A common application involves assessing restrictions on parental rights, where the

³² Council of Europe Commissioner for Human Rights. (2013). Governments should act in the best interest of stateless children. Human Rights Comment.

³³ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, ETS 5, 4 November 1950.

Committee must determine whether such limitations are justifiably necessary to protect the child's best interests and facilitate family rehabilitation. In these contexts, the best interest principle is indispensable because it provides a structured framework for making decisions that might otherwise seem intractable.

Overall, the best interest principle not only helps reinforce and interpret children's rights but also plays a crucial role in mediating between competing rights. This dual function is essential to ensure that children's rights are protected in a balanced and thoughtful manner that respects the dynamics of individual cases and the broader implications for rights jurisprudence.

The third key function of the best interest principle is to guide the effective implementation of rights. This principle serves as a vital directive in the practical application of existing legal and policy measures. Various bodies within the Council of Europe frequently invoke this principle, particularly in contexts concerning the rights of children.

An illustrative example of this principle is the activities of the Committee for the Prevention of Torture and Inhuman, or Degrading Treatment or Punishment (CPT). The CPT conducts visits to detention centres to assess conditions, particularly focusing on the circumstances under which children are deprived of their liberty. Through numerous country reports, the CPT has underscored the critical need to ensure that children in vulnerable situations are housed in environments that respect their dignity and developmental needs. Moreover, the CPT has stressed the importance of maintaining familial contacts for children in detention. In its standards, the CPT explicitly refers to the best interests principle, advocating that considering the best interests of the child, the detention of a child can rarely be justified and that it certainly cannot be motivated by a lack of residence status.

The principle of best interests of the child has significantly enriched the work of the Council of Europe, providing a framework for promoting child-centric policies and practices. The Council encourages its member states to apply this principle thoughtfully and balance it within the broader context of human rights. However, owing to the abstract nature of the best interests principle and its adaptability to diverse situations, it is challenging to pin down a definitive, one-size-fits-all definition. This flexibility, while valuable, makes it imperative that applications of the principle are carefully tailored to the specific circumstances of each case,

ensuring that the outcomes genuinely serve the best interests of the children involved.

When the European Union adopted its Charter of Fundamental Rights,³⁴ it aimed to integrate the principles of the UNCRC, focusing on the best interests of the child. This focus is clearly articulated in Article 24 of the Charter, which mandates that “In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration”. This language mirrors Article 3 of the UNCRC. Additionally, Article 24 of the Charter asserts that “every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests”.

The principle that a child’s best interests should be the primary consideration is also deeply embedded in various pieces of EU legislation, highlighting its widespread application across legal areas. Notable examples include the following.

- The Brussels IIbis Regulation,³⁵ which addresses jurisdiction, recognition, and enforcement of judgments in matrimonial matters and matters of parental responsibility.
- Directive 2011/36/EU on trafficking in human beings³⁶ and Directive 2011/93/EU combating the sexual abuse and sexual exploitation of children and child pornography,³⁷ both of which stress the necessity to prioritize children’s best interests to effectively protect them from severe crimes.

³⁴ European Union, Charter of Fundamental Rights of the European Union, 2012/C 326/02, 26 October 2012.

³⁵ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

³⁶ European Union: Council of the European Union, Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101/1-101/11; 15.4.2011, 2011/36/EU, 15 April 2011.

³⁷ Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA.

- Directive 2012/29/EU, which establishes minimum standards on the rights, support, and protection of victims of crime,³⁸ mandates that assessments of the child's best interests be tailored to the individual needs and circumstances of each child.

Furthermore, even in areas where children's issues are not the primary focus, the importance of the best interest principle is acknowledged. For instance, Directive 2008/52/EC on mediation in civil and commercial matters³⁹ ensures the confidentiality of mediation, except when disclosure is necessary to protect the best interests of children.

The Dublin III Regulation 604/2013⁴⁰ exemplifies how the EU integrates the best interest principle in specific contexts such as asylum procedures, detailing criteria for assessing a child's best interests. These criteria include possibilities for family reunification, the child's overall well-being and developmental needs, the child's views regarding age and maturity, and safety and security considerations, particularly concerning risks of trafficking.

Cross-border family conflicts represent a significant and complex issue within the European Union, attracting considerable attention from both the European Commission and Parliament owing to the numerous queries and complaints they receive annually. These conflicts directly impact the welfare of thousands of children across the EU each year, often entangling them in prolonged legal battles. In some distressing instances, these disputes can escalate to parental abductions, further complicating the situation.

The Brussels IIa Regulation serves as a fundamental piece of legislation in European family law that addresses these intricate issues. Having been in effect for over 20 years, this regulation is pivotal in establishing a cohesive judicial area within the EU. Central to the Brussels IIa Regulation is the principle of the best interests of the child, which is

³⁸ European Union: Council of the European Union, Directive 2012/29/EU of the European Parliament and of the Council of October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, L 315/57, 14 November 2012.

³⁹ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters in OJ L 136.

⁴⁰ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

consistently prioritised throughout its provisions, especially in cases concerning the return of abducted children. This principle is not merely a guideline but is integrated into the fabric of regulation. This is explicitly mentioned in the regulation's recitals and permeates numerous specific provisions ensuring that all judicial decisions under the regulation consider what is most beneficial for the child. This approach underscores the EU's commitment to safeguarding children's rights and welfare in all legal proceedings, particularly those that are sensitive and potentially traumatic, such as cross-border family disputes. The ongoing application of the Brussels IIa Regulation reflects a broader effort within the EU to protect children and prioritise their best interests in all legal contexts, particularly in scenarios that cross national borders and involve conflicting parental rights.

This extensive integration demonstrates the EU's commitment to ensure that the best interests of the child are not only a fundamental legal principle but also a practical guide in policy-making and legislative frameworks across the Union.

The principle of the best interests of the child has been widely adopted and incorporated into national legislations across various jurisdictions in the EU, underscoring its fundamental role in legal systems worldwide. In several countries, this principle is embedded directly in the constitution (examples include Belgium, Hungary, Slovenia, and Spain) highlighting its foundational importance in national legal frameworks. Additionally, numerous countries have integrated the principle into specific legislation, with Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Greece, France, Italy, Lithuania, Luxembourg, Malta, Slovenia, Slovakia, Spain, and Sweden acknowledging the best interests of the child as a guiding force in decision-making processes related to children.

However, the implementation and emphasis of this principle can vary significantly. In some cases, such as Belgium and Italy, the legislation acknowledges the need to consider the child's best interests but stops short of mandating that these interests be the primary or paramount consideration. This distinction is crucial because the weight given to the child's best interests can influence the outcome of legal proceedings and the extent to which children's rights are protected.

Moreover, the application of the best interests principle is not uniformly distributed across all areas of law within these jurisdictions. In

some countries, explicit references to this principle are primarily found in civil judicial procedural codes rather than administrative judicial procedural codes. Often, these references concentrate on sector-specific legislation, particularly concerning family disputes and child protection, as observed in Malta. This application suggests a more limited scope of the principle's influence, potentially overlooking its relevance in broader administrative or legal contexts.

In the context of implementing the principle of the best interests of children, this approach varies significantly across European Union member states. Notably, this principle has not been formally enshrined in national legislation in the three member states of Cyprus, Estonia, and Ireland. This absence indicates a gap in the statutory framework, which could affect the uniform application of the principle across various legal proceedings involving children.

Conversely, a few jurisdictions such as Austria and Finland have taken proactive steps by developing specific criteria within their legislation to aid judges in assessing what constitutes the best interests of the child in particular types of legal proceedings. These criteria are intended to provide clear and actionable guidance to ensure that decisions reflect the welfare and rights of the child consistently and effectively.

In other member states, including Belgium, Czech Republic, Denmark, Greece, Spain, Luxembourg, Latvia, the Netherlands, Poland, and Slovenia, the approach to determining the best interests of the child is less prescriptive. These countries typically rely on looser guidelines or parameters, often derived from the case law of higher courts, though they are sometimes supplemented by legislation. This approach allows for more interpretive flexibility but may result in less consistency in how children's best interests are considered across different cases.

Furthermore, in Belgium, Croatia, Cyprus, Estonia, France, Lithuania, Portugal, and Sweden, no specific criteria or guidelines have been established to guide the application of the best interest principle. Particularly in Sweden, this lack of prescribed criteria is a deliberate choice by the government, which argues that the authorities and courts should retain the flexibility to determine what best serves the child's interests in each individual case. This approach is predicated on the belief that case-by-case discretion allows for tailored solutions that are most suitable for the unique circumstances of each child.

Given these variations, there is a compelling need to advocate for a more comprehensive application of the best interest principle across all legal areas, ensuring that the welfare of the child is a primary consideration in all cases, and not just those explicitly related to family or child protection issues. Expanding the scope and application of this principle would better safeguard children's rights and wellbeing across the entire spectrum of legal and administrative actions.

3. Assisted Reproductive Technologies and the Best Interest Principle

In my discussions on family law with students, I always stress that the child must remain at the centre of all considerations. This perspective reflects a significant shift in how we approach issues such as adoption. The core objective of adoption should not be fulfilling the desires of childless couples but providing a stable, loving family environment for children. However, this principle has often been overlooked in today's world. Similarly, while the use of ART arises from valid and heartfelt desires to build families, the children are unfortunately often overlooked when discussing these technologies.

Amid the rapid evolution of ART, a pressing question arises: Are we fully accounting for the rights of children conceived and born through these technologies? The best interest of the child, as stipulated in the UNCRC, demands that in all matters affecting children, whether undertaken by public or private institutions, courts, or legislative bodies, the child's welfare must be a primary concern.

As our capabilities in reproductive technologies advance, it is essential to reflect on whether our ethical standards and legal frameworks are keeping pace. We must critically examine whether current ART practices and surrogacy effectively safeguard the rights and best interests of the resulting children. These young individuals deserve to have their rights acknowledged and their best interests upheld in a process that fundamentally shapes their lives and future.

The legal ramifications of ART are as complex and varied as the technologies themselves, presenting unique challenges within family law. A fundamental issue arises in determining legal parentage, which traditional laws typically link to genetic relationships or the act of childbirth. However, ART disrupts these conventional bases by decoupling the biological aspects of conception from the gestational role, leading to

intricate legal questions. For instance, the legal system must address whether egg or sperm donors should retain any parental rights or bear responsibilities, and how to define the parental rights of non-biological, intended parents in surrogacy agreements. The responses to these questions differ widely across jurisdictions and reflect diverse societal values and legal standards.

Another significant challenge involves safeguarding the rights and welfare of children born through ART. The principle of the best interest of the child, which is a foundational element of family law, requires that all decisions affecting children prioritise their well-being and development. Within the context of ART, this principle is particularly challenging to navigate. Key issues include the anonymity of donors, the child's right to know their biological origins and ensuring a stable family environment for the child. These considerations raise complex questions regarding the identity, privacy, and emotional and psychological well-being of children born via these technologies.

As ART continues to evolve and become more integrated into the society, it is crucial for legal systems to adapt and refine their approaches. This adaptation involves not only redefining traditional concepts such as parentage but also developing comprehensive regulations that protect the interests of all parties involved, especially children born from these technologies. The goal must be to harmonise the incredible possibilities offered by ART with ethical standards and legal protections that uphold the dignity and rights of individuals and families.

In the drafting of the UNCRC, the question whether unborn children are included in the definition of the child or not was left unanswered, which we know was a compromise solution which ensured that the UNCRC became the most widely ratified convention in the world.

The application of the best interest of the child principle is not without its challenges. One of the main difficulties lies in its subjective nature: what is in the best interest of one child may not necessarily be in the best interest of another. This subjective evaluation requires a nuanced understanding of each individual child's circumstances, needs, and background. Moreover, the principle must be balanced with other legal rights and societal values. In cases of international adoption or cross-border custody disputes, for instance, the principle may intersect with issues of cultural heritage and national identity, adding layers of complexity to legal decisions.

The ethical welfare of potential children resulting from infertility treatments is a critical aspect of policy-making for ART. Globally, legislative frameworks vary significantly in how they prioritise the welfare of children who are not yet conceived but may be born as a result of these technologies. The level of importance placed on this issue reflects the differing ethical priorities and legal standards across countries.

In some jurisdictions, such as the Government of South Australia⁴¹ and the Government of Victoria,⁴² the interests of any child potentially born from ART procedures are considered to be “paramount”, that is, they are the most important consideration in the decision-making process surrounding the use of ART. This designation underscores the commitment to ensure that the rights and well-being of the future child are at the forefront of all medical and ethical considerations.⁴³

Conversely, in places such as Canada, the Parliament stipulates that these interests should not be “given priority”.⁴⁴ While this still places significant emphasis on the welfare of the potential child, it suggests a slightly more balanced approach, wherein the needs and rights of the child are weighed alongside other factors.

Meanwhile, other regions adopt a more cautious approach. The Government of Western Australia, for example, has decreed that the interests of any potential child need only receive “proper consideration”.⁴⁵ This phrasing implies a requirement for a thoughtful assessment of the

⁴¹ Government of South Australia. (1988). Assisted Reproductive Treatment Act. [Online]. Available at: <http://www.legislation.sa.gov.au/LZ/C/A/Assisted%20Reproductive%20Treatment%20Act%201988.aspx> (Accessed: 10 May 2024).

⁴² Government of Victoria. (2008). Assisted Reproductive Treatment Act, No 76. [Online]. Available at: [http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/3ADFC9FBA2C0F526CA25751C0020E494/\\$FILE/08-076a.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/3ADFC9FBA2C0F526CA25751C0020E494/$FILE/08-076a.pdf) (Accessed: 10 May 2024).

⁴³ Lacey, Peterson and McMillan, 2015, pp. 616–624.

⁴⁴ Parliament of Canada. (2004). Assisted Human Reproduction Act. Retrieved from. [Online]. Available at: http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=c6&Parl=37&Ses=3 (Accessed: 10 May 2024).

⁴⁵ Government of Western Australia. (1991). Human Reproductive Technology Act. [Online]. Available at: http://www.slp.wa.gov.au/legislation/statutes.nsf/main_mrtitle_435_homepage.html (Accessed: 2 May 2024).

child's future welfare, although it may not necessarily override other considerations. Similarly, in the United Kingdom, legislation mandates that ART treatments should not be provided unless the welfare of any potential child has been considered, ensuring that such treatments are contingent on a positive assessment of how they might impact the child.⁴⁶

These variations highlight the complex ethical questions that surround ART. They reflect a broad recognition of the need to consider the future welfare of children born as a result of such technologies, although the degree of emphasis can differ significantly. This diversity in legislative approaches necessitates ongoing dialogue and international collaboration to foster policies that adequately protect the interests of children born through ART, while balancing the rights and needs of parents-to-be.

Thus, we see that the best interest principle is mentioned in some form in most ART regulations, but when we take a deeper look at these texts, the best interest principle is very much at the surface level, and the texts of these regulations are completely adult-centric—it is not the best interest of the child at the forefront, but the reproductive rights of the adults.

While the concept of considering a child's interests before conception may seem novel to many, the notion of child welfare is well-established in healthcare settings. Traditionally, child welfare principles suggest that prospective parents undergo screening similar to what is required for adoption and fostering. This idea stems from the belief that assessing the suitability of individuals to become parents can help safeguard the future welfare of children conceived through such means. However, the practice of screening potential parents for their fitness to raise a child before providing access to medical treatments, such as ART, has sparked significant debate. Some ART physicians and patient advocacy groups argue that such screening is inherently unfair and discriminates against individuals or couples who wish to become parents.⁴⁷

Furthermore, there is an ongoing debate regarding the role of healthcare professionals in the screening process, which raises ethical concerns regarding the consistency and fairness of the application of screening procedures.

⁴⁶ Government of United Kingdom. (2008). Human Fertilisation and Embryology Act, c.22. [Online]. Available at: <http://www.hfea.gov.uk/134.html> (Accessed: 2 May 2024).

⁴⁷ Baker and McBain, 2005.

Additional concerns revolve around the boundaries of such screenings. Questions persist regarding the extent of screening that should be authorised and the limits of discretion allowed by clinicians. These issues highlight the delicate balance between protecting potential children and respecting the rights of individuals seeking ART.

Overall, the debate on the preconception consideration of a child's welfare in ART settings involves complex ethical, legal, and social dimensions. It challenges healthcare providers, lawmakers, and the society to carefully weigh the implications of such policies and develop guidelines that are both ethically sound and respectful of individuals' reproductive rights.

The intersection of ART and legal principle of the best interest of the child presents unique challenges and considerations. ART, which encompasses practices such as in vitro fertilisation, surrogacy, and gamete donation, raises complex questions about parentage, identity, and welfare that are central to understanding and applying this principle. This principle, traditionally applied to safeguard the rights and welfare of existing children, encounters unique dilemmas when extended to the context of ART, in which the child in question is yet to be conceived.

A critical question arises regarding the application of the best-interests framework to potential future children. The principle is traditionally meant for children who already exist, and not for determining whether allowing conception would align with the best interests of any resulting child. This means that we need to differentiate between applying the principle in family law and family autonomy and in reproductive law and reproductive autonomy.⁴⁸ This issue is further complicated by the unknowns surrounding the future child's health and mental condition, making it difficult to assess their best interests in advance. For example, when we look at surrogacy, the best-interest principle becomes even more nuanced as we have to balance the interests of the child, surrogate mother, and prospective parents, with an emphasis on the child's right to know their genetic origin and the principle of human dignity for the surrogate mother.⁴⁹

Another significant challenge is the lack of reliable predictive criteria for inadequate parenting. The current methods do not provide a guarantee to ensure the child's best interests as there is no foolproof way

⁴⁸ Cohen, 2011, p. 96.

⁴⁹ Henriksson, 2016.

to predict the future parenting capabilities of individuals. The complexities of surrogacy agreements, including the logic of donation and primary interest of the child, necessitate a careful and ethical approach to ensure the child's welfare.⁵⁰

We must also emphasise the distinction between reproductive and parental rights in ART. While adults have reproductive rights, the future child's welfare, as per the best-interest principle, must be assessed primarily through the parents' ability to ensure their well-being. This perspective aligns with the observations of G. Stanić, who discusses the challenges of cross-border reproductive medicine in the European Union, noting the paramount importance of the child's best interest in contemporary family law.⁵¹ As T. Barzó argues often psychological expertise can help make the right decision in the child's best interests,⁵² this is of course not an option when we are talking about future children.

The most obvious facet of the best interest principle focuses on the physical needs of the child, including nutrition and care. While intended parents opting for surrogacy or ART often have the financial means to support these needs, it is crucial to understand that financial resources alone do not determine parental capability. Furthermore, the emotional well-being of the child deserves equal attention. Every child deserves to grow up in a nurturing and loving environment that supports their future development and education. This reasoning is used by many states that restrict or outright prohibit surrogacy based on the child's best interest.⁵³

The child's right to know about their origins, including their genetic ties, is an integral aspect of their identity and must be considered when utilising ART. This principle of acknowledging the child's interest in a genetic tie is critical for their sense of self and connection to their heritage.⁵⁴

For instance, in the context of embryo donation, the best interest of the child principle takes on nuanced dimensions. Genetic connections play a significant role in establishing kinship ties between donors, recipients, and the offspring.⁵⁵ The ethical responsibility towards the child's welfare

⁵⁰ Chini, 2016.

⁵¹ Stanić, 2015, pp. 5-23.

⁵² Barzó, 2022, pp. 105-146.

⁵³ Bosch, 2018.

⁵⁴ Vij, 2015.

⁵⁵ Goedeke, 2014.

in decisions involving embryo donation cannot be forgotten, and the best interest of the child has to be interpreted broadly, not only as a matter of physical well-being, but also of emotional and psychological integrity. The ethical considerations in embryo donation are vast, ranging from informed consent and confidentiality to the financial aspects of the process. To ensure the ethical dimensions of embryo donation, it is imperative to respect the autonomy of donors and recipients, ensure informed decision-making, and maintain confidentiality. A critical aspect here is the right of the child to know their biological origin, balancing this with the principles of justice and respect for autonomy.⁵⁶ Consenting processes in embryo donation also play a crucial role in safeguarding the interests of all parties involved, including the potential child. An aspect of consent is the consent to the disposition of surplus embryos, which highlights the decisional conflicts arising from the moral status of embryos and evolving personal values.⁵⁷

The case of surrogacy and its implications for child welfare further illustrates the complexities involved in applying the best interest of the child principle.⁵⁸ Surrogacy legislation faces the intricate task of balancing the best interests of the child born via surrogacy with the rights and expectations of the surrogate and intended parents. The challenge lies in ensuring that the child's welfare remains the paramount consideration in all aspects of surrogacy, a goal that requires careful legislative and ethical considerations. Various surrogacy models have addressed child welfare issues in varying ways. Studies have indicated a correlation between the level of protection afforded to intended parents and the focus on the child's best interests.⁵⁹ In certain jurisdictions such as California, surrogacy laws heavily emphasise the fulfilment of contractual obligations, potentially at the expense of the child's welfare. This approach may lead to scenarios wherein despite the intended parents' inability to provide adequate care, legal parenthood is still established in their favour. This model raises concerns regarding prioritising contractual rights over the child's well-being.⁶⁰ The enforcement of surrogacy regulations presents unique challenges. For example, the UK's emphasis on the best interest

⁵⁶ Farin, Yousef, Ehsan and Mahmoud, 2014, pp. 153-182.

⁵⁷ Khorshid and Alvero, 2020.

⁵⁸ Tan, 2019.

⁵⁹ Trowse, 2013, pp. 199-209.

⁶⁰ Neofytou, 2018.

principle in practice may render legislative regulations ineffective. This can lead to a situation where parties involved in surrogacy arrangements bypass legal rules, assuming that the court will transfer legal parenthood to the intended parents based on the best interest principle. Such practices highlight the difficulty in striking a balance between protecting the child's welfare and ensuring the enforceability of surrogacy laws.⁶¹

Creating balanced surrogacy laws requires addressing the competing interests of all parties involved: the surrogate, intended parents, and child born to the surrogate. Legislation must be crafted to discourage misconduct and abuse in surrogacy arrangements, ensuring the protection of all parties, especially the child. This includes considering the legal and ethical implications of surrogacy arrangements. The international surrogacy context adds another layer of complexity. Different countries have varying stances on surrogacy, influencing the legal recognition of these arrangements and the protection of the child's rights and interests.

The application of Preimplantation Genetic Diagnosis (PGD) raises ethical objections and poses challenges to the best interest of the child principle.⁶² This technique, which involves genetic profiling of embryos before implantation, has ignited debates regarding its implications for the welfare of children conceived through this method. One of the critical issues is the potential for PGD to be used for non-medical purposes, such as sex selection for family balancing or screening for traits unrelated to medical necessity, such as intelligence or beauty. This aspect raises ethical dilemmas regarding the potential commodification of human life and the societal implications of designer babies. The ethical concerns extend to the rights of the child, particularly concerning their welfare and the potential impact of selective reproduction on their future quality of life.⁶³ Another controversial aspect of PGD is the practice of selecting for disability. This discussion brings into focus the complex interplay among parental autonomy, the rights of the child, societal values surrounding disability, and genetic selection.⁶⁴

The application of the best interest principle in ART extends beyond simply prioritising the interests of children over those of adults; it requires a nuanced balancing of the needs of all involved. While there are situations

⁶¹ Norrie, 2016, p. 29.

⁶² Bączyk and Rozwadowska, 2017.

⁶³ Øivind, 2014.

⁶⁴ Elliston, 2012.

in which the welfare of the child must take precedence, the goal should be to find a compromise that reasonably accommodates the interests of all parties, prospective parents, surrogate mothers, and the children themselves. This balancing act is particularly critical in surrogacy and other ART practices, where the rights and welfare of various stakeholders are intricately connected. In ART cases, applying the best interest principle necessitates carefully weighing technological possibilities against ethical considerations, always with the child's welfare as the focal point. The principle serves as an ethical compass, guiding decisions to ensure that the child's physical, emotional, and psychological well-being is prioritised in a world that is increasingly shaped by advanced reproductive technologies.

4. Conclusion

Advancements in assisted reproductive technologies have opened remarkable pathways to parenthood, yet they also force us to confront profound questions about the rights and welfare of the children born through these methods. This paper's exploration of the best interest of the child principle in the ART context reaffirms that while reproductive autonomy is a cherished value, it cannot eclipse our ethical and legal duty to the child. From IVF to surrogacy, each innovation has illustrated the tension between would-be parents' freedom to pursue family-building and society's obligation to safeguard children's well-being. In revisiting the core arguments, we find that the best-interest principle – a cornerstone of international child law – must be more than a platitude in ART; it should function as a guide to resolve the delicate balance between parental desires and child welfare. The inconsistent global application of this principle, ranging from jurisdictions where a future child's welfare is deemed paramount to those where it is only one consideration, underscores the pressing need for clearer standards that put children first. Too often, ART laws remain adult-centric, prioritizing reproductive rights over child-centric concerns. A more engaging, child-focused lens is required – one that treats the unborn child not as an afterthought but as a rights-bearing individual at the heart of every decision.

Throughout the analysis, a recurring theme is the ethical and legal tension between reproductive autonomy and child welfare. Prospective parents rightfully value their freedom to make intimate choices about family

creation, yet the exercise of this autonomy sometimes collides with the future child's interests. Decisions about embryo selection, surrogate arrangements, or donor anonymity each raise the question: does honoring the adults' choices risk compromising the child's physical or psychological well-being? This study has highlighted how unchecked reproductive liberty – for instance, enabling surrogacy contracts or gamete donations without adequate child safeguards – can leave the child's rights vulnerable. We must recognize that reproductive freedom carries responsibilities. Ethically, the desire to have a child by any available means cannot justify practices that might harm the very life being created. Legally, this calls for recalibration: frameworks must neither unduly trample on adults' hopes of parenthood nor treat the resulting children as mere outcomes. Instead, laws should mediate these competing interests, ensuring the child's welfare is paramount without wholly negating reproductive choice. In practice, this means fortifying the best-interest principle as a normative guardrail in ART. By explicitly acknowledging the potential for conflict – say, when a surrogate's contractual rights or an infertile couple's wishes might not align with the child's future needs – policymakers can craft balanced solutions that honor both sets of interests. The conclusion drawn is that child welfare considerations should act as a limiting principle on reproductive autonomy: a society committed to children's rights will not permit an adult's choice to become a parent via technology to proceed if it egregiously undermines the prospective child's well-being.

Given these insights, there is a clear imperative for child-centric legal reform in the realm of ART. This goes beyond superficial invocations of the “best interest” mantra and requires reimagining policies with the child truly at the center. Several policy recommendations emerge from this forward-looking reflection. First, legal frameworks worldwide should explicitly embed the best-interest principle into ART regulation, requiring that any procedure – from IVF treatments to surrogacy agreements – be evaluated in light of its anticipated impact on the child. In practical terms, jurisdictions could mandate a formal child welfare assessment as part of ART processes, analogous to the scrutiny applied in adoption proceedings. While such measures must be implemented with care to avoid unfairly restricting who can become parents, they would enshrine a preventative ethos: that we do not wait until after a child is born to consider their interests. Second, reforms should affirm the child's right to identity and origin. Many children conceived via donor gametes or surrogacy struggle with questions of genetic

heritage; laws should ensure they can access information about their biological origins in due course. This might entail, for example, ending anonymous sperm or egg donation and establishing registries that children can consult when they come of age. Such a change strikes a humane balance between donors' privacy and a child's deep-seated need to know where they come from – a key aspect of psychological welfare. Third, surrogacy and ART contracts must be regulated with the child's welfare as paramount. This could mean setting enforceable standards for surrogate screening, requiring post-birth safeguards (like legal parentage orders contingent on the child's best interests), and disallowing any agreement terms that clearly conflict with a child's rights to care and stability. International collaboration is also vital: as long as people can travel to jurisdictions with laxer rules, a patchwork of laws will persist. Global or regional guidelines – perhaps through treaties or soft-law frameworks – could help harmonize minimum child-centric standards in ART, ensuring that no matter where a child is born, certain baseline protections are in place. By championing these reforms, the legal community can move from rhetoric to reality in applying the best-interest principle to ART.

As we look ahead, the intersection of rapid technological advancement and timeless principles of child welfare will only become more complex. The conclusion here is not an endpoint but a call for ongoing vigilance and adaptability. Emerging technologies like gene editing, reproductive cloning, or artificial wombs are on the horizon, promising to redefine what is possible in human reproduction. Confronting these developments with a child-centric mindset is essential. Policymakers and ethicists should proactively ask: how do we ensure the next generation of ART innovations aligns with the best interest of the child? One recommendation is to institute multidisciplinary ethics committees that review new ART techniques before they are widely adopted, evaluating not just safety and efficacy for parents but also long-term outcomes for children. Additionally, a commitment to research is crucial. Longitudinal studies tracking the health, identity formation, and social well-being of ART-conceived individuals can inform evidence-based policies, allowing us to course-correct if certain practices are shown to have adverse impacts on children.

Embracing a child-centric approach to ART is a moral imperative that speaks to our humanity. The true legacy of assisted reproduction will not be measured by how many new parents it creates or how far the technology advances, but by how those children fare in life and how society treats them.

As Nelson Mandela profoundly stated, “There can be no keener revelation of a society’s soul than the way in which it treats its children”. This insight humanizes the entire debate, reminding us that behind every legal principle or medical procedure is a child – a person with a future, feelings, and rights. Ensuring that each child born through ART enters the world to an environment of love, dignity, and respect is how we, as a global community, will be judged. The long-term significance of this issue cannot be overstated: the policies we shape today will resonate for decades in the lives of ART-conceived children and the societies they become a part of. Therefore, as we conclude this scholarly inquiry, we do so with a commitment to action and empathy. It is incumbent upon lawmakers, medical professionals, and all stakeholders to craft frameworks that honor scientific innovation and uphold our highest human values.

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