

# THE BEST INTEREST OF THE INTENDED CHILD – CHILDREN'S RIGHTS IN ASSISTED REPRODUCTION AND SURROGACY

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## ABSTRACT

*This study examines the complex legal landscape of assisted reproduction, exploring the dynamic interaction between emerging reproductive technologies and established legal principles. It seeks to analyse the implications of assisted reproductive technologies (ART) on traditional family constructs and the fundamental legal principle of the best interest of the child, thereby contributing to a nuanced understanding of how law can evolve in tandem with technological advancements while remaining anchored in core societal values. This study aims to offer a balanced perspective that acknowledges the benefits of ART in aiding family formation, while addressing the potential legal and ethical dilemmas it poses. It endeavours to bridge the gap between rapid technological advancements in reproduction and the slower pace of legal adaptation, offering insights into how the law can evolve to better accommodate these changes without compromising core family values and child welfare principles.*

## KEYWORDS

*best interest of the child  
children's rights  
medically assisted  
reproduction  
surrogacy*

## 1. Introduction

In the evolving landscape of family law, assisted reproductive technologies (ART) have emerged, reshaping the structure of families and the dynamics of childbearing. The advent of ART, encompassing a range of medical procedures such as in vitro fertilisation (IVF), surrogacy, and sperm or egg donation, has transformed traditional paradigms of conception and parenthood. This technological revolution, while a beacon of hope for countless individuals seeking parenthood, simultaneously presents unique challenges

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and considerations within the legal domain, particularly concerning the preservation of family values and the protection of children's best interests.

At the core of this discourse lies the evolving interplay between the innovative potential of ART and the legal system's continuous efforts to adapt to these rapid advancements. As ART transcends conventional boundaries of reproduction, it raises legal questions pertaining to parentage, custody, and the rights of all parties involved, including the offspring. These questions are not merely technical; they are deeply entrenched in ethical and moral considerations, reflecting broader societal values and beliefs.

The significance of ART in contemporary society extends beyond merely enabling parenthood. It encompasses a broader narrative of individual rights, societal norms, and the evolving definition of a family. Within this context, the role of the legal system becomes twofold: safeguarding the interests and rights of those who utilise ART, while concurrently upholding the fundamental principles of family law, including prioritising the child's welfare and recognising the legitimacy of diverse family structures.

To comprehend the complex interplay between ART and family law, it is imperative to explore how ART intersects with traditional family values and the legal implications arising from this convergence. Traditional family values, often characterised by biological connections and conventional parenthood roles, face significant redefinition in light of ART. The essence of these values resides in the nurturing of familial bonds, typically grounded in biological lineage and societal norms. However, ART, by enabling individuals and couples to conceive through non-traditional methods, poses a challenge to these established norms. For instance, surrogacy arrangements and sperm or egg donation introduce third-party contributors into the conception process, thus reconfiguring the traditional understanding of parentage and lineage.

The use of ART also raises questions about the rights and responsibilities of all parties involved. Legal complexities arise when determining the parental status of donors, surrogates, and intended parents. This is particularly poignant in scenarios where there is a divergence between genetic, gestational, and intended parenthood, resulting in potential disputes over custody and parental rights.

The legal ramifications of ART are as diverse as the technologies themselves. One of the primary legal challenges is the determination of legal parentage. Traditional laws often base parentage on genetic relationships or childbirth, but ART introduces complications by separating conception from the act of bearing a child. Legal systems worldwide grapple with questions such as: Should egg or sperm donors have parental rights or obligations? What parental rights, if any, should a non-biological intended parent hold in the context of a surrogacy arrangement? The answers to these questions often vary significantly across jurisdictions, reflecting differing societal values and legal principles.

Another legal challenge is the protection of the rights and welfare of children born through ART. The principle of the best interests of the child, a cornerstone of family law, mandates that all decisions regarding children must prioritise their well-being and development. This principle becomes particularly complex in the context of ART, where questions about the anonymity of donors, the child's right to know their genetic origins, and the stability of the child's family environment emerge.

Moreover, ART raises ethical and moral considerations that legal systems must address. Issues such as the commodification of reproduction, exploitation in surrogacy arrangements, and the potential for discrimination based on genetic qualities necessitate a legal framework that balances technological possibilities with ethical constraints.

Navigating this intersection requires a legal framework that respects traditional family values while accommodating the realities of modern reproductive technologies. It calls for laws that are sufficiently flexible to adapt to technological advancements and robust enough to protect the interests of all parties involved, especially the children. Such a framework must also consider the diversity of family structures and the evolving societal norms surrounding parenthood and family life.

The primary purpose of this study is to critically analyse the legal ramifications of ART within the context of traditional family values and the doctrine of the best interest of the child. It aims to provide a comprehensive overview of how ART is reshaping family law, focusing specifically on the challenges and implications for traditional family constructs. In exploring the complexities of parentage, custody, and the rights of children born through ART, this study contributes to a deeper understanding of this evolving legal domain. Furthermore, it aims to offer a balanced perspective that acknowledges the benefits of ART in aiding family formation while addressing the potential legal and ethical dilemmas it poses. Additionally, this study strives to bridge the gap between rapid technological advancements in reproduction and the slower pace of legal adaptation. It offers insights into how the law can evolve to better accommodate these changes without compromising on core family values and child welfare principles.

## 2. A Brief History of Assisted Reproductive Technologies

The development of ART represents one of the most significant milestones in the history of reproductive medicine. This journey, characterised by scientific innovation and ethical debates, has fundamentally altered the landscape of fertility treatment and family planning. Over the years, ART have undergone a remarkable evolution since their inception, radically transforming reproductive medicine and offering new hope to countless individuals and couples facing fertility challenges.

Human reproductive research has historically been fraught with scientific, ethical, and legal challenges that hinder the development of infertility treatments. The first verified attempts at artificial insemination in humans were made in the nineteenth century and are attributed to the physician J. Marion Sims, who conducted fifty-five postcoital inseminations using highly controversial methods, mostly on slaves, without their consent.<sup>2</sup> Only one insemination resulted in pregnancy, which ultimately ended with a miscarriage. The low success rate of his attempts can be attributed to his belief that ovulation occurred during menstruation.<sup>3</sup> The first child conceived through ‘artificial insemination’ is associated with the 1884 experiment conducted by an American surgeon, William Pancoast. He performed a modified insemination procedure during which he injected the sperm of a donor into a female patient who was under anaesthesia and unaware of the impregnation. Nine months later, she gave birth to a baby. While this experiment raised moral concerns, it paved the way for future medical advancements. Artificial insemination is now a crucial aspect of modern surrogacy. Similar to artificial insemination, in vitro fertilisation has been associated with numerous ethical dilemmas.

2 | Sartin, 2004, pp. 500–505.

3 | Ombelet and Robays, 2015, pp. 137–143.

Advancements in understanding the human body and medical development in the 1970s made the 'in vitro fertilisation' of human oocytes possible, a technique that allows fertilisation to occur outside the human body. This breakthrough was marked by the birth of the world's first IVF baby in 1978, a moment that signalled a new era in reproductive medicine and fertility treatments.<sup>4</sup> This achievement was not just a medical breakthrough but also a cultural and societal landmark, challenging existing norms and opening up new possibilities for individuals struggling with infertility.

Following this, there have been significant advancements in the techniques and technologies used in ART. The evolution of 'cryopreservation methods,' particularly vitrification, has been a key development. This process allows for the freezing and storage of gametes and embryos, significantly expanding the scope and efficacy of fertility treatments.<sup>5</sup> The ability to preserve reproductive materials has been pivotal in facilitating treatments, such as egg freezing, sperm donation, and embryo storage, thereby offering more flexible and accessible fertility options.

Another significant advancement in ART has been the development of 'genetic screening techniques.' Methods such as Preimplantation Genetic Diagnosis (PGD) and Preimplantation Genetic Screening (PGS) enable the identification of embryos with genetic anomalies, thus reducing the risk of hereditary diseases and improving the success rates of ART procedures. Additionally, advancements in mitochondrial DNA modification have opened new frontiers in treating infertility, particularly for those individuals with mitochondrial disorders. However, this area of research remains complex and ethically sensitive.<sup>6</sup>

Over the years, ART has continued to evolve, addressing an increasingly broad spectrum of fertility issues and incorporating cutting-edge scientific discoveries. As ART technologies have advanced, they have also ignited considerable ethical, legal, and social debates. Key issues include the rights of donors and surrogate mothers, the welfare of children born through ART, and the societal implications of these reproductive technologies. This ongoing development reflects a commitment to enhancing reproductive outcomes and addressing the diverse needs of individuals seeking fertility assistance. The history of ART serves as a testament to the remarkable progress made in reproductive medicine, offering new possibilities and hope for those seeking to overcome fertility challenges.<sup>7</sup>

The evolution of ART over the past few decades has been nothing short of remarkable. From the first successful IVF birth to today's sophisticated genetic screening and cryopreservation techniques, ART has continually expanded the boundaries of reproductive medicine. As ART continues to evolve, it will undoubtedly challenge and reshape our understanding of fertility, parenthood, and the fundamental nature of family creation in the modern world.

4 | Steptoe and Edwards, 1978, p. 366.

5 | Vanderzwalmen et al., 2020, pp. 142–157.

6 | Ishii, 2018, pp. 88–99.

7 | Petrushko, Piniaiev and Yurchuk, 2021, pp. 315–328.

### 3. Overview of Existing Legal Frameworks Governing ART and Family Law

The legislation governing ART and family law is as diverse and complex as the technologies themselves. Numerous countries have established legal frameworks that address the myriad issues associated with ART, reflecting a balance between enabling technological advancements and safeguarding the rights and welfare of all individuals involved.

One of the critical areas in ART law is the determination of legal parenthood in surrogacy arrangements. The laws governing these arrangements often reflect underlying societal perceptions and ethical considerations. For instance, the current legal provisions that define parenthood following surrogacy are inconsistent, frequently regarding surrogacy as less legitimate compared to other methods of family formation. This situation has prompted calls for legal reforms to recognise pre-conception intentions and commitments to care, thereby providing a more stable foundation for establishing parenthood status in ART legislation.<sup>8</sup>

ART laws are also influenced by cultural and religious factors. In Israel, for instance, the right to procreate, including the use of ART, is influenced by a combination of civil legal systems, religious law (primarily Jewish law), and cultural practices. This complex interplay affects regulations governing surrogacy, egg donation, and even posthumous fertilisation, reflecting the societal values and religious beliefs prevalent in Israeli society.<sup>9</sup>

The legal frameworks for ART vary significantly internationally across different countries, with some nations embracing more liberal approaches while others adopt restrictive policies. This variation results in substantial differences in the availability and legality of specific procedures such as surrogacy, embryo donation, and posthumous fertilisation, which directly impact couples seeking reproductive treatments. This divergence primarily stems from different ethical perceptions and convictions that inform national legislations. Countries such as Sweden, with more restrictive ART laws, contrast sharply with nations such as Greece, where legal frameworks are less stringent. This variance in legal attitudes towards reproductive technologies, such as surrogacy and embryo donation, reflects a complex interplay of social acceptance, ethical considerations, and political opinions within each society.<sup>10</sup>

The differing regulations surrounding ART across various countries have given rise to the phenomenon of cross-border reproductive medicine, commonly referred to as reproductive tourism. Couples unable to access certain procedures in their home countries due to legal restrictions, lack of availability, or cost factors often travel to other nations where these procedures are permitted or more readily accessible. This trend raises several legal and ethical issues, particularly regarding the legal parentage of children born through such arrangements.<sup>11</sup> The legal recognition of parentage in cross-border reproductive

8 | Horsey, 2011.

9 | Westreich, 2016.

10 | Pikramenou, 2014.

11 | Anastasiadou, Masouras and Papademetriou, 2023.

cases presents a significant challenge. When a child is born in a country with different ART regulations, and the couple subsequently returns to their home country, issues related to legal parentage often arise. This matter is crucial as it affects the child's identity, citizenship, and the parents' legal rights and responsibilities. Effective policy-making and legal reforms are essential to address the complexities of reproductive tourism and ensure the protection of all parties involved, especially the children born through these arrangements.

The legislation governing ART in Europe presents a fascinating topic at the intersection of modern medical advancements and deeply rooted traditional family values. These laws, which vary significantly across the continent's diverse cultures, both support and challenge conventional notions of family, parenthood, and child-rearing. The relationship between these legal frameworks and traditional family values reveals a complex interplay of alignment and conflict, reflecting the dynamic nature of societal evolution in response to technological advancements.

At their core, many European ART laws are fundamentally aligned with the traditional values of family formation. These laws enable individuals and couples who might otherwise face insurmountable fertility challenges to realise their dreams of parenthood. Through providing legal avenues for fertility treatments, such as in vitro fertilisation and sperm donation, these laws reinforce the traditional family model by aiding in the creation of new family units.

Furthermore, in certain European countries, ART laws highlight the critical role of genetic connections in establishing legal parenthood. This emphasis on biological connections resonates with traditional views that associate family identity and lineage through blood relations. By prioritising genetic parents in cases of surrogacy or gamete donation, these laws uphold a conventional understanding of family that is rooted in biological connections.

Additionally, a key aspect in which ART laws align with traditional family values is their focus on the welfare of the child. Reflecting a universally held belief in the paramount importance of a child's well-being, several of these laws include stringent regulations to ensure the ethical sourcing of gametes, the safety of ART procedures, and the stability of the child's family environment. This focus is a clear nod to the traditional tenet that the interests of children should be at the forefront of family-oriented policies.

Conversely, ART laws in certain European countries present a challenge to traditional family structures. A notable aspect of this issue is the legal recognition of diverse forms of parenthood that extend beyond biological ties. In jurisdictions that acknowledge the parental rights of non-biological parents in same-sex couples or surrogacy arrangements, there is a distinct shift from the conventional definition of a family. This inclusive approach, while progressive and empowering for many, can be perceived as a departure from traditional family values that emphasise biological parenthood.

The practice of donor anonymity in ART also poses challenges to family values centred around heritage and lineage. The ethical and legal dilemmas surrounding a child's right to know their genetic origins often conflict with the traditional emphasis on family history and the knowledge of bloodline. This aspect of ART regulation creates a friction between the desire for privacy and the traditional value of familial identity.

Similarly, surrogacy, as regulated in certain European regions, often raises ethical concerns that contradict conventional views of family and motherhood. The commodification inherent in surrogacy, where a woman carries a child for another

individual or couple, can clash with traditional notions of motherhood and the sanctity of the family unit.

Due to variations in ART laws, many individuals and couples engage in cross-border reproductive care, seeking ART services in countries with more favourable legal frameworks. This phenomenon highlights the need for a more harmonised approach to ART regulation in Europe. Moreover, the phenomenon of cross-border reproductive care, driven by the varying stringency of ART regulations across Europe, leads to situations where individuals might bypass the regulations of their home countries. This trend can create discordance with the family values upheld in their native legal systems, as individuals seek reproductive assistance that may not align with their country’s traditional norms.

ART laws are a testament to the evolving nature of societal norms in response to medical and technological advancements. While they align with traditional values by enabling family formation and emphasising child welfare, they also challenge conventional family structures through inclusive definitions of parenthood and practices like surrogacy and donor anonymity. As European societies continue to navigate this evolving area, the balance between ART laws and traditional family values will remain a dynamic and critical aspect of family law and policy discussion.

The existing legal frameworks governing ART and family law are characterised by diversity and complexity. They are shaped by cultural, ethical, and technological considerations, reflecting the dynamic interplay between societal values and technological advancements in reproductive health. As ART continues to evolve, these legal frameworks will undoubtedly require continual adaptation and refinement to ensure that they effectively address the challenges posed by these rapidly developing technologies.

#### 4. Best Interest of the Child in Assisted Reproduction

The principle of the best interest of the child occupies a central place in both international and national legal systems concerning family law and child welfare. This principle, while universally recognised, is subject to a broad range of interpretations and applications, reflecting the diverse legal, cultural, and societal contexts in which it operates.

The legal definition of the principle of the child’s best interest is both multifaceted and dynamic. At its core, it mandates that all decisions impacting a child must prioritise the child’s well-being, safety, and holistic development. However, the interpretation of what constitutes a child’s best interest can vary significantly.

The concept of the best interest of the child is a key principle that guides how we think about and act on matters involving children’s rights and well-being. It is based on the understanding that children, due to their young age and developing judgment, often need adults to make decisions for them.<sup>12</sup>

This principle was legally enshrined thirty-five years ago with the adoption of the United Nations Convention on the Rights of the Child in 1989 (hereinafter UNCRC).<sup>13</sup> Signifying a significant milestone in the history of human rights, the Convention has emerged

12 | Zermatten, 2010, pp. 483–499.

13 | UN General Assembly, 1989, p. 3.

as the most universally endorsed human rights treaty. The principle prioritising the best interests of the child serves as a cornerstone of the UNCRC. Article 3, paragraph 1 of the Convention explicitly states that ‘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.’ Furthermore, Article 18, paragraph 1 of the Convention designates parents as primarily responsible for the upbringing and development of the child, emphasising that the child’s best interest should be their fundamental concern. Article 18 asserts that

States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

This principle, therefore, not only guides institutional and legal processes but also emphasises the parental role in fostering and safeguarding the welfare and development of children. It reflects a global consensus on the importance of prioritising children’s welfare in all spheres of society, ensuring that their rights and needs remain at the forefront of all pertinent decisions and actions.

The principle of the child’s best interest, while widely acknowledged and adopted in child welfare and family law, faces criticisms and challenges. This principle, foundational in ensuring children’s rights and welfare, encounters difficulties, primarily due to its inherent indeterminacy and the evolving nature of societal norms and cultural differences. The core issue with the principle of the child’s best interest lies in its ambiguous and often subjective nature. The principle’s indeterminacy stems from the lack of a clear definition of what exactly constitutes a child’s welfare. This ambiguity can lead to difficulties in its practical application, as decision-makers struggle to determine which should be considered when determining a child’s best interests.<sup>14</sup> Another layer of complexity arises from the cultural differences that exist among various nations and communities. The Convention on the Rights of the Child, as a global instrument, must accommodate a diverse array of cultural contexts. This diversity can result in varying interpretations and applications of the principle, as demonstrated by the cross-cultural studies of child welfare practices in different countries.

The principle also raises the issue of balancing the interests of children with those of adults. Emphasising the child’s welfare can, at times, inadvertently make the value of childhood contingent upon, and subordinate to, the value of adulthood.<sup>15</sup> Addressing these critiques requires a balanced and contextual approach to applying the principle of the child’s best interest. It is not solely about prioritising children’s interests over those of adults, but rather about finding an equilibrium that respects the rights and needs of all parties involved. This balance is particularly crucial in cases where children’s welfare might conflict with adults’ rights and interests.

In family law, the principle is often employed in custody disputes, adoption cases, and matters involving child welfare and protection. This principle forms the cornerstone of family and guardianship codes, shaping the interpretation and application of other legal

14 | Reece, 1996, pp. 267–289.

15 | Pennings, 1999, pp. 1146–1150.



norms within these codes.<sup>16</sup> The significance of this principle in legal contexts cannot be overstated, as it serves as a guiding standard for courts and child welfare agencies, ensuring that the child’s physical, emotional, and psychological needs are at the forefront of any decision-making process. It also provides a legal framework for balancing competing interests, such as those of biological parents, adoptive parents, and the state, in matters concerning the child.

In child custody cases, for example, the principle necessitates a thorough examination of the living conditions, emotional bonds, and overall environment offered by each parent. The child’s own preferences are also increasingly being considered, especially in cases involving older children.

The application of the principle of the child’s best interest is not without its challenges. One of the primary challenges stems from its subjectivity; what constitutes the best interest of one child may not necessarily be in the best interest of another. This subjective evaluation requires a deeper and individualised understanding of each individual child’s circumstances, needs, and background. Moreover, the principle must be balanced against other legal rights and societal values. In cases involving international adoption or cross-border custody disputes, for instance, the principle may intersect with issues of cultural heritage and national identity, further complicating legal decisions.

The principle of the child’s best interest is a cornerstone of child-centric legal frameworks globally. It emphasises the legal and moral responsibility to prioritise the well-being of children in all decisions affecting them. While its application can be challenging due to its inherently subjective nature, its role in safeguarding children’s rights and welfare is indisputable. As legal systems evolve, the ongoing refinement and implementation of this principle will remain crucial in ensuring that the welfare of children is upheld.

The intersection of ART and the legal principle of the best interest of the child introduces unique challenges and considerations. ART, which includes 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. Traditionally applied to safeguard the rights and welfare of existing children, this principle encounters unique dilemmas when extended to the context of ART, where the child in question is yet to be conceived.

A critical question arises regarding the application of the best interest framework to potential future children. Traditionally, this principle is meant for children who already exist, rather than for determining whether allowing conception align with the best interests of any resulting children. This distinction necessitates a differentiation between applying the principle in family law and family autonomy versus reproductive law and reproductive autonomy.<sup>17</sup> Furthermore, this issue is complicated by the uncertainties surrounding the future child’s health and mental condition, making it difficult to assess their best interests in advance. For instance, in the context of surrogacy, the principle of the best interest becomes even more nuanced, as we must balance the interests of the child, the surrogate mother, and the prospective parents. This balancing act puts a particular emphasis on the child’s right to know their genetic origins and upholds the principle of human dignity for the surrogate mother.<sup>18</sup>

16 | Walaszek, 1970, pp. 26–27.

17 | Cohen, 2011, pp. 423–437.

18 | Henriksson, 2016.

Another significant challenge is the absence of reliable predictive criteria for inadequate parenting. The current methods do not guarantee the child's best interests, as there is no foolproof way to predict the future parenting capabilities of individuals. The complexities of surrogacy agreements, including the logic of donation and the primary interest of the child, necessitate a thorough and ethical approach to ensuring the child's welfare in such arrangements.<sup>19</sup>

Additionally, we need to emphasise the distinction between reproductive and parental rights in ART. While adults have reproductive rights, the future child's welfare, according to the principle of the best interest, 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 significance of the child's best interest in contemporary family law.<sup>20</sup> As T. Barzó argues, psychological expertise can often assist in making the right decisions regarding the child's best interests,<sup>21</sup> this is, of course, not an option when we discuss future children.

The most evident facet of the principle of the best interest centres on the physical needs of the child, such as nutrition and care. While intended parents who opt for surrogacy or ART often possess the financial means to support these needs, it is crucial to recognise that financial resources alone do not determine parental capability. Furthermore, the emotional well-being of the child requires equal attention. Every child deserves to grow up in a nurturing and loving environment that supports their future development and education. This reasoning underpins the decisions of many states that restrict or outright prohibit surrogacy based on the child's best interest.<sup>22</sup>

The child's right to know about their origins, including their genetic connections, is an integral aspect of their identity and must be considered when utilising ART. This principle of acknowledging the child's interest in genetic ties is critical for their sense of self and connection to their heritage.<sup>23</sup>

In the context of embryo donation, for instance, the principle of the child's best interest takes on other dimensions. There is a significant role of genetic connections in constructing kinship ties among donors, recipients, and the offspring.<sup>24</sup> The ethical responsibility towards the child's welfare in decisions regarding embryo donation cannot be overlooked, and the best interest of the child must be interpreted broadly, including not only as a matter of physical well-being but also of emotional and psychological integrity. The ethical considerations surrounding embryo donation are extensive, ranging from informed consent and confidentiality to the financial aspects of the process. To uphold the ethical dimensions of the embryo donation, it is essential to respect the autonomy of donors and recipients, ensure informed decision-making, and maintain confidentiality. A critical aspect is the child's right to know their biological origins, which must be balanced with the principles of justice and respect for autonomy.<sup>25</sup> The consenting processes

19 | Chini, 2016.

20 | Stanić, 2015, pp. 5–23.

21 | Barzó, 2022, pp. 105–146.

22 | Bosch, 2018.

23 | Vij, 2015.

24 | Goedeke, 2014.

25 | Farin et al., 2014, pp. 153–182.

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 agreement regarding the disposition of surplus embryos, which highlights the decisional conflicts stemming from the moral status of embryos and evolving personal values.<sup>26</sup>

The case of surrogacy and its implications for child welfare further illustrates the complexities involved in applying the principle of the child’s best interest.<sup>27</sup> 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 mother and the intended parents. The challenge lies in ensuring that the child’s welfare remains the primary consideration in all aspects of surrogacy, a goal that necessitates careful legislative and ethical considerations. Different models of surrogacy address child welfare issues in varying ways. Research indicates a correlation between the level of protection afforded to intended parents and the emphasis on the child’s best interests.<sup>28</sup> In certain jurisdictions, such as California, surrogacy laws significantly emphasize the fulfilment of contractual obligations, potentially at the expense of the child’s welfare. This approach may result in scenarios where, despite the intended parents’ inability to provide adequate care, legal parenthood is still established in their favour. Such a model raises concerns about prioritising contractual rights over the child’s well-being.<sup>29</sup> The enforcement of surrogacy regulations presents unique challenges. For instance, the UK’s emphasis on the principle of the best interest may render legislative regulations ineffective. This situation can lead to circumstances in which parties involved in surrogacy arrangements bypass legal rules, operating under the assumption that the court will assign legal parenthood to the intended parents based on this principle. Such practices highlight the difficulty in achieving a balance between protecting the child’s welfare and ensuring the enforceability of surrogacy laws.<sup>30</sup> Developing balanced surrogacy legislation requires addressing the competing interests of all parties involved: the surrogate, the intended parents, and the 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 analysing the legal and ethical implications of surrogacy arrangements. The international context of surrogacy adds another layer of complexity; different countries have varying stances on surrogacy, which influences the legal recognition of these arrangements and the protection of the child’s rights and interests.

The application of PGD raises ethical objections and poses significant challenges for the principle of the child’s best interest.<sup>31</sup> This technique, which involves genetic profiling of embryos before implantation, has ignited debates around its implications for the welfare of children conceived through this method. One of the primary concerns is the potential for PGD to be misused for non-medical purposes, such as sex selection for family balancing or screening for the traits unrelated to medical necessity, such as intelligence or beauty. This aspect raises ethical dilemmas surrounding the potential commodification of human life and the societal implications of ‘designer babies.’ The ethical

26 | Khorshid and Alvero, 2020, pp. 380–384.

27 | Tan, 2019.

28 | Trowse, 2013, pp. 199–209.

29 | Neofytou, 2018.

30 | Norrie, 2016.

31 | Bączyk-Rozwadowska, 2017.

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.<sup>32</sup> Another controversial aspect of PGD involves the practice of selecting for disability, which highlights the complex interplay between parental autonomy, the rights of the child, and societal values surrounding disability and genetic selection.<sup>33</sup>

The application of the principle of the best interest in ART is not merely about prioritising children's interests over those of adults; rather, it entails finding a balance between competing interests. While there are instances where adult interests must be set aside for the child's welfare, a compromise should be sought that satisfies all parties to a reasonable extent. This balancing act is particularly crucial in surrogacy and other ART practices, where the rights and welfare of prospective parents, surrogate mothers, and future children are intricately intertwined. In cases involving ART, the application of the principle of the child's best interest requires a delicate balance between technological possibilities, ethical considerations, and the child's overall welfare. The principle serves as an ethical framework for navigating the complex terrain of modern reproductive technologies, ensuring that the physical, emotional, and psychological needs of the child remain the central concern in all decisions. As ART continues to evolve, so too must the legal and ethical frameworks that uphold the best interest of children born through these technologies.

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## 5. Conclusion

In the constantly evolving field of family law, ART have significantly altered the traditional concepts of family and childbearing. While ART offers invaluable opportunities for many aspiring parents, it also introduces complex legal and ethical considerations, particularly regarding the upholding family of values and the prioritisation of children's well-being.

Central to this discussion is the dynamic relationship between the innovative potential of ART and the legal system's response to these rapid advancements. As ART pushes the boundaries of traditional reproduction, it raises critical questions around parentage, custody, and the rights of everyone involved, especially the children. These questions are not merely technical; rather, they explore deep ethical and moral realms, reflecting broader societal beliefs and values.

The role of ART in today's society extends beyond helping individuals become parents. It represents a larger narrative about personal rights, societal norms, and the changing definition of a family. In this context, the legal system assumes a crucial dual role: it must protect the interests of those using ART, while simultaneously preserving the core tenets of family law, which prioritize a child's welfare and recognize diverse family structures. To truly comprehend the interplay between ART and family law, it is essential to explore how ART intersects with family values and their legal implications. Traditionally, family values have entered around biological connections and conventional parenting roles. However, yet, ART challenges these norms by enabling individuals to conceive in non-traditional

32 | Øivind, 2014, pp. 3–9.

33 | Elliston, 2012, pp. 89–125.

ways. Practices such as surrogacy and egg or sperm donation introduce third parties into the conception process, thereby reshaping our understanding of parentage and lineage.

ART also prompts us to consider the legal rights and responsibilities of all parties involved. There are complexities in determining who is considered a parent, especially in situations where genetic, gestational, and intended parenthood do not align, potentially leading to legal disputes over custody and parental rights.

One of the primary legal challenges posed by ART is the determination of legal parentage. Traditionally, laws have based parentage on genetic ties or childbirth; however, ART complicates this framework by separating conception from childbirth. Legal systems worldwide are grappling with questions regarding the rights of egg or sperm donors as well as the parental rights of intended parents in surrogacy agreements, often reflecting diverse societal values and legal principles.

Another significant challenge involves protecting the rights and welfare of children born through ART. The principle of the child's best interest, which is fundamental to family law, dictates that all decisions concerning children should prioritise their overall well-being. This becomes increasingly complex in the context of ART, raising questions about donor anonymity, the child's right to know their genetic origins, and ensuring a stable family environment.

Moreover, ART brings to the forefront ethical and moral issues that legal frameworks must address. Concerns about the commercialisation of reproduction, potential exploitation in surrogacy arrangements, and discrimination based on genetic traits call for legal structures that balance technological possibilities with ethical limitations.

Navigating the confluence of ART and traditional family values requires a legal framework that respects historical family norms while adapting to the realities of modern reproductive technologies. Laws must be flexible to accommodate technological advances, yet strong enough to safeguard the interests of all parties involved, particularly children.

This study aims to critically analyse the legal implications of ART against the backdrop of family values and the doctrine of the child's best interest. It offers a comprehensive overview of how ART is reshaping the legal contours of family law, emphasising the challenges and implications for traditional family structures. Through this analysis, the study describes the complexities of parentage, custody, and the rights of children born via ART, thereby contributing to a deeper understanding of this evolving legal domain. Additionally, the study aims to offer a balanced perspective that acknowledges ART's role in enabling family formation while addressing its potential legal and ethical concerns. Ultimately, this study bridges the gap between rapid advances in reproductive technology and the slower pace of legal adaptation, suggesting ways in which the law might evolve to better accommodate these changes without compromising core family values and child welfare principles.

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