

# STRENGTHENING CHILD RIGHTS PROTECTIONS IN PROPOSED LEGISLATION RELATING TO SURROGACY AND ADOPTION IN DENMARK

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

### INTRODUCTION

This memorandum proposes changes to the draft legislation on surrogacy, which itself is a response to the *K.K. and others v. Denmark*<sup>2</sup> decision from the European Court of Human Rights (ECtHR). The published Agreement between the government and various political parties regarding the draft legislation, asserts that the proposed law will improve the legal position of children born from foreign surrogacies.<sup>3</sup> This memorandum follows up advice provided by Child Identity Protection's (CHIP) President Maud de Boer-Buquicchio (former UN Special Rapporteur on Sale and Sexual Exploitation) to the Danish Committee on Surrogacy in May 2023.<sup>4</sup>

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

Nonetheless, we herein propose ways for Denmark, in its new legislation, to balance treaty and human rights obligations to the UN Convention on the Rights of the Child (UNCRC), the Optional Protocol on Sale and Sexual Exploitation (OPSC), and the 1993 Hague Intercountry Adoption Convention, with the various decisions of the ECtHR on Article 8 of the European Convention on Human Rights, including the *K.K. and others decision*. These human rights obligations have

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<sup>1</sup> This memorandum was prepared by David Smolin with assistance by Mia Dambach and Katarina Trimmings: <<https://www.child-identity.org/who-we-are/>>. It should be noted that this memorandum relies on an automated translation of the draft Danish laws which likely has imperfections; however, the concepts and intent of the draft legislation are clear, both from its language and from the related materials that have been released.

<sup>2</sup> *K.K. and Others v. Denmark*, no. 25212/21, 06 December 2022.

<sup>3</sup> Agreement Between the Government and Socialist People's Party, Liberal Alliance, the Danish Democrats, the Conservative People's Party, Radical Left and the Alternatives on Children's Right to Their Parents in Surrogacy Agreements, 05 February 2024 [hereinafter 'Agreement Between the Government and Parties'].

<sup>4</sup> See Child Identity Protection, 'Maud de Boer-Buquicchio, CHIP president, invited to speak to Committee on Surrogacy', 23 May 2023, <<https://www.child-identity.org/maud-de-boer-buquicchio-chip-president-invited-to-speak-to-committee-on-surrogacy/>>.

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

been clarified by various recommendations by the UN CRC Committee,<sup>6</sup> the UN Special Rapporteur on the sale and sexual exploitation,<sup>7</sup> the Verona Principles<sup>8</sup> and UNICEF/CHIP.<sup>9</sup>

## EQUALITY CONCERNS

We recognize the expressed concerns that surrogate-born children be treated equally with other children, and that the rights of the child be protected, including the rights of children to private life under the ECHR as outlined by the ECtHR decisions.

At the same time, the protection of some rights should not be accomplished at the expense of others. In that regard, we are concerned that the draft legislation, while having some useful provisions as noted below, would actually undermine the rights of the child to identity, to a best interests of the child determination, and to the right not to be sold or trafficked, in violation of Denmark's international human rights obligations under the UNCRC and the OPSC.

The expressed concern with temporary legal uncertainty in the status of the child in relationship to a genetically unrelated intended parent, described as a legal vacuum or legal void,<sup>10</sup> is given disproportionate attention. After all, typically the child is being raised by both intended parents in a household and is far too young to comprehend their formal legal status. Such a nebulous harm certainly does not justify sacrificing the child's rights to identity, right to a best interests of the child determination, and right not to be sold. The loss of these rights indeed constitutes a much more unequal treatment of the surrogate-born child, as compared to other Danish children, than these temporary uncertainties which are common in many legal contexts, such as children living with a parent and a step-parent or children living with extended families such as grandparents. Thus, we view the proposed law, contrary to its intention, as making significantly worse the legal and child rights situation of children born through surrogacy in foreign jurisdictions, and brought to Denmark. The proposed changes below are intended to alleviate the legal harms to children that arise from the draft legislation.

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

<sup>7</sup> Special Rapporteur on the Sale and Sexual Exploitation of Children, 'Thematic Report A/HRC/37/60, 15 January 2018', presented at the 37th session of the Human Rights Council [hereinafter '2018 SR Report'], <<https://www.ohchr.org/en/documents/thematic-reports/ahrc3760-report-special-rapporteur-sale-and-sexual-exploitation-children>>.

<sup>8</sup> International Social Service, 'Principles for the Protection of the Rights of the Child Born Through Surrogacy', February 2021, <[https://bettercarenetwork.org/sites/default/files/2021-03/VeronaPrinciples\\_25February2021.pdf](https://bettercarenetwork.org/sites/default/files/2021-03/VeronaPrinciples_25February2021.pdf)>.

<sup>9</sup> Child Identity Protection and UNICEF, 'Key Considerations: Children's Rights & Surrogacy, Briefing Note', February 2022, <<https://www.unicef.org/media/115331/file>>.

<sup>10</sup> Agreement Between the Government and Parties (supra note 3).

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

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

The draft law should thus not refer to the Danish courts as entering parentage orders based on or in accordance with foreign surrogacy agreements. Foreign surrogacy agreements commonly arise in jurisdictions where children lack the benefit of any best interests of the child determination at any stage, lack significant protections of the right to identity, and are commercial contractual surrogacies which commodify children and surrogate mothers.<sup>11</sup> It would be contrary to both international human rights and Danish public policy to directly enforce such agreements. Rather, Danish courts should determine parentage according to genetic relationship, the relationship between a genetic intended parent and unrelated intended parent, the living situation of the child, the post-birth and post-payment wishes of the surrogate mother, and all factors relevant to the best interests of the child.

## **THE PROPOSED LAWS WOULD BE IN EFFECT PRIOR TO THE CREATION OF NEW SURROGACY ARRANGEMENTS, AND THUS MAY PROTECT THE RIGHTS OF THE CHILD THROUGH REQUIRING INTENDED PARENTS TO PROTECT SUCH RIGHTS (A PRIORI APPROACH)**

Furthermore, Danish legislation governing future surrogacy agreements should not regard foreign surrogacy arrangements as a *fait accompli* over which Danish law has no control. While Denmark cannot change the laws of foreign commercial surrogacy hubs, Denmark can incentivize actions by Danish intended parents that protect the rights of the child. In that way, Denmark may ameliorate the harms to children of foreign commercial surrogacy laws, by requiring Danish intended parents to fill some of the legal gaps in such foreign laws. Hence, the proposed changes below would require the intended parents from Denmark to use their privilege and power as the paying customers in commercial surrogacy arrangements, to in specific ways protect the rights of the children intended to be born from these arrangements. This is not too much to ask of Danish citizens, who after all are not permitted within Denmark to enter into commercial surrogacies at all. Indeed, the Agreement between the government and the various political parties itself asserts that the intended parents have a responsibility to ensure proper conditions as to the surrogacy agreements.<sup>12</sup>

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<sup>11</sup> See SR 2018 Report (supra note 7); David M. Smolin & Maud de Boer-Buquicchio, 'Surrogacy, Intermediaries and the Sale of Children', in K Trimmings, S Shakargy & C Achmad (eds.) *Research Handbook on Surrogacy and the Law* (Edward Elgar Publishing, 2024), p. 54; and California Family Code, §§ 7960-62.

<sup>12</sup> Agreement Between the Government and Parties (supra note 3), p. 1.

## PROPOSED CHANGES TO DRAFT PROVISIONS IN CHAPTER 5c, ON PARENTAGE IN FOREIGN SURROGACY AGREEMENTS

**30i: COMMENT:** The current draft legislation refers to the Danish Family Court as deciding on parentage “on the basis of a foreign surrogacy agreement” under certain circumstances. This creates the erroneous impression that Danish Family Courts should enforce foreign commercial surrogacy agreements, which would be completely contrary to both Danish law and the rights of the child under the UNCRC and OPSC. Enforcing the provisions of such commercial surrogacy agreements would subject children born through foreign surrogacies to an extreme inequality by removing from this class of Danish surrogate-born children many of the protections of Danish law enjoyed by other children, including the right to identity, best interests of the child determinations on the occasions of a transfer of parentage, and the right not to be sold or commodified as an object of contract law.

### Proposed Language for Section 30i

“Foreign surrogacy agreements, as well as foreign judicial or administrative judgements or decrees or orders based on such, shall not be recognized or enforced in Danish courts. Nonetheless Danish intended parents may apply to Danish Courts for recognition of maternity, paternity, co-maternity or co-paternity where they are the intended parents of children born from foreign surrogacy agreements. In making such determinations, the Danish Family Court shall consider the following:

- (1) Documentation that there is a genetic connection between the child and at least one intended parent [same as current text]
- (2) Notary declaration issued in the child’s country of birth, whereby the surrogate mother, after the child’s birth, and after receiving any and all remuneration and expenses due under the surrogacy arrangement, has confirmed that she wishes to transfer parentage and the child to the intended parent couple or the intended single parent. The declaration should accurately indicate that the surrogate mother’s wish to transfer parentage is free of any coercion and is not made merely in fulfilment of contractual obligations, but rather represents the present free will wishes of the surrogate mother.
- (3) Documentation pertaining to the identity of the child, including whether or not the surrogacy arrangement includes gamete donation, if so the identity of such donors, and the identity of the surrogate mother. Such information shall be preserved for the surrogate born child.

Paragraph 2: The Family Court should make an assessment of the child’s best interests in the form of a best interests determination, requiring submission of relevant information about the intended parents, such as disclosure of any criminal convictions and offenses against children. The Family Court’s decision must be guided by the best interests of the child rather than the wishes of adults. Due to the genetic connection between at least one intended parent and the child, the relationship between the intended parent(s), and the current living situation of the child, the Family Court may apply a rebuttable presumption in favor of the intended parent(s).”

## Chapter 5 d, Prohibition against mediation of surrogacy agreements

**Comment:** This is a helpful section. The following should be added to the existing text:

### Proposed addition to Chapter 5 d:

“The intended parent(s) should submit to the Family Court either:

- a. a declaration that there was no mediation of the surrogacy agreement, and that they located and created a connection with the surrogate mother without the benefit of an agency or intermediary, and an explanation of how the surrogate mother and intended parents met; or
- b. a declaration identifying with contact information all mediators involved, describing their roles and amounts paid to them, and submitting any agreements made with mediators, intermediaries, or agencies.”

## OTHER PROPOSED CHANGES

### SECTION 31 ON AGREEMENTS TO TRANSFER A CHILD

#### COMMENT:

Section 31 invalidates an agreement requiring that a woman who gives birth, must transfer the child after birth. This existing provision of Danish law thus enforces the OPSC by prohibiting contracts for the transfer of a child. The proposed legislation would create an exception based on the new provisions for foreign commercial surrogacies, under which agreements that a woman who gives birth, must transfer the child after birth, would be valid in foreign commercial surrogacies. This proposed provision thus would validate contracts for the transfer of children, which is precisely what the OPSC prohibits.

The existing invalidation of agreements for transfer of a child should NOT be subject to an exception. If properly drafted, as proposed herein, the new provisions for determining paternity and maternity in foreign surrogacies do not involve in any way enforcement of the foreign surrogacy agreement. To the contrary, the ultimate judgment is based on a determination by the Family Court in Denmark of multiple factors, including genetic relationship of at least one intended parent, the relationship of the intended parents, and overall a best interests of the child determination. The Family Court should not and cannot be asked to make such determinations as an enforcement of the contract, as that would, in the context of commercial surrogacy, constitute a violation of the child’s right not to be sold (as the contract for transfer of the child would be based on payment, constituting a direct violation of the OPSC). In addition, enforcement of the contract would be contrary to the best interests of the child, for enforcing a contract in principle is incompatible with a court making a proper best interests of the child determination.

Proposing such an exception illustrates the profound inequality to which this class of surrogate-born children would be subjected, for every other child in Denmark is protected against being made the objects of contracts in this fashion. Why should a class of surrogate-born children suffer such inequality and loss of rights?

Denmark can sufficiently comply with the ECtHR, at least to the degree such can be done without violating its other human rights treaty obligations, without validating contracts for the transfer of a child.

## SECTION 15 OF THE ADOPTION CODE FORBIDDING PAYMENTS FOR CONSENT

**COMMENT:** Section 15 of the Adoption Code prohibits payments for consent to adoption, and does not permit adoptions under such circumstances to be legally recognized, which is in line with international conventions, in particular the OPSC, the UNCRC, and the 1993 Hague Adoption Convention.

The draft legislation proposes to amend Section 15 of the Adoption Code, creating an exception when the adoption can be assumed to be best for the child, an apparent reference to the concept (addressed above) that best interests of the child is presumed for foreign surrogacies.

This section should NOT be amended, and the prohibition of such adoptions should remain without the proposed exception.

It would still be improper, despite the *K.K. and others* decision, to complete an adoption for which remuneration was paid for consent. Such would constitute a violation of Denmark's obligations under Arts. 21 & 35 of the UNCRC, Arts. 1, 2(a), & 3(1)(a)(ii) of the OPSC, and Art. 4(c)(4) of the 1993 Hague Adoption Convention. In combination, these provisions make clear that consents to adoption may NOT be obtained by "payment or compensation of any kind," as a rule obligatory for all forms of adoption, whether domestic or international, and whether or not denominated as Hague Adoptions. Significant efforts by the international community including the Danish Central Adoption Authority have been moving towards preventing illicit practices in adoptions,<sup>13</sup> including the Working Group on this topic, which has produced factsheets adopted at the last Special Commission in 2022.<sup>14</sup>

The 2023 factsheet number 1 on Abduction, Sale of, and Traffic in Children has its first recommendation addressing States so that they:

Establish and properly implement a comprehensive legal framework that prohibits, prevents, addresses and prosecutes the abduction, sale of, and traffic in children for the purpose of intercountry adoption and illegal adoptions.<sup>15</sup>

It would also be a grave injustice to any class of children to assume that being sold is in the child's best interests, and such an assumption would be completely contrary to the concept of best interests of the child under the UNCRC.

Proposing such an exception illustrates the profound inequality to which this class of surrogate-born children would be subjected, for every other child in Denmark is protected against being

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<sup>13</sup> Hague Conference on Private International Law, 'Intercountry Adoption: Working Groups', <<https://www.hcch.net/en/instruments/conventions/publications1/?dtid=62&cid=69>>.

<sup>14</sup> Hague Conference on Private International Law, 'Intercountry Adoption: Special Commission Meetings – Special Commission of July 2022', <<https://www.hcch.net/en/publications-and-studies/details4/?pid=6668&dtid=57>>.

<sup>15</sup> Hague Conference on Private International Law, 'Toolkit for Preventing and Addressing Illicit Practices in Intercountry Adoption', <[Toolkit for Preventing and Addressing Illicit Practices in Intercountry Adoption \(hcch.net\)](https://www.hcch.net/en/publications-and-studies/details4/?pid=6668&dtid=57)>.

sold for adoption. Why should a class of surrogate-born children suffer such inequality and loss of rights?

Further, there are other ways for the Danish Family Court to determine paternity and maternity in favor of intended parents, without completing an adoption where consent was induced by payment. Indeed, the proposed legislation, if subject to the appropriate changes as indicated herein, would do so, without a need to use the Danish adoption system.