



Knowledge Exchange Seminar Series (KESS)

...is a forum that encourages debate on a wide range of research findings, with the overall aim of promoting evidence-based policy and law-making within Northern Ireland



The child's right to genetic ancestry as a key element of the best interests principle in adoption, donor and surrogacy contexts: reforming adoption law in Northern Ireland

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Research focuses on the 'right' to genetic connection – access to information - familial contact, kinship care

- Recent case law – England, Ireland, European Court of Human Rights, Canada
- Recent legislative reforms – Ireland, UK
- Open records – birth information – kin contact?



Draws upon the literature on 'origin deprivation' – context of adoption, donor gametes, surrogacy

- Sociological: genetic identity, social kinship, *de facto* (customary) adoptions
- Psychological: genetic 'abandonment'; non-attachment, welfare, long-term
- Needs = Rights?

For example- on 'biological truth' and 'legal fiction'

- K Wegar 'Adoption, Identity And Kinship: The Debate Over Sealed Birth Records' (1997) Yale University Press, New Haven
- CL Baldassi 'The Quest to Access Closed Adoption Files in Canada: Understanding Social Context and Legal Resistance to Change' *Canadian Journal of Family Law* (2004-2005) 21 pp 212-265
- S Franklin 'Re -Thinking Nature-Culture: Anthropology and the New Genetics' *Anthropological Theory* (2003) 3 65-85
- ED Blyth and A Farrand 'Anonymity in Donor-assisted Conception and the UN Convention on the Rights of the Child' *12 Int'l J Child Rts* 89 (2004) pp 89-104
- E Haines 'Secrecy: What can Artificial Reproduction Learn from Adoption?' *International Journal of Law, Policy and the Family* (1988) (2) 46- 61
- K Hargreaves 'Constructing Families and Kinship Through Donor Insemination' *Sociology of Health and Illness* (2006) 28 (3) pp 261-283
- G McGee, S V Brakman and A Gurmankin 'Gamete Donation and Anonymity: Disclosure To Children Conceived With Donor Gametes Should Not Be Optional' *Human Reproduction* (2001) 16 (10) pp 2033-2038
- P Booth, "The Right to Know One's Father" *Family Law Journal* 34 (2004) 270- 273.
- J Cerda, "The Draft Convention on the Rights of the Child: New Rights." *Human Rights Quarterly* 12 (1990) 115–17
- S Besson, "Enforcing the Child's Right to Know Their Own Origins: Contrasting Approaches Under the Convention on the Rights of the Child and the European Convention on Human Rights" *21 International Journal of Law, Policy and the Family* (2007) 137 -159



Adoption ..identity ..kinship

- A Bainham 'Removing Babies at Birth: A More than Questionable Practice' *Cambridge Law Journal* (2008) 67 (2) pp 260-262 (on fiction and presumption)
- A Bainham 'Permanence for Children: Special Guardianship or Adoption?' *Cambridge Law Journal* (2007) 66 (3) 520-523
- C Talbot and P Kidd 'Special Guardianship Orders-Issues in Respect of Family Assessment' *Fam LJ* (34) 273 (April 2004)
- S Choudry 'The Adoption and Children Act 2002: The Welfare Principle and The Human Rights Act 1998-A Missed Opportunity?' *C Fam* (June 2003) 15.2 119
- G H Miller 'The Psychological Best Interest Of The Child Is Not The Legal Best Interest' *Journal of the American Academy of Psychiatry and the Law* (2002) 30 196-200
- C Hill and M Edwards 'Birth Family Health History' *Adoption and Fostering* (2009) 33 (2) pp 45-53 on the potentially adverse consequences of a lack of information on the child's health history and the ability of adopters to offer 'therapeutic parenting'.
- Bojorge, C. "Intercountry Adoptions: In the Best Interests of the Child?" *QUT Law and Justice Journal* (2002) 15 – 38
- Oren, Laura E. "Righting Child Custody Wrongs: The Children of the "Disappeared" in Argentina." *Harvard Human Rights Journal* 14 (2001) 123–95
- Ronen, Ya'ir. "Redefining the Child's Right to Identity." *International Journal of Law, Policy and the Family* 18 (2004) 147–77



International Law provisions - Examples..

UDHR – anti-discrimination? Art 25(2) ‘..motherhood and childhood..’

UNCRC – drafting stage ..biology avoided? – Art 21 – adoption – parental consent, no financial gain; Art 20(1) ‘special protection and assistance’ -but see also Committee Guidance and Country Reports..

2005 Day of Discussion

ECHR – Art 8, Art 6, Art 14 – Art 3?

family life – adult-centric?

Hague Convention (1993) – Art 31- use of information gathered



Strasbourg Case law on genetic ties/identity and best interests

- *Anayo v Germany* [2010] ECHR 2083
- *R and H v United Kingdom* (2011) 54 EHRR 28
- *Y C v United Kingdom* (2012) (App 4547/10) ECHRR
- *S.H. And Others v. Austria* - 57813/00 [2011] ECHR 1878 (3 November 2011)
- *Ahrens v Germany* (App 45071/09) ECHRR (22 (March 2012)
- *Kearns v France* ECHR 10 January 2008 (Application no 35991/04)
- *Odièvre v France* [2003] 1 FLR 621 App no 6833/74) –see Dissenting Opinion



Domestic case law

***Re G (2013) EWHC 134 (Fam)*- sperm donor agreement - genetic father permitted leave to apply for ongoing direct contact with the child**

***G (A Child) [2013] EWCA Civ 965* - welfare balancing exercise - checklists**

***Irish Supreme Court - M.R. and D.R. & Ors -v- An t-Ard-Chláraitheoir & Ors [2014] IESC 60* – defining legal motherhood**

Canada:

***Pratten v BC [2012] BCCA 480* – children of anonymous sperm donors – discrimination – record-keeping**



Legislation:

HFEA Act 2008 s.54 'commissioning couple'
(2010 Order – ties to s.1 2002 ACA – best
interests)

Ireland:

Adoption (Identity and Information) Bill 2014
Children and Family Relationships Bill
Surrogacy?



Significance for Northern Ireland legislators?

Welfare Checklist(s)?

- Surrogacy?
- '3 parent' children?(mitochondria donation)
- Best Interests – balancing exercises?
- Positive obligations? (financial support?)
- Implications for international adoptees, looked after children, kinship care

Further reading..

Nuffield Council on Bio-Ethics 'Donor Conception: Ethical Aspects of Information Sharing' (April 2013) available http://www.nuffieldbioethics.org/sites/default/files/Donor_conception_report_2013.pdf (accessed 28.04.13)

See also comments on the Nuffield Report by E Blyth available http://www.bionews.org.uk/page_290373.asp?dinfo=7qYLvnCXFa3JsxzobhayPv5J&PPID=290513 (accessed 29.04.13)

and a differing perspective offered by C Smart available http://www.bionews.org.uk/page_290058.asp?dinfo=7qYLvnCXFa3JsxzobhayPv5J&PPID=290513 (accessed 29.04.13)

HFEA Code of Practice (as amended October 2014) available at http://www.hfea.gov.uk/docs/06_Legal_Parenthood_-_HFEA_Code_of_Practice.pdf (accessed 09.02.15)

On apologies see for example Australia <http://www.guardian.co.uk/world/2013/mar/21/julia-gillard-apologises-forced-adoptions> (accessed 31.03.13)

On the issue of using the term 'triad' see also: <http://motherhooddeleted.blogspot.com/2009/08/myth> (accessed 01.02.12); <http://bastardette.blogspot.com/2007/10/ethics> (accessed 17.03.12); on 'Respectful Adoption Language' see further <http://www.originscanada.org> (accessed 02.02.11)





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