

# DOES INTERNATIONAL HUMAN RIGHTS LAW RECOGNIZE SIBLING RIGHTS?

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## ABSTRACT

*International human rights law recognizes the right to family, but to date, the focus of this right has predominantly been on the parent/child relationship. Increasingly, situations are arising where siblings are being denied the right to know or have a relationship with each other. This could occur where parents separate and a custody dispute ensues or where siblings are allocated to different families following adoption or foster care placements. Advances in reproductive technologies have led to additional situations of separation; for example, there have been cases where the intended parents of twins born via surrogacy have taken only one child, thus separating the twins, and children conceived using gamete donation may be unable to connect with their genetic half-siblings (commonly referred to as a “donor sibling” or “dibling”). This Article considers whether international human rights law recognizes sibling rights and concludes that more needs to be done to ensure sibling rights are adequately protected without discrimination.*

## I. INTRODUCTION

“Your parents leave you too soon and your kids and spouse come along late, but your siblings know you when you are in your most inchoate form.”<sup>1</sup>

—Jeffrey Kluger

Protection for the family is enshrined in a range of human rights treaties, including: the Convention on the Rights of the Child (CRC) (Article 16); the International Covenant on Civil and Political Rights (ICCPR) (Articles 17 and 23); and the International Covenant on Economic, Social and Cultural Rights (ICESCR)

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1. *Jeffrey Kluger Quote*, AZQUOTES, <https://www.azquotes.com/quote/160886> [https://perma.cc/QKY5-P9K7].

(Article 10).<sup>2</sup> While these international instruments recognize the right to family, the precise content of the right is unclear. In particular, does it include a right of siblings to know and maintain relationships with each other?

To the extent that United Nations bodies and scholars have focused on the right to family, that focus has been almost exclusively on the relationship between parents and their children or between spouses,<sup>3</sup> with little attention paid to whether siblings have a right to a relationship with each other, independent of their parents. This may be because sibling relationships are often protected by implication: by preserving a parent-child relationship, siblings will often stay together. However, advances in reproductive technologies and contemporary family structures have led to several situations where siblings are being separated from each other, including where:

1. parents separate and a custody dispute ensues regarding the children;
2. siblings are adopted by different families or are allocated to different out-of-home care placements;
3. the intended parents of twins born via surrogacy choose to take only one of the children; and
4. children born via sperm or egg donation are unable to connect with their genetic half-siblings, commonly referred to as “donor siblings” or “diblings,” in circumstances where the donor contributed gametes to multiple families, creating multiple genetically related offspring.

In each of these instances, a child may be denied the opportunity to have a relationship with a sibling. The sibling relationship is recognized as one of the most valuable and enduring connections that an individual will ever forge.<sup>4</sup> The relationship holds emotional and critical significance over the course of a lifetime,<sup>5</sup> and is “extremely important to a child’s socialization and development.”<sup>6</sup> A positive sibling relationship is “associated with less loneliness, fewer behavior

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2. International Covenant on Civil and Political Rights, arts. 17, 23, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, art. 10, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; Convention on the Rights of the Child, art. 16, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

3. *See e.g.*, ICCPR, *supra* note 2, art. 23.

4. *See Sibling Issues in Foster Care and Adoption*, BULL. FOR PROS. (Child Welfare Info. Gateway, Wash., D.C.), Jan. 2013, at 2, <https://fosteractionohio.org/wp-content/uploads/2020/06/siblings-issues-in-foster-care-and-adoption.pdf> [<https://perma.cc/9HEW-XQUE>].

5. *See id.*

6. Barbara Jones, *Do Siblings Possess Constitutional Rights*, 78 CORNELL L. REV. 1187, 1187 (1993).

problems, and higher self-worth.”<sup>7</sup> Many cultures recognize this and celebrate the sibling relationship. For example:

- i. almost all states in the United States recognize “Siblings Day” as a day to “honor, celebrate and cherish that special bond between siblings[;]”<sup>8</sup> and
- ii. the Hindu festival of Raksha Bandhan celebrates the bond between a brother and a sister. The festival is not restricted to those with a blood relationship and celebrates brothers and sisters who share a “very close family-like relationship.”<sup>9</sup>

These celebrations are a testament to the high esteem accorded to the sibling relationship.

Given the importance of the sibling relationship and the evidence that it is being severed in a variety of different circumstances, it is timely to consider whether international human rights law recognizes a right of siblings to know each other and have a relationship. If such a right exists, has it been adequately articulated and is it being adequately protected?

Part II of this Article seeks to define the term “sibling” and analyzes the extent to which the law allows—or at least does not prevent—siblings being separated in the four circumstances identified above. This analysis demonstrates a clear and present need for greater protection of sibling relationships.

Part III analyzes how the right to family has been interpreted, vis-à-vis siblings, in three international human rights treaties: the CRC, the ICCPR, and the ICESCR. It concludes that the CRC is likely to provide some protection to siblings by way of invoking the best interests of the child principle, but such protection is, in practice, ad hoc and limited to sibling relationships between children, to the exclusion of sibling relationships between adults. Other rights, including the right to identity in the CRC and family rights in the ICCPR and ICESCR, can also be invoked to protect sibling relationships. However, the meaning of family may limit these protections to traditional sibling relationships or established sibling bonds. Further, even where a right to a sibling relationship is recognized, the precise scope of such a right remains unclear.

7. *Sibling Issues in Foster Care and Adoption*, *supra* note 4, at 3.

8. Siblings Day is celebrated on April 10. See *Fact Sheet*, SIBLINGS DAY FOUND. (Jan. 2023), <https://siblingsday.org/fact-sheet/> [<https://perma.cc/56US-4ABH>].

9. Mathew Schmalz, *Explaining ‘Rakshabandhan’ – A Hindu Festival that Celebrates the Brother-Sister Bond*, THE CONVERSATION (Aug. 14, 2019), <https://theconversation.com/explaining-rakshabandhan-a-hindu-festival-that-celebrates-the-brother-sister-bond-81665> [<https://perma.cc/K7LR-6LAE>].

Part IV argues that the articulation of sibling rights in international law needs clarification. This could be achieved by a treaty committee(s) developing a General Comment that elaborates on how the right to family includes the right to sibling relationships and how State Parties can better protect this right. Such a General Comment could be jointly developed and published by more than one treaty body (as has been the case on other issues, such as the prevention of harmful practices).<sup>10</sup> A joint General Comment would add to the gravitas of the document and send a powerful message to State Parties about the importance of protecting sibling relationships.

## II. SEPARATING SIBLINGS

“A sibling represents a person’s past, present, and future.”<sup>11</sup>

—John Corey Whaley

### A. *Defining Siblings*

The starting point of any discussion about the rights of siblings is to define what is meant by “sibling.” It is not defined in international law and only rarely defined in domestic laws, although there are some notable exceptions. For example, the Juvenile Code of the state of Oregon in the United States provides that:

“Sibling” means one of two or more children or wards related:

- (a) By blood or adoption through a common legal parent; or
- (b) Through the marriage of the children’s or wards’ legal or biological parents.<sup>12</sup>

The term “blood” can be assumed to be a reference to common or shared DNA. While the term “blood” is outdated and inaccurate, its inclusion means that the definition is broad enough to capture half-siblings and donor siblings. Similarly, the reference to “adoption” or “marriage” also captures siblings who are not

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10. See, e.g., Comm. on the Elimination of Discrimination Against Women & Comm. on the Rts. of the Child, Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination Against Women/General Comment No. 18 of the Committee on the Rights of the Child (2019) on Harmful Practices, U.N. Doc. CEDAW/C/GC/31/Rev.1-CRC/C/GC/18/Rev.1 (May 8, 2019); Comm. on the Prot. of the Rts. of All Migrant Workers & Members of Their Fams. & Comm. on the Rts. of the Child, Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return, U.N. Doc. CMW/C/GC/4-CRC/C/GC/23 (Nov. 16, 2017).

11. John Corey Whaley, *Where Things Come Back* 175 (1st ed. 2011).

12. 10 OR. REV. STAT. § 419A.004(27) (2007).

genetically related but who have been raised together, including as step-siblings. In this sense, it is a useful definition. However, the definition does not include children who are raised together, but whose parents are not married, that is, the children of de facto couples. In this sense, the definition is not sufficient.

Similarly, the Oklahoma Children and Juvenile Code in the United States defines a sibling as a “biologically or legally related brother or sister of a child.”<sup>13</sup> This definition is relatively broad, but the reference to a “legally related” brother or sister is problematic since it fails to include step-siblings.

The Canadian Province of British Columbia does not define “sibling” but does define a “sibling group” to mean:

- [A] group of 3 or more children
- (a) who reside in the same household if they are in the care of a person who is, with respect to each child,
    - (i) a parent of the child,
    - (ii) a person with whom the child is placed under the *Child Family and Community Services Act*,
    - (iii) a person who has custody or guardianship of the child under an order of a court, or
    - (iv) the spouse of a person referred to in subparagraph (i) or (ii) if that person resides in the household, or
  - (b) who are recognized by the director of licensing as a sibling group[.]<sup>14</sup>

It is not clear why the minimum number of siblings is three and why two children cannot form a sibling group. Another deficiency of this definition is that it excludes siblings who do not live in the same household. However, in the context of the Act—which is about the regulation and operation of assisted living and care facilities—this exclusion does not have any repercussions on siblings who do not live in the same household.<sup>15</sup>

Although many jurisdictions do not define the term “sibling,” some have distinguished between “sibling types” such as half-siblings and step-siblings. For example, in the United States, the Arizona Welfare Statute provides that a “sibling of the whole or half blood, step-brother, [or] stepsister,” can be considered a “[c]aretaker relative” for the purposes of that statute.<sup>16</sup> This suggests that although lawmakers did not explicitly define the term “sibling,” they implicitly recognized that there are different sibling types and terms such as

13. OKLA. STAT. tit. 10A, § 1-1-105v1 (66) (2022).

14. Community Care and Assisted Living Act, S.B.C. 2002, c 75, § 1 (Can.).

15. *See generally id.* (focusing on community care and assisted living facilities).

16. Ariz. Rev. Stat. Ann. § 46-801 (2023).

brother, half-sister, step-sister, etc. are well understood and do not need to be defined.

In cases where there is no definition of what constitutes a sibling relationship, “[t]he state generally creates legally recognized sibling relationship by creating parent-child relationships between an adult and more than one child.”<sup>17</sup> This approach, along with those outlined above, is too narrow because it denies individuals the capacity to influence the formation of their sibling relationships and excludes many siblings who have shared genetic origins but different legal or biological parents, such as diblings. Defining siblings through parent-child relationships also fails to consider the individual’s perspective of their sibling bond. Studies demonstrate that a person may perceive as their sibling someone with whom they have a shared genetic history or shared experiences, both of which make that bond important to their sense of identity.<sup>18</sup> Thus, half-siblings, adopted siblings, and step-siblings may be of equal importance to children, notwithstanding different genetic origins.<sup>19</sup>

Social scientists have been unable to reach consensus on the definition of siblings. A 2007 research review found that most studies reviewed did not “clearly state how sibling groups were identified and defined.”<sup>20</sup> Where studies did define the term, they used narrow definitions that excluded some sibling types, such as half-siblings with different mothers.<sup>21</sup> An earlier review made similar findings, noting that in “several studies, both qualitative and quantitative, the term sibling was undefined or references were made to full and half siblings without further explanation.”<sup>22</sup> In addition, the status of foster siblings and adoptive siblings was found to be frequently ambiguous in outcome studies, and these sibling types were often excluded from the definition of a sibling.<sup>23</sup>

Given the importance of both genetics and shared experiences, it is appropriate to define the term “sibling” broadly. It is preferable that definitions be inclusive enough to include self-identified

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17. James G. Dwyer, *The Relationship Rights of Children* 60 (2006).

18. See Natalie Amato, *Black v. Simms: A Lost Opportunity to Benefit Children by Preserving Sibling Relationships When Same-Sex Families Dissolve*, 45 *FAM. L.Q.* 377, 384 (2011).

19. See generally *id.* at 382–83 (“[S]eparating biological or adoptive siblings has a negative impact on children’s development and causes them psychological harm and emotional distress.”).

20. Karla Washington, *Research Review: Sibling Placement in Foster Care: A Review of the Evidence*, 12 *CHILD & FAM. SOC. WORK* 426, 431 (2007).

21. See *id.*

22. Christine Jones, *Sibling Relationships in Adoptive and Fostering Families: A Review of the International Research Literature*, 30 *CHILD. & SOC’Y* 324, 326 (2016).

23. *Id.*

siblings because in many cases “the child may be one of the best sources of information regarding who is considered a sibling.”<sup>24</sup> With this in mind, the following definition is proposed and adopted in this Article:

“Sibling” means individuals who are related by:

- i. the presence of a shared biological origin by virtue of a shared biological parent or shared sperm or egg donor; or
- ii. the presence of a shared parent or parental figure;<sup>25</sup> or
- iii. the marriage or de facto relationship of the parents of two or more individuals.

This definition allows for an individual to self-identify a sibling in circumstances where there is a single connecting factor—such as genetics or a shared family home—notwithstanding the absence of legally recognized bonds.

With this broad definition in mind, this Article now considers the circumstances where siblings are separated and where children are denied knowledge of or access to their sibling(s).

### *B. Custody Disputes*

Siblings, including half-siblings and step-siblings, can be separated if their parents’ relationship breaks down. Williams describes “arbitrary sibling separation” as a “negative repercussion” of divorce and separation which has “largely been ignored.”<sup>26</sup>

Parents may agree to split custody of their children, or courts may impose custody arrangements that result in siblings being separated. In the United States, it is estimated that approximately five percent of all separated or divorced families have a split custody arrangement<sup>27</sup>—that is, “giving each parent primary custody of one or more children.”<sup>28</sup> The majority of such arrangements tend to be decided by the parents before they appear before the court, indicating that some parents are willing to agree to siblings being

24. *Sibling Issues in Foster Care and Adoption*, *supra* note 4, at 2.

25. A legal parent is commonly considered to be a person recorded on a child’s birth certificate as a parent. *See, e.g.*, U.S. Citizenship and Immigr. Servs., USCIS Policy Manual vol. 12, pt. H, ch. 2, § A (2023), <https://www.uscis.gov/policy-manual/volume-12-part-h-chapter-2> [<https://perma.cc/N7LC-U8L5>].

26. Joel V. Williams, Comment, Sibling Rights to Visitation: A Relationship Too Valuable to Be Denied, 27 U. Tol. L. Rev. 259, 259 (1995).

27. David M. Shumaker et al., The Forgotten Bonds: The Assessment and Contemplation of Sibling Attachment in Divorce and Parental Separation, 49 FAM. CT. REV. 46, 50 (2011).

28. *Id.* at 50; DWYER, *supra* note 17, at 60.

separated.<sup>29</sup> This is contrary to the strong presumptions that courts have against split custody,<sup>30</sup> although it is generally not prohibited. For example, in an Australian case, the court ordered that the father have custody of the older sibling and the mother have custody of the younger sibling.<sup>31</sup> The court noted the presence of a loving relationship between the siblings and found that spending four nights per fortnight together was sufficient time for that relationship.<sup>32</sup> Similarly, a Canadian court ruled that three brothers reside with their father, while their sister resides with their mother.<sup>33</sup> In considering the mother's appeal, the court found that separation of the siblings was not the most significant factor to be assessed and that the child's best interests were served by maintaining the status quo, namely that the sister have a separate residence from her brothers.<sup>34</sup>

Where siblings have grown up as step-siblings and their family structure breaks down, they are entirely reliant on their parents to maintain their relationships in the midst of what could be a bitter divorce or separation. Children may also find themselves in a situation where one or both of their parents has or will have other children with another partner, creating a family with half-siblings. A range of circumstances may lead to an outcome where half-siblings are denied the opportunity to meet or continue a relationship with each other. For example, a couple may have three boys before divorcing. The father of the boys may then remarry and have two daughters, with whom his sons form a close relationship. If the father subsequently separates from his second wife, he could potentially refuse to let his sons visit his daughters, thereby severing the close relationship the half-siblings had previously enjoyed.<sup>35</sup>

A similar scenario occurred in a recent U.K. case. The court had to consider whether an eleven-year-old child, "E," should live with his half-brother "N" and maternal aunt or his step-mother, two half-siblings, and a step-sibling.<sup>36</sup> E's father was serving a custodial sentence and his mother died when he was approximately nine

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29. Shumaker et al., *supra* note 27, at 50.

30. See, e.g., *Peters & March* [2010] FamCA 151 (16 February 2010) ¶ 250 (Austl.); *In re S (a Child)* [2016] EWCA (Civ) 495 [30] (Eng.); *Korneino v Walsh-Korneinko*, 2016 ONSC 7300, para. 45 (Can.); *Aragon v. Aragon*, 104 P.3d 756, 763 (Wyo. 2005).

31. See *Roth & Roth* [2014] FamCA 207 (2 April 2014) ¶¶ 135–36 (Austl.).

32. *Id.* ¶ 100.

33. *Poole v. Poole*, 1999 BCCA 203, para. 1 (Can.).

34. *Id.*

35. See *Williams*, *supra* note 26, at 259–60.

36. *In re E (A Child)* (Care Proc.: Placement Outside Jurisdiction) [2017] EWHC B11 (Fam.), [2017] 4 WLR 99 [91]–[92] (Wales).



months old.<sup>37</sup> In advocating for E to be placed with his step-mother, E's father submitted that "[t]o take E away from his siblings is the wrong decision."<sup>38</sup> The court, after taking into account the views of the eleven-year-old child, found that he should reside with his aunt and half-sibling N and not with his step-mother.<sup>39</sup> This decision was made on the basis that E's "emotional link is closer" with his aunt and half-sibling N when compared to his relationship with his step-mother and her three children—two of whom were his half-siblings.<sup>40</sup> The court did not specifically consider the right to maintain a sibling relationship, but did consider E's relationships more broadly in the context of his best interests. This included considering E's own views, his poor relationship with one of his half-siblings, as well as the capacity for his step-mother to care for him—noting her existing caring responsibilities for her three children.<sup>41</sup>

Courts rarely address sibling visitation after parental divorce or separation.<sup>42</sup> This can be particularly problematic in the context of the breakdown of relationships in same-sex families if the law does not acknowledge joint parentage. For example, where each of the ex-partners is the biological parent of a different child (or children) and there is no legally recognized relationship between the non-birth parent and child, the siblings are vulnerable to being separated. This occurred in the United States in Missouri where a lesbian couple formed a family through each woman conceiving a child using the same sperm donor.<sup>43</sup> Michelle gave birth to C.E.W. in 2001, and Leslea gave birth to Z.A.W. in 2004.<sup>44</sup> The couple's relationship broke down in 2005, and in May 2006, Michelle stopped allowing Leslea and Z.A.W. to have any contact with C.E.W.<sup>45</sup> Leslea's petition for a declaration that both women were joint parents of both children was denied.<sup>46</sup> Leslea's arguments were limited to seeking recognition of parental rights.<sup>47</sup> No arguments were made regarding the rights of Z.A.W. and C.E.W. to maintain their sibling relationship, and the court did not consider this issue.<sup>48</sup> In the absence of laws

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37. *Id.* [7], [9].

38. *Id.* [89].

39. *Id.* [89]–[92].

40. *Id.* [92].

41. *Id.* [18].

42. *See id.* [83].

43. *White v. White*, 293 S.W.3d 1, 6 (Mo. Ct. App. 2009).

44. *Id.*

45. *Id.*

46. *Id.* at 6–7.

47. *Id.* at 6.

48. *Id.*

recognizing parental relationships in same-sex families, siblings such as Z.A.W. and C.E.W. continue to be vulnerable to separation.

There is a dearth of research on the impact of divorce and separation on sibling relationships.<sup>49</sup> However, child advocates unequivocally support joint placements of siblings, arguing that it is in the “best interests” of children.<sup>50</sup> This is supported by research that has found that siblings can be a source of emotional support for each other during difficult periods of family breakdown, acting as a buffer and providing each other with comfort.<sup>51</sup> Moreover, maintaining a sibling relationship helps “nurture a sense of stability.”<sup>52</sup>

In cases of family disruption, sibling relationships often take on greater importance.<sup>53</sup> Hasday argues that during difficult times, sibling bonds provide children “with solace, nurturing, caretaking, and secure emotional attachments.”<sup>54</sup> Siblings who are separated following the breakdown of their parents’ relationship “may never resolve their feelings of loss.”<sup>55</sup>

In situations where a parent is less available—for example, when dealing with a difficult divorce or separation—a sibling relationship serves as an attachment. Williams concludes that “it appears that if a young sibling has developed an attachment with a brother or sister, and a parent arbitrarily terminates the relationship, one or both siblings may suffer psychological trauma.”<sup>56</sup>

### C. *Siblings Who Are Adopted or Placed in Foster Care*

When a child is up for adoption or placed into foster care,<sup>57</sup> there is a risk that they will be separated from their siblings.<sup>58</sup> This may be due to a range of factors, including: the size of a sibling group;<sup>59</sup> large age ranges between siblings;<sup>60</sup> the type of out-of-home care a

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49. Shumaker et al., *supra* note 27, at 46.

50. See *Sibling Issues in Foster Care and Adoption*, *supra* note 4, at 2–3.

51. See Mary Anne Herrick & Wendy Piccus, Sibling Connections: The Importance of Nurturing Sibling Bonds in the Foster Care System, 27 *CHILD. & YOUTH SERVS. REV.* 845, 851 (2005).

52. *Id.*

53. See Stephen B. Bank & Michael D. Kahn, The Sibling Bond 18–19 (1982).

54. Jill Elaine Hasday, Essay, *Siblings in Law*, 65 *VAND. L. REV.* 897, 901 (2012).

55. Claudia L. Jewett, Adopting the Older Child 162 (1978).

56. Williams, *supra* note 26, at 282.

57. The terms “foster care” and “out of home care” are used interchangeably in this Article.

58. See *Sibling Issues in Foster Care and Adoption*, *supra* note 4, at 2.

59. Joseph J. McDowall, CREATE Found., Sibling Placement and Contact in Out-of-Home Care 20 (2015).

60. Comm’n for Child. & Young People, In Our Own Words: Systemic Inquiry into the Lived Experience of Children and Young People in the Victorian Out-of-Home Care

child is placed in; or complex trauma, challenging behaviors, and disability.<sup>61</sup> For example, where foster parents cannot handle the behavior of one child, but want to continue caring for that child's sibling(s), a sibling group may be temporarily or permanently separated.<sup>62</sup> Further, there are a range of myths which may contribute to separation, including that a "parentified child" (a child that takes on parenting responsibilities for a sibling) should be separated from younger siblings in order to give them a chance to be a child.<sup>63</sup> In other cases, a child may be born after a sibling has already left the care of their biological parents.

Research reveals that siblings want to be together in care and where they cannot live together, they want regular access to each other.<sup>64</sup> Yet, a substantial proportion of children in foster care are not placed with all of their siblings.<sup>65</sup> For example:

- i. in the United States, California, in 2002, 42% of the children in care were separated from one or more of their siblings;<sup>66</sup>
- ii. in the United Kingdom, a review of data between 1992 and 2022 revealed that an estimated 37% of children with a sibling are separated from a sibling when placed in care;<sup>67</sup> and
- iii. a 2017 study in Scotland found that almost 70% of a sample of children in permanent foster or adoptive families between April 2013 and March 2014 were living apart from at least one sibling.<sup>68</sup>

When siblings are placed together, there are greater levels of placement stability, attachment to carers, and an increased likelihood that those siblings will be returned to their parents.<sup>69</sup>

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System193 (2019), <https://ccyp.vic.gov.au/assets/Publications-inquiries/CCYP-In-Our-Own-Words.pdf> [<https://perma.cc/5EZK-K3E4>].

61. See *Sibling Issues in Foster Care and Adoption*, BULL. FOR PROS. (Child Welfare Info. Gateway, Wash., D.C.), June 2019, at 4, <https://www.childwelfare.gov/pubPDFs/siblingissues.pdf> [<https://perma.cc/3T55-X3GE>].

62. *Id.* at 6.

63. CASEY FAM. PROGRAMS, SIBLINGS IN OUT-OF-HOME CARE: AN OVERVIEW 3 (2003), [https://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/sibling\\_overview.pdf](https://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/sibling_overview.pdf) [<https://perma.cc/XY6S-6FWV>].

64. See Tommy Lundstrom, Maire Sallnas., Sibling contact among Swedish children in foster and residential care—Out of home care in a family service system (2012).

65. CASEY FAM. PROGRAMS, *supra* note 63, at 3.

66. *Id.* at 1.

67. In 2023, the U.K. Children's Commissioner reported that an estimated 37% of children with a sibling are separated from a sibling when placed in care. Children's Commissioner., *Siblings in Care*, Children's Commissioner, [HTTPS://WWW.CHILDRENSCOMMISSIONER.GOV.UK/RESOURCE/SIBLINGS-IN-CARE](https://www.childrenscommissioner.gov.uk/resource/siblings-in-care) (last visited June 26, 2024).

68. Lovisa Backman et al., Together (Scottish All. for Child.'s Rts.), State of Children's Rights in Scotland 79 (2019).

69. Comm'n for Child. & Young People, *supra* note 60, at 191 (citing Trish McCluskey, Berry St., Sibling Relationships and Connection in Out-of-Home Care 6 (2015), at 16).

Similarly, research has shown that children and young people are more likely to describe their placements as feeling “like home when they lived with siblings”<sup>70</sup> and to show “lower levels of depression and self-blame for entry into care.”<sup>71</sup> In the long term, individuals who experienced stronger sibling relationships—including access to their siblings—while in care had higher scores when measuring factors such as employment, education, and housing.<sup>72</sup>

Conversely, when they are separated in out-of-home care, siblings mourn the loss of living together.<sup>73</sup> Research reveals greater rates of placement disruption when children are separated from their siblings, and such siblings report additional trauma and are more “likely to be preoccupied with thoughts of siblings, leading to depression.”<sup>74</sup> Separate placements may also “compound . . . grief issues accompanying placement in out-of-home care, precipitating a belief in children that they have ‘lost a part of themselves’ and no longer can access their usual social and emotional supports.”<sup>75</sup>

Further, children entering foster care are invariably in a crisis situation.<sup>76</sup> The trauma of entering foster care makes the “protective nature of a positive sibling relationship in mitigating the likelihood of mental health problems” even more important.<sup>77</sup>

With respect to adoption, domestic laws may require that some attempt be made to place siblings together with the same adoptive parents, but this does not always occur, and separation is readily justified by agencies.<sup>78</sup> If adoptive parents or carers do not permit siblings to have contact or visitation, it becomes difficult, if not impossible, for siblings to establish or maintain a relationship, notwithstanding that such a relationship is important to them.

The desire of siblings to maintain a relationship following separate placements is exemplified by the story of two Australian siblings who, in 2022, were reunited after nearly eighty years of separation.<sup>79</sup>

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70. *Id.* at 190.

71. *Id.* at 191 (citing MCDOWALL, *supra* note 59, at 17).

72. MCDOWALL, *supra* note 59, at 16.

73. Andreea Bocioaga, Sibling Relationships in care (Nov. 24, 2022) at 5.

74. COMM’N FOR CHILD. & YOUNG PEOPLE, *supra* note 60, at 192 (citing MCDOWALL, *supra* note 59, at 17).

75. *Id.* (citing MCDOWALL, *supra* note 59, at 16).

76. MCDOWALL, *supra* note 59, at 16.

77. *Id.*

78. DWYER, *supra* note 17, at 61.

79. See Liz Gwynn, *Siblings Bill and Beryl Were Lost to Each Other for Nearly 80 Years. The Discovery of a WWII Shipwreck Changed That*, ABC NEWS (Austl.) (July 13, 2022 9:28 PM), <https://www.abc.net.au/news/2022-07-13/discovery-of-wwii-shipwreck-led-to-family-reunion/101229578> [<https://perma.cc/W6NYJ398>].

Bill and Beryl lost their mother to pneumonia and were living in an orphanage while their father, Frank Stewart, was serving in the Navy.<sup>80</sup> His ship was torpedoed by the Japanese in 1942, and Frank was one of thirty-eight sailors who died when the ship sunk to the bottom of the ocean.<sup>81</sup> Bill, aged eleven, was sent to a boys' home in Adelaide, and his younger sister, Beryl, was adopted.<sup>82</sup> They were not provided with any support to maintain their relationship because of a belief at the time that adoptees needed a "clean break" from remaining relatives in order to settle into their adopted families.<sup>83</sup> Both Bill and Beryl continued to look for each other for years but were only reunited following a memorial for the descendants of those who died on board the sunken Navy ship, after researchers located the wreck.<sup>84</sup> Beryl described feeling as though she regained her life "which used to be full of longing and wanting," and Bill, now aged ninety-one, talks to his younger sister every day.<sup>85</sup>

A recent U.K. case also illustrates the desire of siblings to maintain a relationship when separated in foster care.<sup>86</sup> In 2016, two siblings—ABC and DEF—were made the subject of compulsory supervision orders and accommodated in different foster care homes; however, they remained in contact.<sup>87</sup> Prior to this, the siblings lived together.<sup>88</sup> In 2017, when ABC was thirteen years old and DEF was just under seven years old, there was a review hearing with respect to DEF's compulsory supervision order.<sup>89</sup> ABC was not invited to the hearing and was not given an opportunity to speak at the hearing.<sup>90</sup> The court ordered that direct contact between the siblings be restricted to two hours, once every two weeks, and telephone contact between them was prohibited.<sup>91</sup> At a review hearing a couple of months later, ABC was permitted to produce written information and express his views, but the court's prior orders restricting contact between the siblings remained in place.<sup>92</sup>

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80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *See* ABC v. Principal Reporter & Another (*In re XY*) [2020] UKSC 26, [2020] 1 WLR 2703 [26] (appeal taken from Scot.).

87. *Id.* [17].

88. *Id.* [17]–[18].

89. *Id.*

90. *Id.* [17].

91. *Id.*

92. *Id.*

ABC made an application for judicial review, arguing that the legislative regime, which prohibited his participation in the first hearing, as well as the provisions for review of the contact direction were incompatible with his right to family life as articulated in Article 8 of the European Convention on Human Rights (ECHR).<sup>93</sup> The U.K. Supreme Court held that, to comply with the rights set out in Article 8:

There needs, in short, to be a bespoke enquiry about the child's relationship with his or her siblings . . . .

To make effective the rights of the sibling and other family members with a similar interest in maintaining contact with a child, it is necessary both that the relevant public authorities are aware of those interests and that the siblings and family members are informed of the nature of the proceedings concerning the child and of their rights in relation to the proceedings.<sup>94</sup>

The court made a number of observations about the importance of sibling relationships and noted that “the potential importance of sibling relationships to the welfare of children is not in dispute.”<sup>95</sup>

However, ABC's appeal ultimately failed on the basis that he had an opportunity to have his views taken into account at the second review hearing.<sup>96</sup> While the U.K. Supreme Court was not required to consider whether the amount of contact allowed between the siblings was sufficient, the decision is significant because it acknowledged the importance of sibling relationships as part of familial rights and the obligation to take into account the views of separated siblings.<sup>97</sup>

#### *D. Twins Born Via Surrogacy Arrangements*

To maximize the chance of in-vitro fertilization leading to a pregnancy, multiple embryos are sometimes implanted in a person's uterus.<sup>98</sup> This practice extends to surrogacy arrangements, which means that surrogates sometimes carry twins. Unfortunately, there have been rare, but high-profile instances of twins born via surrogacy

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93. *Id.* [20]. The European Convention on Human Rights (ECHR) provides that “[e]veryone has the right to respect for his private and family life” and explicitly states that public authorities cannot interfere with such rights except in certain circumstances. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Nov. 4, 1950, 213 U.N.T.S. 221. This right to family under the ECHR is not as robust as under other treaties—for example, the ICESCR affords the family “the widest possible protection and assistance.” ICESCR, *supra* note 2, art. 10, ¶ 1.

94. ABC v. Principal Reporter & Another (*In re XY*) [2020] UKSC 26, [2020] 1 WLR 2703 [52]–[53] (appeal taken from Scot.).

95. *Id.* [3].

96. *Id.* [54].

97. *Id.* [52].

98. Mayo Clinic Staff, *In Vitro Fertilization (IVF)*, MAYO CLINIC (Sept. 1, 2023), <https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716>.

being separated at birth. The most infamous case was “Baby Gammy,” where an Australian couple brought only the female twin, Pipah, home, leaving her brother, Gammy, in Thailand to be raised by the surrogate.<sup>99</sup> There was a media frenzy surrounding the case, and allegations were made that the Australian couple, the Farnells, had abandoned Gammy because he had Down syndrome.<sup>100</sup> The media attention also led to revelations that Mr. Farnell had been convicted of child sex offenses.<sup>101</sup> A case was brought before the Family Court of Western Australia to decide whether the twin girl, Pipah—who at the time of the trial, was almost two years old—should “remain in Australia with the couple who have raised her from birth or return to Thailand to live with her brother and the woman who gave birth to them pursuant to a commercial surrogacy arrangement.”<sup>102</sup> The court held that Pipah’s best interests would be served by her continuing to live with the Farnells and her three adult half-siblings—Mr. Farnell’s children.<sup>103</sup>

Ultimately, the court held that:

Pipah should not be removed from the only family she has ever known, in order to be placed with people who would be total strangers to her, even though I accept they would love her and would do everything they could to care for all her needs.<sup>104</sup>

The court’s primary consideration was the “strong attachments” that Pipah had formed with the Farnells and the quality of care she was receiving. When considering these relationships as a factor, the court held:

Although I consider Pipah’s potential future relationship with Gammy to be an important matter to consider, it is not of overwhelming importance. It needs to be considered alongside the vitally important relationships Pipah already has, but would lose if she were to be sent back to Thailand.<sup>105</sup>

The court’s decision was supported by the submission of the Independent Children’s Lawyer (ICL) who, in representing Pipah’s interests, submitted that the relationship between the twins “should not be a relationship simply for relationship’s sake” and that

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99. *Baby Gammy: Surrogacy Row Family Cleared of Abandoning Child with Down Syndrome in Thailand*, ABC NEWS (Austl.) (Apr. 14, 2016, 2:00 AM), <https://www.abc.net.au/news/2016-04-14/baby-gammy-twin-must-remain-with-family-wa-court-rules/7326196> [https://perma.cc/YFB5-5YFJ].

100. *Farnell & Another v. Chanbua* [2016] FCWA 17 (14 April 2016) ¶ 50 (Austl.).

101. *Id.* ¶ 49.

102. *Id.* ¶ 2.

103. *Id.* ¶¶ 66–68.

104. *Id.* ¶ 66.

105. *Id.* ¶ 461.

“[t]he relationship must be able to provide something meaningful to both children.”<sup>106</sup> The ICL also commented on Pipah’s relationship with her half-siblings and submitted that she “has a right to have a relationship with her Farnell half-siblings and with Jackson, Mr. Farnell’s grandson.”<sup>107</sup> On Pipah’s relationship with her half-sibling Jane, the ICL submitted that “she and Pipah have a particularly close and loving relationship that has been fostered through significant time spent together.”<sup>108</sup>

Conversely, the court rejected the submission of the Australian Human Rights Commission which argued that proposals for contact with Gammy—for example, that the Farnells send samples of Pipah’s artwork to the surrogate to share with Gammy<sup>109</sup>—would be insufficient to “protect Pipah’s right to the preservation of her identity” and that their sibling relationship was “potentially as significant as that with their individual caregivers.”<sup>110</sup> The court placed greater emphasis on Pipah’s relationship with her half-sibling Jane and even with Jane’s son Jackson because of the time they had spent together and their established relationship.

This decision highlights the competing factors that a court is required to consider when making decisions that result in siblings being kept apart. Further, this case demonstrates that maintaining one sibling relationship may come at the expense of another. However, where the primary consideration for all decisions concerning a child is a child’s best interests, maintaining a single sibling relationship cannot be expected to be the deciding factor. At the very least, consideration should be given to how sibling relationships can be maintained despite physical separation. In this sense, the court did give appropriate consideration to Pipah’s human rights.<sup>111</sup>

However, it should be noted that the court was only required to make an order in relation to Pipah and therefore did not consider Gammy’s best interests. There was no opportunity for the court to hear and consider his interests. Similarly, the comments made by Pipah’s independent lawyer about the relationship between Pipah and Gammy needing to “provide something meaningful to both children” appear to suggest that because Gammy has Down syndrome he cannot provide Pipah with a valuable sibling relationship.<sup>112</sup>

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106. *Id.* ¶ 458.

107. *Id.* ¶ 340.

108. *Id.* ¶ 340.

109. *Id.* ¶ 544.

110. *Id.* ¶¶ 454–55.

111. *See id.* ¶ 544.

112. *Id.* ¶¶ 458–59.



A similar situation occurred in 2012, when another Australian couple engaged a surrogate in India, who gave birth to twins.<sup>113</sup> They returned to Australia with only the girl twin, leaving the healthy boy twin behind.<sup>114</sup> Documents released under freedom of information laws suggest that the couple could not afford both children and intended to “leave behind the twin boy” to complete their family with a girl.<sup>115</sup> The Department of Foreign Affairs and Trade, the Department of Immigration and Border Protection, and the Australian High Commission in India all became involved in an attempt to ensure that the boy twin was not left stateless.<sup>116</sup> Documents also released under freedom of information laws disclose other cases of this nature, suggesting that the separation of twins born via surrogacy is not an isolated occurrence.<sup>117</sup>

These cases demonstrate that the growth of international surrogacy has created the potential for twins to be separated at birth and highlight the lack of protection afforded to a child’s relationship with their sibling. While separated twins are biologically full siblings, they are similar to donor siblings in that they have not been afforded an opportunity to establish a relationship with their sibling. The importance of the relationship between donor siblings—discussed in the next Section—can therefore be compared to the importance of the relationship between twins separated at birth.

### *E. Donor Siblings*

The prevalence of sperm donation and, to a lesser extent, egg donation<sup>118</sup> has allowed people who are unable to create embryos, to do so. Donor siblings (“diblings”) share half their genetic material with other children conceived with genetic material from the same donor.<sup>119</sup>

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113. Samantha Hawley et al., *India Surrogacy Case: Documents Show New South Wales Couple Abandoned Baby Boy Despite Warnings*, ABC NEWS (Austl.) (Apr. 13, 2015, 4:39 AM) <https://www.abc.net.au/news/2015-04-13/australian-couple-abandon-baby-boy-in-india-surrogacy-case/6387206> [<https://perma.cc/XB79-3W9U>].

114. *Id.*

115. *Id.*

116. *Id.*

117. *See id.*

118. Ian Mitchell, *Historical Aspects of Reproductive Technology*, in *THE RIGHT TO KNOW ONE’S ORIGINS: ASSISTED HUMAN REPRODUCTION AND THE BEST INTERESTS OF CHILDREN* 75, 77, 80 (Juliet R. Guichon et al. eds., 2012).

119. Rosanna Hertz, *Sociological Accounts of Donor Siblings’ Experiences: Their Importance for Self-Identity and New Kinship Relations*, INT’L J. OF ENV’T RSCH. & PUB. HEALTH 1 (Feb. 11, 2022).

Many of these donors were promised anonymity, and as a result, many people conceived in this way have no prospect of identifying their sperm or egg donor.<sup>120</sup> However, some jurisdictions are now legislating to allow donor-conceived individuals to access information about the identity of their donor, notwithstanding that at the time of making the donation, donors were advised that this would not be possible.<sup>121</sup>

For example, in 2016, the Australian state of Victoria amended its legislation to provide that donor-conceived individuals can access information about their donor, notwithstanding the existence of contracts promising anonymity that were signed by donors and recipient parents.<sup>122</sup> In attempting to balance the rights of donor-conceived individuals with the rights of donors, the Victorian Parliament formed the view that “the rights of those donor-conceived children outweigh that right to anonymity.”<sup>123</sup> One politician, describing the importance of donor-conceived people knowing their origins said:

I believe very strongly that every child has a right to know their biological history.

...

Genetic heritage is important to the fundamental and very human question of “Who am I?”

...

It is our right to know who we are. Every child has a right to understand their genetic make-up and to know the details of their conception when this is possible.<sup>124</sup>

Many jurisdictions now require that all donors consent to their identity being disclosed to any children conceived using their gametes when those children reach the age of 18.<sup>125</sup> In contrast, it is extremely rare for a donor-conceived person to be given access to information about their diblings.

There is increasing attention being paid to the importance of dibling relationships and donor-conceived children, and their parents

120. *Id.*

121. Edwina Anne Schneller, *The Rights of Donor Inseminated Children to Know Their Genetic Origins in Australia*, 24 *CAN. FAM. L.Q.* 305, 305 (2005).

122. Assisted Reproductive Treatment Amendment Act 2016 (Vic) s 15 (Austl.).

123. Victoria, *Parliamentary Debates*, Legislative Council, 23 February 2016, 732 (Fiona Patten) (Austl.).

124. *Id.* at 727 (Rachel Carling-Jenkins) (Austl.).

125. *See, e.g., Assisted Reproductive Treatment Act 2008* (Vic) s 59 (Austl.); *Human Fertilisation and Embryology Act 1990*, c. 37, § 31ZA (UK); *Human Assisted Reproductive Technology Act 2004*, s 50 (N.Z.).

are taking steps to connect diblings through initiatives such as the Donor Sibling Registry (DSR). This is a U.S.-based worldwide registry that was created to assist with this search process.<sup>126</sup> Wendy Kramer and her donor-conceived son, Ryan, started the registry in response to his interest in his genetic origins.<sup>127</sup> It operates as a not-for-profit organization,<sup>128</sup> has connected more than 25,000 diblings, and has more than 92,000 registrations,<sup>129</sup> demonstrating the strong desire of both donor-conceived individuals and their parents to make contact with diblings.

A study of DSR members found that donor-conceived people are interested in connecting with their diblings out of curiosity, and the majority who had made contact reported it to be a “very positive experience.”<sup>130</sup> One donor-conceived adolescent who has met six of his diblings explained the experience:

It has become like a common occurrence and I don’t expect any of the meetings to go badly, because it is like we have known each other all of our lives even though we did not grow up together.<sup>131</sup>

Research undertaken in 2016 into the experience of adolescents with their diblings found that connecting with diblings was “transformative,” “provided insight into themselves,” and assisted them in obtaining a “better sense of their genetic background and identity.”<sup>132</sup>

Bill Cordrary described his disappointment at not knowing his donor siblings at a younger age:

Three years ago, when I was 67, I found out—using a combination of genetic testing, social networking, and ancestry research—that the doctor was my father. I have made contact with 13 of my siblings and met 9 of them. One of my brothers looks so much like me he could be my twin. Since I have connected with my siblings I have gained a much more complete sense of myself, my identity. But I wish I had met these people when I was young—I would not have suffered from all the toxicity of the secrecy if it had all been open from the outset.<sup>133</sup>

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126. Vasanti Jadva et al., Experiences of Offspring Searching for and Contacting Their Donor Siblings and Donor, 20 *REPROD. BIOMEDICINE ONLINE* 523, 523 (2010).

127. See THE DONOR SIBLING REGISTRY, <https://donorsiblingregistry.com/> [<https://perma.cc/MJS6-TECR>].

128. Board of Directors, THE DONOR SIBLING REGISTRY, <https://donorsiblingregistry.com/about-dsr/board-of-directors> [<https://perma.cc/97YP-KC4C>].

129. THE DONOR SIBLING REGISTRY, *supra* note 127.

130. Jadva et al. *supra* note 126, at 530 (internal quotation marks omitted).

131. *Id.*

132. Sherina Persaud et al., Adolescents Conceived Through Donor Insemination in Mother-Headed Families: A Qualitative Study of Motivations and Experiences of Contacting and Meeting Same-Donor Offspring, 31 *CHILD. & SOC’Y* 13, 17, 20 (2017).

133. Alexa Tsoulis-Reay, *There Are No More Secrets in Sperm Donation*, N.Y. *MAG.: THE CUT*

It is clear that for donor-conceived children, connecting with their diblings provides clarity about their identity and a sense of kinship. These studies and experiences illustrate that sibling relationships are no longer limited to those within a traditional nuclear family; genetic connections also create sibling relationships, even though they may not always be known or even capable of being discovered.<sup>134</sup>

Some donor-conceived individuals stressed the importance of knowing the identity of their diblings so that they would not risk accidentally “form[ing] incestuous relationships with them.”<sup>135</sup> Given that “some sibling groups are concentrated in specific areas,” it is a “genuine possibility” for diblings to unknowingly meet each other.<sup>136</sup> To address this risk, some countries—such as the United Kingdom and Australia—have a limit of ten families that can be created from one donor; however, other countries, such as the United States, have no such limits.<sup>137</sup> The largest sibling group on the DSR is estimated to be 120 individuals,<sup>138</sup> and anecdotal evidence suggests that there are cases where a single donor’s sperm has been “used to create hundreds of children.”<sup>139</sup> Even where there are regulations to limit the number of donations to ten families, this does not include the donor’s naturally conceived children. This means that donor-conceived children could easily have twenty diblings.<sup>140</sup> This provides another compelling reason why individuals should be able to access identity information about their diblings.

Donor sibling relationships are distinct from other sibling relationships in that the right is not to *maintain* an existing relationship, but rather to *establish* a relationship.<sup>141</sup> This means that the psychological and social research into the importance of sibling relationships is not entirely applicable. While the sibling relationship remains unique, regardless of the presence or absence of an existing relationship, the importance of donor siblings being able to connect with each other is more analogous to donor-conceived children contacting their donors.

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(Nov. 22, 2016), <https://nymag.com/thecut/2016/11/there-are-no-more-secrets-in-sperm-donation.html> [<https://perma.cc/RZM6-QNE9>].

134. Naomi Cahn, *The New Kinship: Constructing Donor-Conceived Families* 73 (2013).

135. Jadva et al., *supra* note 126, at 531.

136. *Id.*

137. *See id.*

138. *Id.*

139. Caroline Lorbach, *Experiences of Donor Conception: Parents, Offspring and Donors Through the Years* 79 (2003).

140. *Id.* at 147.

141. *See CAHN, supra* note 134, at 99.

Allowing sperm or egg donors to donate anonymously has now been rejected by a large body of research that unequivocally supports the argument that knowledge of genetic background is a key aspect of identity development for children and a culture of secrecy around their origins is harmful to them.<sup>142</sup> As a result, there are growing efforts to ensure that donor-conceived children have access to the identity indicators of their donors.<sup>143</sup> For some donor-conceived individuals, this has come too late—records may have been destroyed or their donor may have died. In some cases where a donor has died, cannot be found, or does not want to have contact with their donor offspring, meeting a sibling is the only way a donor-conceived individual can build an understanding of their genetic identity. Thus, it is vital that the law protect sibling bonds even in the absence of an established relationship.

Another way in which sibling relationships are formed is via “surplus embryos,” embryos created for assisted insemination that are no longer required by the parent(s).<sup>144</sup> These embryos are sometimes donated to other persons seeking to form a family.<sup>145</sup> Any children born from the donated surplus embryos are biologically “full” siblings—as distinct from half-siblings. Such a scenario is illustrated by the circumstances of Kathryn and Paul, who conceived their daughter, Laura, using a donated embryo and subsequently commenced court proceedings to be able to contact the donors of the embryo for the reasons outlined below:

My main point was always that the girls (they had a daughter, too, sixteen months older than ours) had the right to meet some day and develop a relationship if they chose. Obviously, biologically they are full siblings.<sup>146</sup>

Kathryn also explained that:

[T]here are still five remaining frozen embryos that Paul and I are currently working with the clinic to donate to another infertile couple. We want to assure openness up front if a successful pregnancy occurs.<sup>147</sup>

Kathryn and Paul’s story is indicative of the issues that an increasing number of people are facing as they decide what to do with

142. Brigitte Clarke, *A Balancing Act? The Rights of Donor-Conceived Children to Know Their Biological Origins*, 40 GA. J. INT’L & COMPAR. L. 619, 621 (2012).

143. Schneller, *supra* note 121, 307–08.

144. Ellen Glazer, *Embryo Donation: One Possible Path After IVF*, HARV. HEALTH PUBL’G (Dec. 3, 2021), <https://www.health.harvard.edu/blog/embryo-donation-one-possible-path-after-ivf-202112032649>.

145. *Id.*

146. LORBACH, *supra* note 139, at 91.

147. *Id.*

embryos in storage<sup>148</sup> and the consequences that this may have on sibling relationships if the recipients of embryo donations are not open to supporting a relationship between diblings.

### F. Conclusion—Separating Siblings

There are a range of contemporary influences, such as increased rates of divorce and growing use of fertility-assisted technology, which mean that sibling relationships now come in a diverse array of forms and siblings are not always raised together within the confines of a traditional nuclear family. Increasing rates of family breakdown and advances in technology have led to a range of sibling types: full siblings, half-siblings, step-siblings, adoptive siblings, and diblings. Each of these relationships has meaning and value not only for children, but also for individuals once they become adults.

Given the inherent value of protecting all types of sibling relationships, it is important to consider whether international human rights law recognizes the right to know and have a relationship with a sibling, in all these forms.

## III. DOES INTERNATIONAL HUMAN RIGHTS LAW RECOGNIZE SIBLING RIGHTS?

“The sibling relationship is too valuable to ignore. It is the longest lasting relationship of a person’s life. It outlasts relationships with parents and spouses. It’s a relationship that is too valuable to lose out on.”<sup>149</sup>

—Candyce H. Stapen

This Section analyzes three key international treaties—the CRC, the ICCPR, and the ICESCR—to determine whether State Parties have an obligation to respect and protect sibling relationships. To answer this question, it is important to consider not only the text of the treaties themselves, but also the relevant jurisprudence of each U.N. treaty committee. This jurisprudence includes General Comments, Concluding Observations, and decisions on individual complaints made to a treaty committee.

### A. *The Convention on the Rights of the Child*

The CRC encompasses the idea that children are human beings and individuals with their own rights, separate from any rights of

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148. *Id.*

149. Candyce H. Stapen, *Families*, WASH. POST (Dec. 18, 1989, 7:00PM), <https://www.washingtonpost.com/archive/lifestyle/1989/12/19/families/29a9a9f0-aacb-4111-a3bf-2237d94c0abe/> [https://perma.cc/H59L-R7RU].

their parents. With almost universal ratification, it is the world's most widely ratified human rights treaty.<sup>150</sup> There are three articles in the CRC that may provide protection to sibling relationships, namely, family rights (Article 16), identity rights (Article 8), and the best interests principle (Article 3(1)).

### 1. Family Rights

In a broad sense, family rights can be separated into two categories: the right of non-interference with family life, which is a negative obligation; and the right to protection by the State, which is a positive obligation.

The negative obligation is set out in Article 16(1), which provides that “[n]o child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.”<sup>151</sup> These family protections are directly applicable to the protection of some sibling relationships, and State Parties may be interfering with this right to family life if they prevent siblings from maintaining a relationship. Van Bueren asserts that prohibiting siblings from accessing each other amounts to unlawful interference with the family, in breach of Article 16 of the CRC.<sup>152</sup>

To assess this argument, it is necessary to consider the meaning of both “family” and “arbitrary and unlawful interference.” There is no definitive jurisprudence from the Committee on the Rights of the Child (CRC Committee), the treaty body responsible for the CRC, on the meaning of “arbitrary and unlawful interference,” but there is some guidance on the meaning of “family” in its 2005 General Comment on Early Childhood, which states that:

The Committee recognizes that “family” here refers to a variety of arrangements that can provide for young children’s care, nurturance and development, including the nuclear family, the extended family, and other traditional and modern community-based arrangements, provided these are consistent with children’s rights and best interests.<sup>153</sup>

In addition, in its 2017 General Comment published jointly with the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, the CRC Committee urged

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150. The CRC has 196 State Parties, with the United States being the only country not to ratify it. *Committee on the Rights of the Child*, OFF. OF THE HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/en/treaty-bodies/crc> [<https://perma.cc/S6P4-US87>].

151. CRC, *supra* note 2, art. 16, ¶ 1.

152. Geraldine Van Bueren, *The International Law on the Rights of the Child* 83 (1995).

153. Comm. on the Rts. of the Child, General Comment No. 7 (2005) Implementing Child Rights in Early Childhood, ¶ 15, U.N. Doc. CRC/C/GC/7/Rev.1 (Sept. 20, 2006).

States to comply with their international legal obligations in terms of maintaining family unity, including siblings, and preventing family separation.<sup>154</sup> Protection of the right to family frequently requires that States not only refrain from actions which could result in family separation or other arbitrary interference in the right to family life, but also take positive measures to maintain the family unit, including through reuniting separated family members.

These General Comments indicate that, at a minimum, biological siblings who have been raised together fall within the meaning of family, and States therefore have an obligation to prevent siblings from being separated and take positive measures to maintain the family unit.

The reference to “extended family” also leaves scope for siblings outside of the traditional nuclear family to assert their familial relationships and qualify for protection, particularly where there is societal recognition of that familial relationship. However, in the absence of a definition of sibling, the status of newer categories of siblings, such as donor siblings, half-siblings, and step-siblings, is unclear (noting that donor siblings are only possible in countries where sophisticated medical infrastructure allows for in vitro fertilization). If the familial bond between these categories is to be recognized under international human rights law, in the absence of specific State Party recognition, it must attract broad societal consensus, which at this time, does not appear to exist.

Article 2 requires that the rights set out in the CRC be respected and ensured “without discrimination of any kind,” including discrimination on the basis of “birth or other status.”<sup>155</sup> It can be argued that preventing siblings and other sibling types from enjoying equal rights to relationships with those who they identify as their sibling is discrimination. This discrimination may be based on a siblings’ status as donor-conceived, being placed in foster care, or in the case of half- or step-siblings, not having “full” biological ties.

## 2. The Right to an Identity

The important role that siblings play in the development of identity provides another means of protection under the CRC. Article 8(1) provides that “States Parties undertake to respect the

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154. Comm. on the Prot. of the Rts. of All Migrant Workers & Members of Their Fams. & Comm. on the Rts. of the Child, *supra* note 10, ¶ 27.

155. CRC, *supra* note 2, art. 2.



right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.”<sup>156</sup>

Tobin argues that “‘family relations’ also extends to siblings, grandparents and other relatives or individuals involved in the care of and relevant to the welfare of the child.”<sup>157</sup> This is reflected in General Comment 6 on the Treatment of Separated Children, in which the CRC Committee stated that the identity of siblings is relevant information to collect when ascertaining the identity of a child.<sup>158</sup> In outlining the initial assessment process for the protection of separated children, the Committee said that it should include, among other things, the appointment of:

[P]rofessionally qualified persons to collect biodata and social history to ascertain the identity of the child, including, wherever possible, identity of both parents, other siblings, as well as the citizenship of the child, the siblings and the parents.<sup>159</sup>

This General Comment identifies an intrinsic link between the identities of siblings, simply by virtue of their status as siblings. This intrinsic link may extend to donor siblings. The CRC Committee has made a number of references to the importance of a child’s right to know one’s origins in several of its Concluding Observations, including:

- i. Denmark in 1995, where the CRC Committee expressed concern regarding “a possible contradiction between [Article 8] of the Convention and the policy of the State party with respect to artificial insemination.”<sup>160</sup>
- ii. Norway in 1994, where the CRC Committee similarly expressed concern regarding “the possible contradiction between [Article 8] of the Convention with the policy of the State party in relation to artificial insemination, namely in keeping the identity of sperm donors secret.”<sup>161</sup>
- iii. The United Kingdom in 2002, where the CRC Committee expressed concern “that children born out of wedlock, adopted

156. *Id.* art. 8, ¶ 1.

157. John Tobin & Jonathan Todres, *Article 8: The Right to Preservation of a Child’s Identity*, in *THE UN CONVENTION ON THE RIGHTS OF THE CHILD: A COMMENTARY*, 297 (John Tobin ed., 2019).

158. *See* Comm. on the Rts. of the Child, General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, ¶ 31, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005).

159. *Id.*

160. Comm. on the Rts. of the Child, Concluding Observations of the Committee on the Rights of the Child: Denmark, ¶ 11, U.N. Doc. CRC/C/15/Add.33 (Feb. 15, 1995).

161. Comm. on the Rts. of the Child, Concluding Observations of the Committee on the Rights of the Child: Norway, ¶ 10, U.N. Doc. CRC/C/15/Add.23 (Apr. 25, 1994).

children, or children born in the context of medically assisted fertilization do not have the right to know the identity of their biological parents.”<sup>162</sup>

Although these Comments were all made in regard to a child's right to know their biological parents, they reflect an understanding that a purely genetic connection is sufficient to invoke the protection of Article 8. Doek also noted that Article 8 can be interpreted to include “the right to be informed about your (biological) origins.”<sup>163</sup>

It can thus be cogently argued that siblings, including diblings and other types of siblings, form part of a child's familial relations and, therefore, a part of a child's identity. And, where any element of a child's identity has been compromised, a State Party is required to take positive steps to re-establish the child's identity.<sup>164</sup> Tobin asserts that notwithstanding that jurisdictions afford less rights to siblings than parents, Article 8 “establishes that the right to identity includes the right to know siblings.”<sup>165</sup>

However, in the absence of further guidance by the CRC Committee, it is unclear what exactly constitutes the compromising of a family relation or what it means to know a sibling. For example, does Article 8 mean that a child is entitled to know the identity of their siblings? To write to them? To see them on a regular basis? Does it depend on the circumstances, and if so, what factors should be considered?

Even where the protection for sibling relationships is better enunciated, there is likely to be a relevant restriction, namely that the familial relations must be “recognized by law.”<sup>166</sup> Doek argues that this restriction means that State Parties are not obliged to recognize family relations between a donor and donor-conceived child if it is not recognized by law.<sup>167</sup> On Doek's analysis, the right to an identity does not invoke a right for donor-conceived children to know their donors. By extension, donor siblings, who are also not recognized by law, would be unable to assert a right to identity based on family relations.<sup>168</sup> For twins separated at birth, there is likely to be, at the very least, a question as to whether they are legally recognized as

162. Comm. on the Rts. of the Child, Concluding Observations: United Kingdom of Great Britain and Northern Ireland, ¶ 31, U.N. Doc. CRC/C/15/Add.188 (Oct. 9, 2002).

163. Jaap E. Doek, Article 8: The Right to Preservation of Identity, and Article 9: The Right Not to Be Separated from His or Her Parents 12 (André Alen et al. eds., 2006).

164. CRC, *supra* note 2, art. 8, ¶ 2.

165. Tobin & Todres, *supra* note 157, at 297.

166. See DOEK, *supra* note 163, at 13 (“In light of [the] history, it seems to be arguable that in the current text ‘as recognized by law’ should be linked to ‘family relations.’”).

167. *Id.*

168. *See id.*

twins. For example, in both the Baby Gammy case and the Indian Twins case, the twins born were immediately recognized by the media and the Australian court as having a sibling relationship.<sup>169</sup>

As Doek acknowledges, Article 8 provides a non-exhaustive list of elements that form a child's identity.<sup>170</sup> This leaves open the possibility of arguing that *all* siblings, regardless of whether they are recognized by law or not, form a part of a child's identity. The merit of this argument stems from the weight that donor-conceived children place on knowing their donor siblings. If Article 8 applies to those traditionally recognized as siblings and not to donor siblings, it could be argued that this constitutes discrimination in breach of Article 2 of the CRC.

### 3. The Best Interests of the Child

Article 3(1) of the CRC provides 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.<sup>171</sup>

If protecting a sibling relationship is in the best interests of a child, Article 3 may operate to protect that relationship, regardless of whether the sibling relationship is a traditional brother/sister relationship in a nuclear family, donor sibling, or other contemporary form of sibling relationship. Given the discussion above about the importance of sibling relationships, it is likely that most sibling relationships, barring exceptional circumstances, would be protected by the best interests principle.

The 2013 General Comment 14 on Article 3(1) provides some guidance on its interpretation.<sup>172</sup> It states that the best interests of the child operates as a threefold concept: a substantive right, an interpretative legal principle, and a rule of procedure.<sup>173</sup> The principle is applicable to individual children, an identified group of children, and children as a constituency.<sup>174</sup> It is applicable to "all actions

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169. Baby Gammy: Surrogacy Row Family Cleared of Abandoning Child with Down Syndrome in Thailand, *supra* note 99; Hawley et al., *supra* note 113.

170. DOEK, *supra* note 163, at 11.

171. CRC, *supra* note 2, art. 3, ¶ 1.

172. See Comm. on the Rts. of the Child., General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1), ¶ 1, U.N. Doc. CRC/C/GC/14 (May 29, 2013).

173. *Id.* ¶ 6.

174. *Id.*

concerning children”<sup>175</sup> and includes “[i]naction or [the] failure to take action.”<sup>176</sup> The CRC Committee has emphasized the “strong legal obligation” that is to be placed on States to assess and ascribe weight to the best interests of children in any action undertaken.<sup>177</sup> Moreover, its status as a primary consideration means it cannot be considered on the same level as other considerations.<sup>178</sup> The Committee emphasized that its allocation of “primary” stems from the vulnerability of children in comparison to adults, who have a greater ability to represent their own interests.<sup>179</sup> This is particularly relevant to children who are separated from their siblings, often due to the competing interests of adults. Where there is a conflict in rights, the CRC Committee stresses that the child’s interests are to be afforded high priority and are not just one of several considerations.<sup>180</sup>

Identifying the best interests of a child and whether they are being met can be problematic.<sup>181</sup> The CRC Committee provides that the concept is “flexible and adaptable” and ought to be adjusted or defined to suit a specific situation.<sup>182</sup> However, the CRC Committee also sets out a non-exhaustive list in its General Comment to provide guidance, but notes that considerations can go beyond this.<sup>183</sup> Three of these considerations are relevant to sibling relationships.

The first consideration is a child’s own views as to what is in their best interests. An analysis of the drafting process for the CRC reveals that Article 12(2), which enunciates the right to be heard, was considered to logically follow from Article 3(1).<sup>184</sup> This is because it provides a means of “ascertain[ing] a child’s best interests in a given case.”<sup>185</sup> The Committee has affirmed this interpretation and highlighted the complementary roles of Articles 12 and 3(1).<sup>186</sup> As a child matures, their views should be afforded increasing weight.<sup>187</sup> Moreover, a child has a right to express their own views in all matters affecting them, as opposed to only matters affecting their rights.<sup>188</sup>

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175. CRC, *supra* note 2, art. 3, ¶ 1.

176. Comm. on the Rts. of the Child, *supra* note 161, ¶ 18.

177. *Id.* ¶ 36.

178. *Id.* ¶ 37.

179. *Id.*

180. *Id.* ¶ 39.

181. Sharon Detrick, A Commentary on the United Nations Convention on the Rights of the Child 88 (1999).

182. Comm. on the Rts. of the Child, *supra* note 172, ¶ 32.

183. *See id.* ¶ 39.

184. *See* DETRICK, *supra* note 181, at 89.

185. *Id.*

186. Comm. on the Rts. of the Child, *supra* note 172, ¶ 43.

187. *Id.* ¶ 44.

188. *See* DETRICK, *supra* note 181, at 220–21.

Consequently, where a child expresses that knowing their sibling is in their best interests, this can and should be taken into account.

A second consideration is a child's identity, including aspects relating to their personal, physical, social, and cultural identity.<sup>189</sup> The CRC Committee noted the treaty's explicit requirement for this when considering foster homes or placements (Article 20(3)) and also highlighted its applicability in cases of adoption and separation from or divorce of parents.<sup>190</sup> This "implies that children have . . . the opportunity to access information about their biological family, in accordance with the legal and professional regulations of the given country."<sup>191</sup>

The third consideration is the preservation of family environment and the maintenance of familial relations.<sup>192</sup> The CRC Committee has adopted a broad interpretation of family, stating:

The term "family" must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom (art. 5).<sup>193</sup>

This provides scope to consider sibling relationships—including half-siblings, step-siblings, diblings, etc.—as members of the extended family when determining the best interests of the child. Accordingly, diverse sibling relationships are relevant in considering the maintenance of family relationships and the best interests of the child.

The link between a child's best interests and the right to non-discrimination (Article 2) provides a further basis to argue that non-traditional sibling relationships receive equal treatment under the law.<sup>194</sup> Thus, diblings, for example, have a right to the same protection of their sibling relationships as other children and are entitled to have their sibling relationships recognized and respected where those relationships are in their best interests.

The broad interpretation of the best interests principle means it has the potential to be a useful tool in recognizing and protecting sibling relationships in all their diverse forms. Its limitation is that it only requires that a decision be made in the best interests of a child in a specific situation as opposed to providing an enduring right to a sibling relationship.

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189. See Comm. on the Rts. of the Child, *supra* note 172, ¶ 55.

190. *Id.* ¶ 56.

191. *Id.*

192. *Id.* ¶ 58.

193. *Id.* ¶ 59.

194. See *id.* ¶ 41.

#### 4. Conclusion—CRC

Notwithstanding that distinguishing between sibling types may be discriminatory, it remains unclear whether family rights (Article 16) and the right to an identity (Article 8) can provide a broad right to maintain all types of sibling relationships. Family rights provide that States have an obligation to prevent biological siblings who have been raised together from being separated and take positive measures to maintain the family unit. It is less clear whether this extends to other sibling types. Similarly, it is arguable that the right to identity provides a right for a child to know their origins, which could include siblings who share a genetic bond. However, what it means “to know” a sibling is unclear, meaning the precise scope of protection cannot be ascertained. Finally, while the best interests principle in Article 3 could be a useful tool to recognize and protect sibling relationships, it is limited to being a tool, as opposed to providing a specific enduring right for all children.

#### B. *The ICCPR*

The ICCPR has been described as “probably the most important human rights treaty in the world as it has universal coverage . . . , it contains a large number of rights . . . , and it purports to apply to all classes of person.”<sup>195</sup> The ICCPR may provide protection to siblings pursuant to prohibitions on unlawful interference with the family (Article 17) and protection of the family (Article 23).

#### 1. Family Rights

As noted above, family rights may be divided into negative obligations (protection from interference) and positive obligations (protection by the State).<sup>196</sup>

With respect to negative obligations, Article 17 of the ICCPR stipulates that “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, . . . .”<sup>197</sup> This is almost identical to the language in Article 16 of the CRC,<sup>198</sup> making Van Bueren’s assertion that prohibiting siblings from accessing each other amounts to unlawful interference,<sup>199</sup> equally as applicable to the ICCPR.

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195. Sarah Joseph & Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* 3–4 (3d ed. 2013).

196. See *supra* discussion Part III.A.1.

197. ICCPR, *supra* note 2, art. 17.

198. CRC, *supra* note 2, art. 16.

199. VAN BUEREN, *supra* note 152.

With respect to the positive obligations in Article 23(1) of the ICCPR, “family” is defined as “the natural and fundamental group unit of society” and entitles this group to “protection by society and the State.”<sup>200</sup> Nowak argues that this is an institutional guarantee; a protection of a status under private law as a human right.<sup>201</sup> He articulates this protection as establishing “rights and duties between private parties” including between spouses or between parents and children.<sup>202</sup>

To assess this argument, it is necessary to consider the meaning of both “family” and “arbitrary and unlawful interference.” The Human Rights Committee (HRC), the treaty body with oversight of the ICCPR, elaborated on Article 23 of the ICCPR in General Comment 19. While the HRC stated that family necessarily includes relations between parents and child,<sup>203</sup> it resisted providing any definition of family,<sup>204</sup> stating that:

The Committee notes that the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition. However, the Committee emphasizes that, when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in article 23.<sup>205</sup>

Thus, State Parties have the scope to determine the meaning of family. Similarly, in General Comment 16 on Article 17, the HRC highlighted the broad definition of family, noting that:

Regarding the term “family”, the objectives of the Covenant require that for purposes of article 17 this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned.<sup>206</sup>

Joseph and Castan assert that the broad definition invoked by the HRC purposely leaves State Parties with a cultural leeway in determining the definition of family.<sup>207</sup> However, this does not mean that

200. ICCPR, *supra* note 2, art. 23, ¶ 1.

201. Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary 516 (2d rev. ed. 2005).

202. *Id.* at 514.

203. Hum. Rts. Comm., General Comment No. 19: Article 23 (The Family) (1990), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 198, ¶ 2, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (May 27, 2008).

204. *Id.*

205. *Id.*

206. Hum. Rts. Comm., General Comment No. 16: Article 17 (Right to Privacy) (1988), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, *supra* note 203, at 191, ¶ 5.

207. JOSEPH & CASTAN, *supra* note 195, at 668.

State Parties have exclusive jurisdiction, and a definition set by a State cannot be narrower than that of its society.<sup>208</sup>

In the General Comment on Article 17, the HRC defined lawful interference as that which takes place “in cases envisaged by the law.”<sup>209</sup> However it further clarified this by stating that the law “itself must comply with the provisions, aims and objectives of the Covenant.”<sup>210</sup> In defining the expression “arbitrary interference,” the HRC similarly stated:

In the Committee’s view the expression “arbitrary interference” can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.<sup>211</sup>

Many of the practices that allow siblings to be separated are permitted by law, such as laws governing adoption, foster care, and custody disputes. It can be argued that such interferences with sibling relationship are arbitrary, as they fail to recognize and protect sibling relationships and are not in the best interests of the children. To comply with the ICCPR, these laws must make proper allowances to ensure that sibling relationships are maintained in accordance with the best interests of the child. In the absence of proper consideration and weight being afforded to protecting sibling relationships, it can be argued that the separation is an arbitrary interference, notwithstanding that it may be permissible under the State Party’s laws.

The First Optional Protocol to the ICCPR gives the HRC jurisdiction to hear complaints made by individuals against State Parties.<sup>212</sup> The HRC’s views on these individual communications provide some guidance on who the HRC considers to be a family. These views, though not legally enforceable, hold considerable weight and often lead to States altering their laws or practices to conform with the ICCPR.<sup>213</sup> Many of the complaints relate to the removal of children from parents, family reunifications across borders, and deportations. While there has not been an individual communication directly addressing sibling relationships within the family, the general

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208. See Hum. Rts. Comm., Views on Communication No. 549/1993, annex, ¶ 10.3, U.N. Doc. CCPR/C/60/D/549/1993/Rev.1 (Dec. 29, 1997).

209. Hum. Rts. Comm., *supra* note 206, ¶ 3.

210. *Id.*

211. *Id.* ¶ 4.

212. ICCPR, *supra* note 2, Optional Protocol, art. 1.

213. JOSEPH & CASTAN, *supra* note 195, at 22–23.



indicia articulated by the HRC provides some insight into the definition of family.

In the 2004 decision in *Ngambi v. France*, the HRC articulated a broad understanding of family to include all those who society understands to be part of the family unit.<sup>214</sup> In a complaint about the reunification of spouses, the Committee stressed that neither geographical separation nor the absence of marriage could displace the protection afforded by Article 23.<sup>215</sup> This may provide support for donor siblings to assert that their geographical separation and separate parents do not preclude them from having a familial relationship. However, in finding against the complainant in *Ngambi v. France*, the HRC determined that even in the absence of geographical proximity, there “must first be a family bond to protect.”<sup>216</sup> It may be argued that siblings who have been separated—for example, due to separate foster care or adoption placements—do not have this bond and accordingly can be denied the protection afforded to family. However, such siblings may be distinguished from the reasoning in *Ngambi v. France* because of their shared genetics which, even in the absence of time spent together, may be sufficient to constitute a “family bond.” This argument applies equally to twins born as a result of surrogacy arrangements. However, this conclusion may be undermined by the HRC’s previous view that there must be indicia of “minimal requirements for the existence of family.”<sup>217</sup> The Committee gave examples of such requirements, including a “life together, economic ties, [and] a regular and intense relationship.”<sup>218</sup> However, the requirements were only *suggestions* and were followed by “etc.” Thus, the list provided by the HRC in this 1994 decision, was non-exhaustive and arguably does not preclude a biological bond satisfying the “minimum requirements” for the existence of family.

However, the HRC has, on another occasion, found that the absence of a shared relationship was enough to negate family protection.<sup>219</sup> In the 1981 case of *A.S. v. Canada*, the HRC found that Article 23 could

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214. Hum. Rts. Comm., Decision on Communication No. 1179/2003, annex, ¶ 6.4, U.N. Doc. CCPR/C/81/D/1179/2003 (Jul. 16, 2004) [hereinafter *Ngambi v. France*].

215. *Id.*

216. *Id.*

217. Hum. Rts. Comm., Views on Communication No. 417/1990, annex, ¶ 10.2, U.N. Doc. CCPR/C/51/D/417/1990 (Jul. 27, 1994) [hereinafter *Balaguer Santacana v. Spain*].

218. *Id.*

219. See Hum. Rts. Comm., Decision on Communication No: 68/1980 (Mar. 30, 1981), reprinted in HUM. RTS. COMM., SELECTED DECISIONS UNDER THE OPTIONAL PROTOCOL (SECOND TO SIXTEENTH SESSIONS), at 27, ¶ 8.2, U.N. Doc. CCPR/C/OP/1, U.N. Sales No. E.84.XIV.2 (1985) [hereinafter *A.S. v. Canada*].

not be enlivened as the complainant only lived with her adopted daughter for a period of two years, seventeen years before the complaint was made.<sup>220</sup> Thus, the presence of a formal legal link or a blood relationship may be insufficient to invoke the protection of Article 23 of the ICCPR, without the individuals concerned having lived together as a family for an extended period.<sup>221</sup>

The jurisprudence of the HRC makes it difficult to conceptualize how the ICCPR can be used to protect non-traditional sibling relationships in the absence of an established “family bond.” However, it is likely that siblings who do have an established relationship are entitled to have their relationship protected under both Articles 17 and 23 of the ICCPR. This means that half-siblings, step-siblings, and adopted siblings who have grown up in the same household are likely to be entitled to some protection. However, donor siblings and other siblings who have been separated as children are unlikely to qualify for this protection.

Saul, Kinley, and Mowbray suggest that this approach risks penalizing families whose separation occurred through no fault of their own.<sup>222</sup> And indeed, this condemns many of these excluded siblings to a vicious cycle where they are not entitled to protection because they cannot assert a family bond but are unable to develop a family bond in the absence of protection. Cases between siblings can and should be distinguished on the basis that children are generally not the decision-makers of their fate and cannot choose whether or not to have relationships with their siblings. International human rights law should not deny these siblings the protection that would have been afforded to them but for the decisions made by others that led to their separation.

If a right of siblings to have a relationship with each other was recognized, it would likely attract the same measure of protection afforded to other family members, such as the relationship between spouses and between parents and children. Family disintegration and family separation have both been recognized as issues under Article 23 of the ICCPR<sup>223</sup> and are vital to any examination of sibling rights. Accordingly, to comply with the ICCPR, State Parties must have domestic laws that seek to prevent the separation of siblings and include obligations to reunite siblings where separation has taken place.

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220. *Id.*

221. Ben Saul et al., *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* 732, 732 (2015).

222. *Id.*

223. Hum. Rts. Comm., *supra* note 203, ¶¶ 8–9.

### C. *The ICESCR*

Article 10(1) of the ICESCR provides protection to families, which may extend to sibling relationships. In addition, Article 12 provides the right to health, which may have some implications for sibling relationships.

#### 1. Family Rights

Article 10(1) of the ICESCR provides that:

The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.<sup>224</sup>

The Committee on Economic, Social, and Cultural Rights (CESCR), the treaty body that oversees the ICESCR, has not published a General Comment on Article 10. However, the overlap between Article 10 of the ICESCR and Article 23(1) of the ICCPR means that the jurisprudence and practices relating to that provision are helpful in interpreting Article 10(1) of the ICESCR. Thus, it can be confidently argued that the ICESCR provision relating to family has the same meaning as in the ICCPR and affords similar protection.

#### 2. The Right to Health

The right to health may have some relevance for donor-sibling relationships. Article 12(1) of the ICESCR provides that “[t]he States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”<sup>225</sup>

Pinero argues that the right to access health-related information requires a ban on donor anonymity.<sup>226</sup> She asserts this on the basis of the following guidance provided by the CESCR in its 2000 General Comment on the right to health:

The Committee interprets the right to health, as defined in article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants

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224. ICESCR, *supra* note 2, art. 10, ¶ 1.

225. *Id.* art. 12, ¶ 1.

226. See Verónica B. Piñero, This Is Not Baby Talk: Canadian International Human Rights Obligations Regarding the Rights to Health, Identity and Family Relations, in *THE RIGHT TO KNOW ONE’S ORIGINS: ASSISTED HUMAN REPRODUCTION AND THE BEST INTERESTS OF CHILDREN*, *supra* note 118, at 251, 257.

of health, such as . . . access to health-related education and information . . .

....

. . . Health facilities, goods and services have to be accessible to everyone without discrimination, within the jurisdiction of the State party. . . .

....

. . . [A]ccessibility includes the right to seek, receive and impart information and ideas concerning health issues.<sup>227</sup>

Pinero asserts that the CESCR's guidance means that children born from sperm and/or egg donations have a right to access information about their donors following insemination.<sup>228</sup> For example, it may be that an egg donor is diagnosed with breast cancer after her egg donation, meaning that this information will not appear in her donor file. In such a case, a female child must be given information about this latent health risk to allow her to access timely and appropriate health care.<sup>229</sup>

While there is potential for this right to extend to donor siblings by implication (since donor siblings may have relevant health information for each other), this is a less direct means of protection and fails to recognize the often mutual desire of donor siblings to have a relationship (in contrast with donors who may prefer anonymity). The protection that Article 12 of the ICESCR offers is narrow, as it is limited to health-related information, as opposed to protecting the relationship in its entirety and allowing for contact.

### 3. Conclusion—International Human Rights Law

The analysis of the three most relevant international human rights treaties demonstrates that the CRC is likely to provide some protection to all siblings, pursuant to the best interests principle (Article 3) and the right to identity (Article 8). However, this is inferior to the protection provided by the ICCPR and ICESCR for two reasons. First, the CRC is only applicable to children, thus precluding adult siblings from protection, which is particularly problematic if they become aware of the existence or identity of their siblings

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227. Comm. on Econ., Soc., & Cultural Rts., General Comment No. 14 (2000): The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), ¶¶ 11–12, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) (footnotes omitted).

228. See Verónica B. Piñero, Canadian International Human Rights Obligations in the Context of Assisted Human Reproduction, 46 CAN. Y.B. INT'L L. 193, 194 (2009).

229. *Id.* at 197–200.

later in life. Second, the best interests principle is not a clearly stated protection for siblings, and its indirect application to this issue leaves too much scope for legislators and decision-makers to circumvent this protection and make laws which are arguably not in the best interests of children. Attempting to invoke the right to an identity to protect sibling relationships attracts the same issues and may also impose a more restrictive definition of siblings.

Further, while the right to family under the CRC, ICCPR, and ICESCR is likely to protect traditional sibling relationships, it is unlikely to protect relationships between siblings who do not already know each other and share a bond. This precludes donor siblings and siblings who have been separated, for example, due to foster placements, adoption, or twins separated at birth. Without being defined as family, these siblings are unable to be able to access the protection afforded to families.

To the extent that the right to family protects siblings under the CRC, the obligation of State Parties is twofold: to prevent separation and to actively take steps to reunite separated siblings.<sup>230</sup> As no treaty committee has yet received any individual complaints relating to sibling relationships, it is difficult to definitively determine the precise scope of protection that would be afforded to them under the ICCPR and ICESCR and whether any protection would be equal to that afforded to the relationship between spouses and parents and their children.

### III. THE WAY FORWARD

There is an unacceptable level of uncertainty regarding the extent to which sibling relationships are recognized and protected by international human rights law. It appears that donor-sibling relationships and siblings who do not have an existing relationship with each other may struggle to have their sibling relationships recognized and protected. To remedy this uncertainty and ensure that all persons enjoy equal rights to a relationship with their siblings, there is a need for clarification of how international human rights law recognizes and protects these important relationships.

Contemporary sibling relationships come in forms not contemplated by the drafters of last century's international human rights treaties. However, it is vital that international human rights law is interpreted "in a dynamic manner and with present-day conditions in mind."<sup>231</sup>

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230. See LORBACH, *supra* note 139, at 91.

231. DOEK, *supra* note 163, at 13.

### A. *Publication of a General Comment*

Protecting the rights of siblings in new and emerging forms of relationships would be enhanced by the development of a General Comment that elaborates and clarifies the relationship rights of diverse forms of siblings. The publication of such a General Comment would not be an unprecedented action. For example, the CESCR published a General Comment in 2015, which specifically highlighted the “inextricabl[e]” relationship between a right to water, the substantive right to an adequate standard of living (Article 11), and the right to the highest attainable standard of health (Article 12).<sup>232</sup> Similarly, the CRC Committee published a General Comment in 2005, which clarified the actions that States must take to meet their obligations under the CRC:

In order to pay full respect to the obligation of States under article 9 of the Convention to ensure that a child shall not be separated from his or her parents against their will, all efforts should be made to return an unaccompanied or separated child to his or her parents except where further separation is necessary for the best interests of the child, taking full account of the right of the child to express his or her views (art. 12).<sup>233</sup>

Treaty bodies could similarly highlight the inextricable relationship between the family unit and sibling relationships, as well as the obligation of State Parties to maintain sibling relationships and meet their obligations under the respective treaties.

It is not necessary that each treaty committee draft its own General Comment. On the contrary, there is a growing trend for treaty bodies to collaboratively develop joint General Comments. This form of cooperation is seen in the General Comment on eradicating harmful practices against women and girls (such as female genital mutilation) published jointly by CRC Committee and the Committee on the Elimination of Discrimination against Women in 2014.<sup>234</sup> As noted above, the CRC Committee has also published joint General Comments with the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families.<sup>235</sup>

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232. Comm. on Econ., Soc. and Cultural Rts., General Comment No. 15 (2002): The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), ¶ 3, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003).

233. Comm. on the Rts. of the Child, General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, ¶ 81, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005).

234. Comm. on the Elimination of Discrimination Against Women & Comm. on the Rts. of the Child, *supra* note 10, at ¶¶ 6–9.

235. *See, e.g.*, Comm. on the Prot. of the Rts. of All Migrant Workers & Members of

Both of the HRC's General Comments on family rights<sup>236</sup> are now more than thirty years old and should be revisited, given that in contemporary times it is questionable whether it is appropriate to give State Parties broad scope to define families. As Tobin notes, “[t]his is because in many jurisdictions, new and evolving family structures which result from de facto relationships, divorce and/or separation, single parenting, or same sex relationships are not always recognized and respected within a state.”<sup>237</sup> Accordingly, it is timely for the HRC to develop a replacement General Comments on Articles 17 and 23 which address the evolution in families—including siblings—in the last three decades.

There are two key elements that any General Comment addressing sibling rights should include:

1. a broad definition of “sibling”; and
2. the nature and extent of the right of siblings to a relationship with each other.

When developing such a General Comment, the relevant treaty bodies should begin by publishing a concept note which outlines the scope and objective of the General Comment.<sup>238</sup> This should be followed by broad consultation, including with children and siblings who were separated, to ensure that the global community has an opportunity to provide input into the General Comment.

### 1. Definition of Siblings

A broad definition of siblings is necessary in order to ensure it is inclusive of the many and diverse forms of sibling relationships. Such a definition could be similar to the one proposed earlier in this Article, namely:

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Their Fams. & Comm. on the Rts. of the Child, Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the General Principles Regarding the Human Rights of Children in the Context of International Migration, U.N. Doc. CMW/C/GC/3-CRC/C/GC/22 (Nov. 16, 2017); Comm. on the Prot. of the Rts. of All Migrant Workers & Members of Their Fams. & Comm. on the Rts. of the Child, *supra* note 10.

236. Hum. Rts. Comm., *supra* note 206; Hum. Rts. Comm., *supra* note 203.

237. John Tobin & Sarah M. Field, *Article 16: The Right to Protection of Privacy, Family, Home, Correspondence, Honour and Reputation*, in *THE UN CONVENTION ON THE RIGHTS OF THE CHILD: A COMMENTARY*, *supra* note 157, at 550, 576.

238. See, e.g., Comm. on the Rts. of the Child, Concept Note: General Comment on Children's Rights and the Environment with a Special Focus on Climate Change, <https://www.ohchr.org/en/treaty-bodies/crc/concept-note-general-comment-childrens-rights-and-environment-special-focus-climate-change> [<https://perma.cc/PH63-SN88>].

“Sibling” means individuals who are related by:

- i. the presence of a shared biological origin by virtue of a shared biological parent or shared sperm or egg donor; or
- ii. the presence of a shared parent or parental figure;<sup>239</sup> or
- iii. the marriage or de facto relationship of the parents of two or more individuals.

Adopting a broad definition of siblings is consistent with the adoption of a broad definition of family beyond the nuclear family.<sup>240</sup> The General Comment should stress that a sibling relationship is sufficient to warrant the protection afforded to families in circumstances where siblings have been separated as children as a result of decisions made by their parents, carers, or the State.

The drafters of last century’s treaties could not have foreseen the evolution of non-nuclear families and the medical advances that allow genetically related children to be born into entirely separate and unrelated families. However, it is clear that the intention of these human rights treaties was to protect the rights of all children and families, without discrimination.<sup>241</sup> Although donor-sibling relationships are not universally recognized across the international community, they are nonetheless children whose relationships deserve the equal protection of the law.

## 2. The Nature and Extent of the Right of Siblings to a Relationship with Each Other

A new General Comment should identify each of the Articles within the relevant international treaties that provide protection to siblings and explain the precise nature and extent of the rights. For example, the General Comment should explain how family rights should be interpreted broadly to recognize the right of siblings to have a relationship with each other that is separate and distinct from other family relationships, such as the parent-child relationship and relationships between spouses. Such a provision would be strengthened by identifying the extensive body of research that emphasizes the importance of sibling relationships and the vital role they play in a child’s development and life trajectory.

A General Comment should also explain that State Parties are required to have mechanisms in place to ensure that the protection of

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239. See U.S. Citizenship and Immigr. Servs., *supra* note 25.

240. Comm. on the Rts. of the Child, General Comment No. 7 (2005): Implementing Rights in Early Childhood, ¶ 15, U.N. Doc. CRC/C/GC/7/Rev.1 (Sept. 20, 2006); Hum. Rts. Comm., *supra* note 206, at ¶ 5.

241. See NOWAK, *supra* note 201, at 516.



sibling relationships under international law is enforceable. These actions and mechanisms are necessary to ensure that siblings continue to have access to each other and maintain a relationship even when they are separated. This means that in cases where children are being placed in foster care or where siblings are the subject of custody agreements, the default position should be that they are not separated. That is, there should be a positive obligation on States to keep siblings together where it is in their best interests to do so.

The General Comment should also specify that if siblings are separated, State Parties must promote and maintain sibling contact. At its highest level, such contact includes visitation. Where this is not possible, contact may include phone calls, Facetime, social media connections, and generally sharing what is going on in each of their lives. This is equally applicable to donor-conceived children who want to know and connect with their donor siblings. This may require State Parties to establish a registry for siblings to be able to reach out to each other.<sup>242</sup> State-based registries may be preferable to existing registries (such as the U.S.-based DSR) which handle sensitive personal information, but are unregulated. It is important that the General Comment clearly notes a presumption to maintain sibling relationships and prevent separation. This is important to protect sibling relationships notwithstanding the views of parents, guardians, or carers.

Similarly, for adult siblings, protection of a sibling relationship ought to mean facilitating a means of contact for consenting adults, perhaps in the same way that families are reunited following displacement during conflict.

#### IV. CONCLUSION

The social sciences recognize the importance of sibling relationships and the value that such relationships can provide to both children and adults. It is time that international human rights law catch up to the social sciences by explicitly recognizing and protecting these formative relationships, in all their varied forms.

In the past, protecting the relationship between a parent and child often provided consequential protection to sibling relationships. However, with the increasing shift away from nuclear families,

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242. See, e.g., *Apply to the Voluntary Register*, VICTORIAN ASSISTED REPROD. TREATMENT AUTH., <https://www.varta.org.au/donor-conception-register-services/apply-voluntary-register> [<https://perma.cc/N8UU-S7LH>] (listing “donor siblings” among donors, donor-conceived adults, parents, relatives, and descendants as those the Voluntary Register allows to be connected).

medical advances in assisted fertility treatment, and the proliferation of varied forms of sibling relationships, this is no longer the case.

The bond between siblings is too important to not be explicitly recognized by human rights law. The CRC, ICCPR, and ICESCR all recognize the importance of family rights, but are all silent when it comes to recognizing the rights of siblings to enjoy a relationship with each other, independent of any relationship between a parent and child. A General Comment, developed jointly by all three treaty committees, is the most appropriate way forward, given the importance of recognizing the right of siblings to stay together, reunite if they are separated, and identify and connect with each other in the case of genetically related siblings raised in different families.