Care without Status: Intended Mothers in the ECtHR's Surrogacy Jurisprudence

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Abstract

This article examines the surrogacy jurisprudence of the European Court of Human Rights regarding intended motherhood through a feminist anti-stereotyping lens. It argues that gestation and birth remain the normative basis of legal motherhood, while non-gestational maternal claims lack equivalent constitutive force. It further considers the limited force of reproductive intention and intended mothers' subjection to both regulatory and normative scrutiny. The article's main contribution lies in showing how apparently neutral legal reasoning concerning recognition may reproduce gendered hierarchies. Finally, it introduces "care without status" and develops "derivative motherhood" to explain, respectively, the gap between maternal practice and legal status and the mediated structure through which intended motherhood becomes legally recognized.

Keywords: surrogacy; intended mother; ECtHR; stereotypes; derivative motherhood.

[A] INTRODUCTION

Surrogacy is a valuable method of family formation, whereby a woman (surrogate)[1] gestates and gives birth to a child on behalf of someone else, the intended parents (IPs) (Horsey & Ors 2025: 1). Restrictive regulation in many European states drives their citizens abroad to seek international surrogacy (Storrow 2018). This creates complex legal and immigration hurdles for IPs, ranging from travel restrictions and child separation risks to the common refusal of home countries to recognize foreign legal parenthood (Iliadou 2025a: 342). The families involved have increasingly turned to the European Court of Human Rights (ECtHR) to address whether denying the recognition of this parent–child relationship

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[1] Trans men or non-binary people can also be surrogates, but the term "woman" is used here to mirror the terminology of the ECtHR jurisprudence and domestic laws on legal parenthood discussed in this article.

violates the right to respect for private and family life under Article 8 of the European Convention on Human Rights (ECHR).

A substantial body of scholarship has examined the ECtHR case law on cross-border surrogacy in relation to the recognition of legal parenthood (Tryfonidou 2024; Iliadou 2025a), children's rights to identity and the application of the best interests principle (Bracken 2017; Mulligan 2018), the significance of genetic connection (Tesfaye 2022) and the scope of states' discretion concerning the means and timing of recognition (Bracken 2024; Iliadou 2025b). Scholarship has also exposed the gendered consequences of the Court's approach, including the different significance attributed to genetics and gestation for intended fathers and mothers and the mediated character of intended mothers' claims to recognition (Margaria 2020; Levy 2022; Margaria 2024b).[2] This article builds upon these insights by examining the ECtHR's construction of intended motherhood through the lens of gender stereotyping.[3] It asks what assumptions about authentic and legitimate motherhood are embedded in the Court's surrogacy jurisprudence and how those assumptions shape the recognition of intended mothers under Article 8.

The article argues that the Court's approach is anchored in the normative assumption, which is deeply informed by gender stereotypes about maternal identity, that equates gestation and birth with authentic, legally cognizable motherhood, which in turn produces a recurring disjunction between maternal practice and maternal legal status. Caregiving and established mother–child relationships may be acknowledged, while the intended mother's legal status remains contingent on genetic connection, the child's interests, the genetic father's position and domestic routes to recognition. By introducing the concept of "care without status" to capture this pattern, the article demonstrates how apparently neutral reasoning concerning parenthood and Article 8 may reflect and reproduce gendered assumptions about authentic motherhood, while making the intended mother's legal identity conditional upon the rights, status and

[2] This article deliberately focuses on intended mothers who identify as women in order to examine the distinct gender scripts and essentialist assumptions attached to female reproduction and maternal identity. Using the term "mother" to describe an intended mother prior to legal recognition acknowledges her reproductive agency and caregiving role, underscoring the very gap between social reality and legal status explored in this article.

[3] This article forms part of a broader examination of gender stereotyping in the ECtHR's surrogacy jurisprudence. A related forthcoming chapter applies feminist critical discourse analysis to the Court's construction of surrogates, identifying biological essentialism and the "natural" mother, vulnerability and passivity, and the apparent neutrality through which such stereotypes remain unchallenged: see Iliadou (forthcoming).

cooperation of others, thereby foregrounding the mediated character of intended motherhood.

The concept of "derivative motherhood", developed later in the article, is situated within broader debates concerning derivative parenthood (Black 2014; Strauss 2025) and builds on Alice Margaria's observation that the 2019 *Advisory Opinion* (P16-2018-001) constructs motherhood as "a derivative of fatherhood" (Margaria 2020: 424). As used here, the term does not denote moral, social or *de facto* inferiority. Instead, it captures the conditional legal validation of an intended maternal relationship whose practical existence does not itself determine legal status.

The article's original contribution lies in bringing a feminist anti-stereotyping lens to the ECtHR's treatment of intended mothers. It uses this lens as an interpretive method to identify underlying assumptions about women and motherhood, including how particular understandings of motherhood are rendered natural or self-evident, and to consider whether apparently neutral legal reasoning concerning recognition may also operate as a site of normative scrutiny. Building on scholarship that has identified the gendered asymmetry between intended mothers and fathers and the mediated character of intended motherhood, the article shifts attention to the stereotyping processes through which those outcomes are produced and sustained. This approach enables the article to examine how the gestational construction of motherhood structures the legal treatment of non-gestational maternal claims. In doing so, it develops "care without status" to conceptualize the disjunction between maternal practice and legal recognition, while "derivative motherhood" captures the structure through which that recognition is secured.

The article is structured as follows. First, it briefly establishes the framework developed by the ECtHR for recognizing intended mothers as the legal mothers of their surrogate-born children. It then explores how gender stereotypes concerning motherhood operate through and sustain this framework. Finally, it conceptually synthesizes these findings by characterizing the resulting form of recognition as "derivative motherhood" and the accompanying disjunction between maternal practice and legal status as "care without status". Overall, it argues that the treatment of intended mothers cannot be solely understood as a problem of parenthood recognition but must also be understood as a gendered process through which some forms of motherhood become legally self-evident while others remain conditional upon external validation.

[B] THE ECtHR FRAMEWORK FOR RECOGNIZING INTENDED MOTHERS

The ECtHR has not recognized a standalone right of an intended mother to legal parenthood over a surrogate-born child. Rather, the framework for recognition has emerged incrementally from the child's Article 8 right to respect for private life, initially through cases concerning genetic intended fathers and subsequently extended to intended mothers. The resulting framework distinguishes between the state's obligation to ensure legal recognition of parenthood and the means by which it may be secured, while attaching particular importance to genetic connection, the child's best interests and the particular familial configuration of the family concerned. This section briefly reconstructs that framework to the extent that it is relevant to the position of intended mothers.

The starting point for the recognition of a parent–child relationship following a surrogacy arrangement is *Mennesson v France* (2014), where the Court considered France's refusal to recognize the legal parenthood established in the United States of America. Although the Court found no violation of the IPs' rights, it held that legal parenthood formed part of the children's identity and, because Mr Mennesson was also their genetic father, the impossibility of having that relationship recognized under French law exceeded the state's margin of appreciation and constituted a violation of the children's private life (*Mennesson* 2014: paragraphs 96-100). The judgment established a core principle: where an intended father is genetically related to a surrogate-born child, the child's right to respect for private life requires domestic law to provide a possibility of legally recognizing that relationship (Iliadou 2025a: 345-346). It was observed that the harm concerned the children's "right to development of their personal identity", encompassing both nationality and genetic identity (Mulligan 2018: 459).

However, *Mennesson* did not resolve the position of the intended mother, who was not genetically related to the children. In its 2019 *Advisory Opinion* (P16-2018-001), the Grand Chamber extended the recognition principle to the non-genetic intended mother but under a particular configuration. It held that, where a child has a genetic link with the intended father and the intended mother is designated as the legal mother in the foreign birth certificate, the child's right to respect for private life requires domestic law to provide a mechanism for recognizing a legal parent–child relationship with the intended mother (*Advisory Opinion* P16-2018-001 2019: paragraph 46). The Court again relied on the child's right to private life rather than the intended mother's rights

(Bracken 2021: 7). This principle was subsequently extended to a non-genetic intended father in *DB and Others v Switzerland* (2022), which concerned a male same-sex couple where the other intended father was genetically related to the child. Thus, the emerging principle was broader than the particular maternal configuration considered in the Advisory Opinion, establishing that, where an intended father is genetically related to the child, Article 8 requires the possibility of recognizing the other IP even in the absence of genetic relatedness (Iliadou 2025a: 345-348).

The Court has also considered the position of an intended mother who is herself genetically related to the child. In *D v France* (2020), both IPs were genetically related to the child and the Court confirmed that the child's right to respect for private life required the possibility of recognizing the legal parent–child relationship with the genetic intended mother (paragraph 54). The Court has not yet considered a cross-border surrogacy case in which the intended mother is genetically related to the child but there is no genetic intended father, leaving unresolved whether maternal genetic relatedness alone would trigger the same obligation (Iliadou 2025a: 355-356). As the framework has developed gradually, there is no comprehensive solution to every form of parenthood arising from surrogacy (Tryfonidou 2024: 162). However, in a case involving two intended mothers who both lacked a genetic tie with the child, the Court accepted that foster-care arrangements were sufficient to preserve their family life and did not require recognition of legal parenthood (V*aldís Fjölnisdóttir and Others v Iceland* 2021: paragraphs 56-76; Bracken 2024: 154-155). Importantly, the child's private life was not examined separately, departing from the Court's previous approach and suggesting that, rather than assessing the child's best interests more holistically, the Court places principal emphasis on genetic identity, with genetic relatedness treated as especially worthy of legal recognition.

Furthermore, the ECtHR surrogacy case law reveals a double limitation for intended mothers: first, the continuing significance of genetic relatedness and, second, the possibility that legal motherhood may depend on the legal position and cooperation of the genetic intended father. The latter occurred in *AM v Norway* (2022), where, following the breakdown of their relationship, the genetic intended father, whose legal parenthood was readily recognized by the authorities, refused to consent to the child's adoption by the non-genetic intended mother. Adoption was her only pathway to legal recognition. However, the Court found no violation of the intended mother's rights, because, among other factors, it considered the requirement of a legal parent's consent to adoption to

be reasonable (*AM v Norway* 2022: paragraph 132).[4] This illustrates that legal parenthood for intended mothers is not only contingent on genetic relatedness but can also be at the mercy of the genetic intended father, even though they embarked together on this joint parental project.

Even when the Court requires legal parenthood to be recognized under the aforementioned configuration, it does not determine the means or timing through which recognition must be achieved. The Court does not prescribe a particular method of establishing legal parenthood and, while the margin of appreciation is narrow as to the need for recognition, states retain wider discretion as to its means (*C v Italy* 2023: paragraph 74). Recognition need not occur *ab initio*, and adoption may constitute an adequate mechanism, including for a genetically related intended mother, provided that legal parenthood is established "promptly and effectively" and, at the latest, when the parent–child relationship has become a "practical reality" (*Advisory Opinion* 2019: paragraphs 51-55; Iliadou 2025b: 200-202). In *D v France*, this discretion resulted in different routes to recognition for the genetically related IPs, where the father had been recognized through partial transcription of the foreign birth certificate, while the mother was required to adopt, a differential treatment acknowledged by the Court but not examined on its merits so that there was no violation (*D v France* 2020: paragraphs 59-64; Levy 2022: 149-151). Subsequent case law has clarified that Article 8 may be violated both where recognition is generally (*in abstracto*) impossible and where, despite a mechanism existing in principle, there is no real means for the particular IP to establish legal parenthood (*KK and Others v Denmark* 2022: paragraphs 70-76; Iliadou 2025a: 346). This development has also raised concerns about the creation of a two-tier adoption system, as IPs may effectively bypass ordinary domestic adoption criteria where no alternative pathway to legal recognition exists for children born through cross-border surrogacy (Bracken 2024: 152-153).

Following from the above, for the purposes of this article, four features of the framework are particularly significant. First, the legal recognition of intended motherhood has developed principally through the child's right to respect for private life rather than through a clearly articulated autonomous entitlement of the intended mother. Second, genetics remains central to determining when Strasbourg will require recognition, although the precise significance of maternal genetic relatedness remains

[4] It is worth noting that the child was not a party to the proceedings. As Margaria observes, this meant that the intended mother could not benefit from the central position accorded to the child's interests in the Court's previous surrogacy case law, while the genetic intended father had also terminated contact between the intended mother and the child (Margaria 2024b: 191-194).

unsettled. Third, even where recognition is required, states retain discretion over its means and timing, with adoption occupying a central role and recognition capable of following rather than preceding the development of the relationship in practice. Finally, the strength of the recognition obligation varies according to the legal and relational configuration in which the intended mother is situated, including the legal position and cooperation of the genetic intended father. These features provide the doctrinal basis for examining the gendered assumptions that shape what constitutes motherhood and when it becomes legally cognizable, and whether apparently neutral criteria governing the recognition of intended motherhood may also operate as a site of normative scrutiny.

[C] ECtHR AND GENDER STEREOTYPES

Having established the ECtHR framework for recognizing intended mothers as legal mothers, this section turns to the assumptions about motherhood that shape the conditions under which intended motherhood becomes legally cognizable, and examines how these assumptions may reflect or reproduce gender stereotypes. These assumptions are key, as they help sustain the distinctions drawn between forms of motherhood readily recognized in law and maternal relationships that may be acknowledged in practice while remaining legally unrecognized, delayed or conditional. The analysis undertaken focuses on selected ECtHR surrogacy cases—*Paradiso and Campanelli v Italy* (2017), the 2019 *Advisory Opinion*, *D v France* (2020), *Valdís* (2021), *AM* (2022) and *KK* (2022)—chosen because of their particular relevance to the construction and recognition of intended motherhood.

The analysis adopts a feminist anti-stereotyping approach. Alexandra Timmer understands stereotypes as widely shared beliefs about the characteristics of particular groups which are both a cause and a manifestation of structural disadvantage and discrimination, with gender stereotypes being particularly significant because they make gendered identities and roles appear natural, universal or self-evident, thereby obscuring their character as cultural phenomena and helping to sustain existing relations of disadvantage and inequality (Timmer 2011). In this context, gender stereotypes may operate through assumptions that treat particular characteristics or roles as naturally constitutive of maternal identity. Timmer proposes a two-stage analysis involving the "naming" and "contesting" of harmful stereotypes, aimed at identifying their role in particular cases and challenging their operation within legal reasoning (Timmer 2011: 718-719). However, the present section uses anti-stereotyping analysis as an interpretive lens through which to

examine the assumptions about motherhood embedded within the ECtHR framework examined above, rather than reproducing Timmer's Article 14 methodology in full. In particular, it asks whether apparently neutral criteria governing recognition reproduce gendered understandings of motherhood. The analysis also draws on Fleur van Leeuwen's critical feminist reading of ECtHR jurisprudence, particularly her use of "asking the woman question"[5] to explore "absences, silence, difference, oppression and the power of epistemology" in legal texts (van Leeuwen 2024: 155). Building on this approach, the present analysis asks what characteristics make motherhood appear legally self-evident, what assumptions shape the legal significance attributed to gestation, genetics, intention and care, and how those assumptions structure the Court's understanding of intended motherhood.

To achieve this, the analysis proceeds from the central organizing assumption that gestation and birth operate as the normative basis of motherhood against which non-gestational maternal claims are assessed. It first examines how that assumption operates within the Court's jurisprudence, including through the different legal significance attributed to genetic connection. It then considers two consequences of this framework: i) the limited constitutive force accorded to reproductive intention; and ii) the additional scrutiny to which non-gestational maternal claims may be subjected through apparently neutral legal reasoning concerning recognition and regulation.

Gestation, birth and the normative mother

The central organizing assumption of the Court's approach to intended mothers concerns the continuing association between motherhood, gestation and birth. This association is not created by the ECtHR's surrogacy jurisprudence. Rather, the Court encounters intended motherhood against domestic legal frameworks in which the woman who gives birth is ordinarily treated as the legal mother. For example, in *KK*, the Court noted that under Danish law the "woman giving birth to a child is always deemed to be the mother of the child and as such a legal parent of the child", even where the egg comes from another woman, a rule subsequently described as the "fundamental principle in Danish law on motherhood" (*KK* 2022: paragraphs 27-29). A similar statutory approach was endorsed in *Valdís*, where the Court accepted that the domestic interpretation that "only the woman who gave birth to a child following artificial fertilisation could be considered its mother" was "neither

[5] This method was developed in feminist legal scholarship by Bartlett (1990: 837-849).

arbitrary nor manifestly unreasonable" (*Valdís* 2021: paragraph 64). Thus, the birth-based attribution of motherhood enters the Court's reasoning as the existing legal baseline rather than as a premise itself requiring examination. Yet, through an anti-stereotyping lens, it raises the question of why gestation and birth render motherhood legally self-evident, while other bases for maternal identity do not.

Existing scholarship has already demonstrated the resilience of this association. Margaria observes that the legal definition of motherhood is still anchored in gestation and birth, endorsed by European supranational courts, making the persistent "conflation of gestation and motherhood" a central and largely uncontested assumption in the regulation of parenthood (Margaria 2024b: 182, 204). She further contrasts the relative immutability of *mater semper certa est*[6] with the greater contextual flexibility that has characterized the determination of legal fatherhood (Margaria 2024b: 182, 196-197), a contrast explored in greater detail later in this article. Therefore, rather than the Court creating a gestational definition of motherhood, its surrogacy jurisprudence operates within a legal framework in which gestation continues to function as the paradigmatic marker through which motherhood becomes immediately intelligible and legally cognizable.

From an anti-stereotyping perspective, this matters because stereotypes need not take the form of express statements about what women or mothers are. They may also operate through categories that appear natural or self-evident. The association between giving birth and being a mother can perform precisely this function. The woman who gives birth does not ordinarily have to establish why gestation should constitute motherhood, as the connection itself supplies the answer. Gestation, birth and maternal status are treated as conceptually continuous. This reflects an underlying assumption that equates womanhood with motherhood and, in turn, treats motherhood as the product of biological reproduction (Arendell 2000: 1192-1193). However, far from reflecting an immutable biological fact, *mater semper certa est* functions as "normative dogma" (Milanich 2017: 24), reinforcing a rigid model of "parental dimorphism" that ties legal motherhood primarily to gestation (McCandless & Sheldon 2010: 188; Margaria 2024a: 230-231).

Surrogacy disrupts this self-evidence and continuity by separating functions that historically tended to coincide within one person (Ragoné 1996: 353). The woman who gestates may not provide the genetic material,

[6] This is the Roman law maxim that means "the mother is always certain". For a discussion of its adequacy on surrogacy, see D'Alton-Harrison (2014).

may never have intended to parent the child and may not subsequently undertake any maternal role. Conversely, the intended mother may have initiated the reproductive project, may be genetically related to the child and may assume the social and caregiving role from birth without having gestated. However, surrogacy does not simply reveal that there are competing claims to parenthood, but it exposes the extent to which the intelligibility of motherhood has traditionally depended upon the assumed alignment of gestation, birth and maternal identity.

The different legal significance attributed to genetic relatedness makes this particularly visible. Genetics has played a central role in the Court's protection of intended fatherhood. Yet *D v France* (2020) demonstrates that maternal genetics does not necessarily perform the same legal function. Although the intended mother was genetically related to the child, the Court accepted that France could require her to establish the maternal relationship through adoption rather than through registration of the foreign birth certificate. This produced a significant asymmetry in the treatment of genetic motherhood and fatherhood, where the genetic intended mother was required to undergo an additional process of adoption despite being in the same genetic position in relation to the child as the intended father (Levy 2022: 169-170). Given that the applicants framed their complaints around the child's rights and had not properly raised a discrimination complaint concerning the intended mother's own rights, the Court did not determine the question of sex discrimination on its merits (*D v France 2020*: paragraphs 61, 81-82); *D* should, therefore, not be read as an express judicial endorsement of differential treatment. Nevertheless, the "genetic essentialism" underpinning the Court's post-*Mennesson* jurisprudence operates unevenly, because genetic relatedness can secure direct legal recognition for genetic intended fathers, while adoption is deemed a sufficient route to recognition for genetic intended mothers (Levy 2022: 169-170). Therefore, the case reveals that genetic connection does not displace the distinctive legal significance attributed to gestation in the construction of motherhood in the same way that genetics may ground intended fatherhood.

It should be clarified that this article does not suggest that genetic connection should itself determine legal parenthood. Genetic essentialism (Levy 2022) may itself operate as a naturalizing logic, treating genetic relatedness as an apparently self-evident basis of parental identity (Hargreaves 2006: 269), which obscures what has been termed as the complex "choreography" of biological and social dimensions of kinship (Wheatley 2019: 137, citing Carsten 2004). Therefore, this article does not privilege genetics over gestation, intention or caregiving. Genetic

connection is used comparatively here to demonstrate the resilience of the gestational model and the differential legal significance attributed to genetic motherhood and fatherhood.

In essence, the Court's case law on surrogacy demonstrates that the same form of genetic connection carries different legal significance. Paternal biology is principally expressed through genetic connection, whereas maternal biology remains legally intertwined with pregnancy and birth (Margaria 2024b: 196-197). This is what makes the intended mother's position particularly precarious, because even where she shares the genetic connection that strongly supports intended fatherhood, she does not necessarily occupy an equivalent legal position. This asymmetry is visible in *D v France*, where the recognition of the genetic intended mother is subjected to a domestic adoption process that can be costly and protracted and inherently involves state scrutiny of her fitness to become the legal mother of a child who is already genetically hers (Levy 2022: 171-172).

Read through the anti-stereotyping framework, the surrogacy case law consequently reflects a conception of motherhood in which gestation and birth remain the conventional reference point for understanding who a mother is. Even though the Court enables the possibility of non-gestational motherhood, as seen above, intended motherhood enters a legal framework already organized around a different, embodied model of motherhood. This gestational model constructs the normative mother and proves resilient even in the presence of genetic relatedness. Under the Court's essentialist approach, genetic connection provides a powerful basis to vindicate intended fatherhood, but for intended mothers it does not secure equivalent direct legal recognition. This imbalance matters because, as Timmer explains, stereotypes operate precisely by making gendered identities and roles appear natural and self-evident, thereby obscuring the assumptions on which they rest (Timmer 2011: 714-715). The assumption here is that genuine maternal identity naturally flows from gestation and birth, a premise that reinforces the cultural hierarchy that privileges gestational over non-gestational maternal claims and treats the latter as highly contingent (Johnson 2017: 1350-1358) and potentially subject to additional state scrutiny (Levy 2022: 171-172). Therefore, the anti-stereotyping concern is that gestation and birth may operate as an apparently self-evident paradigm of motherhood against which non-gestational intended motherhood is treated as a secondary deviation requiring special justification and scrutiny.

Reproductive autonomy and the boundaries of legitimate motherhood

Having established that motherhood becomes legally intelligible through gestation and birth as the paradigmatic markers of normative motherhood, resilient to genetic connection (which is otherwise central to fatherhood), the analysis turns to the consequences of that premise in relation to the legal significance attributed to reproductive intention. When motherhood is created deliberately outside this gestational model, intention precedes and explains the creation of the intended maternal relationship. The question, thus, becomes: what legal weight is accorded to the intended mother's reproductive choice and intention to parent in legally recognizing the mother–child relationship?

Reproductive autonomy denotes the capacity to make meaningful decisions about whether and how to procreate and to have those decisions accorded appropriate legal respect (Robertson 1994; Jackson 2001). The Court has long located such decision-making within Article 8 as part of private life which encompasses the right to respect for decisions both to become and not to become a parent (*Evans v the United Kingdom* 2007: paragraph 71), while "the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose" is a choice that constitutes an expression of private and family life (*SH and Others v Austria* 2011: paragraph 82). Conceptually, grounding parenthood in intention is closely connected to reproductive autonomy insofar as it gives legal significance to deliberate reproductive choice and individual agency in procreation and parenting (Shultz 1990). From this perspective, an intended mother's deliberate initiation of and participation in a surrogacy arrangement provides a strong basis for her intention to carry legal significance in determining maternal status.

Yet, the ECtHR surrogacy case law demonstrates that intention does not operate as an independent basis for legal motherhood. This is clearly visible in the 2019 *Advisory Opinion*, where the Court held that domestic law need not recognize the legal mother–child relationship *ab initio* but recognition must be possible "at the latest" when the relationship has become a "practical reality" (paragraphs 52-54). Since both the mechanism and criteria for recognition remain within the state's margin of appreciation, there is "no guarantee that the intended mother will be recognised as the legal mother", with domestic authorities retaining the ultimate decision-making authority over that status (Bracken 2021: 12). This structure suggests that, although reproductive intention explains the origin of the intended maternal relationship, it does not itself perform the

constitutive legal work of establishing maternal status. Legal motherhood may eventually be established, but only once other conditions render that relationship legally cognizable rather than because the woman intended from the outset to become the child's mother.

AM (2022) makes the limited constitutive force of maternal intention particularly apparent. The applicant had participated in the surrogacy arrangement with the genetic intended father and subsequently, albeit for a short period of time, acted as a mother to the child. The Court expressly acknowledged that she had "acted as a mother" with the intention of continuing to do so and that emotional bonds had been forged between them (*AM* 2022: paragraph 108). Nevertheless, adoption required the legal father's consent, which he refused after the relationship between the IPs had broken down. The Court recognized that the resulting situation was "particularly harsh" and that the intended father had effectively brought the applicant's parental project to an end but, nonetheless, concluded that the domestic authorities had adequately examined the competing interests and found no violation of Article 8 (*AM* 2022: paragraph 133). The combination of the father's unilateral decision and the passage of time ultimately prevailed despite the applicant's original intention and subsequent maternal relationship with the child (Margaria 2024b: 191-193).

AM exposed how, under the particular configuration, female reproductive autonomy became subordinate to the position of the genetic intended father. Even though the judgment does not articulate such a finding, this was the practical outcome, shaped by domestic adoption law, the child's best interests and the procedural circumstances of the case. In addition, the case demonstrates how little independent legal force is accorded to reproductive intention when intended motherhood is not already anchored in the conventional gestational model. The intended mother's decision to become a parent, her participation in creating the parental project and even her subsequent performance of the maternal role could not independently establish maternal status. Furthermore, although intention was central to the surrogacy project for both IPs, the intended mother's lack of genetic connection meant that recognition of her parenthood eventually depended on the genetic father's consent, creating a significant power imbalance between the two IPs (Iliadou 2025a: 356). Judge Jelić warned in dissent that such an imbalance of power could enable one IP to make life-changing decisions affecting the other IP's parenthood and could be misused in order to abuse the other IP (*AM* 2022: Dissenting Opinion of Judge Jelić, paragraphs 44-46).

This difference acquires a gendered significance when situated within the broader regulation of parenthood. Margaria observes that, more generally, legal fatherhood has developed in a comparatively context-sensitive manner, allowing genetics and, in some circumstances, intention to operate as legitimate bases for paternal status, whereas the determination of motherhood remains considerably less flexible, arguably leading men's intention to parent (or even not to parent) to be taken more seriously than women's reproductive intention (Margaria 2024b). Paternity was historically unverifiable at birth, which is why fatherhood was mediated through presumptions and marriage (Meulders-Klein 1990). As genetic testing became increasingly reliable, genetics increasingly supplemented and, in many contexts, displaced or rebutted the marital presumption as the primary basis for establishing legal fatherhood (NeJaime 2017: 2276-2279). Assisted reproduction, however, revealed that genetics itself was not indispensable and, in sperm donation, legal fatherhood may attach to the consenting prospective father rather than the sperm donor, allowing intention to displace genetic connection (Margaria 2024b: 197). The legal accommodation of sperm donation expanded fatherhood's non-biological capacity, while legal motherhood remained substantially grounded in biological connection (NeJaime 2017: 2290-2293).

This disparity exposes a gendered asymmetry in the legal authority accorded to reproductive autonomy and intention when viewed through an anti-stereotyping lens. The evolution of legal fatherhood has been flexible and responsive to societal and technological developments, as intention can establish paternal status without biological connection in sperm donation, while in the ECtHR's surrogacy jurisprudence an intended father's parental project receives legal recognition when reinforced by genetic connection, as illustrated by *Mennesson*. In contrast, maternal reproductive intention is not accorded equivalent constitutive force. Whether an intended mother combines intention with genetic connection, as in *D v France*, or with the actual performance of the maternal role,[7] as in *AM v Norway*, her reproductive intention does not establish maternal status but remains dependent on further legal validation, including through adoption, fitness scrutiny and the genetic father's consent. This asymmetry risks reproducing the gendered assumption that motherhood follows naturally from gestation and birth, rather than being a parental status that may also be constituted through deliberate reproductive agency.

[7] The significance of care and the performance of maternal practice for intended motherhood is considered in detail in section [D] below, particularly through the concept of "care without status".

Normative scrutiny and the apparent neutrality of legal reasoning

The analysis so far has shown that intended motherhood enters the ECtHR's surrogacy jurisprudence from a position already outside the conventional gestational paradigm through which motherhood is rendered legally cognizable. Gestation and birth remain the normative reference points for maternal status, while reproductive intention does not constitute motherhood in their absence. A further layer of complexity arises from the cross-border character of the Court's surrogacy cases, where IPs who reside in surrogacy-restrictive jurisdictions travel abroad to pursue surrogacy arrangements legally available elsewhere. In such cases, the intended mother's claim to recognition engages questions of public policy and circumvention, adding an additional layer of legal scrutiny. The question for an anti-stereotyping analysis is whether that formally regulatory scrutiny also becomes a site of normative evaluation, through which assumptions about legitimate motherhood, reproductive motivation and parental conduct enter the apparently neutral legal reasoning.

Key to this second consequence of treating gestation and birth as the normative basis of motherhood is that non-gestational maternal claims are subjected to heightened scrutiny that involves unexamined moral assumptions and institutional suspicion. Feminist family law scholarship has long exposed how legal systems actively construct "proper" motherhood and exercise surveillance and control over women who depart from dominant maternal scripts (Diduck 1993). The idea of "reproductive governance" is also useful here, because it examines how legislative controls, moral injunctions and other institutional mechanisms operate to produce, monitor and control reproductive behaviour (Morgan & Roberts 2012: 241-243). Assisted reproductive technologies generate anxieties precisely when their uses and users depart from conventional understandings of gender, motherhood and the family, while discourse and regulation operate to distinguish socially legitimate from "illegitimate" reproductive practices (Michelle 2006: 109-113). Surrogacy and intended motherhood are particularly disruptive in this respect because legal questions concerning recognition and regulatory circumvention arise alongside departures from conventional assumptions about how genetic, gestational and social relationships should translate into legal parenthood.

The manner in which reproductive autonomy and agency are socially and legally narrated also matters (Michelle 2006: 111). These narratives operate under the "common assumption that all women want to

become mothers", with cultural imagery connecting motherhood with "normality" (Donath & Ors 2022: 2). Still, reproductive desire itself is not represented neutrally. Popular representations of infertility have historically constructed women with fertility problems through narratives of "desperation", "anguish" and "suffering", framing the desire for motherhood as an intense and compelling imperative (Franklin 1990). At the same time, new reproductive technologies destabilize conventional understandings of parenthood and the "natural", but they also bring reproduction increasingly within the terrain of legal and public control (Franklin 1990: 200-201). When a woman steps outside approved social and gestational scripts, the same desire that was culturally praised is reframed as selfish, unnatural, or deviant (Teman 2008: 1105). This tension is particularly significant for intended mothers, because their reproductive project separates motherhood from conventional gestational and social scripts; hence, their reproductive intention acquires an ambivalent character, which produces a particular paradox.

The paradox in question is that the same reproductive intention that lacks sufficient constitutive force to establish her as a legal mother, as demonstrated above, may become legally salient in ways that support the state's regulatory response. While the gestational mother's legal status is treated as self-evident and requires no justification, IPs who disrupt dominant kinship norms face a form of "reproductive accounting" (Smietana & Twine 2022: 325-326), requiring them to account to the wider society for their decision to undertake surrogacy. Here, the intended mother is compelled to explain, justify and formally account for her route to reproduction through additional recognition procedures, including adoption and the associated state scrutiny. Crucially, this reproductive intention was realized through an arrangement pursued in a jurisdiction where surrogacy is lawful. The anti-stereotyping question is, therefore, whether apparently neutral doctrinal categories,[8] such as public policy (*ordre public*), circumvention of domestic laws and adoption, respond merely to a conflict with the home state's regulatory framework (ie regulatory scrutiny), or whether they function as disciplinary mechanisms that carry assumptions about intended mothers whose maternal claims depart from the normative gestational model (ie normative scrutiny).

Paradiso and Campanelli v Italy (2017) provides the clearest illustration of this dynamic. The applicants had travelled to Russia to pursue a

[8] This concern can be understood through what Gatti and Evolvi describe as "apparent rationality" and a "screen of neutrality", whereby judicial reasoning may present itself as technically objective while dominant social values remain embedded in the subtext rather than being articulated expressly (Gatti & Evolvi 2024: 798-799).

surrogacy arrangement despite surrogacy being prohibited in Italy and, although they had previously been declared suitable for inter-country adoption, had not followed the procedures required under Italian adoption law. The domestic courts treated this not only as a circumvention of domestic regulation, but as revealing something about the applicants themselves, "in particular [about] Mrs Paradiso", who had undergone treatment that had reportedly placed her life at risk and had, nevertheless, chosen surrogacy rather than the authorized adoption route. From this, the domestic court expressed concern that the child might serve to fulfil a "narcissistic desire" of the applicants or to "exorcise an individual or joint problem", and considered that the IPs' conduct cast doubt on their "genuine affective and educational abilities" and "instinct of human solidarity" (*Paradiso* 2017: paragraphs 37, 207). The domestic courts also attached significance to Mrs Paradiso's having spread a rumour that she was pregnant and having implied that she was the child's "natural" mother, treating these acts as part of a wider attempt to conceal the circumstances of the child's birth and circumvent Italian law (*Paradiso* 2017: paragraph 44).

The Strasbourg Court did not originate these characterizations, but neither did it distance itself from them. It reproduced the domestic court's concerns and accepted that the authorities were entitled to attach weight to the applicants' deliberate circumvention of Italian law and to the state's interest in preventing an unlawful situation from continuing (*Paradiso* 2017: paragraphs 207-215). The dissenting judges expressly criticized what they described as the majority's "accommodating reference" to the domestic court's suggestion that the applicants were fulfilling a "narcissistic desire" and to its doubts concerning their affective and educational abilities. The majority's stance matters, however, as "the ECtHR sets standards in human rights law both within and beyond Europe and presents an important construction site for rights narratives, including reproductive rights narratives" (Oja & Yamin 2016: 63).

An anti-stereotyping viewpoint reveals how regulatory scrutiny becomes intertwined with judgments about reproductive motivation and maternal legitimacy. Pregnancy and "natural" motherhood form part of the normative vocabulary through which Mrs Paradiso's claim is assessed, while circumvention of domestic law becomes a basis for questioning not only the route to parenthood but also the applicants' qualities as prospective parents. Thus, the reproductive project is subjected to moral scrutiny (Michelle 2006). The apparent neutrality of the reasoning lies precisely here: the doctrinal language of illegality and circumvention is formally detached from gender, yet its application permits judgments

about reproductive motivation, maternal authenticity and parental worth to enter the analysis without those underlying assumptions about motherhood themselves being examined. Persistence in becoming a parent, rather than being understood solely as an exercise of reproductive autonomy, becomes capable of being read as narcissistic, excessive or suspect. The gendered dimension is particularly striking in the emphasis placed on Mrs Paradiso's willingness to endure repeated and medically risky fertility treatment. Within a cultural framework in which women are expected to desire motherhood, and in which infertility has historically been narrated through "desperation", "anguish" and "suffering" (Franklin 1990), narratives that might ordinarily elicit sympathy, her determination to become a mother becomes part of the evidential basis upon which that desire may be construed as excessive or pathological. Therefore, the three issues examined above converge here: first, gestation renders conventional motherhood legally self-evident; second, reproductive intention lacks equivalent constitutive force; and, third, when legal recognition is sought, that intention may become subject not only to regulatory scrutiny but also to normative scrutiny through apparently neutral legal reasoning. The resulting disjunction between maternal practice and legal status is developed in the following section through the concepts of "care without status" and "derivative motherhood".

[D] CARE WITHOUT STATUS AND DERIVATIVE MOTHERHOOD

Section [C] demonstrated why intended motherhood remains legally precarious. This section turns to the consequence of that precarity once maternal relationships are lived in practice. The ECtHR's surrogacy jurisprudence reveals a recurring disjunction between maternal practice and maternal legal status, as an intended mother may initiate the reproductive project, assume day-to-day care and be socially situated as the child's mother, while lacking corresponding legal maternal status. This article conceptualizes that condition as "care without status". A related question then arises as to the structure through which legal motherhood is eventually recognized. Where recognition is granted, it may depend upon mediated and conditional pathways external to the intended mother's own intention or maternal practice. This article captures that structure through the concept of "derivative motherhood".

"Care without status" identifies the disjunction between the lived performance of motherhood and its formal legal recognition, where "status" denotes legal parenthood and not other forms of accommodation

of care. Rather than suggesting that caregiving should, by itself, determine legal parenthood, the term captures the more specific position in which maternal intention, care and an established relationship with the child are visible to the authorities, yet they remain insufficient to constitute maternal legal status. The distinction is important because, in some cases, the ECtHR, far from ignoring the intended mother's maternal role, expressly acknowledges it, but what remains uncertain is the legal force attached to it.

Valdís (2021) provides the clearest illustration of this problem. Neither intended mother was genetically related to the child and Iceland refused to recognize them as the child's legal parents. Yet the authorities placed the child in their foster care and, after their subsequent divorce, arrangements were maintained under which the child alternated between the two women while retaining access to each (paragraphs 12, 60). The Strasbourg Court accordingly accepted that "family life" existed among the applicants, notwithstanding the absence of legal parenthood (paragraphs 61-62), and attached weight to the measures taken by the state to preserve that family life (paragraphs 71-75).

Valdís illuminates precisely this coexistence of recognition and non-recognition. The intended mothers were sufficiently maternal for their relationships with the child to constitute protected family life and for the state to organize the child's continuing care around them, but not sufficiently maternal for either woman to acquire the corresponding legal status of mother. Hence, the case demonstrates that the function of maternal practice (here, caregiving) can be acknowledged and legally accommodated without being translated into maternal status, which remains without recognition. It is this condition that the concept of "care without status" seeks to capture.

The same disjunction is visible, albeit in a different form, in *KK* (2022). The intended mother had lived with and cared for the twins since their arrival in Denmark, but Danish law did not recognize her as their legal mother. She was nevertheless granted joint custody with the genetic father (paragraph 8), and the Strasbourg Court accepted that the applicants were able to enjoy family life together without practical obstacles (paragraphs 49-51). The precarity, therefore, did not consist in the absence of all recognition of her caregiving role, but in the absence of a legal parent–child relationship corresponding to that role. When Danish law made step-parent adoption unavailable because remuneration had been paid to the surrogate, the intended mother remained a caregiver with joint custody but without maternal legal status (paragraphs 11, 14-15). The

Court ultimately found a violation only of the children's right to respect for their private life, concluding that the available legal arrangements did not sufficiently compensate for the impossibility of establishing a legal parent–child relationship with the intended mother (paragraphs 70-77). The case, therefore, illustrates not only "care without status", but also the mediated structure of recognition developed below through the concept of "derivative motherhood".

At its outer boundary, the gap between maternal practice and maternal status may also render the caregiving relationship vulnerable to termination. In *Paradiso* (2017), the child was removed from the IPs and all contact ceased. Despite Mrs Paradiso having provided uninterrupted, maternal care to the infant "to the highest standards" for eight months (paragraphs 25, 106), the Grand Chamber found no violation regarding the child's emergency removal and placement for adoption. By prioritizing the need to bring an "unlawful situation" to an end, the Court permitted the complete dismantling of a functional, care-based maternal bond due to the absence of genetic ties, the brief duration of cohabitation and the "legal uncertainty created by the applicants themselves" (Iliadou 2019: 148). In *AM* (2022), examined in more detail above, the same precarity appeared in a different form: the intended mother's inability to secure legal status left the continuation of her maternal relationship vulnerable to the genetic father's refusal to consent to adoption.

The distinction between functional parenthood and formal legal parenthood is well established in family law scholarship, particularly in debates concerning functional, *de facto* and intentional parenthood, with some scholars advocating functional or intention-based approaches (Storrow 2002) and others questioning the suitability of functional approaches as a basis for determining legal parenthood (Baker 2017). "Care without status", however, captures a narrower phenomenon within the ECtHR's surrogacy jurisprudence, where the intended mother's maternal practice may be legally visible, acknowledged and even protected while remaining insufficient to constitute the corresponding legal status of mother. This sits uneasily with the Court's broader understanding and protection of *de facto* family ties (Iliadou 2019: 146-148). An anti-stereotyping perspective exposes a significant gendered tension. Within dominant heterosexual family ideology, intensive mothering is culturally prescribed as a gendered expectation, portraying the good mother as child-centred, devoted and self-sacrificing (Arendell 2000: 1194).[9] Yet, within the Court's surrogacy reasoning, that very same labour does not

[9] On the "good" versus "bad" mother trope in surrogacy, see Abrams (2015: 180-183).

carry equivalent constitutive force. The legal order readily accepts the intended mother's lived caregiving but refuses to let that labour generate independent maternal status.

In this respect, "care without status" identifies a form of structural marginalization that may be obscured by apparently neutral legal terminology. As demonstrated in *Valdís* and *KK*, mechanisms such as foster care and joint custody can operate as partial substitutes for legal parenthood. They regulate and preserve the functional caregiving relationship without themselves constituting the intended mother as the child's legal mother. Lived maternal practice is thereby decoupled from maternal legal identity. By treating care as legally relevant but insufficient on its own terms to constitute motherhood, the Court's reasoning risks reinforcing the hierarchy identified in section [C], in which gestational motherhood remains legally self-evident while non-gestational motherhood requires additional validation. This raises the further question of how legal recognition is secured when it is ultimately granted, which is addressed next through the concept of derivative motherhood.

If "care without status" captures the disjunction between the function of motherhood and its legal status, "derivative motherhood" describes the structure through which that status becomes legally cognizable. The concept builds on broader scholarship concerning derivative parenthood that has been employed in different senses. Lynda Wray Black uses "derivative parentage" to identify a chronologically secondary route to parenthood, expressly clarifying that the term denotes neither moral nor *de facto* inferiority (Black 2014: 832, footnote 192). Gregg Strauss nevertheless rejects Black's distinction between "primary" and "derivative" parentage because it risks suggesting that genetics itself generates moral parentage, arguing instead that genetic connection gives rise only to a liberty to pursue parenthood, with parentage ultimately grounded through caregiving (Strauss 2025: 80, footnote 101). These competing formulations demonstrate that "derivative" may refer either to the temporal route through which parenthood is acquired or, alternatively, to the legal basis upon which parental status is recognized.

In the ECtHR surrogacy context, Margaria observes more specifically that the 2019 *Advisory Opinion* constructs motherhood as "a derivative of fatherhood", because the intended mother's route to recognition is mediated through the prior recognition of the genetic father (Margaria 2020: 424). This formulation draws attention both to the temporal sequencing and to the conditionality of recognition, since the intended mother's status becomes legally cognizable through an already recognized parental

relationship that precedes and partly structures the legal validation of her own claim, rather than through an autonomous maternal entitlement.

Building on these accounts, this article uses "derivative motherhood" to describe a particular structure of legal recognition affecting intended mothers in surrogacy. The term does not convey an inferior form of maternal identity, nor does it suggest that intention, care or genetics should themselves operate as absolute grounds of maternal status. Rather, it identifies a legal structure in which the intended mother's status is assessed and secured through rights and legal positions already recognized in others, principally the child and the genetic father, without her own maternal relationship and Article 8 interests themselves providing an autonomous basis for maternal status. This also distinguishes derivative motherhood from a broader relational understanding of family life and parenthood, in which interdependence and connection are central. As Jonathan Herring notes, "[p]eople do not understand their family lives as involving clashes of individual rights or interests, but rather as a working through of relationships" (Herring 2014: 20). Derivation, however, involves a specific form of legal dependency. In the present context, it captures a particular asymmetry in the legal construction of motherhood, where gestational motherhood operates as an originating status, whereas intended motherhood is required to pass through additional forms of legal authentication.

The mediating structures identified previously through the ECtHR surrogacy case law demonstrate that, first and foremost, intended motherhood is mediated through the child's own right to private life, rather than through the intended mother's autonomous rights (eg *Mennesson* 2014; *KK* 2022). Second, it is mediated through the legal position and consent of the genetic intended father, where his genetic relatedness becomes the anchor for her legal status, rendering it ancillary (eg 2019 *Advisory Opinion*; *AM* 2022). Finally, intended motherhood may be mediated through domestic adoption, which subjects the intended mother to additional legal scrutiny rather than treating reproductive intention or lived caregiving as independently constitutive of maternal status, a requirement that persists even where she shares a genetic link with the child (*D v France* 2020). Genetic connection operates somewhat differently, as it is an additional criterion affecting the strength and route of recognition, but does not itself eliminate the need for legal validation. These mediating factors reveal that intended motherhood acquires legal force through additional sources of validation external to the intended mother's own intention and maternal practice.

Naming this structure as "derivative motherhood" brings into view a recurring form of legal dependency that may otherwise remain obscured by discrete and apparently neutral rules concerning genetics, children's rights, adoption and domestic recognition. It thereby enables scrutiny of why intended motherhood, unlike gestational motherhood, repeatedly requires an additional source of legal validation.

The importance of this structure becomes clearer when contrasted with the conventional legal construction of parenthood. Fatherhood has historically been the mediated status (Margaria 2020: 424), whereby, as explained earlier, marriage and presumptions connected a man to a child through his relationship with the woman who gave birth, while motherhood followed directly from gestation and birth. In the surrogacy jurisprudence examined here, that conventional direction of derivation is partially reversed. Genetic fatherhood may operate as the originating legal relationship, while the intended mother's status becomes mediated through the father–child relationship and other forms of legal validation (Margaria 2020: 424). Derivative motherhood, therefore, describes not merely a delayed route to recognition, but a reordering of the conventional architecture of parenthood in which the status traditionally treated as immediate becomes the status requiring mediation.

Taken together, "care without status" and "derivative motherhood" reveal a form of motherhood whose legal recognition is conditional and mediated. The intended mother may be central to the reproductive project and to the child's lived family life, yet neither intention nor maternal practice independently generates legal status. "Derivative motherhood" captures this structure of dependency through which recognition is secured, while "care without status" captures the disjunction between performing motherhood and possessing maternal legal status. Ultimately, the concepts expose a form of intended motherhood that may be socially real and emotionally established, while remaining legally contingent.

[E] CONCLUSION

This article has examined the ECtHR's surrogacy jurisprudence on intended motherhood through an anti-stereotyping lens. Its central argument is that, in Strasbourg's surrogacy case law, gestation and birth continue to operate as the paradigmatic basis through which motherhood becomes legally self-evident, while non-gestational maternal claims, including those supported by genetic connection, require additional justification. As a consequence of that, reproductive intention does not carry equivalent constitutive force for intended mothers. Neither

reproductive intention nor the subsequent performance of the maternal role independently establishes maternal status. Another consequence flowing from the rigid gestational model is that, where intended motherhood seeks legal recognition, reproductive intention may re-enter legal reasoning not as a basis for parenthood, but through concerns about circumvention, legitimacy and reproductive conduct, leading to a double regulatory and normative scrutiny. Taken together, the above demonstrate that the ECtHR's apparently neutral framework for recognition operates within, and may reproduce, gendered assumptions concerning the conditions under which motherhood becomes legally intelligible.

The consequences of this framework have been conceptualized through "care without status" and "derivative motherhood". "Care without status" captures the disjunction between maternal practice and maternal legal status, whereby an intended mother may initiate the reproductive project, care for the child and establish a socially and emotionally meaningful maternal relationship without acquiring corresponding legal maternal status. "Derivative motherhood", in turn, identifies the structure through which recognition becomes legally cognizable, as intended motherhood is mediated through additional sources of validation, including the child's Article 8 interests, the legal position of the genetic intended father and domestic mechanisms such as adoption. Naming this structure makes visible a recurring form of legal dependency that may otherwise appear as a series of discrete and apparently neutral rules. Together, the two concepts expose how the Court's surrogacy jurisprudence not only regulates parenthood recognition but also helps determine which forms of motherhood are treated as legally self-evident and which remain conditional upon external validation.

About the author

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