

Case Report

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Requirement of Consent to DNA Testing: A case for Reform in Nigeria

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Abstract

The requirement of consent is a sine qua non to Deoxyribonucleic Acid (DNA) testing generally. It is in the main premised on the need to uphold the right to privacy as well as the right to bodily self determination. The importance of DNA testing cannot be over emphasized as its use over the years has metamorphosed. With advancing technology, its use as a means of procuring evidence to establish paternity of a child, resolving some immigration issues, solving crime or indeed any other form of research has however been hindered by the requirement of consent. In Nigeria, there are increasing cases of absconding fathers who avoid parental responsibility by denying paternity and refusing DNA testing. This calls to question the issue of the child's right to information about his or her parentage for whatever reason may be advanced and the 'Parent's' right to privacy and bodily self determination exercised by withholding consent to DNA testing. This paper weighs the contrasting rights vis a vis the principle of "Best interest of a Child" enshrined in the Nigerian Child's Right Act and concludes that it has become imperative in Nigeria to enact legislation compelling any or all parties involved in such a scenario or any other to subject themselves to mandatory DNA testing in protection of the child and finally suggests reform in the form of a proposed bill for consideration by either the Edo State House of Assembly or the Nigerian National Assembly.***

Key Words: DNA Testing, Child Rights, Parentage, Bill

Introduction

The family is the smallest unit of society and comprises of a father, mother and child or children as the case may be. This unit, small as it may be, plays a major role in the development of an individual and in determining the kind of person he/she becomes in the future or indeed as an adult. Where an individual lacks information regarding such background or is misled regarding such information it may cause some psychological issues. Sometimes, a man is deceived into thinking that a child born by his wife and raised by him is his and the child is deceived into thinking a man who raises him is his/her biological father and knowledge that the reverse is the case can be devastating. The woman cannot be deceived however except in the rare case of a child being switched at birth or cases of egg donations hence in the main, there are more paternity suits while maternity suits though possible are almost none existent. In such situations of deception be it intentional or inadvertent, one of the most genuine ways to determine paternity, maternity or indeed

parentage is by DNA testing. This testing can only be done upon the consent of the parties involved as it cannot be achieved without breaching the bodily self determination and right to privacy of the individuals involved.

This article examines the requirement of consent to DNA testing and circumstances under which it may be necessary to mandate consent in the interest of a child. It is divided into four parts. The first deals with the introduction and setting for this paper. The second part examines the nature of Deoxyribonucleic Acid (DNA) testing, its uses, the issue of consent and issues antecedent to the requirement of consent in the Nigerian society. The third part discusses the concept of 'Best Interest of a child' in particular within the purview of the Child's Right Act and advances reasons why reform is necessary. The fourth part proffers recommendations in the form of legislative enactment/bill which could cure the lacuna and concludes the article.

DNA testing and the Issue of Consent

Deoxyribonucleic Acid (DNA) testing¹ was first described by two scientists namely Francis H. C. Crick and James D. Watson in 1953². These Scientists were the ones who identified the double-helix structure of DNA, which resembles a twisted ladder, and established the role of DNA as the material that makes up the genetic code of living organisms. Sometime later in the 80s DNA profiling, as it is often called today was developed from two independent breakthroughs in molecular biology that occurred at about the same time on different sides of the Atlantic. In the USA, the polymerase chain reaction (PCR) was invented by Kary Mullis, while in the UK 'DNA fingerprinting' was being discovered by Professor Sir Alec Jeffreys at the University of Leicester³.

Originally DNA profiling was developed as a method of determining paternity⁴. To do this, samples which had been taken under clinical circumstances were examined for genetic evidence that could link a parent to a child. However it soon became a valuable tool for investigation and use in the courts when some time in 1986 the Police in England asked Professor Alec Jeffreys who was investigating the use of DNA for forensics to verify the confession of a seventeen year old boy in two rape- murders in the English Midlands. The tests not only proved that the teenager was not the perpetrator of the crime but it pin pointed Colin Pitchfork as the perpetrator, secured his conviction and led to the first mass screening project for DNA profiling in the world⁵.

In the United States of America, the first DNA-based conviction occurred in 1987 shortly after the successful conviction of Colin Pitchfork. In the case of *Andrews v. State*⁶, the Circuit Court in Orange County, Florida, convicted Tommy Lee Andrews of rape after DNA tests matched his DNA from a blood sample with that of semen traces found in a rape victim⁷. Since then the use of DNA Profiling has metamorphosed from just parentage testing to include criminal investigation, and identification. Despite this metamorphosis, there is no gainsaying the fact that its use for parentage testing is still invaluable.

Parentage Testing as the name implies refers to 'testing conducted to confirm or deny the biological parentage of a particular child or person⁸. This testing may be done via blood group or DNA analysis. Parentage testing could be paternal or maternal ie paternity testing or maternity testing however the most common form is the paternity testing. This is because the maternity of a child is usually obvious from the gestation or pregnancy and birth except for special circumstances for example, where a child has been separated from its mother, switched at birth or where maternity is at issue in the context of an immigration application, then a maternity test would be apt⁹.

In the western countries of the world the issue of parentage testing often arises in the case of donor sperm conceived children as well as adopted children. It has also been advocated by Children's Rights Movements to check "Child Identity Fraud" and Fathers Rights Movements to check "Paternity Fraud"¹⁰. Mothers as well as mothers-in-law who wish to protect their sons from being cuckolded into paying maintenance or child support for children that are not really theirs have joined their voices to advocate for parentage testing¹¹. In the Nigerian society however, similar as well as different scenarios exist for the need to explore the options

that DNA testing provides. For example, many men are known to have denied paternity of babies born by their female partners, leaving the women helpless; sometimes upon the death intestate of a deceased, different person(s) come forward claiming filial relationship and an entitlement to inherit from the deceased. Recognizing this trend as dangerous, the Lagos State House of Assembly deemed it fit to criminalize such action thus:

276. Desertion of Children

Any Person who being a parent, guardian or other person having the lawful care or charge of a child under the age of twelve years, and being unable to maintain such child, willfully and without lawful or reasonable cause deserts the child and leaves him without any means of support, is guilty of a misdemeanor and is liable to a fine of One Hundred Thousand Naira (N100, 000.00) without prejudice to the recovery of any cost any other person may have reasonably incurred with respect to the upkeep of the child

277. Desertion of Pregnant Woman or Girl

(1) Any person who impregnates a woman or girl and fails, refuses or neglects to contribute to maternity related costs from ante-natal to post-natal stages is guilty of an offence and is liable to a fine of Forty – Five Thousand Naira (N45,000.00) without prejudice to the recovery of any cost that any other person may have reasonably incurred in relation to the upkeep of the woman or girl

(2) For the purpose of this section, maternity related costs include all medical expenses, food expenses, reasonable shelter and other accessories.

(3) In determining the financial liability of a person under subsection(1) of this section, the court shall have regard to the means and sources available to him¹²

The National Assembly of the Federal republic of Nigeria also deemed it necessary to legislate thus:

16. (1) Any person who abandons a wife or husband, children or other dependant without any means of sustenance commits an offence and is liable on conviction to a term of imprisonment not exceeding three (3) years or to a fine not exceeding Five Hundred Thousand Naira (N500,000.00) or both¹³.

In the Nigerian society, children with no knowledge of their paternity are often forced to experience and endure certain disabilities for example, lack of finance and adequate care, a lack of personal identity etc. These disabilities are even more obvious because Nigeria is a patriarchal society. Where such children in a bid to fulfill their craving for an identity, request a DNA test from the alleged fathers, some men have been known to deny the wishes/needs of these children be they juveniles or adults by tacitly refusing consent to DNA testing.

The principle of informed consent to medical procedures is based in the main on the right to privacy and the right to bodily self determination and it developed largely from case law¹⁴. It developed from claims of patients against their physicians that the physicians did not acquire the proper authorization for the action which they took. For example, in *Mohr v. Williams*¹⁵, the physician obtained the patient's consent to perform surgery on her right ear. During the procedure, the surgeon realized that it was the patient's left ear that needed the surgical procedure and proceeded to operate on that ear. In an action against the Physician, the court determined that the surgeon had violated the terms of the informed consent,

stating that the patient “enters into a contract authorizing the physician to operate to the extent of the consent given, but no further.” While this case epitomizes the notion of autonomous authorization of medical procedures, it is worthy of note that it negates the paternalistic concept that the physician acts in the patient’s best interest¹⁶. Another view conceived from the angle of moral philosophy is focused on ensuring the patient’s right to make autonomous choices as the practical embodiment of respect for persons and for individual autonomy. Autonomy in this context includes notions of self-governance, liberty rights, and privacy. This moral framework upholds the patient’s right and ability to make choices that are consistent with his or her values and preferences to be the main rationale for informed consent¹⁷.

Mandating DNA testing in any scenario may therefore involve bypassing the consent of one or other of the parties to determine the truth of a quest. In the scenarios hitherto highlighted, doing so would amount to infringing on an individual’s right to privacy and bodily self determination but on the other hand, not doing so might amount to denying a child the right to an identity and information about his or her family origins. It would also amount to allowing an individual to benefit from his or her own wrong¹⁸. Mandating DNA testing therefore causes a conflict between the individual’s right to privacy also known as the right to anonymity and the child’s right to information or better yet, the necessity of disclosure.

Rights to Anonymity V. Necessity of Disclosure:

In the context of DNA testing to determine paternity, the issues have been broken into two namely, the right to anonymity and the necessity to disclose. The proponents of the right to anonymity in the western countries of the world are mainly anonymous sperm donors and parties in adoption situations. The advocates of this right maintain that in certain scenarios like the cases of anonymous sperm donations and adoptions, the party who has donated his sperm anonymously is entitled to his privacy and as such under no circumstances should his identity be revealed. This is usually the desire of the couple using the sperm for insemination as well as the party donating the sperm because the couple want to be able to exercise all the rights accruing to a parent in the case of a successful insemination and subsequent birth and the sperm donor haven being paid as is the case in some situations or even where otherwise wants to avoid the responsibility/obligation of being a parent. On the other hand, advocates of the necessity to disclose find support in the growing body of research, largely conducted in the adoption field, which maintains that knowledge of one’s genetic background is crucial to the development of a sense of identity or self¹⁹. The position that an individual’s genuine psychological need for information regarding his or her origins is very vital was recognized by the U.S. Supreme Court in the case of *Mills v. Atlantic City Dep’t. of Vital Statistics*²⁰. Also, in the case of *Johnson v The Superior Court of Los Angeles County, et al*²¹ the United States Supreme Court recognized that the United States Constitution protects privacy rights relating to marriage, procreation, contraception, motherhood, family relationships and child rearing²². The Court was however, unwilling to recognize a fundamental right to privacy regarding disclosure of personal information²³. Instead, the Court applied a mere rational basis test to determine wheth-

er the state’s interest in gathering or releasing private information outweighs any personal privacy interest in non-disclosure²⁴. Grossman and Inigo²⁵ opine that the Argentinean courts have held that there is a social duty to guarantee the child’s right to know his origins and that this is a fundamental right because it concerns personal duty and is central to any notion of personal freedom. While discussing the stance of a German constitutional court re-echoed the opinion of the court that the rationale upon which the right of information regarding an individual’s biological origins should be granted the individual is that “human dignity and the right to develop one’s personality demands that the individual should know what determines his individuality and parentage is a vital key to finding one’s individuality and self awareness”²⁶.

The Best Interest of the Child

According to Yvonne Dausab²⁷, best interest of a child simply means considering the child before a decision affecting his or her life is made and is an “overarching common law principle that has been used to assist primarily the courts and other institutions in the decisions in the decision making process.” The Children and Family Relationships Bill 2014 of Ireland defined best interests in the context of a child to include the physical, emotional, psychological, educational and social needs of the child including the child’s need for stability having regard to the child’s age and stage of development. It went ahead to set out the types of situations in which regard must be had to the ‘best interests’ principle²⁸.

Section 1 of the Child Rights Act²⁹ provides that “in every action concerning a child, whether undertaken by an individual, public or private body, institutions of service, court of law or administrative or legislative authority, the best interest of the child shall be the primary consideration.” This is a replica of the United Nations Convention on the Rights of the Child’s³⁰ requirement that member states to the convention observe the “best interests of the child as a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.” By art 43 (1) of the CRC, the United Nations Committee on the Rights of the child³¹ is empowered with the delicate task of monitoring the enforcement of the CRC.

Bearing in mind that the CRA is an adaptation of the CRC, it is necessary to consider the position of the CRC regarding the ‘Best Interest of The Child’ and the child’s right to knowledge of his or her origins. It is noteworthy that though Art 3 of the CRC directly makes the Child’s best interest a primary consideration for the welfare of the child; however none of the articles of the CRC specifically addresses or promotes the child’s right to knowledge of his or her origins³². However the Committee in exercise of its powers has interpreted Art 7 of the CRC as granting the child a right to the knowledge of his or her origins³³. The CRC however imposes limits on the right to know and be cared for by parents in cases where the information sought would be contrary to the child’s best interests³⁴. This limitation is seen in the use of the words “as far as possible” in articles 7 and 8 of the CRC. From the above it is clear that even though the right of a child to the knowledge of his/her origins is not expressly referred to in the CRC, the Committee has interpreted that right from content of other provisions of the CRC. Despite the willingness of countries to domesticate this convention

and incorporate this principle into their body of laws, the concept remains elusive, to the point that it is subject to competing interpretations. One thing however stands out and that is the fact that where there is a dispute relating to a child with contrary opinions as to what course of action is in the best interest of a child, the Courts remains the best resort and they help the State fulfil her role as *parens patrie* to the child by determining what course of action is in the best interest of a child.

In fulfilling this role, Courts and other institutions confronted with this responsibility need to ask themselves the following questions:

- Which specific interest is at issue?
- What is the nature of such interest?
- Is the interest of a long-, medium- or short-term duration?
- Are the criteria for determining such interest objective or are they based on the

Child's subjective wishes³⁵?

One case which exemplified the application of this rule and standards is the Johnson case cited anonymous sperm donor. After balancing all the rights and obligations, the court held in favour of removing the cloak of anonymity and enforcing the right of the child to knowledge of the biological father/medical history/records of the anonymous sperm donor as this indeed was in the best interest of the child Brittany.

It is noteworthy that the C.R.A provides for the use of scientific evidence under Part VII titled 'Provision for Use of Scientific Tests in Determining Paternity or Maternity'. The section provides that in any civil proceeding in which the paternity or maternity of a person is subject to determination, the court hearing the proceeding may on application by a party to the proceeding, give directions for:

- i. The use of scientific test including blood tests and DNA tests to ascertain whether the tests show that a party to the proceeding is or is not the father or mother of that person
- ii. For the taking within a period to be specified in that direction, of blood samples from that person, the mother of that person, the father of that person and any party alleged to be the father or mother of that person or from any two of those persons³⁶.

The above provision of the CRA without more interpreted literally grants the family court the power to give directions regarding the use of blood tests and or DNA testing to determine paternity and or maternity upon the application of a party with the requisite locus so to do. Even though the Act uses the term direction as against the words order/rule or judgment, the effect of the direction of the court is no less effective more so as subsection (1) b talks about the court giving directions about a specific time frame within which the tests should be taking³⁷. Section 66 provides for failure to comply with directions for taking scientific tests and subsection (1) states:

(1) Where the Court gives a direction under section 63 of this Act and a person fails to take any step required of him for the purpose of giving effect to the direction, the court may draw such inferences, if any, from the facts as appear proper in the circumstances. The purport of the above is that in circumstances of a case either disputing or alleging paternity or indeed maternity, upon a direction from the court to the effect that a party partake in a scientific test within a specific time frame, where the said party refuses to

comply with this direction, the court may infer a relationship or otherwise as the case may be and the presumption of legitimacy³⁸. The peculiar nature of child rights protection in Nigeria owing to its residual nature, gives states the exclusive responsibility and jurisdiction to make laws relevant to the specific situations. Thus State laws inimical to the rights of the child are expected to be amended or annulled as may be required, to conform to the Act and the CRC. Thus the C.R.A applies only to the Federal Capital territory and needs to be adopted by the states with or without amendments before it can apply to the state. This and the permissive nature of the word 'direction' as used in the C.R.A informs the need for this proposal.

The C.R.A³⁹ is silent on the rights of an adopted child to have information about his/her origin/ identity and or parentage. Where disputes arise regarding the child and in situations mentioned under Head 32(1) of the Children and Family Relationship Bill 2014 or like situations, the court is the final arbiter to resolve such disputes and this forms the basis of our proposal for a legislation mandating DNA testing as seen below.

The Bill

A Bill For An Act To Provide For Mandatory DNA Testing in the Best Interest of the Child and or Matters Connected There with- whereas, certain individuals procreate and birth children who they subsequently abandon and deny responsibility for, and Whereas, these children whether minors, teenagers or adults have been forced to experience and endure lots of disabilities as a result of their lack of identity and inability to trace their roots, therefore BE IT ENACTED by the National Assembly of the Federal Republic of Nigeria as follows:

Part I - Preliminary

1. This Act may be cited as the Mandatory Deoxyribonucleic Acid (DNA) Testing Bill, 2015.

2. This Act applies to the investigation of parentage by vulnerable persons and the procedure for mandating such a test.

2. For the purposes of this Act:

"alleged father" means any man identified by a vulnerable child or vulnerable mother as the biological parent of a child

"child" means a person desirous of investigating the circumstances of his or her birth irrespective of whether the person is a minor, under the age of eighteen years or an adult;

"court" means a Judge in Chambers;

"Custodian" means a person appointed under section –

"DNA" means deoxyribonucleic acid;

"DNA profile" means the results of forensic DNA analysis;

"father" means a recognized/identified biological male progenitor

"forensic DNA analysis" means the analysis of genetic material

"forensic DNA laboratory" means a place in which forensic DNA analysis is conducted;

"insufficient" in relation to a sample, means insufficient in respect of quantity for the purpose of enabling information to be produced by means of forensic DNA analysis used or to be used in relation to the DNA sample;

"intimate sample" means:

(a) a sample of venous blood;

(b) a urine sample;

(c) a sample of semen or other tissue fluid obtained by breaking

the skin;

(d) pubic hair;

(e) a dental impression; and

(f) a swab taken from:

(i) any part of a person's genitals;

(ii) a person's bodily orifice other than the mouth.

"Police officer" means an officer involved in the course of enforcing a mandatory order of court;

"non-intimate sample" means:

(a) a sample of hair other than pubic hair;

(b) a sample taken from a nail or from under a nail;

(c) a swab taken from any part of a person's body other than a part from which a swab taken would be an intimate sample;

(d) saliva; or

(e) skin impression;

"qualified person" means;

(a) a registered medical practitioner; or

(b) a dentist, where the sample is a dental impression.

"tester" means a person qualified to conduct forensic DNA analysis

"vulnerable child" means any child whether a minor, teenager or adult whose alleged father whether married to the mother or otherwise denies paternity of the child in question; more so when such denial constitutes a lack of identity and results in any form of disability or discrimination.

"vulnerable father" means any man foisted with the responsibility of raising a child under the guise of being the biological father; believing same to be as a result of his financial status, fame and or leadership position for the sole purpose of exploiting him

"vulnerable mother" means any mother believing her child to be the product of herself and an 'alleged father' who is stuck with sole responsibility for the vulnerable child because the biological father denies same.

Part 2 Offence

4. It shall be an offence for an alleged father not being an anonymous sperm donor to refuse to consent to a DNA test for the purpose of determining paternity of a vulnerable child;

5. Where an alleged father not being an anonymous sperm donor refuses to consent to a DNA test for the purpose of determining paternity of a vulnerable child, the alleged father shall be guilty of the offence 'Parentage avoidance'

6. The offence of 'Parentage avoidance' shall be a simple offence punishable with a maximum of three (3) months imprisonment or a fine not exceeding N500,00000 or both.

Part 3 Procedure For Mandating Consent

7. Where a vulnerable child, a vulnerable mother or a vulnerable father requests an alleged father or a child to take a DNA test and he/she refuses, the said vulnerable child or the vulnerable mother in the case of a minor child or the vulnerable father may apply to court for an order mandating the alleged father/child to comply with the said order

8. The application by the vulnerable child, vulnerable mother or vulnerable father shall be made by way of a motion on notice, supported by an affidavit stating the reasons for believing that the

alleged father is the biological father and, the disabilities suffered by the vulnerable child mother or vulnerable father as the case may be.

9. Upon receipt of the said application in subsection (8) above, the court shall consider the application on the preponderance of evidence and where there is a possibility of parentage, the court shall mandate the alleged party to comply with the said order.

Part 4 Procedure For Effecting The Order

10. Upon receipt of the mandatory order, the vulnerable party shall liaise with the bailiff of court to effect the said order. In effecting the said order, the bailiff shall comply with the procedure for effecting compliance with court orders as set forth in the sheriff and civil process act.

Part 5 Obtaining A Non-Intimate Sample On The Order Of The Court

11. - (1) A police officer is authorized to take a sample from a person under section 10

(2) A police officer shall notify a person from whom a non-intimate sample is to be taken under section 10

(a) of the reason for taking a sample; and

(b) that his DNA profile will be the subject of a comparison with that of the vulnerable party

12. Where the non intimate sample is either insufficient or unsuitable, the tester may request for an intimate sample.

13. Where an intimate sample is requested, same shall be collected by a qualified person.

13. The copy of the result of the Mandatory DNA test shall be submitted to the court at the end of the said procedure.

14. This Act shall come into effect on the 1st of January 2016

Conclusion

In dealing with the question as to whether or not DNA testing to establish parental relationships should be mandatory, the best interest of the child must be paramount. Where a child, (minor or adult) desires to establish his sense of identity/self, such should not be denied the child. An alleged father, the allegation of which has been found plausible on the preponderance of evidence, must subject himself to such testing. The requirement of the preponderance of evidence test will help weed away frivolous claims or claims made just to embarrass an 'alleged father.' This would help to bring some order into the process.

Mandatory DNA testing would also provide succour/respite for men who otherwise may be tricked and pressured into assuming responsibility for children whom they did not truly father. This would certainly help to check such occurrences.

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3. University of Leicester "History of DNA Profiling" <http://www2.le.ac.uk/departments/emfpu/genetics/explained/profiling-history> accessed on the 22/08/2005

4. Lisa Calandro et al, "Evolution of DNA Evidence for Crime Solving - A Judicial and Legislative History" Forensic Magazine <http://www.forensicmag.com/articles/2005/01/evolution-dna-evidence-crime-solving-judicial-and-legislative-history> accessed on

22/8/2015; University of Leicester “History of DNA Profiling” supra, accessed on 22/8/2015

5. *Ibid*; Alec Jeffreys, was able to validate the uniqueness of personalized DNA material in each person’s skin, body fluids, blood, nails and hair. Outside of identical twins, no two people have the same DNA pattern.

6. 533 So. 2d 841 (Fla. Dist. Ct. App. 1988)

7. Lisa Calandro et al “Evolution of DNA Evidence...” Supra note

8. Australian Law Reform Commission “Essentially Yours: The Protection of Human Genetic Information in Australia” (ALRC Report 96) Chapter 35; There are other types of kinship testing done via DNA analysis eg twin testing, sibship testing and even grandparent testing however the focus of this paper is the parentage testing

9. *Ibid*

10. Both frauds being basically the same thing but named from the perspective of the focus of the movement

11. “Paternity Fraud and Children’s Human Identity Rights” http://www.canadiancrc.com/Paternity_Fraud.aspx

12. Section 276 and 277 of the Criminal Law of Lagos State, No 11, 2011

13. Section 16, Violence Against Persons (Prohibition) Act. 2015; This Act not only criminalized abandonment of Spouse, Children and other Dependents without sustenance but also criminalized the attempt, facilitation/lubrication and assisting of this offence in subsections (2) (3) and (4) respectively

14. Faden RR, Beauchamp TL, A History and Theory of Informed Consent. (New York: Oxford University Press, 1986):1–392;

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17. Supra note 14; Beauchamp TL, Childress JF. *Principles of Biomedical Ethics*, Third Edition. (New York: Oxford University Press, 1989) :1– 470; referred to in Marcela G. del Carmen, Steven Joffe, “Informed Consent for Medical Treatment and Research: A Review” *The Oncologist* September 2005 vol. 10 no. 8 636-641 accessed at <http://theoncologist.alphamedpress.org/content/10/8/636.full.pdf+html> on the 24/9/2015

18. In the sense that the said biological parent probably abandoned the child at birth or before and at the child’s point of need, the same parent withholds consent thereby denying the child a right to an identity and the attendant issues involved when the child never asked to be brought into the world.

19. See, e.g., Katherine O’Donovan, “Interpretations of Children’s Identity Rights”, in *Revisiting Children’s Rights* 73, 75 (Deirdre Fottrell ed., 2000) (reporting on a study of Aboriginal children and the negative effects of policies that ignored their identity); see also Geraldine Hewitt, “Missing Links: Identity Issues of Do-

nor-Conceived People”, *Fertility Counseling*, Autumn 2002, at 14, 19 where it was noted that “of the 47 donor-conceived people who took part in this study, only 3 had not experienced identity issues” and the other forty-four persons indicated that their identity issues related to “their conception through anonymous donor sperm”).

20. 372 A.2d at 651.

21. 80 Cal. App. 4th 1050 (2000); In this case, the parents of a six year old child, Brittany conceived via donor sperm struggled to obtain personal medical information regarding the anonymous donor which was required to enable an understanding of the child’s medical history. She had been diagnosed with a genetically-transmitted kidney disease known as Autosomal Dominant Poly-cystic Kidney Disease (ADPKD) which originated from the child’s anonymous sperm donor. Her biological father, the donor fought, with the full support of the sperm bank, to maintain his anonymity at all cost.

22. See *Griswold*, 381 U.S. 479; *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding unconstitutional a Massachusetts statute banning the distribution of contraceptives by non-physicians); *Moore v. East Cleveland*, 431 U.S. 494 (1977) (finding a zoning ordinance which allowed only members of single “family” to live together violated the Constitution); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (right to marry is fundamental right).

23. See *Whalen v. Roe*, 429 U.S. 589 (1977) (holding that prescription drug users’ privacy interests in not having the state gather information about their drug usage was outweighed by the state’s interest in gathering data).

24. *Ibid*

25. Grossman C. P & Inigo D., ‘The Overriding Interest of the Child in Policy and Judicial Decisions’ *The International Survey of Family Law* 2000, 9 at p.16

26. Barnat E. & Strava U., ‘Legal Ban on Surrogate Mothers and Fathers?’ *University of Louisville Journal of Family Law* Vol 32, No. 2, 267 at 269

27. Yvonne Dausab “The Best Interest of the Child” http://www.kas.de/upload/auslandshomepages/namibia/Children_Rights/Children_h.pdf last accessed on the 5/11/2015

28. Head 32(1) of the General Scheme of the Children and Family Relationships Bill 2014: “Where in any proceedings before any court, the guardianship, custody or upbringing of or access to a child or the administration of any property belonging to or held on trust for a child or the application of the income thereof, is in question, the court, in deciding that question, shall regard the best interests of the child as the paramount consideration.” These same situations are the situations which arise in Nigeria and most countries of the world and form the basis for the need to mandate consent to DNA Testing in the best interest of the child.

29. 2013, Cap C 50, Laws of the Federal Republic of Nigeria hereinafter CRA

30. Art 3 hereinafter referred to as the CRC.

31. Hereinafter referred to as the Committee

32. Douglas Hodgson, “The International Legal Protection of the Child’s Right to a Legal Identity and the Problem of Statelessness”, 7 *Int’l J.L Pol’y & Fam.* (1993) 255,265, referred to in Brigitte Clark, “A balancing Act? The Rights of Donor- Conceived Children to Know Their biological Origins” 2012, *GJICL*, Vol. 40, No.

3, pg 619; <http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1001&context=gjicl> last accessed on the 5/11/2015

33. Samantha Besson, "Enforcing the Child's Rights to Know her Origins: Contrasting Approaches Under the Convention on the Rights of the Child and the European Convention on Human Rights, 21 *Int'l J.L. Pol'y & Fam.* (2007), 137, 150. For clarity Art 7 provides:

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Parents in this art. and in the context of the right to know could be interpreted broadly to include social, legal, biological and gestational parents and a further interpretation of this article in consonance with articles 9 and 18 as well as the rest of the CRC would appear to guarantee the child the right to have a relationship with any of the above type of parent. Although it has been argued by Brigitte Clark supra that the biological parent does not rank as highly as the other forms of parents particularly as these

others arise from actively caring nurturing and loving the child. 34. Brigitte Clark, "A balancing Act?" supra note 32

35. Mahlobogwane, F. 2005. "South African courts and the best interest of the child in custody disputes". *Codicillus*, 46(1) referred to in Yvonne Dausab "The Best Interest of a Child" supra note 27

36. Sec 63 (1), Part VII of the CRA 2003

37. This provision stops shy of mandating the parties of party to participate in a mandatory testing when it makes such testing subject to the alleged party granting his consent. Thus the provisions of Sec. 63 and 64 may be seen as approbating and reprobating, because in one breathe it give issues of paternity and maternity with the use of scientific testing and in the same breathe subjects this power to the grant of consent

38. The recent decision of the Owerri Division of the Court of Appeal in the case of Anozia v. Nnani (2015) 8 NWLR pt 1461 pg 241 at pg 254; paragraphs f-g that "A court cannot order an unwilling adult or senior citizen to submit to DNA test, in defiance of his fundamental rights to privacy for the purpose of extracting scientific evidence...." is a blow that highlights the weakness of the word 'direction' as used in Sec 63 of the C. R. A and hopefully the Supreme Court will address this decision in the best interest of the child.

39. Article 7