

# Parenthood and Artificial Human Reproduction: the Dangers of Inappropriate Medicalisation

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## **Introduction**

In 1992 Professor Sheila McLean edited a volume of essays entitled *Law Reform and Human Reproduction*.<sup>1</sup> Reflecting her consistent internationalist approach to legal study, the volume contained contributions from Australia, Canada, New Zealand, Czechoslovakia (as it then was), France, the United States and – my own contribution – the United Kingdom. That chapter focused on the Human Fertilisation and Embryology Act 1990, which the UK Parliament had recently enacted as a response to the legal and ethical issues arising from the developing medical technologies that had been explored in the Warnock Committee Report.<sup>2</sup> The major purpose of the 1990 Act was the regulation of medically assisted reproduction, and the licensing of its providers, and many of the issues covered in my contribution to that earlier book are examined in the present volume by Rebecca Cook and Bernard Dickens.<sup>3</sup> As well as dealing with regulatory issues, the 1990 Act, under the headnote “Status”, also set out the legal rules for identifying who were the parents of a child whose existence had been brought about by the processes regulated under the Act.<sup>4</sup> The issue of parenthood certainly does not lie outwith Sheila McLean’s broad field of interest, and she has had a direct impact on at least one aspect of the

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<sup>1</sup> Dartmouth, 1992.

<sup>2</sup> *Committee of Inquiry into Human Fertilisation and Embryology* (“The Warnock Committee”), Cmnd. 9314 (1984).

<sup>3</sup> Above, chapter ?

<sup>4</sup> Ss.27-30 of the 1990 Act.

parenthood provisions in the 1990 Act, by chairing a review set up by the UK Department of Health into parenthood after the posthumous removal of gametes: some of the recommendations in her report, published in 1998,<sup>5</sup> were enacted as the Human Fertilisation and Embryology (Deceased Fathers) Act 2003 and then re-enacted as s.39 of the Human Fertilisation and Embryology Act 2008.<sup>6</sup>

The 2008 Act itself was a response to the substantially increased scientific understandings and capabilities in relation to medically assisted reproduction since 1990, but the opportunity was also taken to update the “status” provisions in the earlier Act, in light both of the experiences in operating these provisions, which had proved to be much more technically troublesome than had been anticipated, and of the changing social realities of family life that had been experienced since the 1990 Act. The very word “status”, used in the 1990 Act to describe the issue, illustrates perfectly how dated the underlying assumptions of that Act were. A new set of rules, under the less recondite heading “Parenthood in Cases Involving Assisted Reproduction”, was enacted in Pt 2 of the 2008 Act.<sup>7</sup>

If anything, the social revolution in attitudes both to family life and family law was even more stark than the revolution in scientific capacity since 1990. A non-discrimination imperative had (none too soon) been embraced by law- and policy-makers, and same-sex couples (long used to constructing for themselves non-traditional families outwith the law’s regulation<sup>8</sup>) embraced the technologies that made non-traditional methods of human reproduction possible. But the match was and remains ill-fitting. The 1990 Act constructed “infertility” as a medical problem and offered regulation of medically assisted reproduction as the legal solution. Yet

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<sup>5</sup> *Review of the Common Law Provisions Relating to the Removal of Gametes and of the Consent Provisions of the Human Fertilisation and Embryology Act 1990* (Department of Health, 1998).

<sup>6</sup> This allows a deceased man to be registered as the father of a child brought into existence by the use of his sperm after his death.

<sup>7</sup> The status provisions in the 1990 Act were not repealed and they continue to determine parenthood for children conceived after the coming into force of that Act (on August 1, 1991), but before the coming into force (on April 6, 2009) of Pt 2 of the 2008 Act.

<sup>8</sup> See K. Weston, *Families We Choose: Lesbians, Gays, Kinship* (Columbia University Press, 1998); K. Almack, “Seeking Sperm: Accounts of Lesbian Couples; Reproductive Decision-making and Understanding the Needs of the Child” (2006) 20 *Int. J Law Pol and Family* 1-22.

the “infertility” of same-sex couples is not traced to any physical deficiency amenable to medical intervention: rather it comes from the biological reality that they simply cannot themselves provide all the genetic material necessary to create children. It is no surprise, therefore, that same-sex couples continue to access artificial reproductive technologies by non-medicalised routes. It is the purpose of this chapter to examine the continuing appropriateness of constructing the issue as a medical as opposed to a social problem and to highlight, through the case law, an emerging gender tension that this has given rise to.

### The Importance of Parenthood

Why is parenthood<sup>9</sup> important? In the United Kingdom the significance of the question of who a child’s parents are to the welfare-based judgments courts are all too often asked to make about the child’s upbringing has long been a matter of dispute<sup>10</sup> (typically played out in applications for residence and contact orders<sup>11</sup>) but it has never been suggested that the matter is of no relevance and it is not without significance that parties to disputes about the child’s parenting continue themselves to raise the issue of parenthood (in an attempt to strengthen their own case or to weaken their opponents’). The House of Lords endorsed the use of the word “parent” to cover persons who were not genetically related to (or had adopted) the child in *Re G (Children) (Residence: Same-Sex Partner)*<sup>12</sup> and though Baroness

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<sup>9</sup> I am using “parenthood” throughout this chapter in the sense that Callus uses the word “parentage”, that is to say to refer to the biological link between progenitors and their offspring: T. Callus, “A New Parenthood Paradigm for Twenty-first Century Family Law in England and Wales?” (2012) 32 *LS* 347-368. She reserves “parenthood” for what I describe as “parenting”. The distinction we both draw is the same, but I adopt the terminology of parenthood and parenting to emphasise that the dichotomy is between “parent” as a noun and “parent” as a verb. It also consists with the way the word “parenthood” is used in the headnote to the relevant provisions in the 2008 Act.

<sup>10</sup> Is parenthood neutral to the welfare judgment, as the House of Lords seemed to suggest in *J v C* [1970] AC 668, or a presumptive starting point, as the Court of Appeal held in *Re K (A Minor) (Custody)* [1990] 3 All ER 795? See further, K. Everett and L. Yeatman, “Are Some Parents More Natural than Others?” (2010) 22 *CFLQ* 290-309.

<sup>11</sup> Or “child arrangement orders”, in the new English terminology.

<sup>12</sup> [2006] UKHL 43, [2006] 1 WLR 2305.

Hale famously allowed the word “parent” to mean either a genetic parent, a gestational parent or a social and psychological parent, the context in which these comments were made indicate that she had in mind “parent” as someone who parents a child as opposed to someone with parenthood status:<sup>13</sup> it is to be noted that she never allowed the social or psychological parent in that case the title of “mother”. In fields not ultimately governed by the welfare of the child, such as succession, child support and maintenance, “parent” has a more absolutist (generally biological) meaning, irrespective of the social realities of the child’s life.<sup>14</sup> It is not, however, crucial that the same people should be identified as “parents” in every context in which the question arises. And, of course, as Campbell points out,<sup>15</sup> the law’s conception of “parent” may be very different from any individual child’s.

### **Parenthood Disputes Prior to 1990**

Parenthood disputes have always been strongly gendered, reflecting the very different interests of each gender. Before the passing of the Human Fertilisation and Embryology Act 1990, such formal law as there was on determining how the parent-child relationship was to be established focused on the identification of the father: the identification of the mother was not perceived to create any room for dispute. For it is a truth that has bedevilled the male psyche since the dawn of time that, while women always know who their children are, men never do. Men are reliant on

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<sup>13</sup> Cf *Alliance for Marriage and Family v AA* [2007] 3 SCR 124 where the Supreme Court of Canada rejected an appeal (if on a matter of title) against a decision of the Ontario Court of Appeal (2007) ONCA 2 that a child had two mothers (the women who were bringing him up) and a father (the genetic progenitor who played a significant part in the child’s life) – the application to be recognised as a mother had been brought by the partner of the genetic mother, with the support of both genetic parents. Interestingly the Ontario Court of Appeal contemplated that this recognition would have effect for succession and immigration purposes as well as granting a status and role in the upbringing of the child. See L. Harder and M. Thomarat, “Parentage Law in Canada: The Numbers Game of Standing and Status” (2012) 26 *Int. J. Law Pol. and Fam.* 62-87, who suggest that the law’s general resistance to multi-parenting models is to a large extent explained by its rejection of polygamy as a legitimate family form.

<sup>14</sup> So for example the child in *Re G* (n.12 above) will inherit from its legal parent (the gestational mother) but (absent a will) not from those who parent him, such as the gestational mother’s partner.

<sup>15</sup> A. Campbell, “Conceiving Parents Through Law” (2007) 21 *Int. J. Law Pol. and Fam.* 242-273.

information provided by women. The law has long attempted to provide men with some certainty by creating presumptions of paternity from known facts, the most important, and most wide-spread, of which is that a child born to a married woman is the child of the woman's husband: *pater vero is est, quem nuptiae demonstrant*.<sup>16</sup> This is a presumption of biological connection, drawn from the man's relationship with the mother: fatherhood, in other words, has traditionally been located in a combination of biology and relationship with the mother, though biology is the sole determining factor in the absence of the appropriate relationship.<sup>17</sup>

Maternity disputes are different from paternity disputes, in concept, motivation and outcome. The doctrine in the *Digest*, *mater semper certa est etiam si vulgo conceperit*,<sup>18</sup> reflects the fact that for most of human history there was no basis conceived possible, other than pregnancy and childbirth, upon which maternity could be identified. That ancient certainty was, of course, shattered by the development of medical techniques for creating a child using the genetic material of one woman and the gestational environment of another woman.<sup>19</sup> There was much academic discussion of the question of how, in the face of that possibility, the law ought to define "mother".<sup>20</sup> In the absence of legislation, there is no obvious answer to the question of whether a woman's genetic contribution is more important than her gestational contribution: in truth, both are essential to the creation of new human life. The Warnock Committee, faced with two analogies (basing motherhood on genetics

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<sup>16</sup> Justinian's *Digest*, II, iv, 5.

<sup>17</sup> The European Court of Human Rights is highly suspicious of rules of law whose effect is to prevent the (biological) truth of a child's parenthood from being established: see the cases discussed by A. Bainham in "Truth Will Out': Paternity in Europe" (2007) 66 *CLJ* 278-282.

<sup>18</sup> n.16 above.

<sup>19</sup> Indeed the development of mitochondrial donation, presaged by s.26 of the 2008 Act (inserting a new s.35A into the 1990 Act) and subject to regulations being drafted as this chapter is written (see [Department of Health Consultation "Mitochondrial Donation", February 2014, draft regulations included](#) ~~l. Sample, "Three Person IVF: UK Government Backs Mitochondrial Transfer", *Guardian*, 28 June 2013~~) will allow the genetic material of two women (if in very different proportions) being used.

<sup>20</sup> See D.S. Rosettenstein, "Defining a Parent: The New Biology and the Rebirth of the *Filius Nullius*" (1981) 131 *New LJ* 1095; A.E. Stumpf, "Redefining Mother: A Legal Matrix for New Reproductive Technologies" (1986) 96 *Yale LJ* 187-208; G. Douglas, "The Intention to be a Parent and the Making of Mothers" (1994) 57 *Mod. LR* 636-641.

as fatherhood is, or basing it on a donation model, as they suggested sperm donation should be) made a pragmatic choice, which the UK Parliament accepted and gave effect to in s.27 of the Human Fertilisation and Embryology Act 1990, discussed below.

The very fact that such a choice existed in relation to motherhood reveals a deeper truth: that parenthood in the eyes of the law is never, truly, “natural” but is instead a social or legal construct whereby the law *chooses* to preference one factor over another in the definitional quest to locate parenthood in an appropriate individual. Genetic connection is the factor that is chosen to identify, for legal purposes, fathers and marriage is chosen as the factor that presumes this genetic connection: these are choices made by the law no less than gestational connection is the chosen factor that identifies mothers. If this is so, then the parameters of parenthood are as vulnerable to social change as any other legal construct. It is well-recognised that from a child’s perspective those who parent (as a verb) tend to have more significance to the child’s wellbeing than those who are a parent (as a noun indicating a genetic connection): it is not a self-evident truth that the noun is more important than the verb. This is not to deny that knowledge of one’s “roots” has importance, but merely to suggest that in ranking genetic background with present upbringing there is nothing “natural” in concluding that the former is more important, for any purpose, than the latter.

### **The Human Fertilisation and Embryology Act 1990: Mothers and their Husbands**

There was nothing radical about the Human Fertilisation and Embryology Act 1990: as with the common law, in determining parenthood one first starts with the mother and then one traces fatherhood through the relationship that she is in. “Mother”, as the lynchpin, requires a clear definition and was given one by s.27 of the 1990 Act, as follows:

“The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child.”

This has been the law in the United Kingdom ever since: it is replicated in s.33 of the Human Fertilisation and Embryology Act 2008. This absolutist approach renders the position of women in relation to parenthood far more certain than the position of men: the female provider of genetic material, if different from the gestational provider, is automatically and for all purposes excluded while the male provider will be excluded from parenthood only if various conditions relating to his consent are satisfied (and even then, as we will see, he retains an “interest”). One of the consequences of this, as McCandless and Sheldon point out,<sup>21</sup> is that the position of the gestational mother in a surrogacy situation is made unchallengeably that of “mother”, with the result that she has absolute control over the parental order process and substantial control over the adoption process. By these means, surrogacy arrangements are rendered unenforceable.<sup>22</sup>

Starting from the certainty of motherhood, the 1990 Act follows a centuries-long tradition in filiation by drawing a fundamental distinction between births to married and births to unmarried women. Section 28(2) provides that if a woman was party to a marriage at the time of the placing in her of an embryo, or of sperm and egg, or her (artificial) insemination and her husband was not the provider of the (male) genetic material, then that husband will nevertheless be regarded by the law as the father of the child, though he can avoid paternity by showing that he did not consent to the artificial conception.<sup>23</sup> This has the effect of transferring fatherhood from the man

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<sup>21</sup> J. McCandless and S. Sheldon, “The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form” (2010) 73 *Mod LR* 175-207, at 183.

<sup>22</sup> See also K. Horsey, “Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements” (2010) 22 *CFLQ* 449-474.

<sup>23</sup> That the man must consent to the actual impregnation using identified genetic material – as opposed to consent to the idea of impregnation – is the result of *L Teaching Hospitals NHS Trust v A* [2003] EWHC 259 (QBD), [2003] 1 FLR 1091. As a matter of strict statutory interpretation this result is questionable, though the pragmatic answer is, in a case in which the parties were in no genuine dispute with each other, understandable. Consent must be positive and not mere acquiescence, according to *M v F* [2013] EWHC 1901 (Fam).

who was the biological progenitor to a man who is not. This is less radical than it might sound, for fatherhood's starting point continues to be the man's relationship with the mother: s.28(2) is little more, then, than a modern manifestation of *pater est quem nuptiae demonstrant*.

There is, however, an important limitation to the rule in s.28(2), which is that it is applicable only when the child is conceived through "artificial" means. So if a married woman becomes pregnant by sexual intercourse with a man other than her husband it is the biological progenitor who will be the child's father, even if the intent of all parties was that the husband would be – would perform the role of – father.<sup>24</sup> This limitation may be a necessary consequence of the fact that the 1990 Act is designed to regulate, and to provide parenthood rules following, medically assisted reproduction, but if so the rule in s.28(2) is too broad since it applies to self-administered as well as medically assisted artificial insemination. Why a child's legal paternity should turn on the mechanism by which sperm was introduced into the mother is obscure.<sup>25</sup>

The rules are rather different if the mother was not married at the time of her (artificial) insemination. In this case, s.28(3) of the 1990 Act provides that the mother's male partner will be treated in law as the father of the child if the treatment was provided to the woman and the man "together". Paternity, once again, is traced to the mother's relationship with the man. The phrase "treatment together" proved unexpectedly contentious as a matter of statutory interpretation and there followed a substantial amount of litigation on the parameters of the phrase.<sup>26</sup> The importance of the provision, however, must not be overshadowed by its inherent ambiguity. There

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<sup>24</sup> Such a husband will have the benefit of the *pater est* presumption, though of course that presumption is always vulnerable to rebuttal – made more vulnerable in the modern world by the certainties of DNA profiling.

<sup>25</sup> *M v F*, n.23 above, was decided under the 2008 Act where the rule in s.35 is the same as that in s.28(2) of the 1990 Act. The first dispute in that case was whether the pregnancy had come about by sexual intercourse (in which case the biological progenitor was the father) or by artificial insemination (in which case the consenting husband would be the father). The second dispute was whether the husband had indeed consented.

<sup>26</sup> See for example *Re Q (Parental Order)* [1996] 1 FLR 369; *U v W (Attorney General Intervening) (No. 2)* [1997] 2 FLR 282; *R v Human Fertilisation and Embryology Authority, ex p. Blood* [1997] 2 All ER 687; *Evans v Amicus Healthcare Ltd* [2005] Fam 1; *Re R (A Child) (IVF: Paternity of Child)* [2005] UKHL 33, [2005] 2 AC 621.

is no prohibition in the 1990 Act on artificial reproductive technology being made available to persons other than married couples, though there was a half-hearted attempt to encourage treatment providers to preference opposite-sex couples.<sup>27</sup> Children born to unmarried couples, no less than children born to married couples, need clear rules identifying who their parents are, and Parliament accepted that these rules should permit, as they do with married couples, transference of paternity from the biological progenitor to the man intended to play the social role of father.

However, the application of the rule in s.28(3) is limited to pregnancies that come about by licensed medical assistance. This has the clear effect of pathologising artificial insemination, which is entirely inappropriate for female couples where the need for a third party contribution is not traced to any medical condition. Female couples do not suffer from any disability that needs “treatment”<sup>28</sup>: their practical need is simply for access to sperm, and their legal need (which was not met by the 1990 Act) is a means to transfer parenthood from the provider of the sperm to the mother’s partner.

In the end, the result of the 1990 Act was not so very different from the common law. The crucial distinction in determining parenthood continues to be between married and unmarried couples and the right of parenting (in the absence of any further court order) remains exclusively vested in that couple. The provision of a rule establishing non-genetic paternity over a child born to an unmarried mother is better seen as an aspect of the vastly decreased significance of the concept of illegitimacy than of any great shift in legal attitudes towards parenthood itself.

### **The Human Fertilisation and Embryology Act 2008: From Status to Contract**

From around the 1990s, systems of family law across the western world abandoned the overtly political purpose of preferencing certain forms of family in favour of responding to the functions that families perform irrespective of their makeup. It was

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<sup>27</sup> See Sarah Elliston’s contribution to the present volume, below, chapter ?

<sup>28</sup> See Robin Downie’s discussion of disability in the present volume: below, chapter ?

becoming increasingly obvious that the traditional family model provided too limited a focus for the law, and especially so in relation to the parent-child relationship.<sup>29</sup> Unmarried couples, though still without comprehensive financial claims against each other in England and Wales, have been permitted to adopt children there since the coming into force in 2005 of the Adoption and Children Act 2002; increased financial rights and obligations were granted to cohabiting couples<sup>30</sup> in Scotland by the Family Law (Scotland) Act 2006,<sup>31</sup> and joint adoption permitted to cohabiting couples by the Adoption and Children (Scotland) Act 2007 (coming into force in 2009). An even more significant cultural development since 1990 has been the revolution in attitudes towards same-sex couples.<sup>32</sup> The law responded to this development by vastly increasing the protections afforded to such couples in both family law and equality law. The most important legal development in the UK for same-sex couples between 1990 and 2008 was of course the Civil Partnership Act 2004, which created a means by which same-sex couples could register their relationship with the state and acquire thereby virtually all the responsibilities and rights that flow from marriage.<sup>33</sup> These social and legal developments rendered the “status” provisions in the 1990 Act woefully out of date and so, when that Act was revised by the 2008 Act, the opportunity was taken to amend the parenthood rules to provide (as the adoption legislation had already done) for joint parenthood for same-sex couples. The rules determining paternity were extended to female partners of mothers in two ways: (i) the civil partner of the mother is deemed to be the “female parent”<sup>34</sup> or “other

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<sup>29</sup> See S. Sheldon, “Fragmenting Fatherhood: The Regulation of Reproductive Technologies” (2005) 68 *Mod LR* 523-553.

<sup>30</sup> Though of lesser value than those of married couples or civil partners.

<sup>31</sup> See E. Sutherland, “From ‘Bidie-in’ to ‘Cohabitant’ in Scotland: the Perils of Legislative Compromise” (2013) 27 *Int. J. Law Pol. and Fam.* 143-175.

<sup>32</sup> This change is explored by K. Norrie, “From Decriminalisation to Marriage: Changing Judicial, Political and Religious Attitudes in the United Kingdom to Gay and Lesbian Families”, in H. Petersen, J.M. Villaverde, I. Lund-Andersen (eds), *Contemporary Gender Relations and Changes in Legal Cultures* (DJØF Publishing, 2013).

<sup>33</sup> And marriage itself was extended to same-sex couples in England and Wales by the Marriage (Same-Sex Couples) Act 2013 and will be extended in Scotland by the Marriage and Civil Partnership (Scotland) Bill 2013.

<sup>34</sup> 2008 Act, s.44.

parent”<sup>35</sup> of the child on the same basis as the mother’s husband would be deemed to be the father,<sup>36</sup> and (ii) the non-registered partner of the mother is deemed to be the “female parent” or “other parent” if both she and the mother agreed that she should be treated as the parent.<sup>37</sup>

The clumsy terminology is to be noted. The Act cannot bring itself to allow a child to have two mothers. “Motherhood” is reserved to the provider of the gestational environment and her partner’s “parenthood”, traced to the relationship with her, is something different, and less absolute. Just like its 1990 predecessor, the 2008 Act starts from the solidity of the definition of “mother” and traces co-parenthood through her relationship with her partner. The mother is unshakeably the child’s first parent.

The unregistered partner of the mother will become father or other (or female) parent not, as under the 1990 Act through the fact that licensed treatment has been provided to the couple “together”, but instead through both the mother and the partner consenting to the “agreed parenthood conditions”.<sup>38</sup> These conditions are, as McCandless and Sheldon point out,<sup>39</sup> deliberately designed to be contractual in nature, which can be seen clearly in the case of *Re E and F (Assisted Reproduction) (Parents)*.<sup>40</sup> Here, the mother’s partner was denied parenthood because of a technical deficiency, rather than anything to do with her relationship with the mother, or indeed with the child. The forms by which the mother and her partner signified their agreement that the partner be treated as parent were completed just after, rather than (as required) before, the insemination treatment was provided. In addition, the forms were regarded as invalid since they had not been preceded by the required counselling, and so, though signed, had not been signed with “informed consent”. Though a contractual analysis underpins ss.36 and 43, the availability of

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<sup>35</sup> 2008 Act, headnote to ss.42-47.

<sup>36</sup> Section 35 of the 2008 Act, replicating the rule in s.28(2) of the 1990 Act.

<sup>37</sup> Section 43 of the 2008 Act, replicating the new rule in s.36, which replaces s.28(3) of the 1990 Act.

<sup>38</sup> 2008 Act, s.36 for men and s.43 for women.

<sup>39</sup> n.21, above, at p.185.

<sup>40</sup> [2013] EWHC 1418 (Fam).

the contract is limited to couples who access infertility treatment through licensed providers. As under the 1990 Act, the unregistered partner will be denied parenthood – whatever the terms of any contract or agreement – if the couple use non-medically assisted means (whether sexual intercourse or self-administered artificial insemination with privately acquired genetic material). As we will see, it is this exclusion that has caused most difficulties for the courts.

Notwithstanding its extension of the rules to female couples, the 2008 Act is, in its underlying assumptions, as traditionalist as its 1990 predecessor and it creates a limited and exclusive legal parenthood that takes as its template the traditional nuclear family. It reflects what McCandless and Sheldon describe<sup>41</sup> as “parental dimorphism”, that is to say a model that cannot conceive of more than two parents: (i) a mother and (ii) her husband or her civil partner or her non-registered partner. The two parent model may well have reflected both social reality and legal principle when no-one conceived of parenthood in any terms other than biological. Yet once the genetic underpinnings of parenthood are broken – and a central aim of both the 1990 and 2008 Acts was to allow that breaking without the necessity of court process (ie adoption) – there is no logical reason why parenthood needs to be kept within the bounds of the traditional model. Callus similarly suggests that if the law were to preference parenting over parenthood then the way would be open to multi-party parenting.<sup>42</sup> In truth, this is a plea for the rejection of the distinction between parenthood and parenting but the distinction will remain necessary so long as some issues (such as succession) are unchallengeably governed by the former while other issues (such as parental responsibilities and parental rights) are founded (and increasingly so) on the latter. In any case, multi-party parenting would work only when all parties are able to agree roles without misunderstanding and the case law to be discussed below suggests that unambiguous agreement is extremely difficult to achieve.<sup>43</sup>

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<sup>41</sup> McCandless and Sheldon, (n.21, above) at p.188.

<sup>42</sup> Callus, (n.9 above) at p.360.

<sup>43</sup> In the absence of a fully researched empirical study it cannot be known the extent to which such agreements work amicably in practice: it is only when they break down that they come to the attention of the courts.

One important consequence of the law continuing to trace parenthood through the mother is, of course, that the new extensions of the parenthood provisions could not be applied to male couples. The only option for male couples is court action, either seeking an adoption order or a parental order following surrogacy.<sup>44</sup> The only concession made to male couples by the 2008 Act is its extension of title to seek a parental order to them so that, reflecting the adoption provisions, both male civil partners and male unregistered couples can now seek and obtain parental orders after surrogacy.<sup>45</sup> However, surrogacy itself is not regulated by the Human Fertilisation and Embryology Acts as it is not a practice that requires medical intervention. So medicalization of parenthood has the effect of offering something to (some) female couples and nothing at all to any male couple. The major legal issue faced by male couples – very different from that facing female couples – is whether the payments they make to the surrogate will be authorised by the court.<sup>46</sup> So, while parenthood has been medicalised for women, it has been monetised for men. Yet contract – made available to opposite-sex couples and female couples as a means of achieving legal parenthood – is withheld from male couples for any surrogacy arrangement they make with a surrogate mother remains, as it has been since 1990, statutorily unenforceable.<sup>47</sup> The practical needs of male couples seeking parenthood are, of course, very different from the practical needs of female couples seeking parenthood but the legislature has found it noticeably easier to accommodate the legal needs of the latter than those of the former.

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<sup>44</sup> The latter is governed throughout the UK by s.54 of the 2008 Act.

<sup>45</sup> The 1990 Act had limited parental orders to married couples (as, at that time, did the adoption legislation in both Scotland and England): the 2008 Act extended this to all couples “in an enduring family relationship” (following the formulation in the English adoption legislation). The provision requiring that one of the applicants be genetically related to the child remains (s.54(1)(b)). And parental orders have never been available to single people (s.54(1)), as adoption sometimes is.

<sup>46</sup> See for example *Re D (Children) (Surrogacy) (Parental Order)* [2012] EWHC 2631 (Fam), [2013] 1 All ER 962; *A and B v SA* [2013] EWHC 426 (Fam); *J v G (Parental Orders)* [2013] EWHC 1432 (Fam); *Re P-M* [2013] EWHC 2328 (Fam).

<sup>47</sup> Surrogacy Arrangements Act 1985, s.1A, as inserted by the Human Fertilisation and Embryology Act 1990, s.36(1).

## The Challenges of Same-Sex Couple Parenthood

The 1990 Act ignored same-sex couples (male or female) completely, leaving them with no option but to construct their own families without legal involvement.<sup>48</sup> The 2008 Act, following the absorption of same-sex couples into family law by the Civil Partnership Act 2004 and the reforms to adoption law, attempted to meet the deficiency, by offering same-sex couples access to joint parenthood. As we have seen, however, the 2008 Act is no less traditionalist than its 1990 predecessor, and female couples were offered parenthood recognition under the Act only so long as they conformed to the norms long-ago established by heteronormativity. It is no surprise, therefore, that a large number of female couples continue to see more attractions in private arrangements than through the medicalised and assimilationist options regulated by the Human Fertilisation and Embryology Acts.<sup>49</sup> This, together with the very much more limited options for parenting available to male couples, has led men, in particular, to seek to fashion new styles or forms of parenthood which, by and large, women have resisted.<sup>50</sup> A brave new world for gay and lesbian couples, with non-gendered parenting or role expectations – and with full legal support for their designs – this is not.

There have been a number of cases before the UK courts in which female couples have received sperm from men in return for some involvement in the child's upbringing and in which relationships between the parties – the women on one side, the man on the other – have broken down.<sup>51</sup> Cases that come before the courts, necessarily involving arrangements that have not worked, cannot, of course, be taken to indicate the likelihood of such arrangements being successful.

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<sup>48</sup> See n.8 above.

<sup>49</sup> See L. Smith, "Tangling the Web of Legal Parenthood: Legal Responses to the Use of Known Donors in Lesbian Parenting Arrangements" (2013) 33 *LS* 355-381 at pp.373-374

<sup>50</sup> This may be unfair. A noticeable feature of the cases to be discussed is that the women nearly always envisage *some* role for the man in the child's life – just not as involving as the man envisages. See L. Smith, "Is Three a Crowd? Lesbian Mothers' Perspectives on Parental Status in Law" [2006] 18 *CFLQ* 231-252. And see the co-operating three parents in *Alliance for Marriage and Family v AA* (n.13 above)

<sup>51</sup> US cases with the same factual bases are discussed by N.G. Maxwell, "The Kansas Case of *KMH*: US Law Concerning the Legal Status of Known Sperm Donors" (2008) 4 *Utrecht LR* 135-161.

Nevertheless, the contentious cases do reveal how the courts respond to families created by non-traditional means, and they provide warnings as to likely sources of tension. The bewildering variety of results in the cases about to be discussed might be explained simply by the fact-specificity of any child law case, but Smith is right to point out that “the judgments exhibit disagreements and uncertainties on points of principal”.<sup>52</sup> This is caused, she suggests, by the fact that orders relating to parenting are being used to resolve disputes about the meaning of parenthood.

A number of common themes emerge from the cases, the most obvious of which is the differing perceptions of the parties, even when what looks like clear agreement has been reached. Words mean different things to different people. So for example in *L and R v W and W*<sup>53</sup> the women had advertised for a male couple who, in return for their sperm, would be offered the role of “father” and “step-father”. The men with whom they entered an agreement to that effect understood these terms very differently from the women. In *Re B (Role of Biological Father)*<sup>54</sup> the role the women saw for the man was an “avuncular” one, that of a benign, but distant, uncle; the man saw the chance (and perhaps his only chance) to become a parent in an involving sense. The women felt they could accommodate his desire to be a “parent”, but both sides were using that word to mean very different things. In the end, the judge refused to grant the man parental responsibility on the basis that he was likely to use such an order to interfere disproportionately. The women’s position as parents of the child was affirmed, for to allow the man “parental status” “would not be consistent with [the women’s] autonomy as a nuclear family”.<sup>55</sup> Nevertheless a contact order was made, its level being calibrated to allow the child to come to understand the true link he had with the man, but without developing a relationship of great importance. The judge talked of the father’s “unique biological status”, indicating that this was a matter of some importance, but without explaining what that importance entailed.

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<sup>52</sup> L. Smith, n.49 above, at p.364.

<sup>53</sup> [2011] EWHC 2455 (Fam), [2012] 1 FLR 1056.

<sup>54</sup> [2007] EWHC 1952 (Fam), [2008] 1 FLR 1015.

<sup>55</sup> [2008] 1 FLR 1015 at 1023.

Another feature of these cases, and one that clearly increases the scope for misunderstanding, is the lack of appropriate vocabulary to capture in words the true nature of the relationships between the parties and the child, and the role each is to play. The failure of the Human Fertilisation and Embryology Acts to provide a satisfactory title for the female parent who traces her parenthood to her relationship with the mother has already been noted. Connected to this problem is the sensitivities that existing language creates. The women often term the man who provided the sperm “the donor” as opposed to “the father” and it is sometimes this verbal distancing that motivates the man to seek, by court action, some formal recognition of his role in the child’s life.<sup>56</sup> The lack of appropriate vocabulary was addressed by Hedley J, in *L and R v W and W*.<sup>57</sup> Pointing out that “father”, “step-father” and similar words developed to describe traditional family arrangements were entirely inappropriate in this type of situation, the judge suggested that the concepts of “primary parents” and “secondary parents” better encapsulated the realities of the situation in such cases. He designed the order he made to ensure that the men had a role, albeit secondary, in the child’s life: a role that ensured the child’s sense of identity, provided a “male component in parenting”, and a general role of benign parenting. The women would remain as what Hedley J described as “principal parenters” and the men as “secondary parenters”. As in *Re B (Role of Biological Father)*, the judge is attempting to structure an order that recognises the women as the nuclear family, with the man as a benign, if always external, presence in the child’s life.

Neither the attempt to structure parenthood at different levels nor the terminology suggested by Hedley J found approval in one of the few cases on the issue to reach the Court of Appeal. In *A v B*<sup>58</sup> the Court of Appeal held that there are no principles

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<sup>56</sup> See for example *X v Y* 2002 SLT (Sh Ct) 161 (discussed in K. Norrie, “Contact, Welfare and the Right to (Gay) Family Life” 2003 *SLT (News)* 23-27) and *Re D* [2006] EWHC 2 (Fam), [2006] 1 FCR 556.

<sup>57</sup> n.53 above and, later *Re P (Contact)* [2011] EWHC 3431 (Fam), [2012] 1 FLR 1068. This case has many similarities to the long-running litigation in New Zealand ending with *P v K* [2006] NZFLR 22, though the court’s approach was very different, founding strongly on the child’s “right to know both parents”, which preferences (or at least was assumed by the New Zealand court to preference) the two biological parents. The European Court of Human Rights makes the same assumptions: see n.17 above.

<sup>58</sup> [2012] EWCA Civ 285; [2012] 1 WLR 3456.

to guide such cases, other than that the welfare of the child is the determining feature. The implication of this is that identification of parenthood (primary, secondary or however it is described) is not a significant factor in determining issues of upbringing such as what parental responsibility, or what level of contact, any individual should have in respect of any particular child. Referring to Hedley J's approach in *L and R*, Thorpe LJ said: "I would not endorse the concept of principal and secondary parents. It has the danger of demeaning the known donor and in some cases they have an important role."<sup>59</sup> Rather, the Court of Appeal saw the mother and partner as primary carers and the father as being on the threshold of providing secondary care, which did not make him a "secondary parent". Thorp LJ nevertheless found no difficulty in describing all three parties as "parents".<sup>60</sup>

The mother's partner's vulnerability (especially significant in *A v B* because the man was both the biological father and indeed married to the mother:<sup>61</sup> as such he automatically possessed full parental responsibilities and parental rights, while the partner had none) is a feature underpinning many of the cases. In the Scottish case of *X v Y* the sheriff exacerbated that vulnerability by conferring parental responsibilities and parental rights on the father but withholding them from the mother's partner. A clear hierarchy of "parent" is apparent here, with the mother (gestationally defined) at the top, followed by the father and then in what seems a distant, because always artificial, third place the mother's partner. *X v Y* was of course decided before the 2008 Act, which allows "parenthood" (as well as parental responsibilities and parental rights) to be conferred on the partner, but given that the partner is usually as closely involved in the child's upbringing as the mother, and more closely involved than the father, it illustrates sharply the law's reluctance to construct the parental hierarchy in a manner that places parenting on equal terms with parenthood. Millbank (in discussing what she called the "intra-lesbian" disputes)<sup>62</sup> reminds us that parenting of the sort done by the partner has never

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<sup>59</sup> [2012] EWCA Civ 285; [2012] 1 WLR 3456 at para. [30].

<sup>60</sup> [2012] EWCA Civ 285; [2012] 1 WLR 3456 at para. [30].

<sup>61</sup> The mother had married him in order to hide her sexuality.

<sup>62</sup> J. Millbank, "The Limits of Functional Family: Lesbian Mother Litigation in the Era of the Eternal Biological Family" (2008) 22 *Int. J. Law, Pol. and Fam.* 149-177.

created “parenthood”, while the man’s biological connection to the child historically has done so. This, she suggests, explains why the man’s biological status is afforded greater weight than the partner’s parenting role.

Courts have often perceived the mother’s partner as the interloper in the family, by drawing an analogy with heterosexual breakdown. So in *X v Y* the sheriff treated the father as if he were a separated parent of a child born to a relationship between the mother and the father. The reality of course was that the relationship into which the child was born was between the mother and her female partner who, having been involved in the decision to create the child, was in a very different position from a step-parent. It was the man and not the partner who was the “interloper” into the child’s life. The male claimant in *Re D*<sup>63</sup> argued in exactly the same way – as the child’s father he had much to offer the child which the women’s (and particularly the partner’s) recalcitrant attitudes were denying the child.

The tendency to analyse these disputes as if they were traditional separated heterosexual parent cases may paradoxically be traced to the decision in *Re G (Residence: Same-Sex Partner)*<sup>64</sup> where a new conception of parenthood beyond the traditional was first endorsed by the House of Lords. The judges in that case (which was a dispute between the women themselves rather than one of a man against a female couple) were at pains to present the case as no different from any other residence/contact dispute. While, from an equality point of view, this has some attractions – “it took sex out of the equation, in a historical legal context in which (homo)sex usually operated as a disadvantage”<sup>65</sup> – it nevertheless runs the risk of failing to recognise, and make appropriate provision for, the complexities of individual families and has bedevilled the quite different type of case (men against women) being considered here.

Perhaps the most interesting feature of these “known donor” cases is that in each of them men are attempting to create a new form of parenthood where they have

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<sup>63</sup> [2006] EWHC 2 (Fam), [2006] 1 FCR 556.

<sup>64</sup> [2006] UKHL 43, [2006] 1 WLR 2305.

<sup>65</sup> A. Diduck, “ ‘If Only We Can Find the Appropriate Terms to Use the Issue Will be Solved’: Law, Identity and Parenthood” (2007) 19 *CFLQ* 458-480, at p.461.

recognition and some involvement, though less than that expected (or demanded) of the traditional father. Female couples, by and large, have preferred to replicate the nuclear model of family life (as a means of providing security to the position of the partner) and the courts have been reluctant to move beyond that model. In *Re D*,<sup>66</sup> for example, the judge granted parental responsibility to the man, though removed it of much of its content, in order to give recognition to the man as a “parent of a very different sort”.<sup>67</sup> Smith suggests that this is a judicial attempt to recognise the differing aims of the parties – the women wanted affirmation that they were the decision-makers in the child’s life, the man wanted recognition of his status as father – but criticises the result as being at odds with the existing legal position of distinguishing between parenthood and parenting: an order relating to parenting was used to recognise the man’s parenthood.<sup>68</sup> The man’s influence over the child’s upbringing was again the issue in *R v E (Female Parent: Known Father)*,<sup>69</sup> where the issue of parenthood once again influenced the decision on a question of parenting. The man’s application for a residence order – sought as a result of disagreement that arose between the man and the women about certain aspects of the child’s upbringing – was refused, though a contact order was made on his behalf and a joint residence order in favour of the women was also made. Bennett J said that the father had never been a “co-parent” – meaning it seems he had never adopted the role of social or psychological parent, and though he was the genetic parent who had a real relationship with the child, that was not regarded as giving him any sort of veto over how the women, whom the parties had agreed were the child’s “parents”, brought up the child. The man was in no better position than, for example, a concerned grandparent who disapproved of some aspects of his or her grandchild’s upbringing at the hands of the parents. The judge was more influenced by the social

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<sup>66</sup> [2006] EWHC (Fam) 2, [2006] 1 FCR 556.

<sup>67</sup> [2006] EWHC (Fam) 2 at para [93].

<sup>68</sup> n.49 at pp.364-366. Her point is that it is rare for a father’s application for parental responsibility to be refused, even when day to day care of the child is being provided by others. The case may be better explained by the judge at the end of her judgment: at para [94] Black J pointed out that the practical reality of her order was to ensure that the man’s consent would be needed were the mother’s partner ever to seek to adopt the child (and cut him off completely).

<sup>69</sup> [2010] EWHC 417 (Fam).

realities than biological background, but the reasoning is still fundamentally traditionalist: Callus uses this case to illustrate her contention that the “two parents and no more” model adopted by the law creates tensions that ultimately detract from the child’s welfare.<sup>70</sup> The parties’ own attempts to construct a matrix of family relationships beyond a traditional model failed because they were unable to agree its parameters – and the court responded by setting traditionalist parameters for them.

The continuing strength of the biological claim to parenthood is shown starkly in the first case in which the 2008 Act was directly applicable and in which, therefore, the biological link had been rendered legally irrelevant. What is remarkable about *Re G (A Child)*,<sup>71</sup> where the Act effected a transference of parenthood from the men to the women, and revealing how embedded traditionalist ideas of the role of men and women in parenting are, is that the consequences of that transference were effectively ignored by the court. The case involved one male couple, two female couples and three children. The disputes were entirely typical: the men had understood a far greater involvement in the lives of the children than the women had either contemplated or were comfortable with. After some years of disagreement, the men eventually went to court, seeking both parental responsibility (over their own biological children) and contact (in relation to all three children). Their problem was that, both female couples being in civil partnerships and the conceptions having been achieved by artificial (though not medically-assisted) insemination, the female partners of the mothers were “parents” under the terms of s.42 of the 2008 Act and the men’s parental connections to the children were as a consequence completely severed. The result, in English law, was that the men (as strangers to the children) needed to obtain the court’s leave to seek the orders,<sup>72</sup> and the decision relates to the application for leave. The men argued that the children would benefit by knowing who their fathers were (blithely ignoring the legal point that these children had no fathers); the women argued that to grant leave to the men would subvert the policy behind the 2008 Act, which the judge accepted was to allow lesbian couples to be

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<sup>70</sup> Callus, (n.9 above) at p.353.

<sup>71</sup> [2013] EWHC 134 (Fam), [2013] 1 FLR 1334.

<sup>72</sup> Scots law does not require court leave in these circumstances: any person “claiming an interest” may seek an order under s.11(3)(a)(i) of the Children (Scotland) Act 1995.

joint – and exclusive – parents. Leave to seek contact orders was granted to both men,<sup>73</sup> and the interesting feature of the case is why: the judge held that the men were, whatever the 2008 Act says, the biological parents of the children and this gave them a clear interest entitling them to seek contact. They might not be legal fathers but they were, when all is said and done, fathers. This reflects, if in starker form since the law had acted to terminate fatherhood, the biological determinism inherent in, for example, Black J's acceptance in *Re D*<sup>74</sup> that she was "considerably influenced by the reality that Mr B is D's father. Whatever new designs human beings have [including, she may be taken to imply, legal designs] for the structures of their families, that aspect of nature *cannot* be overcome". Mr B is D's father only if we adhere, whatever the law says, to biology as the "true" definition of parenthood

The biological connection, therefore, continues to give an interest notwithstanding the terms of the 2008 Act and the cutting of the parental link is not as absolute as it appears. It may, however, be that biology gives an interest in this way only to men, for it is not at all clear that the same result would have been reached in relation to a biological mother who, on egg donation, lost her claim to the status of mother. It is unlikely that such a woman would be held to retain a "clear interest" even after the law had cut off her maternity. The egg donor, though biologically linked to the child, is not in any legal sense the "mother", and perhaps she is not the mother in any socially understood sense either (except in the eyes of the geneticist). Perhaps an explanation for this difference in treatment is to be found deep in our (gendered) psyche: men who donate genetic material seem to need a continuing connection with the products of that material far more than women who donate genetic material. I suspect that, if true, this is a consequence of the fact that, for most of humanity's history, the biological connection (even when presumed) was all that a father had, while a mother had (and is expected to have) a clear nurturing role. It is no mere etymological quirk that the words "mother" and "father" carry, when used as verbs,

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<sup>73</sup> Leave was denied in respect of residence orders since the children were being perfectly well looked after by their mothers. Seeking residence as opposed to contact is likely to be nothing more than a negotiating tactic in many cases.

<sup>74</sup> [2006] 1 FCR 556 at p.582.

very different connotations – to mother is to nurture while to father is to do no more than to procreate.

All of the cases considered above concerned questions relating to the child's upbringing and each, therefore, required ultimately to be decided on the basis that the welfare of the child – as opposed to who the child's parents are – was paramount. As such, they are all in their fundamentals part of the long-running debate around the extent to which a parental relationship, however that is established, affects the welfare judgment.<sup>75</sup> However, parenthood as a matter of fact is sometimes determinative of questions to which the welfare judgment has never been relevant. For example the law of intestate succession operates on the assumption that a child has (at most) two parents, identified in an absolutist sense: parenthood is determinative of succession irrespective of who is parenting the child. There is no doubt that a person identified as a parent by the Human Fertilisation and Embryology Acts 1990 or 2008 will be a “parent” for the purposes of the law of intestate succession and that the cutting of the parental links embodied in these Acts will be given effect without qualification. The biological fathers in *Re G (A Child)*<sup>76</sup> are, therefore, not the children's fathers for succession purposes, even while they have an interest, traced to their biological parenthood, entitling them to seek some parenting role in the children's lives.

The Child Support Act 1990 similarly limits its obligations to “parents” as strictly defined by law.<sup>77</sup> Private law claims for maintenance will turn on the interpretation of the appropriate statute. In *T v B*<sup>78</sup> a female couple had a child after artificial insemination from an unknown donor through a clinic licensed under the 1990 Act. This cut off the male donor's paternity but without (as the 2008 Act would subsequently do) transferring parenthood to the mother's female partner, but the partner nevertheless obtained an order under the Children Act 1989 allowing her to share in the parenting of the child. After the couple separated the mother failed in

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<sup>75</sup> See n.10, above.

<sup>76</sup> [2013] EWHC 134 (Fam), [2013] 1 FLR 1334.

<sup>77</sup> See *Re M (Child Support Act: Parentage)* [1997] 2 FLR 90.

<sup>78</sup> [2010] EWHC 1444 (Fam), [2010] Fam 193.

her attempt to enforce a maintenance obligation against the partner. This obligation was imposed by the Children Act 1989<sup>79</sup> on anyone who was a “parent” of the child, but that word in that context was held to be limited to biological parents and those who had become parents by operation of the law (such as through adoption) and so did not extend to persons who (merely) had parental responsibility. On the other hand, in Scotland an obligation of aliment (private maintenance) is owed not only by a “parent” (by which is presumably meant a legal parent) to his or her child but also by a person to a child who has “been accepted by him as a child of his family”.<sup>80</sup> There is some scope in Scotland therefore for financial obligation to be traced to factual parenting as well as to biological parenthood.

## Conclusion

It is tempting to see the 2008 Act as a radical re-imagining of parenthood, with its move away from genetic definitions and its embracing of gay and lesbian families; the very complexity of the parenthood provisions seems designed to reflect the multiplicity of modern family forms. It is more likely, however, that as Eijkholt suggests<sup>81</sup> the 2008 Act was not designed to embrace personal or procreative autonomy<sup>82</sup> but to do no more than to make certain technologies available for therapeutic reasons only. If this is so then the parenthood provisions in the Human Fertilisation and Embryology Acts are properly to be seen not as liberalising measures but merely as necessary consequences of the regulation contained in the Acts of therapeutic treatment. Neither the recognition of joint parenthood for unmarried couples (the major innovation of the 1990 Act) nor the extension of the

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<sup>79</sup> Sched. 1 para 1.

<sup>80</sup> Family Law (Scotland) Act 1985, s.1(1)(d). A similar result is achieved in Canada: *Chartier v Chartier* [1999] 1 SCR 242.

<sup>81</sup> M. Eijkholt, “Procreative Autonomy and the Human Fertilisation and Embryology Act 2008: Does a Coherent Conception Underpin UK Law?” (2011) 11 *Med. Law Int.* 93-126.

<sup>82</sup> On procreative autonomy, see R. Brownsword, “Happy Families, Consenting Couples, and Children with Dignity: Sex Selection and Savious Siblings” (2005) 17 *CFLQ* 435-473. See also A Zanghellini, “Lesbian and Gay Parents and Reproductive Technologies: The 2008 Australian and UK Reforms” (2010) 18 *Fem. Leg. Stud.* 227-251.

rules to same-sex couples (the major innovation of the 2008 Act) alters the conception of “family” as two parents who live together permanently and exclusively, bringing up their children without interference from any individual outside the nucleus. It is for this reason that the Acts are of such little assistance in resolving disputes arising from attempts to exercise procreative autonomy in a non-therapeutic context.<sup>83</sup>

The Human Fertilisation and Embryology Acts’ focus on mothers explains why they are unable to offer much to male couples, and this suggests a deeply rooted understanding of parenting as a fundamentally female activity. For ostensibly anti-discrimination reasons, the 2008 Act addressed the needs of female couples by providing a mechanism to transfer parenthood from the male progenitor to the mother’s partner. The needs of male couples (such as mechanisms to protect their interests in surrogacy arrangements) are, of necessity, very different and quite palpably medical intervention offers them nothing: the 2008 Act made no attempt to make surrogacy arrangements more certain (even while it made parental orders after surrogacy available to all couples irrespective of gender-mix). Surrogacy arrangements remain unenforceable, and the financial aspects of these arrangements remain subject to judicial oversight.<sup>84</sup> There are sound reasons why the law should resist allowing surrogacy arrangements to become enforceable contracts,<sup>85</sup> but as we have seen the 2008 Act, by embracing a contract model for unregistered opposite-sex couples and unregistered female couples, does suggest that there is some room in the law’s design of parenthood for enforceable contracts. And it is not obvious why the exclusion of the female connection to children (which disproportionately inhibits male couples seeking to become parents) should always require judicial approval while the termination of the male connection does not. Neither the law nor social policy can or should ignore the differing contributions men

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<sup>83</sup> Callus highlights the “tangible incoherence between legislative developments following licensed ART [artificial reproductive technology] and common law stagnation for self-arranged artificial insemination”: (n.9 above) at p.364.

<sup>84</sup> See n.46 above.

<sup>85</sup> See M. Crawshaw, E. Blyth and O. van den Akker, “The Changing Profile of Surrogacy in the UK – Implications for National and International Policy and Practice” (2012) 34 *J. Soc. Wel. & Fam. Law* 267-277.

and women make to child creation but that does not mean that the existing disparity of treatment between female couples and male couples should not be open to question. A better balance might be struck (for example) by removing judicial control over the financial rewards male couples are willing to offer.

More importantly, it needs to be recognised that men, whether coupled to other men or not, are increasingly embracing the role of parent – and this is to be encouraged. It is good social policy (for both men and women) to fashion a more gender-neutral view of parenting, that moves away from the ages-old allocation of parenting to the female domain. The cases discussed above might well be seen, in Smith's words, as "a regressive effort to insert identified fathers into lesbian families".<sup>86</sup> But it would be better to recognise them as attempts (if not altogether successful) to accommodate men's desire to fashion a new model of fatherhood which encompasses meaningful involvement in children's lives. Both men and women have a mutual interest in parenthood, even when parenting is primarily provided by a couple of only one gender. It would be a pity if the mutuality of interest in non-discrimination that exists for gay men and lesbians were to founder on an increasing disparity of interests in relation to parenthood and parenting. The Human Fertilisation and Embryology Acts encourage that disparity by medicalising the issue of same-sex parenting and by offering far more to women than to men. It is no surprise that the courts struggle to accommodate a new model of either parenthood or parenting, for this medicalisation of the issue inhibits the law from developing an understanding of what it means to be a parent unshackled from millennia-old perceptions of the roles that women and men *ought* to play in society's most important activity – the procreation and nurturing of children.

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<sup>86</sup> n.49 at p.377.