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The Human Fertilisation and Embryology Act 1990 and Non-Traditional Families

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There is now a broad consensus that reform of the Human Fertilisation and Embryology Act 1990, as amended, has become necessary. Our focus in this legislation article is not on whether the Act needs to be reformed, but on the narrower question of whether the regulation of fertility treatment in the UK does enough to protect the interests of non-traditional families. The 2008 reforms to the original 1990 Act took some important steps towards inclusivity, for example by deleting the requirement that clinics consider the child's 'need for a father' before providing treatment, and enabling two women to be a child's legal parents from birth. Our contention here is that any new legislation should go further in order to recognise and accommodate diverse family forms.

INTRODUCTION

Given that it regulates a fast-moving area of science and medical practice, the longevity of the Human Fertilisation and Embryology Act 1990 is remarkable. It has been subject to one significant overhaul, via an amending statute in 2008, but the basic structure of the Act and its contents continue to reflect recommendations made even longer ago, by the Warnock Committee in 1984.[1] It is therefore not surprising that there is now a broad consensus that the Act is 'inevitably showing its age',[2] and that reform has become necessary.[3]

Many different aspects of the statutory scheme might be said to be no longer 'fit for purpose'. In part, this can be explained by the fact that, in 1990, 'fertility treatment was considered controversial and often stigmatised'[4] and it was therefore assumed that there was a need for strict additional controls over consent,

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1 *Report of the Committee of Enquiry into Human Fertilisation and Embryology* (London: HMSO, 1984) (Warnock Report).
2 Sally Cheshire, 'Is the UK fertility sector facing a tipping point?' *Bionews* 8 July 2019.
3 Julia Chain, 'The HFEA 30 years on – what needs to change?' (Speech at 2021 Progress Educational Trust Annual conference) at https://www.hfea.gov.uk/about-us/news-and-press-releases/2021-news-and-press-releases/the-role-of-the-regulator-uk-perspectives [https://perma.cc/7XXF-ZR6E]. In 2023, the HFEA launched a consultation on the review of the Act, 'Modernising the regulation of fertility treatment and research involving human embryos' at https://www.hfea.gov.uk/about-us/modernising-the-regulation-of-fertility-treatment-and-research-involving-human-embryos [https://perma.cc/4A7Y-S9PZ].
4 Chain, *ibid*.

confidentiality and access to treatment. The Human Fertilisation and Embryology Authority (HFEA) has suggested that it would be better able to protect patients if it had access to a greater range of sanctions, and that the very strict limits the Act places upon data sharing are 'increasingly out of date'.[5] There is also an ongoing debate over whether the 14-day limit – which makes it a criminal offence to carry out research on embryos after 14 days – should be extended.[6]

The current Chair of the HFEA, Julia Chain, has drawn attention to the fact that: 'The Act has much of importance to say about the embryo but is silent on the patient and does not reflect patient centred care as being a cornerstone of good treatment.'[7] It could be argued that one aspect of a more patient-centred approach would be to be more responsive to changes to family structures and the increasing number of treatments provided outside the typical '"patient with a male partner" model, including increasing numbers of patients in female same-sex relationships, and patients with no partner'.[8] In this legislation article our focus is not on whether the whole Act is in need of reform, but on this last and narrower question of whether there are aspects of the Act which do not do enough to accommodate the interests of non-traditional families.

Zoe Darwin and Mari Greenfield have pointed out that: 'queer people's experiences of conception, pregnancy, birth and parenting are under-recorded, under-researched, and under-heard'.[9] Since the emergence of the gay rights movements in the 1970s, 'gay men and lesbians have had to position themselves in relation to a heterosexually dominated conception of the family and raising children, from which they had largely been excluded'.[10] The invisibility of non-heteronormative families is translated into policy in a number of ways, for example through the assumption in maternity policies that new mothers will always have given birth, thus excluding lesbian co-mothers.[11]

The Human Fertilisation and Embryology Act 1990 takes for granted that a child could have only one legal mother and one legal father. In 2008, the dramatic step was taken to enable a child to have one legal mother and one (female) second legal parent, thus enabling a female same-sex couple to be recognised

5 *ibid*.

6 Nuffield Council on Bioethics, *Human Embryo Culture: Discussions concerning the statutory time limit for maintaining human embryos in culture in the light of some recent scientific developments* (London: NCOB, 2017); Insoo Hyun and others, 'Human embryo research beyond the primitive streak' (2021) 371 *Science* 998.

7 Chain, n 3 above.

8 Julia Chain, *The HFEA: Working to Improve Access and Outcomes for All* (Speech at 2022 Progress Educational Trust Annual conference, 9 December 2022).

9 Zoe Darwin and Mari Greenfield, 'Mothers and others: The invisibility of LGBTQ people in reproductive and infant psychology' (2019) 27 *Journal of Reproductive and Infant Psychology* 341.

10 Nicola Surtees and Philip Bremner, 'Gay and lesbian collaborative co-parenting in New Zealand and the United Kingdom: "The law doesn't protect the third parent"' (2020) 29 *Social & Legal Studies* 507.

11 *ibid*. Indeed, a recent study with women who had entered shared biological motherhood arrangements with their female partners highlighted that for many, the reason they did so was not only so that the child shared biological relationships with both female parents, but also that forming their family this way offered a 'social and legal legitimacy that was not guaranteed with traditional IVF' (Kate Shaw and others, 'Sharing motherhood: same-sex female couples' reasons for choosing shared biological motherhood' (2022) 37 *Human Reproduction* (supplement 1) deac107-464).

as a child's legal parents from birth. But more than three decades after the Act was originally introduced, it is becoming clear that this modest recognition of one type of non-heteronormative family does not go far enough.

The law plays an important role in the exclusion and inclusion of minority communities through its definitions of what counts as a family, and who can be legally recognised as members of that family. Julie Wallbank has argued that the law has a 'channelling function', through which same-sex couples are given an incentive (legal parenthood from birth) to 'choose formal arrangements over informal ones',[12] and the privileged status given to married and civilly-partnered couples under the Act could also be seen as 'a means of encouraging prospective parents to sign up'.[13]

As Wallbank further explains, the Human Fertilisation and Embryology Act's parentage provisions 'promote the two-parent model of child rearing and actively discourage the formation of more radical parenting arrangements involving three or more adults'.[14] A female same-sex couple can be a child's legal parents, but only if they conform to a two-parent family model, thus excluding the possibility that the child's 'father' could be recognised as the child's third parent. In any co-parenting arrangement between a female same-sex couple and a male friend, or between three people in a polyamorous relationship,[15] one 'parent' cannot have the reality of their relationship legally recognised.

Julie McCandless and Sally Sheldon have highlighted that, furthermore, the rules require there to be some complementarity or difference in the way in which each parent acquires their parental status: the mother's status is acquired through giving birth, while the father or second parent acquires their status through their relationship with the mother or through an agreement to be a parent.[16]

It is increasingly acknowledged that a right to gender identity includes a right to be recognised in one's chosen gender identity.[17] As Peter Cannoot and Mattias Decoster point out, 'various states have either voluntarily introduced, or have been forced by the courts to recognise, a "third", non-binary sex/gender category'.[18] Yet the Human Fertilisation and Embryology Act 1990 takes for granted that fertility treatment is provided only to women, and its parenthood provisions are modelled on the biological and heterosexual family norm.[19] It

12 Julie Wallbank, 'Channelling the messiness of diverse family lives: resisting the calls to order and de-centring the hetero-normative family' (2010) 32 *Journal of Social Welfare & Family Law* 353.

13 *ibid*. See also Eliza Garwood, 'Reproducing the homonormative family: Neoliberalism, queer theory and same-sex reproductive law' (2016) 17 *Journal of International Women's Studies* 5.

14 Wallbank, n 12 above.

15 Maria Pallotta-Chiarolli, Peter Haydon, and Anne Hunter, '"These Are Our Children": Polyamorous Parenting' in Abbie E. Goldberg and Katherine R. Allen (eds), *LGBT-Parent Families: Innovations in Research and Implications for Practice* (New York, NY: Springer, 2013) 117.

16 Julie McCandless and Sally Sheldon, 'The Human Fertilisation and Embryology Act (2008) and the tenacity of the sexual family form' (2010) 73 MLR 175.

17 Peter Cannoot and Mattias Decoster, 'The Abolition of Sex/Gender Registration in the Age of Gender Self-determination: An Interdisciplinary, Queer, Feminist and Human Rights Analysis' (2020) 1 *International Journal of Gender, Sexuality and Law* 26.

18 *ibid*.

19 See also Susie Bower-Brown, 'Beyond Mum and Dad: Gendered Assumptions about Parenting and the Experiences of Trans and/or Non-Binary Parents in the UK' (2022) 18 *LGBTQ+ Family: An Interdisciplinary Journal* 223.

could be argued that this reliance on a traditional family model is especially striking, given the potential that assisted conception technologies have to disrupt conventional assumptions about what a family should consist in.

It is important to acknowledge that there has been considerable progress towards inclusivity since the Warnock Report expressed a clear preference for a particular family model: 'we believe that as a general rule it is better for children to be born into a two-parent family, with both father and mother'.[20] The HFEA's 9th Code of Practice is instead clear that 'patients should not be discriminated against on grounds of gender, race, disability, sexual orientation, religious belief or age'.[21] The 2008 reforms to the original 1990 Act took some important steps towards greater inclusivity, for example by deleting the requirement that clinics consider the child's 'need for a father' before providing treatment, and enabling two women to be a child's legal parents from birth.[22] Our contention here is that if the HFEA's review of the 1990 Act results in new legislation, this should go further towards accommodating the interests of non-traditional families.

THE HUMAN FERTILISATION AND EMBRYOLOGY ACT 1990, AS AMENDED

Providing 'treatment services' to trans men

The HFEA regulates fertility treatment in the UK via a licensing regime, and section 11(a) of the Human Fertilisation and Embryology Act 1990 enables the HFEA to grant licences 'authorising activities in the course of providing treatment services'. 'Treatment services' are defined in section 2 of the Act as 'medical, surgical or obstetric services provided to the public or a section of the public for the purpose of assisting *women* to carry children'.[23]

In 1990, it was taken for granted that the only people who could receive treatment services that would assist them to carry children were women, and so the use of this word did not involve a deliberate decision to make the treatment of men unlawful. Rather, it would not have occurred to those responsible for drafting the Bill, or to parliamentarians when they debated it, that the use of the term 'women' could be exclusionary.

Unless a trans man undergoes surgical treatment – such as a hysterectomy – which eliminates the possibility of pregnancy, he could stop taking testosterone in order to try to conceive a child. If he were to seek intrauterine insemination (IUI) or *in vitro* fertilisation (IVF) treatment in a licensed clinic, it is not clear that it would be lawful for the clinic to treat him, given that treatment licences can be issued only for services for the purpose of assisting women to carry children.

20 Warnock Report, n 1 above, para 2.11.
21 HFEA 9th Code of Practice, para 8.6.
22 It is, however, worth noting that this move towards inclusivity at the same time excluded men in same sex partnerships, for whom joint parenthood from birth is impossible.
23 Emphasis added.

This question arose for the first time in *R (on the application of McConnell)* v *Registrar General for England and Wales*[24] (*McConnell*). Freddy McConnell had been living as a man since 2009. In 2013, he started medical transition with testosterone therapy, and a year later, he underwent a double mastectomy. In 2016, under medical guidance, he suspended his testosterone treatment in order to receive fertility treatment in a licensed clinic. The clinic recorded his gender as 'M' for male. In 2017, he was issued with a gender recognition certificate, under the Gender Recognition Act 2004, which confirmed his legal gender as male. Ten days after this certificate was issued, he underwent a successful cycle of IUI at the clinic, using donor sperm.

After giving birth, Freddy McConnell was told that he would have to be registered on the birth certificate as the mother of his son (YY). As we see below, his application for judicial review of this decision was unsuccessful. The question of whether it had been lawful for the clinic to treat him was *obiter*, but at first instance, Sir Andrew McFarlane P expressed 'some doubt that the treatment was lawfully provided under the HFEA regime'.[25] Because the legality of his treatment was not a matter of dispute between the parties, and neither the clinic nor the HFEA had taken part in the proceedings, the Court of Appeal declined to express a view. It did, however, note that 'a similar issue of law may arise in future cases, in which it does have to be determined and it would only be right to do so after hearing full argument'.[26]

At the moment, therefore, it is unclear whether it is lawful for licensed clinics to provide treatment services to trans men. If the statute's reference to 'women' were to be interpreted to include anyone with female reproductive organs, even if their legal gender is now male, then treatment would be lawful. Conversely, if 'women' is interpreted to mean people whose legal gender is female, the treatment of trans men would be unlawful. This lack of certainty is undesirable, because clinics need to know how to respond to requests for treatment services from trans men.[27] Indeed, if it were subsequently to be determined that a clinic had provided treatment services to a trans man outside the terms of its licence, it would have committed a criminal offence.

If treatment services cannot lawfully be provided to trans men, this could amount to a breach of Articles 8 (the right to private and family life) and 14 (the right not to be discriminated against in the exercise of one's Convention rights) of the European Convention on Human Rights (ECHR), because preventing someone from accessing fertility services on the grounds of gender reassignment could be said to discriminate against them in the exercise of their right to respect for their private and family life.[28]

24 [2020] EWCA Civ 559.

25 *R (on the application of TT)* v *The Registrar General for England and Wales* [2019] EWHC 2384 (Fam) at [139].

26 *McConnell* n 24 above at [26].

27 Alan Brown, 'Trans Parenthood and the Meaning of "Mother", "Father" and "Parent" – *R (McConnell and YY) v Registrar General for England and Wales* [2020] EWCA Civ 559' (2021) 29 *Medical Law Review* 157.

28 It might also involve treating someone less favourably on account of a protected characteristic, contrary to the Equality Act 2010.

Despite this uncertainty over the legality of the treatment of trans men, the HFEA's 9th Code of Practice goes much further than any of its previous iterations in addressing how clinics should treat trans patients. It instructs clinics that they 'should recognise the sensitivities of treating trans patients and have practical ways of accommodating their needs with dignity and respect'.[29] For example, clinics 'should avoid making assumptions when referring to gender (for example if a telephone enquiry is received regarding sperm storage, avoid assuming the caller is male), and should take privacy and sensitivity into consideration.'[30]

Nevertheless, the HFEA also makes the slightly curious decision in its Code of Practice, ostensibly for 'inclusivity' reasons, to use 'the term "trans" to refer to all trans identities, including persons who consider themselves "non-binary" … and "non-gendered"'.[31] Some non-binary and/or gender non-conforming people will also be trans, but many will not be, and it might be preferable for the next iteration of the Code of Practice to deal separately and specifically with any issues that arise in the treatment of non-binary or gender non-conforming people.

Parenthood provisions

The parenthood provisions in the Human Fertilisation and Embryology Act identify the legal parents of children born following certain treatments covered by the Act, and contain the criteria for the making of a parental order following a surrogacy arrangement. In the case of donor insemination, they can also apply when treatment takes place outside of a licensed centre – for example, in cases of informal sperm donation – but only where conception was through artificial insemination, and not sexual intercourse.

The parenthood provisions are one of the most complex and confusing aspects of the statutory scheme, not least because there are *two* sets of rules, the original 1990 ones, which apply to children born between 1991 and 2009, and the provisions in the otherwise amending statute – the Human Fertilisation and Embryology Act 2008 – which set out the rules governing the parentage of children born since April 2009.

Definition of 'Mother'

Under section 33 of the Human Fertilisation and Embryology Act 2008: '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'.

29 HFEA 9th Code of Practice, para 4.21.
30 *ibid*.
31 *ibid*, para 4.15.

As Zaina Mahmoud and Chloe Romanis have pointed out, it is decidedly odd to define a woman who 'is carrying' a 'child' as 'the mother of the child'.[32] In legal terms, if nothing else, a pregnant woman is not yet the mother of the fetus she is carrying, and the fetus is not yet a child. Nevertheless, once a child is born, it is clear that the woman who gave birth is his or her legal mother. At common law too, legal motherhood has been said to be 'proved demonstrably by parturition'.[33] Following the Court of Appeal judgment in *McConnell*, even if the person who gave birth to a child is a man, he will be the child's legal mother.

Freddy McConnell's response to being told that he had to be recorded on YY's birth certificate as his 'mother' was to seek a declaration that, as a matter of domestic law, he was entitled to be registered as YY's 'father', or, failing that, as his 'parent' or 'gestational parent'. His secondary and alternative claim was that the failure to give him this option was incompatible with his and/or his son's human rights, under Article 8, in conjunction with Article 14, of the ECHR.

The government conceded that the failure to register Freddy McConnell as the child's 'father' or 'parent' or 'gestational parent' interfered with his and/or YY's Article 8 rights, and the Court of Appeal considered that this concession had been 'correctly made',[34] because it was 'an example of the state requiring a trans person to declare in a formal document that their gender is not their current gender but the gender assigned at birth'.[35] However, the Court of Appeal held that this interference could be justified under Article 8(2) of the ECHR: it was clearly in accordance with the law,[36] and was a proportionate means of serving a legitimate aim.

> The first question which arises under Article 8(2) is whether the interference is 'in accordance with the law'. In the present appeal it was not suggested that it is not. Clearly it is in accordance with the law. Legislation governs the matter and it is accessible, clear and foreseeable. It therefore has the requisite quality of law for the purposes of the Convention.
>
> The second question is whether there is a legitimate aim for the interference. There clearly is. It consists of the protection of the rights of others, including any children who are born to a transgender person, and the maintenance of a clear and coherent scheme of registration of births. It is important in this context to bear in mind that this is a question to be addressed at a general level. It does not turn on the facts of this or any other particular case. The question is not whether it would be in the best interests of YY to have the person who gave birth to him described as his mother on the long-form birth certificate. The question is whether the rights of children generally include the right to know who gave birth to them and what that person's status was …

32 Zaina Mahmoud and Elizabeth Chloe Romanis, 'On Gestation and Motherhood' (2023) 31 *Medical Law Review* 109.
33 *The Ampthill Peerage* [1977] AC 547, 577 per Lord Simon.
34 *McConnell* n 24 above at [53].
35 *ibid* at [55].
36 *ibid* at [57].

> The view that Parliament has taken is that every child should have a mother and should be able to discover who their mother was, because that is in the child's best interests'.[37]

The UK courts are thus clear that it is important that everyone is able to identify the person who gave birth to them, and, under UK law, that person is always the child's mother.[38] It may be right that identification of the person who gave birth is essential, but to require them to be registered on their child's birth certificate as their 'mother' is a *non-sequitur*. As Freddy McConnell had argued, the birth certificate could simply identify the child's gestational parent. In addition, we would question whether, in passing the Human Fertilisation and Embryology Acts 1990 and 2008, Parliament had taken the view that 'every child should have a mother'. It seems more likely that the legislation uses a gendered term to describe the person who gives birth because it used to be taken for granted that the person who gives birth will be female.[39]

Of course, there are those who are likely to argue that there would be dangers in moving away from the principle of *mater semper certa est* (the mother is always certain), in particular, that it risks eroding a surrogate (mother)'s 'right' to be recognised as the child's mother from birth. Britta van Beers and Laura Bosch, for example, have said that: 'This abandonment of the principle of *mater semper certa est* gives reason for concern from a human rights perspective. This maxim can be said to protect the surrogate mother's right to family life between herself and the child to whom she gives birth and *vice versa*.'[40]

In our view, however, it is possible to protect the interests of surrogates without requiring them always to be recognised as the child's legal mother (given that this is out of step with how the vast majority of surrogates see themselves).[41] And if the gestational parent is legally a man, the best way to protect the interests of this gestational parent – as well as those of his child – is not to require him to be registered as his child's mother.

37 *ibid* at [57], [58] and [86].

38 The HFEA's Code of Practice confirms that 'What is relevant in determining legal parenthood is the birth gender of the trans patient … a trans man who gives birth to a child will … be recorded on the birth certificate as that child's mother' (HFEA 9th Code of Practice, para 6.50). Though this is not a principle in law more broadly, the fact that two men can obtain a parental order following a surrogacy arrangement and thus a revised birth certificate *without* a mother named on it, makes this somewhat contradictory.

39 Interestingly this was around the time that 'gender-neutral drafting' was beginning to become the norm in the UK. Had it been more embedded at that point, perhaps the statute might have been differently worded. See Emily Grabham, 'Exploring the Textual Alchemy of Legal Gender: Experimental Statutes and the Message in the Medium' (2020) 10 *feminists@law*, who also argues that 'that the genres of sex/gender that have become so much a part of our institutional, social and cultural landscape have often been co-constructed through legal, textual, innovations. As such, they are also likely to change in the future' (*ibid*, 8).

40 Britta van Beers and Laura Bosch, 'A Revolution by Stealth: A Legal-Ethical Analysis of the Rise of Pre-Conception Authorization of Surrogacy Agreements' (2020) 26 *The New Bioethics* 351.

41 As such it has been proposed in the report of the Law Commission of England and Wales and Scottish Law Commission, *Building Families through Surrogacy: A New Law* Law Com No 411, Scottish Law Com No 262 (2023), and accompanying draft Bill that there is a route to recognising intended parents as the legal parents of a surrogate-born child at birth. See also Kirsty Horsey and others, 'UK surrogates' characteristics, experiences, and views on surrogacy law reform' (2022) 36 *International Journal of Law, Policy and the Family* ebac030.

We would argue that the practical interference with Freddy McConnell's rights under Article 8 of the ECHR went beyond requiring him to acknowledge his birth gender on an official document. As Amy Frieder has pointed out, LGBTQ+ people can experience difficulties when travelling with their children, and they are sometimes advised to carry their child's birth certificate with them, in order to prove to border officials that the child they are travelling with is 'theirs'.[42] In some countries, producing a birth certificate which states that the child's mother is a trans man 'may confuse border officials rather than explain the parent-child relationship. Even worse, such designation would out a male-presenting parent as trans, which could lead to discrimination'.[43] More generally, it is normally assumed that people are entitled to privacy with respect to their trans status. Whenever Freddy McConnell needs to produce his son's birth certificate, he will be forced to disclose that he is trans.

Even in countries which have historically adopted a more conservative approach than the UK to the regulation of assisted reproduction, more imaginative solutions to the issue of trans parenthood are being developed. In France in 2022, for example, following the case being referred back by the *Cour de Cassation* after an earlier appeal,[44] the Toulouse Court of Appeal not only allowed two 'maternal filiations' to be included on a child's birth certificate, but specifically 'recognised the right of a transgender person who has become a woman, who has conceived a child with her male reproductive system, to be designated as mother in the child's birth certificate'. This was deemed to be in the best interests of the child, and in line with the right to respect for private life under Article 8.[45]

Second Parent v Father/Mother

Unless the child's mother received treatment with donor sperm on her own (which would make her the child's sole legal parent), sections 35–47 of the Human Fertilisation and Embryology Act 2008 identify the other parent, when a child is born following conception with donated sperm. The other parent does not have to be the mother's partner; the only eligibility requirement is that he or she must not be within 'the prohibited degrees of relationship' (for the purposes of incest). In practice, in the vast majority of cases, these statutory provisions enable the mother's partner to be her child's legal parent from birth.

In some respects, sections 35–47 equalise the treatment of male and female partners. For unmarried male and female partners, the 'agreed parenthood

42 Amy B. Frieder, 'Trans Parenthood in an Era of Assisted Reproductive Technology: Approaches to Defining Motherhood' (2021) 34 *Harvard Human Rights Journal* 155. On LGBTQ+ parents' experience of birth registration, see further Páraic Kerrigan and Amber Cushing, '"Our story with the state": Birth certificates, data structures and gay and lesbian families' [2022] *Sexualities* 13634607221106913.

43 *ibid*.

44 Cour de cassation, civile, Chambre civile 1, 16 septembre 2020, 18-50.080 19-11.251, Publié au bulletin at https://www.legifrance.gouv.fr/juri/id/JURITEXT000042372068 [https://perma.cc/HS6B-UGLP].

45 Cour d'appel de Toulouse, Communiqué de presse du 9 février 2022 at cours-appel.justice.fr/toulouse/communique-de-presse-du-9-fevrier-2022 [https://perma.cc/E4LE-TY3M].

provisions' are identical, aside from the terminology used to describe the child's second parent. In addition, the presumption that if a mother is married her husband is the child's father (unless he did not consent to her treatment) has been extended, so that a presumption of parenthood also exists for female spouses and for both female and male civil partners. The wording of this now more widely applicable provision is not unproblematic, however. There is no need for a woman's partner to consent to her medical treatment, this is something that she does on her own. In any reform to the law, if this presumption were to be retained, it would be preferable if it could be worded differently, so that there would be a presumption that the woman's spouse or civil partner has agreed to be treated as the child's father or second legal parent, unless he or she specifically opts out of being so treated.

The most significant reform effected by the parenthood provisions in the Human Fertilisation and Embryology Act 2008 was that sections 42–45 made it possible, for the first time, for a child to have two female legal parents from birth. Previously, the mother's female partner could only become their child's legal parent through adoption. Now, if the mother is married to, or in a civil partnership with a woman, that woman will be the child's second legal parent unless she did not consent to the mother's treatment with donated sperm.[46] If the child's mother is unmarried, then with her agreement and that of the second female parent, the child will have two female legal parents from birth. In both scenarios, however, only one of the child's two female parents can be described in law as the child's 'mother'.

If a woman who conceives using donated sperm has a male partner, he will be treated as the child's legal father from birth (either because he is married to, or in a civil partnership with the mother, or because he and the child's mother have agreed to him being treated as the child's father). So, while the mechanisms for the attribution of parenthood are the same, there is a significant terminological difference: male non-genetic parents are fathers, whereas female non-gestational parents are not second mothers, but second parents, and they will be registered on their child's birth certificate as 'parent 2' (including in 'shared motherhood' arrangements, discussed below).

Of course, families are not going to call the child's non-gestational female parent 'parent 2'. While the words families use to describe their relationships vary, a child with two female parents will generally be regarded as a child with two mothers.[47] Legally, however, this is impossible. Just as in the *McConnell* case, these legal definitions of parenthood are out of step with the way in which families see themselves. Where women share 'biological' motherhood, so that one partner is the child's gestational mother, and the other is the child's genetic mother, it may be particularly hard for them to understand why they cannot

46 Though it is clear that this information has not filtered down to all the places it should have done and entrenched assumptions prevail: see *Osborne & Anor* v *Cambridgeshire County Council* [2022] EWHC 1982 (Admin), in which a female couple who had had a child using IVF were told by the registrar that the second female parent would have to adopt and sought to undo this some years later.

47 Though for non-binary or even non-gender parents, some people may indeed describe themselves as a 'parent' or find another gender-neutral term for everyday use.

both legally be treated as mothers. Instead, the non-gestational 'mother', even if she is the child's genetic mother, is legally merely 'parent 2', or as Alan Brown has put it, someone who provides 'an additional, somewhat ill-defined, parenting presence', but one that is not 'deserving to be on the same level as either "mother" or "father".'[48] Shaw et al explain that this is 'particularly exclusionary for non-birth mothers', for whom the legislation is experienced as 'both heteronormative and cisnormative', because these legal 'definitions are not inclusive of any family where conception, pregnancy and birth are separated, such as in two-mother families who have conceived using reciprocal IVF'.[49]

Confusion and Inconsistencies Caused by Surrogacy

Intended parents who have a child through surrogacy can obtain a bespoke court order which transfers legal parenthood to them post-birth, provided that certain eligibility criteria are met.[50] Sections 54 and 54A of the 2008 Act set out the current eligibility criteria for parental orders, for couples and single applicants, respectively.[51] However, it should be noted that those who obtain parental orders will not be recorded on the child's revised birth certificate as 'mother' or 'father' (even if they are the child's genetic parents), but will instead be registered as his or her 'parent(s)'. This not only treats couples who are unable to carry a pregnancy differently from those who are able to do so, but in addition, given the decision in the *McConnell* case, it is noteworthy that in certain circumstances, it *is* possible for a child's birth certificate to record the identity of a child's 'parent(s)', rather than their mother and father/parent 2.

While two men can become a child's legal parents after a surrogate birth by applying for a parental order, under section 54 of the Human Fertilisation and Embryology Act 2008, unlike a female same-sex couple, legal parenthood for two men from birth is not currently possible. Furthermore, if they are granted a parental order, neither of the male parents will be registered as the child's 'father' on the birth certificate, whereas as we have seen, the woman who gives birth in a female same-sex relationship will be a 'mother'. Are same-sex male couples therefore treated differently from same-sex female couples, who can both become legal parents from birth (with one being the child's 'mother'), whereas men in a same-sex couple cannot both establish their parenthood until the making of a parental order, which will result in neither man being registered as the child's 'father'?

48 Alan Brown, '*Re G; Re Z (Children: Sperm Donors: Leave to Apply for Children Act Orders)*: Essential Biological Fathers and Invisible Legal Parents' (2014) 26 *Child and Family Law Quarterly* 237. It is also odd that legislation prioritises the genetic connection in some situations but not all. If a genetic connection is not important then why (outside of donation) make a genetic link a requirement for a parental order, for example?

49 Kate Shaw and others, '"Her bun in my oven": Motivations and experiences of two-mother families who have used reciprocal-IVF' (2023) 72 *Family Relations* 195.

50 Originally set out in the Human Fertilisation and Embryology Act 1990, s 30.

51 Solo applicants have only been able to apply for parental orders since January 2019, after a remedial order was made following a finding that not to allow this was incompatible with solo genetic parents' human rights (*Re Z (A Child) (No. 2)* [2016] EWHC 1191 (Fam)) and new Regulations were subsequently passed to amend the Act.

The Law Commission of England and Wales and the Scottish Law Commission have recently reviewed the law relating to surrogacy.[52] Although they have proposed that some intended parents will be able to follow a new 'pathway' which will enable them to acquire legal parenthood from birth, for others (such as people who have children through 'independent' or overseas arrangements), the parental order process will remain. The Law Commissions propose some changes to the eligibility criteria for parental orders, which have in any event already been subject to considerable revision in the family courts,[53] in order to fulfil the court's duty under the Human Fertilisation and Embryology (Parental Orders) Regulations 2010 to make the child's lifelong best interests its paramount consideration.[54] The Law Commissions have not, however, recommended any revision to the registration of the intended parents as the child's 'parents', and this gender-neutral designation will also apply to intended parents who are eligible to register the birth themselves under the new 'pathway'.[55]

Indeed, surrogacy highlights some further inconsistencies in the recognition of trans parenthood. Unlike Freddy McConnell, who gave birth and is legally his son's 'mother', a trans man who uses surrogacy will, following the making of a parental order, be recognised as his child's 'parent'. Jake Graf, for example, froze his eggs before transitioning, these were fertilised with donor sperm, and the resulting embryo was carried by a surrogate.[56] After being granted a parental order, Jake and his wife Hannah, a trans woman, both became their child's legal 'parents'. The Human Fertilisation and Embryology Act 2008 thus differentiates between the parental status of trans men who have children, depending upon whether they gave birth themselves or relied upon a surrogate. Trans men who use a surrogate, even if they could carry the pregnancy themselves, would therefore be able to obtain their preferred legal outcome, that is being registered as their child's legal parent, rather than as their mother.

If a trans woman has a child on her own through surrogacy, using sperm frozen before transitioning, she would be eligible for a parental order, and could be registered on the child's revised birth certificate as their parent. If she did not freeze sperm before transition, and therefore needed to use a sperm donor as well as an egg donor, she would be ineligible for a parental order, because section 54(1)(b) specifies that at least one parent's gametes must have been used to create the embryo. Although they had considered permitting parental orders in cases of 'double donation' (where both egg and sperm are donated) in cases of 'medical necessity', the Law Commissions concluded that there was no workable or appropriate definition of 'medical necessity', and hence a single trans woman who had not frozen sperm would continue to be ineligible for a parental order.[57]

52 Law Commissions, n 41 above.
53 See for example *Re X (A Child) (Surrogacy: Time limit)* [2014] EWHC 3135 (Fam).
54 See for example *Re H (A Child) (Surrogacy Breakdown)* [2017] EWCA Civ 1798.
55 Law Commissions, n 41 above, para 4.252.
56 'Jake and Hannah Graf "over the moon" to be expecting second child' *ITV News* 1 February 2022.
57 See Law Commissions n 41 above, paras 6.117-6.146.

Treatment of Shared Motherhood

Some clinics used to be reluctant to treat women without male partners because of the wording of the original 1990 Act, which required clinics to take account of a prospective child's 'need for a father' before offering treatment.[58] Although it had always been possible for single women and same-sex female couples to find clinics willing to treat them, the 2008 reforms replaced the child's 'need for a father' with the 'need for supportive parenting', and the treatment of female same-sex couples is now routine.[59] It is also increasingly common for female same-sex parents to share 'biological' motherhood, by creating embryos using one woman's eggs and transferring them to her partner's uterus. Although commonly described as 'shared motherhood',[60] legally this is a misnomer because only the woman who gave birth can be recognised as the child's mother.

If the female couple were to swap roles for a subsequent pregnancy – which is also not uncommon – this would mean that both women become the legal mother of a child whose genetic mother is their partner (and who in law, will just be a second legal parent). This legal terminology is a poor fit with the biological and social reality of the child's parenthood: the child has two 'biological' mothers, one gestational and one genetic, as well as two social mothers. Amending the law to make the terminology more inclusive – either by allowing a child to have two legal mothers, or by making legal parenthood gender neutral,[61] so that all legal parents are simply 'parents' (gestational or non-gestational) – would better reflect the lived reality of children born into 'shared motherhood' families.[62]

It is not only the terminology which is problematic. The HFEA also requires the genetic mother to be screened as if she were an egg donor, rather than as someone undergoing treatment with her partner. This screening is 'far more complex, time-consuming and costly', as well as being 'medically unnecessary'.[63] In contrast, when a woman receives treatment with her male partner's gametes, he is not treated as a sperm donor, and there is no need for this additional screening. In heterosexual couples, men providing sperm are only required to undergo less intensive and lower cost 'partner screening' before treatment can go ahead. This means that females in same-sex couples are being

58 Lisa Saffron, 'Can fertility service providers justify discrimination against lesbians? (2002) 5 *Human Fertility* 42.

59 'Family formations in fertility treatment 2018: UK IVF and DI statistics for heterosexual, female same-sex and single patients' (HFEA, 22 September 2020) at https://www.hfea.gov.uk/about-us/publications/research-and-data/family-formations-in-fertility-treatment-2018/ [https://perma.cc/7KHK-9V9Z].

60 D. Bodri and others, 'Shared motherhood IVF: high delivery rates in a large study of treatments for lesbian couples using partner-donated eggs' (2018) 36 *Reproductive Biomedicine Online* 130.

61 Recently discussed in a wider context of reform by Davina Cooper and others, *Abolishing legal sex status: The challenge and consequences of gender related law reform* Future of Legal Gender Project, Final Report (King's College London, 2022) 38.

62 As has happened in South Africa where an unmarried lesbian couple recently won a Pretoria High Court case based on discrimination against their non-married status, and who may now both be named legal 'parents' of their twins following a shared motherhood arrangement: *V and Another* v *Minister of Social Development and Another* (27706/2021) [2022] ZAGPPHC 114 (22 February 2022).

63 Ippokratis Sarris, '"Partner-created embryos": Time to change the law to support lesbian couples' *Bionews* 8 November 2021.

treated differently because of their sexual orientation, without any justification (such as medical necessity).

In June 2021, the HFEA introduced a new consent form enabling a woman to give her eggs or embryos for the treatment of her female partner without the need to be registered as a donor. However, some clinicians queried whether this also meant that there was no need for the more comprehensive donor screening for female partners who provided eggs for use in 'shared motherhood' IVF. After considering the law, in August 2021 the HFEA issued guidance to clinics to accompany a new consent form, which stated that such women 'must be screened as donors in line with the standard licence conditions'.[64] This requirement stems from paragraph 7 of Schedule 3A to the Human Fertilisation and Embryology Act 1990, which states that: 'In relation to donations of gametes or embryos other than partner-donated sperm or partner-created embryos, licence conditions shall require compliance with the selection criteria for donors and the requirements for laboratory tests laid down in section 3 (donations other than by partners) of Annex III to the second Directive.'

This paragraph refers to the second European Tissues and Cells Directive, which covered donation of all tissues and cells within the EU (except blood and blood-products), and which was transposed into UK law.[65] 'Partner-created embryos' are defined in Schedule 3A of the Human Fertilisation and Embryology 1990 as 'created using the gametes of *a man and a woman* who declare that they have an intimate physical relationship'.[66] As a result, 'partner donation' can only involve the donation of gametes between a man and a woman who declare that they have an intimate physical relationship; thereby excluding women who are in a relationship with each other. The result is that two women in an intimate relationship are not considered partners for the purpose of embryo creation and are required to be screened as donors if one woman carries an embryo created from the egg of the other. In practice, this treats women in shared motherhood arrangements less favourably than heterosexual couples undergoing IVF together.

The HFEA has recognised the unfairness of this and because a change in the law would be needed to rectify it, has raised it with the Department of Health and Social Care.[67] In the meantime, this continues to place an additional burden on people in same-sex relationships when accessing health care. It would also appear to be contrary to the policy behind the Marriage (Same Sex Couples) Act 2013 which affords parity between, and requires equal treatment of, heterosexual and same-sex married couples.

64 HFEA Clinic Focus, August 2021.

65 Directive 2004/23/EC on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells.

66 Human Fertilisation and Embryology Act 1990 Schedule 3A, para 12 (emphasis added).

67 As explained in a letter sent by the British Fertility Society to the Parliamentary Under Secretary of State at britishfertilitysociety.org.uk/wp-content/uploads/2021/11/DHSC-Shared-Motherhood-20.10.21.pdf [https://perma.cc/D9HG-9M5H].

Is it Sensible to Include Parenthood Provisions in a Future Human Fertilisation and Embryology Act?

More fundamentally, it might also be worth asking whether it is sensible for a piece of health legislation, which regulates what can lawfully be done with embryos and gametes, to also cover what are essentially family law questions about the attribution of parenthood. Could the question of parenthood be removed entirely from the Human Fertilisation and Embryology Act and placed in a separate piece of legislation (ideally with regulation-making powers to facilitate future modification)? Indeed, the Law Commission has raised birth registration as a possible focus of its programme of law reform,[68] and the removal of parenthood provisions to a separate Act, and away from the regulation of fertility treatment and embryo research, might make such a project easier.

As we have seen, apart from cases where IVF takes place using an embryo created from a heterosexual couple's gametes, or a woman with a male partner is treated with donor sperm, the law and the terminology used to describe parenthood following fertility treatment does not match the 'reality' of families' lives. In addition, clinics record 'consent to parenthood' at the same time as taking consent to receive fertility treatment. In practice, this means that couples are filling in multiple different forms at the same time. This complexity increases the risk of human error, as evidenced by the dozens of cases in which Sir James Munby P and other judges have made declarations of parentage, following clinics' mistakes in recording their patients' 'consent to parenthood'.[69] In most of these cases, parents were contacted 'out of the blue' by the clinic where they had received treatment, often many years previously, in order to alert them to the fact that an error in the clinic meant that they were not their child's legal parent, and that they would need to go to court to resolve this. Although the courts have invariably made orders confirming legal parenthood, these mistakes have caused the affected families considerable stress and anxiety.

Rather than tweaking the existing parenthood provisions, more radical reforms might enable more than two people to be registered as parents on a child's birth certificate. For an increasing number of children, this might better reflect their family life. As mentioned earlier, if a female same-sex couple conceives and co-parents a child with the child's biological father, then 'in real life,' the child has two mothers and one father. Legally, however, the child has one mother, one second legal parent and one sperm donor.

One way to encompass diverse families in new parenthood legislation might be to prioritise the intention to become a parent as the defining feature of parenthood.[70] That way, whenever people become parents through assisted conception, the people who intend to parent the child would be recognised as the child's legal parents (and be under a legal obligation to register the birth), *and* more than two parents could be accommodated, if that is what is intended.

68 Law Commission, *Consultation for the 13th Programme of Law Reform* (London: Law Commission, 2016); and see Law Commissions, n 41 above, 106.

69 See for example *In the matter of the Human Fertilisation and Embryology Act 2008 (Case AM)* [2018] EWHC 3178 (Fam).

70 Kirsty Horsey, 'Challenging presumptions: legal parenthood and surrogacy arrangements' (2010) 22 *Child and Family Law Quarterly* 449.

Using 'intention to be a child's legal parent' as the defining feature of legal parenthood would also simplify the current parentage provisions, which differ according to whether the mother is married/civilly partnered, and whether the second legal parent is a man or a woman. In practical terms, these unnecessarily complicated rules are confusing for patients, and, because they result in patients having to fill in different forms depending upon their family circumstances, they increase the likelihood that the wrong form will be filled in.

In addition, the agreed fatherhood/parenthood provisions, which apply to unmarried parents, require the potential father/second legal parent to have 'given the person responsible a notice stating that he [or she] consents to being treated as the father [or parent] of any child resulting from treatment provided to W under the licence'.[71] The filling in of the 'consent to parenthood' form is in practice part of the process of giving informed consent to medical treatment. This may be confusing for patients, who are being asked at the same time to consent to treatment, the use and storage of gametes and embryos, their posthumous use, parenthood and perhaps also to donation of gametes and embryos for research. Intention to become a legal parent is not the same thing as consenting to a medical procedure, and using different words to describe the intention to be a legal parent and informed consent to medical treatment might help patients to better understand what is happening when they are presented with multiple forms to sign.

It could also be argued that the distinction that is currently drawn between married/civilly partnered mothers (whose spouse/civil partner will be the child's father/second legal parent from birth unless he/she did not consent to her treatment), and unmarried parents is itself outdated, given that it is replicating the common law presumption of legitimacy in marriage. Of course, this is a wider issue than just the definition of parenthood following treatment with donor sperm, but in any reform of the Human Fertilisation and Embryology Act 2008, a test for parenthood which applied to everyone would have considerable advantages for patients and clinics.

In addition, there may be advantages in calling all legal parents just that: 'parent'.[72] Indeed, this happens already in relation to surrogacy, and would continue under the Law Commission's proposals for reform. Using gender neutral language for legal parenthood beyond surrogacy would be more inclusive in many situations, not least when trans men have children, and in shared motherhood arrangements. In daily life, most families would undoubtedly continue to use gendered terms for their mothers and fathers, but we would argue that there is no need for these terms to be enshrined in law, when their use may be non-inclusive and inaccurate.

Legal identification of a child's gestational parent is necessary, to reflect the fact that only this parent automatically has parental responsibility from birth,

71 Human Fertilisation and Embryology Act 2008, ss 37 and 44.

72 New Zealand's Law Commission's recent proposals for reform of the law of surrogacy, *Te Kōpū Whāngai: He Arotake Review of Surrogacy* (2022) para 1.35 states: 'We use the term "parent" rather than "mother" or "father" throughout this Report except where it is necessary to do otherwise, for example, when referring to existing law, the facts of a particular situation or specific research findings'.

while the other parent acquires it, currently either as a result of being registered on the child's birth certificate, or through his or her relationship with the gestational parent. But there is no need for the law to tie itself in knots by recognising 'male mothers,' as it did in the *McConnell* case, when the birth register could instead simply identify Freddy McConnell as his son's (gestational) parent.

CONCLUSION

It has become increasingly evident that reproductive technologies – designed initially to help infertile heterosexual couples to have children – have facilitated the creation of an ever-wider range of family forms. The technology that led to the birth of the world's first 'test tube baby' in 1978, and which has led to more than eight million IVF births worldwide, is now routine rather than experimental. Refinements to the technology have led to improvements in treatments for male factor infertility and have facilitated the birth of children who have not inherited a familial genetic condition. Routine IVF has enabled gestational surrogacy to become the most common form of surrogacy, including for same-sex male couples and single men, and has facilitated 'shared motherhood'.

Although there have been shifts in social attitudes, the law remains conservative in its notions of who or what a parent can be. In 1990, it may have been inevitable that the legislation would embody the Warnock Report's assumption that the 'optimum' family environment is, or is as close as possible to, the heteronormative family model.[73] There is, however, now a large body of empirical research which shows that concerns that children may be harmed by being born into different kinds of family structures are unfounded.[74] Nevertheless, these assumptions continue to underpin parenthood provisions which are at best piecemeal and clumsy, and at worst unfair and stigmatising. In 2023, it is unacceptable for the regulation of reproductive technologies and the families they create to embody questionable assumptions about family life, which we now know to be at odds with empirical evidence demonstrating the wellbeing of children born into unconventional family forms.

Inevitably, many people hold strong opinions about what a family can or should (or should not) be. At the same time, it is inappropriate for regulation of an area as sensitive as assisted conception to contain exclusionary provisions that have a negative impact upon people's family life. Rewriting the legislation so that it is more inclusive (whether or not the parenthood provisions remain in it or are placed in separate new legislation) would be a start in increasing public understanding of diverse family forms, helping to reduce prejudice and improving the lives of parents and their children.

73 See, for example, McCandless and Sheldon, n 16 above.

74 As shown time and time again by the studies led by Susan Golombok and her team at the Cambridge Centre for Family Research, neatly summarised in the preface to Susan Golombok, *We are family: what really matters for parents and children* (London, Scribe, 2020).