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The final publication is available at Wiley via http://dx.doi.org/10.1111/j.1468-2230.2010.00790.x

Cite as: Julie McCandless and Sally Sheldon. 2010. 'The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form'. *Modern Law Review* 73(2) 175-207.

The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form[1]

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INTRODUCTION

The Human Fertilisation and Embryology Act 2008 ('the 2008 Act') has recently passed onto the statute books, introducing a range of changes to the 1990 Act of the same name ('the 1990 Act').[2] Unsurprisingly, given the controversial nature of its subject matter, the passage of the 2008 Act attracted sustained critical scrutiny, though this tended often to focus on a relatively narrow selection of the range of issues with which it dealt including, notably, the creation of animal-human hybrid embryos,[3] the screening of embryos in order to select a so-called 'saviour sibling',[4] and the removal of the requirement that clinicians consider the future child's 'need for a father' when deciding whether a given woman should be accepted for treatment services.[5]

In this paper, we are concerned with those provisions of the 2008 Act that determine the parenthood of children conceived by technologies regulated by the legislation. The changes

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[1] We are grateful to the SLSA for funding expenses relating to the interview component of this research and to our interviewees (of whom a list appears below in nn 30-35) for sharing their insights into the reform process with us. We also thank Emily Jackson, Marie-Andrée Jacob, Daniel Monk and two anonymous referees for helpful comments on an earlier version of this paper.

[2] The Act received royal assent on 6 November 2008 and is being phased into operation. The revised parenthood provisions, contained in Part 2 of the Act, were the first changes to come into force and apply to all treatment received on or after 6 April 2009. Other amendments to the 1990 legislation followed in October 2009, with the exception of the new parental orders (regarding parenthood resulting from surrogacy) which do not come into force until April 2010. See http://www.hfea.gov.uk/en/1752.html.

[3] These are embryos which combine both human and non-human DNA. The 2008 Act adopted the term 'human admixed embryos.' See s 4A 1990 Act, as amended.

[4] See Sched 2, s 1ZA(1)(d) 1990 Act, as amended. This process involves screening embryos to select an embryo to grow into a child who would be a genetically compatible tissue donor for an existing sick child.

[5] See s 13(5) 1990 Act, as amended. The phrase was replaced with a new requirement that clinicians consider the future child's need for 'supportive parenting' in the context of a general welfare assessment.

introduced to these 'status provisions' are at least equally radical to the deletion of the 'need for a father' provision (most significantly, in providing for the first time that two women may be recognised as a child's legal parents from the moment of birth) and are likely to make more difference in practice. However, reform of the status provisions received significantly less attention from respondents in the public consultation exercises and the two Parliamentary committees which considered the reform, from Parliament itself during debate of the Bill, and from the media. Indeed, it would seem that the popular press only became aware of the implications of the new status provisions some months after they had been passed.[6]

The lack of attention provoked by the status provisions might lie in their complexity: one commentator described them as '14 pages of legal jargon'.[7] Their reform lacks the apparent simplicity and consequent galvanising, polarising appeal of the question of whether consideration of a future child's 'need for a father' should simply be deleted. Yet, whilst technically complex, revising the status provisions raises equally charged questions regarding what a family should 'look like'. The questions faced by drafters included not merely whether law should recognise two women as a child's parents but, if so, on what basis and what terminology might best be adopted for two parents of the same sex. Further, how might we best recognise a child's social parents (those who will raise him or her) alongside those who contributed genetic material to his or her creation? Here, the architects of the 2008 Act confronted the possibilities offered not just by the donation of sperm, egg and embryo, but also of mitochondrial DNA, offering the possibility of three 'parents' with a genetic link to the child.[8] In this paper, our aim is to explain both what is innovative about the provisions which they crafted, but also to elucidate the extent to which, far from offering 'a radical and dangerous new departure in family law',[9] or a 'lego-kit model of family life',[10] these provisions equally reflect deep rooted assumptions and highly conservative understandings about who should count as family.

In tracing some of the normative underpinnings of the new law, we adopt the conceptual tool of the 'sexual family' offered by Martha Fineman. Fineman bemoaned the grip of the 'sexual family' on the US legal imagination, coining this term as a useful shorthand to describe the ideal family type of a heterosexual couple, joined through a formally celebrated union, living with

[6] For example, the *Daily Mail* reported the parenthood provisions as 'news' in March 2009: F. MacRae, 'Another blow to fatherhood: IVF mothers can name ANYONE as 'father' on birth certificate – and it doesn't even have to be a man' *Daily Mail* (2 March 2009). See further below at nn 153-157.

[7] R. Smith, 'Single Women Can Name "almost anyone" as Second Parent after IVF' *Daily Telegraph* (2 March 2009).

[8] The legislature needed also to consider the future possible reproductive use of artificial gametes (derived from adult stem cells). This was prohibited under the 2008 Act, which amended s 3 of the 1990 Act to provide that only 'permitted' embryos and gametes can be put to reproductive use. Artificial gametes do not fall within the relevant definition provided in s 3ZA of the 1990 Act, as amended.

[9] Per Christian Institute, House of Lords, House of Commons Joint Committee on the Human Tissue and Embryos (Draft) Bill, Vol II Evidence, Session 2006-07, HL Paper 169-II, HC Paper 630-II (July 2007), Ev 61, para 13.

[10] Per Family Education Trust, ibid, Ev 69, question 16(a).

genetically related offspring.[11] According to Fineman, such an understanding of the family has been at the centre of the development of family law and policy, being assumed both as the reality for which legislation should be made and the ideal norm, which it should strive to enforce. This, she argues, has resulted in legislation that is more concerned with family form than the actual contingencies of care-taking relationships and dependency. In this paper, we take the concept of the 'sexual family' as a useful framework for seeking to understand the changes introduced by the 2008 Act. We describe what, in these reforms might seem disruptive of the unity of the sexual family, yet we aim also to trace the tenacious hold of this model on English law in the face of developments which might appear at first sight to herald its decline. As such, we also aim to track how the legal sexual family concept is adapting and, perhaps, buckling in the light of this changing context. First, however, we provide a little background regarding the process by which the 1990 Act came to be amended.

THE REFORM PROCESS

The 1990 Act established a regulatory regime, overseen by the Human Fertilisation and Embryology Authority ('the HFEA'), for embryo research and for those infertility treatment services which involve the creation of embryos outside a woman's body or the use of any gametes other than her own and those of her partner, as well as the storage (and post-storage use of) gametes.[12] The 1990 Act had its origins in a report produced by a Committee of Inquiry, chaired by Mary (now Baroness) Warnock in 1984.[13] Some twenty years on, the Government felt that it was time to reconsider the operation of the legislation:

> The [1990] Act has stood the test of time well, and is a tribute to the foresight of its creators ... The Act and the regulatory system it established have instilled public confidence in the safe and ethical use of assisted reproduction technology subject to appropriate safeguards. However, it was never expected that the Act would remain forever unchanged in this area of fast-moving science.[14]

Reform was thus thought necessary to update the legislation in the light of advancing scientific knowledge and to attempt to 'future proof' it against developments yet to come.[15] It would also provide an opportunity to consolidate various changes made to the legislation since its inception and to address certain further lacunae or problems which had become evident with the existing wording of the 1990 Act.[16] Significantly for our purposes, the 2008 Act would also provide an opportunity to update the legislation in the light of changing social and familial norms, most notably with

[11] M. Fineman, *The Neutered Mother, the Sexual Family and other Twentieth Century Tragedies* (New York and London: Routledge, 1995) at 143.

[12] ss 3, 4.

[13] *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, Report Cm 9314 (1984).

[14] Department of Health, *Review of the Human Fertilisation and Embryology Act: A Public Consultation* (2005).

[15] e.g. the consideration given to artificial gametes. See above n 8.

[16] Most notably, for our purposes, the ambiguity of the phrase 'treatment together' in establishing legal fatherhood under s 28(3) 1990 Act. See further below.

respect to the recognition of same sex parents, who were felt by many to be discriminated against by the operation of the 1990 Act.

The first major step in concretising ideas for reform was undertaken in the House of Commons Science and Technology Committee's Report on *Human Reproductive Technologies and the Law* in 2005,[17] which drew on the responses to an on-line public consultation exercise and evidence provided by a range of expert witnesses.[18] While this Committee undertook a wide-ranging review of the operation of the 1990 Act, it declined to consider the working of the status provisions.[19] This Report was followed by the Department of Health's own review of the legislation in the same year,[20] which drew on a further public consultation, followed by a white paper setting out proposals for reform.[21] The Department of Health then published draft legislation,[22] which was scrutinised by a Joint Committee of the House of Commons and House of Lords, chaired by the Liberal Democrat MP, Phil Willis.[23] The Joint Committee conducted its own on-line consultation exercise on a number of specific questions (none of which concerned parenthood),[24] as well as inviting both written and oral evidence on a broader range of issues.[25] The Joint Committee's work did include brief consideration of the status provisions but it made no recommendations regarding them.[26] Revised legislation, incorporating many of the Joint

[17] House of Commons Science & Technology Committee, *Human Reproductive Technologies and the Law* (Fifth Report of Session 2004-5. HC 7-1) (2005). See further: HM Government, *Government Response to the Report from the HC Science & Technology Committee* (2005).

[18] Hansard Society, *Online Consultation on Human Reproductive Technologies and the Law, Commissioned by the Science & Technology Select Committee (Summary Report)* (2004).

[19] The Committee did consider issues relating to artificial gametes (see paras 89-90) and the welfare clause (paras 91-101), concluding that the 'need for a father' was discriminatory and unjustifiably offensive to many (para 101).

[20] Department of Health, *Review of the Human Fertilisation and Embryology Act: a Public Consultation* (2005).

[21] Department of Health, *Review of the Human Fertilisation and Embryology Act: Proposals for Revised Legislation*, Report Cm 6989 (2006).

[22] Human Tissue and Embryos (Draft) Bill 2007. Following the dropping of provisions foreseeing the merging of the HFEA and Human Tissue Authority, the title of the Bill was changed to the Human Fertilisation and Embryology Bill. For reasons of clarity, we refer to the Bill by this name throughout.

[23] House of Lords, House of Commons Joint Committee on the Human Tissue and Embryos (Draft) Bill, Vol 1: Report, Session 2006-07, HL Paper 169-I, HC Paper 630-I (July 2007) (hereafter 'JC Vol 1') and Vol II: Evidence, Session 2006-07, HL Paper 169-II, HC Paper 630-II (July 2007) (hereafter 'JC Vol 2'); see also HM Government, *Government Response to the Report from the Joint Committee on the Human Tissue and Embryos (Draft) Bill*, Report Cm 7209 (2007).

[24] For details, see JC Vol 1, pp 105-10.

[25] See JC Vol 2.

[26] Though it did recommend that further consideration be given to whether the fact of donation be registered on a birth certificate (JC Vol 1, para 276) and further changes be made to the draft welfare clause (para 243).

Committee's recommendations, was then subject to over eighty hours of parliamentary debate.[27] While the revision of the welfare clause did occupy a significant proportion of this time, again, the status provisions passed virtually undiscussed.[28]

In this paper, we draw on the extensive published documentation produced at all stages of the process described above. While we are interested in the content of these discussions, our focus on the status provisions means that we are inevitably also interested in what was ignored or not considered in any detail within them, being deemed a low priority or simply taken for granted as entirely uncontroversial. In order better to address these questions, we rely on a further key source: a small number of semi-structured, in-depth interviews with key actors who were involved in shaping the legislation.[29] Our interviewees included key officials at the Department of Health with responsibility for overseeing the drafting and implementation of the relevant aspects of the legislation,[30] a senior member of the HFEA,[31] the academic legal advisors to the two parliamentary committees mentioned above,[32] the Chair of the Joint Committee,[33] and a further member of that Committee, who is also a member of the House of Lords and herself a former Chair of the HFEA.[34] We also draw on a number of communications with the General

[27] For the text of the Bill, amendments tabled and links to all parliamentary debates, see: http://services.parliament.uk/bills/2007-08/humanfertilisationandembryology.html.

[28] Totalling up the occasional brief mentions to the status provisions over the course of this eighty hours gives a total of around one hour, with about fifteen minutes of this occupied with discussion of the clause that was to become s 46 of the 2008 Act, dealing with the naming on a birth certificate of a partner who dies prior to the treatment of the mother: see HL Debs vol 698 cols 475-9 (28 January 2008). This does not take account of discussion relating to a child's right to information regarding his/her conception and whether birth certificates should be marked in some way to indicate donor conception, which was far more thoroughly discussed.

[29] Key actors were identified by the authors by virtue of the professional role which they had held in the reform process, with each interviewee also asked to identify anyone who they felt had played a particularly significant role in the reform process. Interviewees were contacted directly by the authors and all requests for interviews were granted with two exceptions: Dawn Primarolo, MP (the Minister responsible for steering the 2008 Act through Parliament) and Kenneth Clark, MP (the Minister responsible for steering the 1990 Act through Parliament). Interviewees were sent a brief synopsis of the research project in the initial invitation. Interviewees were also offered an indicative list of questions for preparatory purposes, with three interviewees requesting this information (McLean, Morgan and Willis, see below nn 32 and 33). The interviews, ranging from 40-120 minutes, were conducted by the authors and transcribed by a professional transcriber. A copy of the interview schedule is on file with the authors.

[30] Edward Webb, Deputy Director for Human Tissue Transplantation, Embryology and Consent; Gwen Skinner, the policy manager responsible for the development of the legal parenthood provisions in the 2008 Act; and Katy Berry, who was responsible for the implementation of the 2008 Act.

[31] Emily Jackson, Deputy Chair of the Human Fertilisation and Embryology Authority.

[32] Derek Morgan, Advisor to the House of Commons Science and Technology Committee and Sheila McLean, Advisor to the House of Commons Science and Technology Committee and the Joint Committee.

[33] Phil Willis, MP.

[34] Baroness Ruth Deech.

Register Office.[35] While the limitations of the information which can be gleaned from such interviews should be acknowledged, our interviewees provided numerous insights into the reform process that are unavailable from the published documentation.[36]

The reform process outlined above was lengthy and undoubtedly resulted in rigorous scrutiny of certain key aspects of the 2008 Act. However, there were also some important limitations on what was achievable in this process, which should be noted at the outset. First and most significantly, the 2008 Act is an amending statute. Nowhere was a blank piece of paper offered for reform, in a way that allowed for a thorough and fundamental rethinking of the kind of regulation which might best suit this area or the ethical principles which should underpin it. Rather the architects of reform worked outwards from the provisions already in place, making the key question not 'what model of law do we want?' but rather 'what needs to be changed?' Indeed, the Joint Committee described the reform process as 'tinkering with the existing legal provisions rather than going back to first principles and seeking to take an overall view of where to go in the next fifteen years', singling out the approach taken to parenthood as one of two specific examples of the inadequacies of approach.[37] While Phil Willis MP, the Chair of that Committee, confirmed his frustration with this method in interview, the fact that only new clauses would be subject to parliamentary debate undoubtedly eased the successful passage of the Act, making the Government's work far easier.[38] For current purposes, it can be noted that while some aspects of the status provisions were completely rewritten, those regulating legal motherhood and the attribution of fatherhood to the legal mother's husband were left almost untouched and barely considered.

Second, as we noted above, the time available for scrutiny of the legislation was heavily dominated by a relatively narrow range of issues. These issues were dictated by a combination of factors, including: key individuals' power to influence the agenda of the parliamentary

[35] Email correspondence with David Trembath, Births, Deaths and Adoptions Branch at the General Register Office.

[36] In so far as is possible within such a small cohort of interviewees, we attempted to mitigate problems of fading memories and selective recall by interviewing more than one person involved in each key stage of the reform process (which we take to be the drafting of the legislation overseen by the Department of Health, the pre-legislative scrutiny offered by the Joint Committee and discussion of the new statute in Parliament) and by checking the information gleaned from the interviews against the available published documentation. While key actor interviews have some well-rehearsed limitations, we have nevertheless obtained a perspective on this reform process that would simply not have been possible to glean from the published documentation alone. For a methodological consideration of key actor interviews, see T. Odendahl and A. Shaw, 'Interviewing Elites' in J Gubrium and J. Holstein (eds), *Handbook of Interview Research: Context and Method* (Thousand Oaks, CA: Sage, 2002) 299-316.

[37] Along with the approach to the regulation of human admixed embryos. JC Vol 1, para 44.

[38] Respectively, interviews with Willis and Webb on file. Webb told us: 'an option could have been just to repeal the 1990 Act altogether and start with a new one that starts at clause one. But that would have required a debate on all the various provisions and sections in the 1990 Act, including those where there were no Government proposals for change and if everyone is happy, then why volunteer provisions to be reopened? So that was a conscious decision by Ministers to have an Amendment Act.' And later: 'We have to be aware there's a job to do, in a certain time-scale and we can't afford to turn over stones that we don't need to turn over.'

committees;[39] significant media interest in particular aspects of the law; attention from the public and expert witnesses in the various consultation exercises;[40] and the limited amount of available time, which resulted in matters deemed less pressing simply falling off the agenda. The Joint Committee Chair told us that he had hoped that many of the issues which had been insufficiently discussed in Committee would have received further attention in Parliament but this did not happen because of way that debate had been guillotined around the 'big sexy issues'.[41] In terms of parenthood under the Act, each of these factors appears heavily to have contributed to the focus on the 'need for a father' provision and lack of detailed scrutiny of the status provisions, noted above. Further, it should be noted that a significant proportion of the time available to the Joint Committee for the essential work of detailed pre-legislative scrutiny was taken up with exploring (and eventually defeating) the Government's plan to merge the HFEA with the Human Tissue Authority to form a new regulatory body: the Regulatory Authority for Tissues and Embryos ('RATE'). This proposal emerged as a cost-cutting measure following the Department of Health's review of Arm's Length Bodies.[42] The proposal found favour with virtually no one but absorbed an extensive amount of time and energy – not to mention the general resources that were expended in the preparations for RATE – from a Committee which was already forced to work to a seriously constrained timeframe, thus exacerbating the need to prioritise which aspects of reform might be considered.[43]

A third point to note is that the task of overseeing the redrawing of the legislation fell to a Government Department – Health – that does not have central responsibility for law and policy relating to the family. As we will explain below, some radical innovations in family law in other countries (most notably the recognition of three legal parents on the birth certificate) are taking place in the context of conceptions resulting from the use of assisted reproduction. In this reform process, however, the view was strongly taken that it was not for a Government Department concerned with health to instigate significant change in the area of family law and policy.[44] Rather, the Department of Health took a deliberately cautious view, eschewing any radical innovation in this area, emphasising the importance of legislating for the majority of cases and

[39] In this sense, Sheila McLean, who was the specialist advisor to both parliamentary committees, told us: 'I got no sense that there was any real interest in the parenthood thing at all, to be honest.' Derek Morgan, advisor to the Science and Technology Committee explained it in terms of that Committee being interested in the 'politics of reproductive regulation and not the politics of reproduction.' Interviews on file.

[40] Willis, interview on file.

[41] Willis, interview on file.

[42] See further Department of Health, *Reconfiguring the Department of Health's Arm's Length Bodies* (2004).

[43] The Joint Committee was given just under nine sitting weeks to consider the draft legislation, rather than the recommended 12. JC Vol 1, paras 2-3. It is ironic that a measure designed to save time and money could have absorbed such extensive resources.

[44] Webb, interview on file.

ensuring that provisions were drafted in such a way as to accord with common sense views of the family.[45]

While the 2008 Act introduces a number of changes relevant to parenthood, as noted above our focus here is on just the reworking of the 'status provisions'.[46] In what follows, we consider in turn the provisions regulating the acquisition of motherhood, fatherhood and female parenthood. With regard to each, we briefly outline the working of the 1990 Act before going on to provide a detailed exposition of the provisions which were eventually voted onto the statute books. We then move on to a close analysis of the enduring legacy of the 'sexual family' model in this reform process. Relying on this conceptual framework, we aim to make explicit some of the broad beliefs and values which implicitly underpinned the choices made in this process, thus opening them up for further ethically and empirically informed evaluation in the future.

THE 'STATUS PROVISIONS' OF THE 2008 ACT

The 'status provisions' of the 1990 and 2008 Acts set out who should be treated as the legal parents of a child conceived through regulated treatments in those, relatively rare, cases where the child is not straightforwardly the genetic offspring of both parents.[47] As we aim to show, the model of family underlying these provisions was barely considered by the reformers at all, not forming a core part of the reform project. Rather, those involved in the reform project tended to rely on common sense assumptions about the family, which were subject to little sustained scrutiny or critical evaluation.

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[45] Skinner described how Department of Health officials worked by testing out the new agreed parenthood provisions against their intuitions: 'We went through a lot of situations where we imagined possible circumstances that could arise and tested out the Bill to see if it would meet those. For example, thinking through the most complex personal relationship changes, which could possibly happen in a period of six months, to see if the Bill worked ... We thought about all the things that could happen to a couple, maybe other people coming into the relationship or a person making a different decision about her sexual orientation and marrying someone when she's got a legal parenthood agreement in place with another woman and seeing if the Bill worked against all possible scenarios. That was the test really.' Interview on file.

[46] A number of further changes of interest are not discussed here. Notably, the new law also includes an extension of the rights of children conceived via gamete donation to information regarding the circumstances of their conception; a relaxing of the eligibility requirements for 'fast-track' adoption procedures following surrogacy arrangements; a prohibition on the reproductive use of artificial gametes (derived from adult stem cells); the introduction of a 'cooling off' period before embryos can be destroyed in the light of a disagreement as to their future disposition on the part of the man and woman who contributed the gametes resulting in their creation; and, as noted above, it replaces the requirement that clinicians consider a future child's need for a father with a requirement to consider the child's need for 'supportive parenting' in s 13(5). On the first of these, see further C. Jones, 'The Identification of "Parents" and "Siblings": New Possibilities Under the Reformed Human Fertilisation and Embryology Act' in J. Wallbank, S. Choudhry and J. Herring (eds), *Rights, Gender and Family Law* (London: Routledge Cavendish, in press 2009) ch 10.

[47] In the vast majority of treatment services provided in clinics, the future parents' own gametes will be used. The legislation covers only treatments involving donated gametes (sperm, ova, embryos) and/or the creation of an embryo outside of a woman's body, see n 12 above. Some licensed treatments are not caught by the status provisions, namely insemination procedures whereby the sperm of the woman's husband or partner is used.

In very broad terms, the 2008 Act maintains the 1990 Act's provisions regarding motherhood, rewrites the provisions regarding fatherhood whilst remaining true to their ethos, and introduces one particularly significant innovation: if certain conditions are met, the *female* partner – or, indeed, friend or acquaintance – of a mother who conceives through the regulated technologies may also now be recognised as the resulting child's legal parent. As noted above, the new parenthood provisions were the first part of the 2008 Act to come into operation, applying to all regulated treatments which take place on or after 6 April 2009. Here, we first outline the changes introduced to legal motherhood and legal fatherhood resulting from the use of regulated technologies before going on to look at the female parenthood provisions.

Motherhood

The attribution of the status of mother proved relatively straightforward in both the 1990 and 2008 Acts: excluding the case of adoption, the birth mother and no other is to be treated as the legal mother of the child.[48] This remains true whether or not the egg used to conceive the pregnancy was the woman's own and regardless of whether a surrogacy agreement was in existence. This gestational grounding of motherhood has meant that, in the UK, a surrogate mother's right to be recognised as a child's legal mother has never been successfully challenged.[49] It should be noted that not all jurisdictions have followed this approach: most famously, the Californian court in *Johnson v Calvert* took the view that motherhood might be grounded in genetic links combined with an intention to create a child.[50] Yet in the UK reform process, at no point was any serious consideration given to the possibility of changing the principle that motherhood is singularly grounded in gestation.[51]

However, the 2008 Act does contain one innovation pertaining to motherhood: it gives added emphasis to the principle that no route to legal motherhood (or female parenthood),[52] can be achieved purely on the basis of a genetic link, providing that a woman is not to be treated as the parent of a child who she has not carried, except where she is so treated on the basis of other provisions of the Act.[53] The section mirrors a similar provision which, in certain circumstances, exempts a man from being considered the legal father of a child resulting from his donated

[48] s 27 1990 Act, s 33 2008 Act.

[49] In *Re P (a Child)* [2007] EWCA Civ 105, on a highly unusual set of facts, the genetic father succeeded in winning a residence order but the surrogate's legal status as the child's mother remained undisturbed. For the genetic father's wife to be considered as the child's legal mother, she will have to adopt the child.

[50] [1993] 5 Cal.4th 84. The court ruled that when two women can prove they have biological links with a child (through ova/gestation), the one who intended to bring about the birth of a child that she intended to raise as her own is the legal mother. It was considered that this principle would similarly apply to egg donation cases.

[51] There is no discussion of other possibilities in the published documentation listed above, see nn 17-23, and our interviews confirmed a lack of such discussion 'behind the scenes'.

[52] For the acquisition of 'female parenthood', see below.

[53] s 47. Notably: civil partnership, agreement with the mother, where provisions regarding the transfer of embryos after the death of civil partner/agreed female parent apply, or adoption.

sperm.[54] Yet with regard to men, such a provision is clearly legally necessary: unlike motherhood, fatherhood can be – and indeed very frequently is – acquired on the basis of a genetic connection. With regard to women, the section might appear to be legally redundant given the very clear provisions setting out that legal motherhood is to be established only through gestation (and 'female parenthood' only through the provisions detailed below). As such, the decision to include it is of interest, and we discuss it further below.

Fatherhood

Under the 1990 Act, where a child was conceived through the use of donor sperm following either licensed treatment or 'artificial insemination', the woman's husband would be the legal father unless it could be shown that he did not consent to the relevant treatment.[55] Despite a common assumption to the contrary, the framing of this provision in terms of 'artificial insemination' served also to catch self-arranged donor insemination, provided that the conception was not through sexual intercourse. Marriage thus commanded a privileged place as the preferred way of attributing legal fatherhood.

If no father existed by virtue of marriage, an unmarried man could be deemed the legal father where receiving licensed 'treatment together' with the mother.[56] Unmarried male partners were thus able to gain the same parental status as married men, though only where conception resulted from licensed treatment services and without the presumption of consent that occurred in marriage.[57] Where someone was treated as a father by virtue of either of these provisions, no other man was to be treated as the father of the child.[58] As mentioned above, where sperm had been obtained through a licensed clinic, a sperm donor was not to be treated as the legal father. The effect of this, where treatment services were provided for a single woman or a woman in a same sex relationship, was that the resulting child would be legally fatherless. As such, the 1990 Act extended the severing of a legal connection between genetic paternity and legal fatherhood, first to licensed treatments other than donor insemination and, second, to unmarried male partners.[59] It also evidenced a clear intention that a child could and should have only one legal father: a married woman who sought treatment services together with a different male partner could not succeed in securing two legal fathers for her children.

These provisions have been understood as an attempt to foresee the various ways in which people might seek to make use of reproductive technologies and to impose a 'sexual family'

[54] s 28(6) 1990 Act; s 41 2008 Act.

[55] s 28(2). In the absence of consent, there is nonetheless a rebuttable presumption that the husband is the father, see s 28(5) which explicitly saves the common law marital presumption of paternity.

[56] s 28(3).

[57] Note, however, that the 1990 Act conferred only parental status and not parental responsibility, which is conferred through provisions in the Children Act 1989.

[58] s 28(4).

[59] Thus extending the measures introduced by s 27 Family Law Reform Act 1987.

template upon the resulting familial relationships.[60] Yet such foresight inevitably had its limits and one important task facing the architects of the 2008 Act was to remove the ambiguity in the provision regulating the acquisition of fatherhood by unmarried men, which had been highlighted through legal challenges in the years since 1990.[61] Rejecting the test of 'treatment together' and the similarly ambiguous notion of 'joint enterprise' which the courts had developed to give it meaning,[62] the 2008 Act nevertheless remains true to the spirit of the 1990 legislation. It maintains the position that, where a woman seeks treatment with her husband, he will be the legal father unless it can be shown that he did not consent to the treatment.[63] For unmarried fathers, it accepts the principle that legal fatherhood should be grounded in the parents' intention, yet rewrites the test to be used to achieve this result, adopting a highly formalised, contractual model, which it is hoped, will offer rather more clarity.[64] Thus, the 2008 Act provides that if there is neither a father by virtue of marriage nor a female parent by virtue of civil partnership, then an unmarried man can be treated as a child's father, provided that 'agreed fatherhood conditions' are met.[65] These conditions provide that both the intended mother and father must have given written and signed consent to the man being treated as the father of any child resulting from the licensed treatment; that at the time of implantation or insemination neither party has given notice of withdrawal of this consent; and that the woman has not given further notice that she consents to someone else being treated as the father (or female parent) of the child.[66] Significantly, these provisions do not restrict the acquisition of parenthood to a woman's partner, rather they turn on consent (both the mother's and father's) in grounding fatherhood.[67]

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[60] J. Dewar, 'The Normal Chaos of Family Law' (1998) 61 MLR 467, 482; S. Sheldon 'Fragmenting Fatherhood: the Regulation of Reproductive Technologies' (2005) 68 MLR 523. As we noted above, the Department of Health described how they would invent various scenarios in which individuals might seek to have children, determine who would be considered the legal parents under the (then draft) legislation and test these outcomes against their own intuitions as to what was right, n 45 above.

[61] *Re B (Parentage)* [1996] 2 FLR 15, *U* v *W* [1997] 2 FLR 282, *Re R (Contact: HFEA)* (2001) 1 FLR 247, *The Leeds Teaching Hospitals NHS Trust* v *Mr A, Mrs A and Others* [2003] EWCA 259 (QBD). These cases are examined in more detail in Sheldon, *ibid*.

[62] *ibid*.

[63] s 35.

[64] Webb, interview on file. Unsurprisingly, this very contractual form of words results from the Department of Health's team of lawyers, who delivered this wording as a means of achieving the outcome desired by the Department.

[65] ss 36-37.

[66] Where consent is withdrawn by someone who had previously agreed to be treated as a parent of a child born to a woman as a result of treatment services provided to her under the Act, the clinic has a duty to tell the woman of this change in circumstances and cannot treat her until she has been so notified: see s 14(6D) of the 1990 Act, as amended. However, where the future mother consents to A being treated as the parent of a child resulting from treatment services provided to her (thus extinguishing the claims to parental status of B, who had previously consented to be treated as the future child's father or female parent), the clinic's duty is merely to take 'reasonable steps' to notify A of the change in circumstances: s 14(6E), 1990 Act, as amended.

[67] Nonetheless, the most recent edition of the HFEA Code of Practice has retained the language of 'partner' to describe the prospective second parent. This raises the questions of the extent to which the impact of the new

The provisions do contain one important limitation: the intended parents must not fall within the prohibited degrees of relationship foreseen in incest legislation.[68] We return to this below.

Finally, the 2008 Act incorporates into the 1990 Act the provisions of the Human Fertilisation and Embryology (Deceased Fathers) Act 2003 which allow for a man to be registered posthumously as the father of a child.[69] This status is limited to being named on the birth register as the child's father, and is applicable whether or not the man's own sperm or donor sperm is used in the treatment.[70] The man must have given written consent for this to happen and the mother must consent to his name being recorded on the birth certificate.[71]

Female Parenthood

The most radical change introduced in the reworking of the status provisions is to allow for the first time for same sex female partners each to be recognised as the legal parent of a child from the moment of birth.[72] The birth mother would, as previously, be recognised as the legal mother by virtue of having gestated the pregnancy.[73] Under the 2008 Act her partner, or any other woman to whom she is not prohibitively related, can also be recognised as a 'female parent' on lines directly analogous to those by which men may be recognised as fathers. Thus, where a woman is in a registered civil partnership, her partner will be recognised as the child's 'female parent' unless it can be shown that she did not consent to the treatment or artificial insemination.[74] Very significantly, as for heterosexual married couples, this provision does not apply merely to treatment received in a licensed clinic. As such, where a civil partnered lesbian couple have a child through self-arranged donor insemination, both partners are now legally entitled to be registered as parents on a child's birth certificate and the genetic father will not be recognised. Where a woman is not in a civil partnership, her partner, or another woman, can nonetheless be recognised as a 'female parent' if treatment is received at a licensed clinic and if

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parenthood provisions has been well understood and, further, whether the HFEA's choice of terminology may prove misleading for clinicians. See HFEA Code of Practice (8th Edition), e.g. at paras 8.3, 8.13.

[68] Marriage Act 1949, First Schedule, as amended by the Marriage Act 1949 (Remedial) Order 2007 (abolishing the bar to marriages between former parents and children-in-law).

[69] s 28(5A), 1990 Act, as amended.

[70] ss 39-40 2008 Act, respectively. Note the separate provisions here for posthumous genetic fatherhood and posthumous non-genetic fatherhood.

[71] Such recognition of paternity has no legal force, for example, in terms of nationality or succession. Rather, this measure suggests the symbolic importance of fatherhood in completing the nuclear family. See further Sheldon, n 60 above.

[72] Same-sex couples have been able to achieve joint parenthood by virtue of adoption since the Adoption and Children Act 2002, which came into force in December 2005.

[73] s 33, see above.

[74] s 42.

the 'agreed female parenthood conditions', which exactly mirror the agreed fatherhood conditions, as set out above, are met.[75]

The provisions regarding posthumous registration of fatherhood are likewise extended to female parenthood. While, in the case of men, the legislation contains two separate provisions (one regulating cases where the man's own sperm was to be used, another where it was not), for female parenthood only one provision is deemed necessary.[76] This serves to emphasise the legal irrelevance of whether or not a woman is a genetic parent, a point to which we return shortly.

THE 2008 ACT AND THE 'SEXUAL FAMILY'

As has been noted by earlier commentators, reproductive technologies offer the possibility to break down parenthood into the various constituent parts (including social, intentional, genetic and gestational links) on which parenthood has typically been predicated and which, in the sexual family model, are all located within the sexual couple composed of one mother and one father, who raise their own genetic children.[77] Separating out these different facets of parenthood offers difficult challenges for a legal order which has historically laboured hard to maintain the fiction that they are united in the sexual family. Law has policed this fiction in various ways, most notably through simply refusing to recognise non-marital children who were treated as *filius nullius* and thus excluded from a place within this symbolic legal order; and through rules making it virtually impossible for a married couple to establish that children born during a marital union had actually been fathered by a man other than the husband.[78]

However, the coherence of the legal 'sexual family' ideal is increasingly out of touch with demographic reality. If such assumptions were ever possible, it is clear that today it cannot be presumed that children will be raised by a couple[79] or, where they are, that the couple will be heterosexual[80] or joined in a formally celebrated union.[81] Further, many children will not be

[75] ss 43-44.

[76] s 46.

[77] Diduck quite rightly notes that there is nothing natural or inevitable about law's reliance on these particular factors. Rather, they are elements that law has identified as important in a particular temporal and social context: A. Diduck, '"If only we can find the appropriate terms to use the issue will be solved": Law, Identity and Parenthood' (2007) 19 *Child and Family Law Quarterly* 458.

[78] See generally, Stephen Cretney's impressive *Family Law in the Twentieth Century: A History* (Oxford: Oxford University Press, 2005) 533-6 and R. Collier and S. Sheldon, *Fragmenting Fatherhood: A Socio-Legal Study* (Oxford: Hart Publishing, 2008), ch 6. See Andrew Bainham's rather different interpretation on this point: Bainham, 'What is the Point of Birth Registration?' (2008) 20 *Child and Family Law Quarterly* 449.

[79] In 2007, 24 per cent of families with dependent children were lone parent families, compared to 7 per cent in 1972. See Office of National Statistics ('ONS'), *Social Trends No. 38* (Basingstoke: Palgrave Macmillan, 2008) at 19.

[80] There have been recent legal reforms that offer to recognise some same sex relationships, through introducing a process whereby same-sex partnerships can be formally recognised (Civil Partnership Act 2004) and provisions

raised by two parents with whom they share a genetic relationship: a significant increase in the rate of non-marital births and decline in marriage as a lifelong permanent commitment to one person has resulted in increased numbers of 'genetic families' being split across households, with children living apart from at least one genetic parent, typically their father.[82] As such, a great many parenting arrangements will not meet all the criteria of the 'sexual family' ideal set out above.

Beyond these demographic shifts, the use of reproductive technologies drives further clear inroads into the sexual family ideal. The regulatory framework imposed in the 1990 Act strove to maintain and entrench the 'sexual family' model at a time when other aspects of family law had already developed far more flexible and creative ways of recognising the significance which multiple 'parent' figures might have in a child's life.[83] Yet the cracks in the sexual family model were also clearly visible in the 1990 Act (and before), most notably in the acceptance of the separation of genetic parenthood from intentional/social parenthood; the formal recognition that the sexual couple (and legal parents) at the heart of the family unit need not be the genetic parents of any children of the family;[84] and the attribution of fatherhood to a man neither genetically related to the child nor legally connected to the child's mother.

However, notwithstanding these significant challenges to it, we would suggest that the sexual family ideal has retained a significant hold, which is clear in the provisions of the 2008 Act. Either because its implicit understanding of the family accorded with their own common sense vision of the world or because change was seen as too politically sensitive in this particular context, the reformers left undisturbed many of the key assumptions, which had underpinned the original 1990 Act. This can be seen in: the ongoing significance of the formally recognised adult couple; law's continued adherence to a two-parent model; what we describe as 'parental dimorphism' (which, within the two-parent model, allows only for one mother plus one father or female parent); and the notion that the couple must be (at least potentially) in a sexual relationship. We consider each of these factors in more detail below before going on to offer some thoughts on transgender parents' use of reproductive technologies which, we suggest, provides a further illustration of various tensions and is set to raise thorny legal problems for future judicial determination.

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which allow both parties in a same-sex partnership to have a legally recognised relationship with a child through adoption (Adoption and Children Act 2002).

[81] By 2006, 43 per cent of births were to unmarried women compared to a rate of 25 per cent in 1988. The majority of these births are to cohabitees with 86 per cent of non-marital births being jointly registered. See ONS above n 79 at 24.

[82] While marriage remains popular (284,000 marriages in 2005), the permanence of the union is less certain, with divorce significantly more common (56,000 in 1968, 155,000 in 2005). See ONS *ibid*, at 20-21.

[83] See e.g. provisions in the Children Act 1989, as amended, relating to parental responsibility and a range of orders relating to children, such as those pertaining to contact and residence.

[84] See above. See further: J. McCandless, 'Status and Anomaly: Re. D (contact and parental responsibility: lesbian mothers and known father) [2006]' (2008) 30 *Journal of Social Welfare and Family Law* 63.

The ongoing significance of the formally recognised adult couple

As we have seen, the 2008 Act maintains the hierarchical structure of the 1990 Act, whereby husbands (and now female civil partners) are given 'first shot' at parental status.[85] Only when there is no father or female parent by virtue of this formally recognised relationship,[86] are the courts directed to consider whether there is a father or female parent under the agreed parenthood provisions. As such, while marriage may no longer be the only means of legally recognising an adult couple, it retains considerable importance and the extension of the marital presumption to female civil partners can be seen as assimilation to (and extension of) this marital ideal rather than any radically new way of recognising parent-child legal ties.[87] It is noteworthy, however, that a presumption which used to be grounded in a high probability that the husband was the genetic father is now extended to situations where we know for certain that there is no genetic relationship between parent and child.[88]

We noted above a further significant distinction between formally recognised and other partnerships: parental status is *presumed* for husbands (and now civil partners) in both licensed and self-arranged 'artificial insemination', whereas unmarried/unregistered partners can gain legal recognition under the 2008 Act only in the context of licensed treatment and only where they satisfy the agreed parenthood conditions.[89] While procedures involving IVF techniques can only occur in a medical setting, practices such as donor insemination do not necessarily require medical assistance. Although there are no available figures, it seems reasonable to assume that the practice of self-arranged artificial insemination is more common amongst lesbian couples than heterosexual couples and the effects of extending the presumption of parenthood to civil partners who arrange their own artificial insemination are thus highly significant. This extension also poses interesting questions for birth registration procedures in relation to what evidence a Registrar might legitimately request in order to establish that the conception was 'artificial'

[85] Note that this is also true in the context of surrogacy, where if the birth mother is married or in a civil partnership, and the conception is brought about by means other than sexual intercourse, her husband or female partner will be the presumed second parent of the child. This is true even when the gametes of the commissioning father (or indeed mother) are used. See further E. Jackson, 'What is a Parent?' in A. Diduck and K. O'Donovan (eds), *Feminist Perspectives on Family Law* (Abingdon: Routledge-Cavendish, 2006).

[86] Under s 35 or s 42 respectively.

[87] On the assimilationist model adopted in the Civil Partnership Act 2004, see N. Barker, 'For Better or For Worse? The Civil Partnership Bill [HL] 2004' (2004) 26 *Journal of Social Welfare and Family Law* 313; C. F. Stychin, "'Las Vegas is not where we are": Queer Readings of the Civil Partnership Act', (2006) 25 *Political Geography* 899.

[88] While ss. 35 and 36 do not affect the *pater est* presumption, it may be rebutted by evidence (e.g a DNA test) showing that the husband is not the child's genetic father. In that case, a man in respect of whom the agreed fatherhood conditions were satisfied would be the child's father under s 36. There is no presumption parallel to the *pater est* presumption in common law for people who enter a civil partnership and, as such, the provisions which would otherwise apply to determine parenthood will not be affected by the mother entering into a civil partnership after the transfer of an embryo or gametes.

[89] In the context of non-licensed treatment when a woman is neither married nor in a civil partnership, the provider of the sperm is the child's legal parent under the common law.

rather than through sexual intercourse.[90] That this significant change appears to have passed largely unnoticed is evidence of the lack of scrutiny received by the status provisions, which we noted above.

The ongoing distinction drawn between married and unmarried fathers (and, indeed, its extension to civil partnered female couples and those not in such a partnership) is interesting in the context of widespread erosion of the relevance of this distinction elsewhere in family law, a trend which gathered momentum in the 1970s and is currently continued in the Welfare Reform Bill 2009.[91] In the face of such a trend, why did the architects of the reform of the 2008 Act retain and build on this distinction here? The roots of this prioritisation of marriage appear to lie in anxieties during the passage of the 1990 Act regarding the use of reproductive technologies and the perceived threats which they posed to the nuclear family.[92] Twenty years on, the failure to challenge a distinction which is now even further out of line with current family law and policy lies in the constraints on the reform process which we noted above: the 2008 Act is an amending statute, which builds on the structure of the 1990 Act. Further, reform in this area is conducted in the harsh spotlight of media attention: the clear sense of those overseeing the drafting of the legislation was that to challenge the distinction between married and unmarried couples ran the risk of being taken to be attacking marriage and thus liable to attract very hostile coverage.[93] The result is a piece of legislation which, in maintaining a clear distinction between formally recognised and other relationships, is now very significantly out of line with broader family law principles.

The Two Parent Model

[90] The current practice by Registrars is that generally no evidence will be required unless the Registrar has reason to believe that those persons seeking to register the birth are providing false information. In correspondence, Trembath indicated the following: 'As you say, where legal parentage is not conferred on the mother's female partner because they were not in a civil partnership (and the mother was not married), and treatment was not carried out at a clinic in the UK or consent had not been properly given, the partner could not legally be registered as the parent. The biological position would then apply i.e. the man who had intercourse with the mother or donated sperm for a DIY insemination would be the father and could be registered a[s] such. Where there is any dispute between the parties as to the means of conception or status of the parents, before registering the birth the registrar will seek further information or ask to see relevant documentation as appropriate (e.g. confirmation from the clinic of the treatment, consent forms etc) in order to establish the correct parentage. In any circumstances, only two people may be regarded as the parents so in a case where all three parties wish to be registered as parents, the registrar will have to defer registration and take whatever action is appropriate to establish the correct parentage.' While documentation may be available to confirm or deny that treatment took place at a licensed clinic, what the Registrar would ask for by way of evidence that conception took place 'artificially' rather than through sexual intercourse in the self-arranged context remains an interesting empirical question and one that poses the further consideration of what the distinction in the provision actually seeks to achieve. Trembath, e-mail on file.

[91] This aims to ensure joint registration of all births and provides that parental responsibility will be automatically acquired by an unmarried man (or non-civil partnered female partner) who registers as a child's father (or female parent) under these new provisions: see Sched 6, Part 2, Clause 21.

[92] See further Dewar, Sheldon, n 60 above.

[93] Webb interview, on file: 'if we changed the recognition of married men or marriage, people might see that as the Government attacking marriage. So we always have to be mindful of the bigger political picture as well...'

In the context of widespread political and cultural disagreement regarding on what grounds parents should be recognised, acceptance of the fact that we can have two – and only two – 'real' parents has proved a unifying article of faith.[94] The two parent model retains a grip on the law which appears to have outlived any inevitable relationship between legal parenthood and either biological fact or marital convention. Significantly, while the reform of s 13(5) ensured that there was sustained attention to the question of whether a child could flourish equally well without a father (either in a single parent family or raised by a same sex couple), this reform process saw no discussion of the question of whether, if two parents are better than one, three parents might be better than (or, at least, as good as) two. In other contexts, family law has developed increasingly flexible and creative ways of recognising a range of adults as of significance to a child. To take just two examples: parental responsibility can be awarded to any number of adults and current adoption practice seeks to maintain links with birth parents alongside those with legal/social parents.[95] Yet it seems that notwithstanding this greater flexibility, there remains something special about the legal status of parent and registration as such on a birth certificate. The question of whether, in certain circumstances, more than two parents might be legally recognised was raised by just one respondent early in the Government consultation process regarding how the 1990 Act should be reformed[96] and, although noted in two consecutive interventions in the House of Lords debates, was not subject to any further elaboration.[97] Given that for the vast majority of births only two adults will be involved in the child's conception, intend to be the parents and be accordingly registered on the birth certificate, one might be forgiven for assuming that the issue of multiple birth registration simply did not occur to the Government as a matter for consideration. However, the Department of Health told us that they had mooted the possibility of a child having three legal parents in the early stages of the reform process and discussed it with the Office for National Statistics. The idea was rejected on the basis that the consequences of such a change were too far reaching and controversial, potentially 'hijacking' the reform process and jeopardising the Bill.[98]

Within the wide-ranging consequences foreseen by the Department of Health, there may, of course, be very good reasons for refusing to recognise more than two legal parents. Perhaps most obviously, such a refusal might be grounded in a concern for the best interests of a child.

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[94] On the fact that such claims to authenticity (being a 'real' parent) are grounded in claims to exclusivity (only one mother and one father can be 'real' parents), see further Sheldon, n 60 above; Jackson, n 85 above.

[95] See Children Act 1989, s 2 and C. Ball, 'Regulating Inclusivity: Reforming Adoption Law for the 21st Century' (2002) 7 *Child and Family Social Work* 285.

[96] AHRC Centre for Law, Gender And Sexuality, *Response to the Public Consultation on the Human Fertilisation and Embryology Act*, response to question 56, available at: http://www.kent.ac.uk/clgs/documents/clgshfearespfinal.pdf. Sheldon was involved in writing this submission.

[97] Per Baroness O'Neill of Bengarve and Baroness Baker, HL Deb vol 696 col 858-861 (21 November 2007).

[98] The Department of Health also clearly felt that a statute aimed at a very specific area of law was not the right place to introduce wide-ranging reform of fundamental family law principles: 'Three people wanting to parent a child ... there is nothing necessarily wrong with it, it's just the whole concept of parenthood would be altered with huge cost ...', Skinner, interview on file; 'all of a sudden a child's got *three* parents? Let's try to stick to ... the structure we've already got', Webb, interview on file.

We might worry that potential conflict would inevitably follow from a multiplication of the number of parents, or that a child with three parents might find the arrangement confusing or face stigma from peers. These are, however, empirical concerns which, to the best of our knowledge, have not been investigated and thus remain entirely speculative. The Department of Health's early policy decision and lack of further attention to this issue signals just how ingrained in our collective imagination is the notion that a child has only two parents, even in the context of assisted reproduction where more than two people may contribute biologically to the reproductive process. Indeed, as was noted above and is further discussed below, the possibility that two women might both lay claim to be recognised as mothers on the basis of biological links (leaving a third party to claim fatherhood or female parenthood) was considered worthy of specific exclusion. It is also clear that any attempt to introduce a third parent onto the birth certificate was seen as very difficult to implement in political terms, invoking the remit of a large number of different Government departments.[99]

The limited amount of consideration given to the advantages and disadvantages of recognising more than two parents is particularly interesting given that a growing number of other jurisdictions have begun to countenance such a possibility. The New Zealand Law Commission has recommended changes to the law to permit a child to have three legal parents in certain reproductive contexts: notably, when a couple conceive a child with a known donor[100] and in situations whereby the wrong gametes have been used in treatment procedures.[101] The New Zealand Government has resolved to give these recommendations further consideration.[102] In Canada, the Ontario Court of Appeal has ruled that it could bridge a 'legislative gap' in the Children's Law Reform Act 1990 by allowing a child to have three registered legal parents.[103] Again, this was in the context of a lesbian couple conceiving a child with a known donor and the Ontario Court found that not to allow the child's non-biological mother also to register as the child's legal parent along with the biological parents was a violation of her rights under the Canadian Charter of Rights and Freedoms.[104] Meanwhile, the Superior Court of Pennsylvania

[99] Willis, Skinner, interview on file. Relevant departments would include the Home Office, the Office for National Statistics, the Department of Work and Pensions and a number of others.

[100] New Zealand Law Commission, *New Issues in Legal Parenthood*, Report 88 (2005), recommendation 10, paras 6.60-6.73.

[101] *ibid*, recommendation 16, paras 8.15-8.17. This may have been a particularly useful legal mechanism in the UK case *The Leeds Teaching Hospitals NHS Trust* v *Mr and Mrs A and Others* [2003] EWCA 259 (QBD), as considered by Sheldon, n 60 above, at 544-547. The Law Commission's Report also notes that although the New Zealand courts have never recognised a child as having more than two legal parents it has, in *H* v *Y* [2005] NZFLR 152, paved the way for a declaration of paternity to be issued in relation to an adopted person who already has a legal father. No legal rights or responsibilities would, however, flow from this declaration.

[102] Ministry of Justice, *Government Response to the Law Commission Report on New Issues in Legal Parenthood* (2006), paras 23-27 and 33-34.

[103] In *AA* v *BB* (2007) ONCA 2.

[104] Specifically her rights to equality and fundamental justice under ss 15 and 7 respectively.

has held that a child may have three legal parents for the purposes of child support.[105] In all these examples, how it may be beneficial for a child to have three registered legal parents was discussed, moving the deliberations on this issue beyond mere assumption that it would in some way be harmful.[106] Yet in the UK, despite the lack of political or cultural consensus on what actually makes someone a parent, the idea that a child benefit from having more than two parents appears to have been too radical to have merited any discussion in this context, leaving the reformers to rely on the sexual family 'two parent' model as the default option.

'Parental dimorphism': one mother plus one father/female parent

Further, while English law has become increasingly open to the idea that a child can have two parents of the same gender, the sexual family model continues to resonate in a steadfast resistance to the possibility that a child can have two 'mothers' (or indeed two 'fathers').[107] The two parent model thus also appears to encompass an assumption of what might be loosely termed 'parental dimorphism', by which we mean that the two parents are seen as occupying complementary yet different legal roles. This was seen above in the fact that a lesbian co-mother is not to be legally recognised as a 'mother' (a status reserved for the woman who has gestated a pregnancy) but as a 'female parent' (a status awarded on grounds which closely parallel those by which men obtain fatherhood). The 2008 Act further provides that references elsewhere in law to 'father' should be taken to include 'female parent'.[108]

This points to another significant dimension of the sexual family: that it is rooted in the idea of complementarity, assuming a fundamental difference in how parental status is acquired.[109] As has been seen above, motherhood is firmly grounded in gestation (and this holds significance *per*

[105] *Jennifer L. Shultz-Jacob* v *Jodilynn Jacob and Carl Frampton* [2007] PA Super 118. It is here interesting to note that if the Welfare Reform Bill (2009) is passed in its current form, it would seem to prohibit such a possibility. See Sched 6, Part 1, clause 4 and clause 13 (inserting ss 2E, 10B and 10C into the Births and Deaths Registration Act 1953), which would allow for the re-registration of a birth *only* when the birth is solely registered by the mother.

[106] McCandless has elsewhere discussed this in the context of a recent application for parental responsibility by a known donor that was objected to by the lesbian couple who were the primary carers of the child: n 84 above.

[107] Note that adoption certificates use the gender neutral terminology of 'parent' for each parent rather than 'mother' and 'father'. This meant that following the changes in the Adoption and Children Act 2002, which permit a same-sex couple to adopt a child together, the semantics of 'mother/mother' or 'father/father' were avoided. Trembath, e-mail on file.

[108] See the changes made to the Births and Deaths Registration Act 1953 and other relevant legislation by Sched 6, Part 1 of the 2008 Act (and Part 2 for enactments relating only to Scotland). A further question which arises was whether, rather than providing for these separate gendered statuses, the law might simply have moved to a position of 'parent one' and 'parent two'. Yet as Skinner told us: 'We didn't want to take away the term 'mother' or the term 'father', which are emotive terms for most people and they would want to keep them for heterosexual couples and women would want to keep 'mother'.' Interview, on file.

[109] Although Fineman is more concerned with the gendered imagery of the sexual family in relation to care-work, as opposed to how it plays out in the attribution of legal parenthood *per se*, this sense of complementarity appears to be an implicit part of the sexual family model, which in its pure form requires a male and female parent, each of whom is genetically related to the child.

se, rather than merely standing as a proxy for a genetic link).[110] Law's interest in genetic links has thus tended to be focussed on fathers.[111] Indeed, as noted above, the possibility of acquiring either motherhood or 'female parenthood' through a genetic link is explicitly addressed – and excluded – in the 2008 Act.[112] The grounds for such exclusion are not readily evident. No rationale was given for it in the explanatory notes accompanying the 2008 Act and there is no discussion of it in the Parliamentary debates,[113] suggesting that it either passed unnoticed or was felt to be entirely uncontroversial. Two explanations were offered for the provision during the course of our interviews. First, and almost certainly most significantly, was the perceived need to avoid any future possibility that two women might each claim to be recognised as the mother of a child citing, respectively, gestational and genetic connections. Such claims would be most likely to arise in the context of a lesbian couple who wish both to enjoy a biological connection with a future child and therefore choose to create an embryo from one partner's ova, which will be implanted in the other partner.[114] As we noted above, recognising two women as parents in this way would leave open the possibility that a third party might also attempt to assert legal parenthood. Second, it was suggested to us that the provision might reflect concerns about mitochondrial DNA donation, seeking to head off the possibility that a donor might assert some parental claims on this basis.[115] While such a provision appears unnecessary given the clear definitions of legal motherhood and female parenthood provided in the statute, this section might be taken as providing what one interviewee suggested to be 'clarity' and, another, a 'belt and braces' approach.[116]

Whether legally necessary or not, this explicit rebuttal of any possibility that female parenthood might be grounded in genetic links serves to emphasise the distinction between how we think

[110] As might have been thought to be implied by the phrase, *mater est quam gestatio demonstrate* (is gestation nothing more than the *demonstration* of a genetic connection?).

[111] This is not to deny that law recognises other genetic links: e.g. in inheritance law and incest prohibitions. Further, as noted above, the 2008 Act increases the rights of children born of gamete donation to trace their (half-) siblings: see Jones, n 46 above.

[112] s 47.

[113] When this provision was discussed at Committee stage in the House of Commons the only question posed in relation to it was whether children born through egg donation would have a similar right of access to information as children born through the use of donated sperm. See per Mark Simmonds MP, Commons Committee Stage Debate, 7th Sitting, col 240 (12 June 2008).

[114] Webb confirmed this understanding: 'it is about a very clear principle that the woman that gives birth is the mother and that's it... There was something about the need to make it absolutely clear that where we have two women in a relationship and one provides the egg to the other and she gives birth that it would be absolutely clear, in that situation, the donor is not the mother.' Interview on file.

[115] Willis, interview on file. Beyond s 47, we saw further anxiety associated with female procreativity in the Joint Committee's recommendation that an embryo made from the genetic material of two women alone should be prohibited for use in treatment and that, in the case of mitochondrial donation, the child would have only two legal parents. JC Report, paras 186 and 307.

[116] Skinner, Jackson, interviews on file. As Jackson went on to acknowledge, this flies against a received principle of statutory interpretation: that the draftsman should be taken not to have included unnecessary words in a statute.

about motherhood and fatherhood: while genetic connections are very relevant to establishing fatherhood, legal motherhood is a status emphatically grounded in gestation.[117] This distinction in how men and women are able to acquire parental status has a significant impact in practice. Imagine a non-civil partnered lesbian couple, Jacqui and Jill, who both wish to enjoy a biological connection with a jointly planned child and thus decide that Jacqui will donate an egg that will be fertilised with donor semen, with the resulting embryo implanted into Jill. Jill will thus be the child's legal mother and Jacqui can achieve female parenthood on the basis of an agreement with Jill, which meets the statutorily prescribed conditions. However, now imagine that Jacqui and Jill separate before an embryo is implanted. Jacqui can of course ask the clinic to destroy the stored embryos which were created using her eggs.[118] However, if she fails to do so there is nothing to prevent Jill from informing the clinic that she no longer wishes Jacqui to be the agreed second parent and having these embryos implanted (with or without another partner recognised as legal father/female parent). Although the clinic has an obligation to take 'reasonable steps' to inform Jacqui before the embryos are used (thus giving her the opportunity to withdraw consent), there is no prohibition on use of the embryos if such 'reasonable steps' do not result in contact being established.[119] As such, if the agreed parenthood conditions are no longer met (e.g. because Jill has informed the clinic that she no longer wishes Jacqui to be the agreed second parent or because she has formed a legally binding agreement with a new partner), Jacqui might thus find herself in a position where she has no legal rights at all with regard to the genetic child that she jointly planned with Jill.[120]

A man who has contributed sperm to create an embryo to be implanted in his partner would not find himself in a similar position because he would achieve fatherhood not on the basis of the agreed fatherhood conditions but on the basis of his genetic connection with the resulting child, as per the common law. This points to a broader problem with the current framing of the agreed female parenthood provisions, which seek to extend legal recognition to lesbian co-parents on exactly parallel conditions to those by which men acquire legal recognition as fathers: in some instances, parallel treatment will deliver unequal results because men and women are not similarly (biologically) situated with regard to reproduction. It is noteworthy that while there was some, albeit limited, discussion regarding whether 'female parents' ought to be recognised at all, once that decision was made, how one might seek to frame such recognition appears to have received very little critical scrutiny, with our interviewees generally perplexed by the

[117] On this, see further, Sheldon, n 60 above at 546-7. For the contention that greater weight should be placed on the genetic tie for all parents, see A. Samuels 'The Surrogate Child: Who is his or her Mother and Who is the Father?' (2000) 68 *Medico-Legal Journal* 65.

[118] As per the consent provisions contained in Sched 3.

[119] S 14(6E) 1990 Act, as amended. See further above, n 66.

[120] It is interesting to speculate whether Jacqui might invoke a Human Rights Act challenge on such a set of facts. Jacqui's Article 8 privacy rights appear to be clearly engaged in such a context. Can she also produce a convincing argument under Article 14 that she is discriminated against relative to a man (who, where he is the genetic father of the child, would not be caught by these provisions in the same way)?

question of whether this might have been done in any other way.[121] The Department of Health reported a strategy of working outwards from the provisions for heterosexual couples to ensure 'complete equality between the two':

> So, we started with married couples and then read across to civil partners, and then having done something for civil partners, we considered the position of unmarried heterosexual couples and the 'treated together' provision ... [Notes the imprecision of the 'treatment together' test and the welcome opportunity to tighten up that wording] ... We've got a more precise provision now of signing a fatherhood agreement before insemination or embryo transfer, which can be withdrawn before that takes place ... And, having done that for unmarried heterosexual couples, we considered the position of non-civil partners and introduced the parental agreement there. That was the process.[122]

The Department also reported that it had met several times to discuss the reform with Stonewall, a group which has been subject to some criticism for its assimilationist approach to the recognition of same sex relationships.[123] The small number of LGBT groups that replied to the consultation exercises noted above applauded the extension of parental recognition, with no critical comment as to its form,[124] and there was similarly little discussion in the Science and Technology Committee, Joint Committee or in Parliament on this question. Yet as Diduck has explored in a different context, there are grounds to be wary of any straightforward assumption that lesbian families are 'just like other families'. The differences in how lesbian couples may choose to structure their parenting arrangements are crucial and Diduck suggests that law needs to recognise this difference rather than simply viewing it as a distraction.[125]

Finally, it is also worth pausing to consider where gay men figure in this extension of parental recognition through the status provisions. To our knowledge, this issue was raised only once in the entire, extensive reform process described above and then by a respondent who was arguing

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[121] The Department of Health told us that they described to their lawyers what they wanted to achieve in practice, and the lawyers produced the text of the agreed fatherhood and female parenthood conditions. Webb, interview on file.

[122] Webb, interview on file.

[123] For a critique of Stonewall as advocating a model of reform that tends to promote formal equality in a socially conservative, assimiliationist way, see Stychin, n 87 above.

[124] e.g. the only LGBT group who replied to the JC's consultation was the Equality Network (ev 33), a network of Scottish organisations working for LGBT equality. The Network's submission welcomed the proposal to remove sexual orientation discrimination from the Act, noting that 'the principle of treating the civil partner of a mother in the same way as the husband of a mother, and treating a "non-civil-partnered" same-sex partner the same as an unmarried mixed-sex partner, is now well established in other law. It is also supported by the increasing amount of evidence on outcomes for children of same-sex parents...' JC Vol 2, at 353.

[125] A. Diduck, n.77 above. Diduck's own brief discussion of Part 2 of the 2008 Act is unsurprisingly highly critical. Jenni Millbank makes a similar point in an insightful recent overview of lesbian and gay intra-familial disputes in a number of western nations, noting that: 'Many parenting reforms have proceeded under an equal treatment approach, analogising co-mothers with the position of non-biological parents in heterosexual families. There is much appeal in such an approach, which I am not necessarily criticising, however it has produced very little engagement with the underlying principles or discussion of the 'fit' in its application to lesbian-led families.' See J. Millbank, 'The Limits of Functional Family: Lesbian Mother Litigation in the Era of the Eternal Biological Family' (2008) 22 *International Journal of Law, Policy and the Family* 149, at 169.

for a more conservative approach to reform.[126] Gay men do benefit from the extension of the possibility of obtaining a 'fast track' adoption following surrogacy;[127] however it seems not to have been considered that the status provisions might be further adapted to allow two men to be recognised as parents from the moment of birth. Again, this can be explained through the tenacious hold of the two-parent sexually dimorphic family model on our thinking. Within this model, at least as it has played out in the UK context, motherhood is grounded in gestation. In 1990, the law took a step away from the 'pure' form of the sexual family, by recognising that a woman's partner might be recognised as the legal father even if not the genetic father of her child, on the basis of his relationship to the woman and his intention to create a child. Given the operation of the longstanding previous legal presumption of *pater est*, this was not such a large change.[128] In the 2008 Act, this shift is extended one step further: similarly to recognise a woman's female partner. However, to recognise two gay men as parents under the status provisions would be a significant step further again, and one which simply stretches the current legal imagination too far, as it would involve moving beyond the idea that the birth mother is a legal mother (or, alternatively, recognising three parents from the moment of birth). While the law in this area has been open to the idea that fatherhood can be grounded in intention (and avoided on the same basis), the same has been less true of motherhood.[129] Thus, given the resistance to recognising more than two parents, gay men are squeezed out of the picture.

The (potentially) sexual couple

As noted above, husbands and civil partners have 'first shot' at obtaining legal parenthood along with the child's birth mother. Such couples will normally be in a sexually intimate relationship[130]

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[126] Brenda Almond, an emeritus Professor of Philosophy suggested that 'caution is needed when tampering with something as fundamental as having a parent of each sex'. She notes that while the changes to the status provisions are proposed in the name of gender equality, the principle is applied inconsistently, with the Bill's proposals couched entirely in terms of women. She concludes that '[a]ny reasoning that could justify these proposals in respect of women could equally justify similar arrangements for men.' Her argument would appear to have been intended to function as a *reductio ad absurdum*. JC, Vol 2, Ev 21 at 2.2.

[127] See s 54 2008 Act, extending the category of couples who can apply for a parental order (fast track adoption) following surrogacy to civil partners, and unmarried opposite sex couples and non-civil partners who are an 'enduring family relationship' and not in prohibited degrees of relationship to each other. In contrast with adoption, single people cannot apply for a parental order.

[128] While the marital presumption could be rebutted by evidence establishing beyond reasonable doubt that the husband could not be the father, the law for many years refused in the interests of public decency to allow either party to give evidence that they had not had intercourse at the relevant time: see Cretney n 78 above at 533-6 for a detailed and insightful discussion of the case law.

[129] Gillian Douglas has suggested that focussing on intention reflects a very male way of thinking about parenthood and US author Karen Czapanskiy expresses a similar idea in a different context, suggesting that while women are 'draftees' into parenthood, men are 'volunteers'. G. Douglas, 'The Intention to be a Parent and the Making of Mothers' (1994) 57 MLR 636; K. Czapanskiy 'Volunteers and Draftees: The Struggle for Parental Equality' (1991) 38 *University of California Los Angeles Law Review* 415. On the need for a conceptual division between maternity and motherhood see K. O'Donovan and J. Marshall, 'After Birth: Decisions About Becoming a Mother' in Diduck and O'Donovan, n 85 above.

[130] Note that lack of consummation remains as a ground for annulment of a marriage. No similar provision is made with regard to civil partnership, although see N. Barker, *'Sex* and the Civil Partnership Act: The Future of

and must, at least, be lawfully permitted to be so: marriage and civil partnership are not open to those in the prohibited degrees of relationship foreseen in incest legislation.[131] As we have seen, those who do not achieve fatherhood/female parenthood through a formally recognised union, can do so through the agreed fatherhood and female parenthood conditions. While these were clearly designed to cater for couples, they are not explicitly restricted to those in a sexually intimate relationship.[132] However, as we noted above, legal recognition under these provisions cannot be accorded to those who fall within the prohibited degrees of relationship with the child's mother, as foreseen in incest legislation. There is nothing in the published deliberations regarding the rationale for including the incest prohibition and no significant discussion of this provision in the parliamentary debates, suggesting its inclusion to be uncontroversial and thus to require no elucidation. The prohibition also occurs in adoption regulation, and it is clear that this was an important influence on the drafters' decision to include it here.[133] Such a prohibition is unlikely to be grounded in eugenic considerations, which do not arise in cases of gamete donation. Rather, as one of the senior civil servants whom we interviewed at the Department of Health put it:

> you've got incest from the point of view of genetic material being damaged ... but then is there just generally an idea of something not quite being right about a mother and sister raising a child together, in a legally recognised partnership? So that's why we looked at adoption. That's where we could draw the comparison.[134]

To recognise as legal parents two people who ought not to be involved in a sexual relationship because of existing kinship relationships would, it appears, offend some deeply held but unstated value, confusing our ideas about family. Thus, while we suggested above that the two parent model might be seen as having outlived its moorings in the heterosexual couple, the sexual family model continues here to frame our understanding in so far as the couple at the heart of the family remains a sexual one.

It is worth pausing to consider here the self-evident necessity of this provision. Why is it that a mother and daughter should not both be legally recognised as parents? We know that these kinds of collaborative parenting arrangements occur as a matter of social fact: for example, where a mother and father raise a child with their own daughter, who has become pregnant at a young age whilst still living at home. Many would see this as the ideal arrangement in which a teenage mother might raise her child and certainly would not see anything wrong in her own parents taking on a substantial parenting role with respect to the new baby. What then is different about allowing individuals in these kinds of relationships to choose to create a child together, and

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Non-Conjugality' (2006) 14 *Feminist Legal Studies* 241, for an argument that this has more to do with a political reluctance to discuss same-sex sex than the idea that civil partnerships would not entail a sexual relationship.

[131] See n 68 above.

[132] As was noted above, the fact that the provision was not restricted to 'partners' was only noticed by many relatively late in the reform process.

[133] Skinner, interview on file.

[134] Webb, interview on file.

recognising all of them on a birth certificate? It is clear from the discussion above that the answer cannot lie in the fact that we believe legal parenthood should always follow genetic links or that it is dependent in some way on a marital relationship between the parents.

One interesting case which might offer a useful prompt to tease out intuitions was reported under the title, 'Sisters make baby with three mums'.[135] Alex was infertile as a result of chemotherapy. When she and her husband decided to start a family, her twin sister, Charlotte, agreed to donate an egg, while her other sister, Helen, offered to gestate the pregnancy. The resulting child, Charlie, was thus created from Charlotte's egg and Alex's husband's sperm, and gestated by Helen. The report which accompanies this story on the BBC website is accompanied by a picture of a smiling Alex holding Charlie, and flanked by her two sisters. Whilst there is no way of knowing the extent to which the positive tone of the BBC report might be representative of broader opinion, it is noteworthy that the story represents these events as a laudable act of familial support, rather than one which suggests concerns for the future wellbeing of Charlie, who will, after all, be raised within the confines of a (hetero)sexual family unit. However, would reactions to this story be different if the three sisters lived together and intended collectively to raise him, having chosen this method of conception in order that they each might have a significant connection with Charlie (as primary carer, genetic and gestational parent), which they would wish to see legally recognised? Would the idea that Charlie had 'three mums' become less palatable in such a case? And, if so, is there a solid ethical underpinning for such an intuition, which merits its translation into legal prohibition?

Our purpose here is not to offer a normative evaluation of the merits of the inclusion of the incest prohibition but to highlight that these kinds of normative questions were only addressed in a very limited way in this reform process. Any possibility that we might extend parenthood to two individuals who were already in a close kinship relationship appears to have been self-evidently wrong to the law-makers. Read alongside the guidance which the HFEA has provided on how clinicians should interpret the newly revised welfare clause, it appears that while it may be desirable for a woman's family to help her to raise a child, it is not similarly acceptable for family members to seek to create a child together, or at least not in a way that is formally recognised through law.[136]

Transgender parents

[135] 'ONE life -Three Sisters Make One Baby', BBC 1 (31 October 2005). See the accompanying report on the BBC website: 'Sisters make baby with three mums', http://news.bbc.co.uk/1/hi/health/4370804.stm (last accessed 12 May 2008).

[136] The recently published latest edition of the Code of Practice advises clinics that where they have some cause for concern regarding a woman's ability to provide 'supportive parenting' (as required by s 13(5), as amended), they may also take account of support offered by family and friends. The following definition of 'supportive parenting' is given: 'commitment to the health, well being and development of the child. It is presumed that all prospective parents will be supportive parents, in the absence of any reasonable cause for concern that any child who may be born, or any other child, may be at risk of significant harm or neglect. Where centres have concern as to whether this commitment exists, they may wish to take account of wider family and social networks within which the child will be raised.' HFEA Code of Practice (8th Edition), at para 8.11.

We end this consideration of the 'sexual family' underpinnings of the 2008 Act, by considering the case of transgender parents, who offer a further illustration of some of the tensions described above and, we would suggest, a store of thorny problems for future judicial determination. Take the case of X, a female-to-male transsexual and his (female) partner, Y, who had together obtained infertility treatment services using donor semen.[137] X had been present throughout Y's treatment, had acknowledged himself to be the father of any children conceived and was now playing an active parenting role. Nonetheless, he was told that he could not be registered on the birth certificate of the resulting child, Z. X took his case to the European Court of Human Rights, where he lost.[138]

Under the 2008 Act, a future X would be able to register as a female parent. And further developments since his case was heard would also offer him a second, potentially more attractive, possibility. At the time that X went to the courts, English law defined a person's sex by reference to biological criteria at birth and allowed no possibility for it to be subsequently reassigned.[139] This position has now been radically altered by the Gender Recognition Act 2004 ('the 2004 Act') which, under certain conditions, allows for legal recognition of an individual's new gender. This allows for X to become legally a man, should he so choose, and therefore to be in a position to achieve legal recognition as a father. Previous parental roles are not affected by such a change,[140] raising the intriguing possibility that a female-to-male transsexual might simultaneously be a mother to children born prior to gender reassignment and a father to those conceived afterwards via infertility treatment services. Likewise, a male-to-female transsexual might be a father to children born before reassignment and a 'female parent' to those born after it. However, the correct terminology for someone who is now a male 'mother' or female 'father' remains elusive. A Conservative MP who raised this issue in the debates which preceded the 2004 Act's introduction in the House of Commons received a somewhat evasive response from the Government:

> [Widdecome]: If a woman who has lived her life as a woman, has been registered at birth as a woman and has borne children decides that she wishes to change gender to become fully a man, and the birth certificate is rewritten to reflect that, who is the legal mother of those children?

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[137] *X, Y and Z* v *the UK* (1997) 24 ECHR 143.

[138] The majority of the Court held that while his privacy rights under Article 8 were engaged, they had not been violated. Any potential disadvantages suffered by the applicants were limited since X was not prevented from acting as a social father and could apply for a joint residence order, which would give him parental responsibility. One of the judges commented that 'it is self-evident that a person who is manifestly not the father of a child has no right to be recognised as her father.' *Ibid*, at 175. See A. Bainham, 'Sex, Gender and Fatherhood: Does Biology Really Matter?' (1997) 56 *Cambridge Law Journal* 512 at 515. More recently, in *Goodwin* v *UK* [2002] 2 FLR 487 and *I* v *UK* [2002] 2 FLR 518, the Court has found that a failure to recognise a change in status for post-operative transsexuals no longer fell within a State's margin of appreciation, as an emerging consensus in favour of granting legal recognition could be discerned.

[139] *Corbett v Corbett* [1970] 2 All ER 33, *R v Tan* [1983] QB 1053, *B v B* [2001] 1 FLR 389.

[140] s 12, 2004 Act.

> [Lammy]: She is the parent of those children and she has acquired a new gender.[141]

In his resort to the gender neutral term, 'parent', David Lammy appears to sense a safer way of describing the post-operative parental relationship, avoiding the conclusion that a child could have no legal mother but rather two legal fathers or vice-versa. The same semantic strategy is invoked in the context of same-sex adoption, where a couple will find themselves each registered as a child's 'parent'. This avoids a direct challenge to the parental dimorphism noted above and side-steps the issue of whether being a 'father' or 'mother' means nothing more than being a male or female parent or whether 'mother' and 'father' are distinct and complementary roles, with distinct accompanying social expectations.[142]

It is likely that transgender parents will pose further significant challenges for the courts charged with interpreting the 2008 Act in the future. Another case recently reported in the British press concerned Thomas Beatie, an American transgender man who, despite having undergone gender reassignment (legally and physically), had retained the ability to gestate a pregnancy and, faced with his wife's inability to do so, decided to become pregnant. He has since given birth to a daughter and is expecting a second child. Beatie is certainly not the first transgender man to give birth,[143] though it is possible that he is the first legally recognised as such to do so. Given that under the 2004 Act a person can become legally male while still retaining their female reproductive capacity,[144] Beatie's case illustrates some problems which may yet come to be faced by the UK courts.

First, ought a clinic in the UK attempt to help such a couple to have a child and should the HFEA license such treatment?[145] Having been refused by several clinics, Beatie and his wife resorted to home insemination following the purchase of anonymous sperm from a commercial sperm bank.[146] This echoes the experiences of a Spanish transgender man, Rubén Noé Coronado

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[141] HC Debs vol 418 col 52 (23 Feb 2004). David Lammy was then Parliamentary Under-Secretary of State for Constitutional Affairs.

[142] This in turn begs the question of whether 'fathering' and 'mothering' are distinctive styles of parenting, typically associated with men and women respectively but amenable to being performed by individuals of either gender, i.e. fathering may be associated with authority, discipline and certain activities (e.g. sport), with mothering associated with nurturing, hands on caring and so on. On such a definition, clearly men can mother and women can father (though it should be noted that the latter term is typically used to suggest a biological role rather than a social one). On this point, see further A. Doucet, *Do Men Mother?* (Toronto: University of Toronto Press, 2006).

[143] See further S. Dylan Moore, 'The Pregnant Man – An Oxymoron?' (1998) 7 *Journal of Gender Studies* 319. Note, however, that unlike Beatie, most transgender men will either have given birth long before transition or will delay transition in order to do so.

[144] The 2004 Act does not require sterilisation as a precondition to obtaining a Gender Recognition Certificate.

[145] Note that licensed treatment is the only way to access medically vetted sperm in the UK, which, unlike the USA does not permit for the sale of cryopreserved sperm on a commercial basis. As such, any person who resorts to self arranged insemination in the UK must use fresh sperm, with the inherent medical risks that this might potentially bring.

[146] As reported in Thomas Beatie's first person account to *The Advocate* magazine, available at http://www.advocate.com/exclusive_detail_ektid52947.asp (last accessed 16 April 2009). A total of nine doctors were involved in initial requests. Beatie further comments: 'Doctors have discriminated against us, turning us away

Jiménez, who reportedly contacted 158 clinics in Spain before finding one which was prepared to treat him before he underwent full surgical reassignment.[147] Yet despite the evident discomfort some people felt at the idea of a man being visibly pregnant, Beatie and his wife are causing no direct harm to anyone else, appearing merely to have the same desire as many other couples to share genetic and gestational connections with their child.[148]

Secondly, if such a procedure were permitted in the UK, who would be recognised as the parents of that child? The man who has gestated the pregnancy should presumably be seen as the child's mother, though whether that is compatible with his status as a man is unclear.[149] Likewise, if a male-to-female transsexual has stored sperm prior to reassignment which is then used to impregnate a female partner, would she be the child's 'father' or 'female parent', and will this depend on the genetic connection or the person's current legal gender? And if womb transplants become possible in the future, could she ask to make use of the sperm to create an embryo which she could then gestate herself?[150]

Other authors have already provided an interesting analysis of the reproductive possibilities at play here and the extent to which the 2008 Act would struggle to address them.[151] Our own aim is merely to provide one further example of how the 'sexual family' notion struggles to accommodate such possibilities. Indeed, the questions posed by transgender parenthood serve to illuminate many of the tensions inherent in continuing to map our legal determinations of parenthood to a family model that is unmoored from its traditional underpinnings. Once the various constituent elements of the family form envisaged in the sexual family model are no

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due to their religious beliefs. Health care professionals have refused to call me by a male pronoun or recognize Nancy as my wife. Receptionists have laughed at us.'

[147] D. Fuchs, 'Transsexual man expecting twins sparks ethical row', *The Guardian* 30 March 2009. As in the Beatie case, Jiménez's female partner is unable to bear a child.

[148] Though some will no doubt speculate regarding the welfare of a future child, who will come to learn that s/he was gestated by her 'father'. See Dylan Moore, above n 143, for an empirical consideration of the tensions between gender identity and the desire to have a genetically related child. Note also *J* v *C and E (A Child)* [2006] EWCA Civ 551 for a recent judicial consideration of the issue, with Wall LJ stating that had the applicant in this case, a female-to-male transsexual, revealed the truth about his gender to a fertility clinic, 'the clinic would have plainly risked the forfeiture of its license had it provided treatment services for them' (at para 25). In this case the applicant merely sought treatment as a man along with his female partner, rather than treatment that would enable him to become pregnant. While it is certainly likely that the deception in this case by the applicant – he had kept his gender transition a secret from his partner – influenced Wall LJ, his assertion might be read as revealing a more general concern about the desirability of transgender persons receiving fertility treatment.

[149] In the case discussed above, which was decided prior to the introduction of the Gender Recognition Act (2004), the European Court of Human Rights was not prepared to recognise that someone who was still, legally, a woman could be a child's father: *X, Y and Z* v *UK* (App no 21830/93) (1997) 24 EHRR 143, [1997] 2 FLR 892.

[150] The possibility of womb transplants may not be too distant: W. Fageh et al. 'Transplantation of the Human Uterus' (2002) 76 *International Journal of Gynaecology & Obstetrics* 245; I. Evans, 'Womb Transplants Could Be Two Years Away, Experts Claim', *The Times* 5 September 2006..

[151] See S. McGuinness and A. Alghrani, 'Gender and Parenthood: The Case for Realignment' (2008) 16 *Medical Law Review* 261.

longer all tightly contained within one couple, then tension between them is inevitable. Further, the transgender example illustrates well the extent of the challenges that the use of reproductive technologies pose to current understandings of parenthood and how many of these have passed unaddressed in this reform process and the revised legislation resulting from it.[152]

CONCLUSION

In late March 2009, some four months after the 2008 Act had received royal assent, *The Daily Mail* reported that:

> [f]amily values were under attack again last night with the news that single women having IVF will be able to name anyone they like as their baby's father on the birth certificate. New regulations mean that a mother could nominate another woman to be her child's 'father'. The 'father' does not need to be genetically related to the baby, nor in any sort of romantic relationship with the mother.[153]

A string of reports in other newspapers shows that the Mail was not alone in viewing as 'news', provisions which had passed into law many months ago, a clear illustration of the lack of scrutiny of the status provisions during the reform process and consequent widespread lack of awareness of their content.[154] Having discovered the provisions, the paper was able to produce a number of prominent critics to attack them as 'social engineering on the hoof',[155] which ignored the 'basic nature of a man and a woman bringing a child up together as parents'[156] and leading to the 'falsification of birth certificates'.[157] These hostile comments mirror the criticisms which were voiced during the limited discussion of the status provisions during the reform process described above, which saw them described as 'a radical and dangerous new departure in family law',[158] offering a 'lego-kit model of family life'[159] and equating children to 'commodities such as washing machines'.[160] Bewailing the new 'agreed fatherhood conditions', Lord Patten was driven to complain that:

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[152] The Department reported that they were actively considering how best to address the problems posed by transgender parenthood. They explained that: 'For the sake of the whole Bill reading strangely for a relatively small number of people, we thought we will stick with the one that sounds sensible to most people and then address the issues that arise from this difficult situation separately.' Skinner, interview on file.

[153] F. McRae, n 6 above.

[154] See further Smith, n 7 above; S-K. Templeton, 'Who's the IVF Daddy? Anyone You Care to Name' *Sunday Times* 1 March 2009.

[155] David Jones, Professor of Bioethics, St Mary's University College.

[156] Ann Widdecombe MP (Conservative).

[157] Baroness Ruth Deech.

[158] Christian Institute, n 9 above.

[159] Family Education Trust, n 10 above.

[160] Iris Robinson MP, HC Debs col 1126 (12 May 2008). The provocative title of Thérèse Callus's recent critique of the provisions also clearly implies commodification concerns, drawing an analogy with what many have argued are spurious media-fuelled anxieties about the possibility of 'designer babies'. T. Callus, 'First "Designer Babies", Now

> The Government are able to define the meaning of 'mother' … Yet flip over [the] page and off we go into a magical mystery tour about what on earth the word 'father' might mean in different times and places, as a sign. This leads me to the conclusion that the Government, either by design or, as I suspect, by a muddled series of accidents, have ended up attempting to deconstruct the meaning of fatherhood in the Bill, divorcing male parenthood from biological reality as well as from practical and moral responsibilities.[161]

In this paper, we have provided a detailed analysis of what is innovative about the revisions made to the status provisions. The above critics are right in noting that, for the first time, two women can be named as a child's parents from the moment of birth though they neglect to mention that, since December 2005, same-sex partners have been able both to be registered as a child's adoptive parents.[162] Critics are also correct to highlight that potential parents may not even be in a sexual relationship, yet they might also recall that neither was this a statutory requirement under the 1990 Act, which for unmarried couples required merely that a man receive 'treatment together' with a woman.[163] And, while Lord Patten may be offended by the contractual form of the provisions which have replaced the old 'treatment together' clause, to imply that there is anything new in divorcing male parenthood from 'biological reality' is clearly mistaken. As we noted above, such a separation was already clear in the 1990 Act and, indeed, in the Family Law Reform Act 1987 which preceded it. Indeed, there is a strong argument to be made that the *pater est* principle has long prioritised the marital connection over the biological one.[164] Lord Patten's plea to remember the importance of 'biological reality' should also remind us of the contingency of what has been meant by the biological 'truth' in the context of motherhood. For women, the biological link has both gestational and genetic components yet, for as long as it has been possible to separate these out, law has privileged the former over the latter.

In this light, it is interesting to note one final issue which preoccupied actors in the reform process: the perceived deception implicit in naming on a birth certificate someone other than a child's biological parents.[165] In her critique of the (then draft) parenthood provisions, Thérèse Callus has written:

> By recognising the status of two female parents, the child's identity is thrown into disarray because the recognition of two female parents conceals the necessary heterosexual element of human existence.

À La Carte Parents' (2008) 38 *Family Law* 143. On the misnomer of 'designer babies' see e.g., C. Gavaghan 'Defending the Genetics Supermarket: the Law and Ethics of Selecting the Next Generation' (Abingdon: Routledge-Cavendish, 2007) ch 1.

[161]Per Lord Patten, HL Debs vol 697 col 30 (10 December 2007).

[162] Following the coming into effect of the Adoption and Children Act (2002).

[163] s 28(3) 1990 Act.

[164] See Bainham, n 78 above for a contrary view.

[165] See generally for a critical discussion of what she describes (at 109) as the 'contemporary thirst for "truth"', C. Smart, *Personal Life: New Directions in Sociological Thinking* (Cambridge: Polity, 2007), chapter 5. For a rather different view, see J. Eekelaar, *Family Law and Personal Life* (Oxford: OUP, 2006).

> Admittedly, even the provisions [of the 1990 Act] on the use of donor gametes can lead to deception insofar as the parents may conceal their use of donated gametes, but the proposals double that deception.[166]

This mirrors Baroness Deech's plea to the House of Lords 'for the truth to be on birth certificates – or at least no obvious lie'.[167] Yet these interventions beg an interesting question: is the purported evil of deception lessened or increased in correlation with the likelihood of its discovery? There is a strong counter-argument to be made to Callus that a child cannot long be successfully deceived where there are two named female parents on the birth certificate and, thus, if we are really concerned about lying to children, we should be far more worried about permitting a man other than the genetic father to be so named.[168] Those accounts which argue that birth certificates should be a record of 'true biological fact' also need to grapple with a further problem: in some instances, this would require us to name more than two parents.

This paper has attempted to tease out and render explicit the assumptions underpinning Part 2 of the 2008 Act. Our aim has not been to criticise the law for its lack of internal coherence: we make no assumption as to whether such coherence is achievable or, indeed, desirable. The tensions and contradictions reflected in the above discussion are just as readily apparent in the way that ordinary people talk about parenting, as is well illustrated in recent interviews conducted with men regarding their visions of fatherhood and lesbian women regarding motherhood.[169] The above analysis does, however, lead us to question the role played by the ideal of the 'sexual family' in limiting the options considered in this reform process and whether – and for how long – it can be maintained in the face of the pressures upon it which we have sketched above.

Neither have we attempted any sustained normative analysis of the assumptions that we have highlighted as significant in underpinning the 2008 Act. However, while we have provided no argument to say that they are misplaced, we would go so far as to suggest that they would have benefited from less reliance on intuition and more sustained analysis so that the assumptions behind our legislation are made subject to critical scrutiny, transparent debate and explicit choice. As was seen above, while the status provisions reflect a series of commitments about the appropriate shape of the family, they were subject to very little attention from Parliament, the public or the media. The complexity of these provisions may have encouraged a view that they

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[166] Above, n 160.

[167] HL Debs vol 697 col 293 (12 Dec 2007).

[168] And this is surely a major part of the reason why lesbian parents are known to be so much more honest with their children regarding the circumstances of their conception. See R. Cook, S. Golombok, A. Bish and C. Murray 'Keeping secrets: A study of parental attitudes toward telling about donor insemination', (1995) 65 *American Journal of Orthopsychiatry* 549; S. Golombok, 'Parenting and secrecy issues related to children of assisted reproduction', (1997) 14 *Journal of Assisted Reproduction & Genetics* 375; M. Stevens, B. Perry, A. Burston, J. Golding and S. Golombok, 'Openness in lesbian mother families regarding mother's sexual orientation and child's conception by donor insemination', (2003) 21 *Journal of Reproductive and Infant Psychology* 1.

[169] J. Ives, *Becoming a Father/Refusing Fatherhood: How Paternal Responsibilities and Rights are Generated*. Thesis submitted to the University of Birmingham for the Degree of Doctor of Philosophy (July 2007); L. Smith, 'Is Three a Crowd? Lesbian Mothers' Perspectives on Parental Status in Law' (2006) 18 *Child and Family Law Quarterly* 231.

were largely 'technical' in nature, however other 'technical' aspects of the legislation (such as the provisions regulating use of human admixed embryos) attracted significant attention and we have aimed to demonstrate above that parenthood provisions raise no less interesting normative questions. This lack of scrutiny may well have contributed to a failure to identify and attempt to remedy problems for the future. For example, we have noted the failure to tease out some of the complexities relating to transgender parenting and have suggested that the way in which the recognition of lesbian parents has been framed, closely paralleling the treatment of heterosexual parents, is not necessarily well designed to fit the specificities of same sex families. Specifically, we described the lack of rights accorded to a woman who contributes an egg to create a child with her partner, who will be the gestational (and therefore legal) mother. More generally, it is likely that English law will be forced to address the question of whether to recognise more than two legal parents at some point in the future. As we noted above, however, the Department of Health was quite clear in its view that it was not the right body to oversee any wide ranging changes to family law: if such sustained analysis of the law regulating parenthood is to occur, it must happen elsewhere.[170] While this reluctance is understandable, the lack of such analysis meant that earlier provisions which have become increasingly out of step with other aspects of family law over time were left intact and that new measures were developed at least in part in reliance on common sense assumptions rather than detailed analysis and sustained consideration.

It has been argued elsewhere that the vision of the family underpinning the 1990 Act was already an anachronism at the time that it was passed.[171] The gulf between the sexual family ideal and shifting patterns of parenting were readily apparent to the judiciary in 1990, with contemporary judges routinely making complex determinations designed to protect children's relationships with a range of adults, rather than seeking mechanically to impose the template of the nuclear family model onto social realities which did not obviously fit easily within it. The inherent traditionalism of the 1990 Act was at least in part explicable through anxieties regarding the possibilities offered by reproductive technologies, resulting in a 'conservative impulse' to contain them.[172] Some of the reforms effected by the 2008 Act might therefore seem to reflect a coming of age of reproductive technologies and a more relaxed attitude to their regulation.[173] On the other hand, we have here tracked the extent to which the more radical possibilities offered by assisted reproductive technologies were shelved or left unconsidered. We suggested that while

[170] It is far from clear which arm of government would be best placed to carry out this work: over and above the clear implications for families, the question of who should be named on a birth certificate is also of central concern to the Home Office, the Office for National Statistics and the Department of Work and Pensions.

[171] Sheldon, n 60 above.

[172] J. Dolgin, 'The "Intent" of Reproduction: Reproductive Technologies and the Parent-Child Bond' (1994) 26 *Connecticut Law Rev* 1261, 1313. See further Sheldon, n 60above; M. Strathern, *Reproducing the Future: Essays on Anthropology, Kinship and the New Reproductive Technologies* (New York: Routledge, 1992) and S. Franklin and H. Ragoné (eds), *Reproducing Reproduction: Kinship, Power and Technological Innovation* (Philadelphia: University of Pennsylvania Press, 1998).

[173] e.g. the reform of s 13(5) and, whatever limitations we have noted to these provisions, the very possibility of recognising a second female parent. It is also noteworthy that the question of whether single women should be eligible to receive treatment, a matter of extreme controversy when the 1990 Act was passed, appears no longer to be at issue.

the two-parent model has outlived its moorings in the heterosexual couple, that this model has continued to frame understandings of parenthood and lies at the root of some interesting tensions in this reform process, underpinning the refusals to admit the possibility that a child can have two 'fathers' or two 'mothers', that a child can have three legal parents or that motherhood can be grounded in anything other than gestation. And, indeed, the very fact that reproductive technologies remain regulated by primary legislation, only to be offered under licence, may signal an ongoing suspicion both of the technologies and of those who seek to use them.[174]

In practice, only a tiny minority of individuals will ever gain parenthood by virtue of the legal principles which form the focus of this paper.[175] Yet we would suggest that these provisions are nonetheless of very significant interest. In this reform process, while the reformers tended to rely on a combination of common sense intuitions regarding who should count as family and a general desire to achieve 'equality', we can nonetheless trace a complex and ongoing renegotiation of the boundaries of law's understanding of family, with the end result being to encompass a broader range of familial arrangements and, most notably, to further recognition of families headed by a lesbian couple. How the more radical potential of the 2008 Act to open up parenthood more visibly to non-partners under the agreed fatherhood and female parenthood provisions will reconfigure our understandings of family remains to be seen, with much depending on how clinics understand the provisions and their willingness to accept that non-partners are eligible for treatment.[176] It would seem that relocating the boundaries of family will inevitably result in a new series of exclusions,[177] which will provoke their own controversies in years to come, inevitably again falling to be renegotiated as our ideas of family shift further. As Phil Willis MP, the Chair of the Joint Committee put it:

> Since 1990, we have had a recognition of non-nuclear families, the like of which I wouldn't have believed possible. You know ... like many of the creatures over here [in the House of Commons] ... [I was] brought up in the generations that recognise the nuclear family as the norm and everything else as abnormal or slightly abnormal. And yet, legislation, you know, has really changed all those definitions. And the idea that families in the future will not again morph in different directions... I think it's fanciful to think that that is not going to happen, because I think it is. I think you mentioned about more than two parents – I think that may well become the reality. You know, you have a number of people who actually are the family of an individual child or children. Now, what do you do about that?[178]

[174] As Webb informed us, whether procedures such as IVF should be legally registered was one of the first things to be considered by the Department of Health in this process, the conclusion being that 'there was still need for it.' Interview on file.

[175] Indeed, as we noted above, only a small minority of those who make use of assisted conception are caught by these provisions.

[176] We thank Emily Jackson for this important point. As we noted above, the steer provided to clinicians in the HFEA's Code of Practice is potentially misleading, in implying that all second parents will be partners. Above, n 67.

[177] As Callus puts it, in her critique of the new provisions, 'Justified on the premise of equality, the proposals in fact give rise to further inequalities' (n 160 above at 146).

[178] Willis, interview on file.