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The role of sexual partnership in UK family law: the case of legal parenthood

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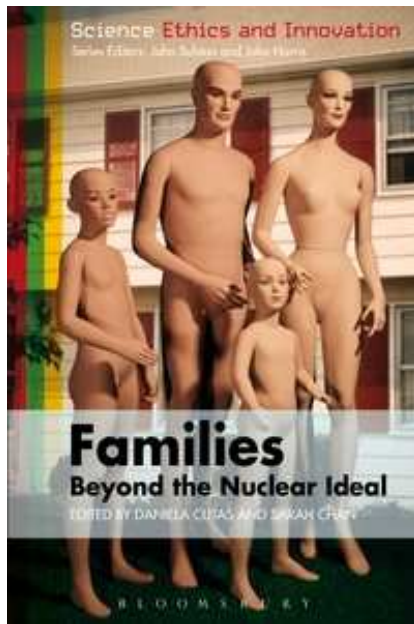
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Chapter 2. The Role of Sexual Partnership in UK Family Law

The case of legal parenthood

Julie McCandless^[1]

Introduction

The question ‘What makes someone the parent of a child?’ is at once straightforward and complex. Straightforward because we often have what we feel to be a ‘common sense’ or ‘intuitive’ response. This might be with respect to individual parent-child relations – ‘Z and Y are X’s parents’ – or it might relate to a more generalized normative standard – ‘the woman who gives birth to you is your mother’. However, if we collected a number of these ‘common sense’ or ‘intuitive’ responses, we are likely to find variation and contradictions within, signalling that our notions about parenthood are rather more complex than we might first envisage. In this chapter, I set about exploring this complexity through the lens of legal parenthood in the UK. It should be noted from the outset that I am not suggesting law to be somehow representative of how people understand parenthood: this is an empirical question far beyond the scope of this short chapter. Instead, what I am interested in are the various grounds upon which a person may be regarded as a *legal* parent at the moment of a child’s birth in the UK. When we investigate this closely, we see that while these grounds have arguably shifted and expanded over recent decades, the notion that a child has two ‘real’ parents has remained constant. This is reflected in the strict two-parent model for legal parenthood (see also Lotz, this volume).

Although legal parenthood has primarily developed through the common law, specific statutory provisions have been enacted in response to a number of assisted reproduction techniques, namely donor insemination, IVF using donated gametes and certain surrogacy arrangements.^[1] While clearly these provisions affect a relatively small proportion of births in the UK, the extent to which assisted reproduction generates controversy and captures the social imagination renders related legislation highly significant and symbolic. Moreover, Part 2 of the Human Fertilisation and Embryology Act 2008 (‘the 2008 Act’) provides the most recent formal statement and codification of legal parenthood in the jurisdiction. That this codification reaffirms the strict two-parent model for legal parenthood is important, not least because the parenthood provisions apply to reproductive techniques which very directly dismantle the seemingly axiomatic two-parent connections of sexual reproduction which conflate bio-genetic ties with socio-legal roles and responsibility in most, if not all, Western societies (Boyd 2007; Diduck 2007; Dolgin 1997; Franklin 1997; Strathern 1992). What purpose does reaffirming the two-parent normative model serve and what does it say about our understandings of parenthood and family more generally? What tensions does it present for how legal parenthood is determined in the context of sexual reproduction where bio-genetic ties are increasingly determinative, especially for fatherhood? Did the law-makers involved really engage with the question of *who* counts as a parent and on *what* basis? Or were their deliberations primarily informed by ‘common sense’ and intuitive ideas of what a family *should* look like, rather than reasoned consideration and analysis of different reproductive contexts?

In this chapter I first provide some background to the 2008 Act, explain its role in the determination of legal parenthood and set out the significance of the parenthood provisions for the normative family ideology signalled by the legislation. I then introduce Martha Fineman’s analytical concept of the ‘sexual family’ (1995) as a framework for explaining the changes introduced by the 2008 Act, analysing how they reconfigure but retain this family model in part 3 of the chapter. While Fineman’s definition of the sexual family is similar to the definition of the nuclear family used by this collection, I have adopted her term as a way of highlighting the centrality of adult sexual partnership for legal regulation of familial relationships. The final part of the chapter questions the extent to which this family model can continue to maintain normative force for legal regulation.

The 2008 Act

The 2008 Act is a piece of amending legislation to a 1990 Act of the same name. The legislation deals with a number of controversial issues in the field of human genetics, reproduction and embryology. My focus in this chapter relates to Part 2 of the legislation, which provides for the attribution of legal parenthood following certain assisted reproductive techniques. In short, these provisions are determinative for legal motherhood in all cases of licensed treatment, while for fatherhood they are determinative when donated sperm is used^[1]. When a man’s own sperm is used in the legal mother’s treatment, legal fatherhood is not governed by the 2008 Act, but falls to the common law. This effectively means that it is determined by the genetic link^[2]. Unlike the 1990 Act, the 2008 Act also provides for legal parenthood to be attributed to a second female parent. Although the determination of female parenthood is similar to fatherhood, one key difference is that when a woman donates an egg to the legal mother, the parenthood provisions remain determinative and she cannot be attributed parenthood on the basis of her genetic link. This will be discussed further in part 3.

The decision to have amending legislation was deliberately taken by the Department of Health in order to ensure that Parliamentary debate was not reopened on questions such as the general permissibility of research on human embryos (McCandless and Sheldon 2010a: 180). Although Part 2 completely replaces the corresponding portion of the 1990 Act – so that while reference is usually given to ‘section X of the 1990 Act, as amended’, any reference to the parenthood provisions reads as ‘section X of the 2008 Act’ – this should not be taken as an indication that the provisions relating to parenthood were fundamentally re-countenanced. While a number of important changes did occur, not least the possibility of recognizing two women as the parents of a child from the moment of birth, the 2008 Act left undisturbed many of the key assumptions of the original legislation, most particularly the notion that a child should have no more than two legal parents. With the extension of parenthood to a second female parent, the two-parent family model has clearly been reshaped. However, the insistence in the 2008 Act on a normative model of two ‘real’ parents is crucial in shoring up several assumptions relating to appropriate parenting and family form. Before moving to a more thorough discussion of this, I want here to set out the significance of the parenthood provisions in the new legislation.

In academic scrutiny relating to how the 1990 Act attempted to maintain and impose the heterosexual nuclear family model on reproductive practices that in very direct ways challenged such a paradigm, it seems fair to say that the parenthood provisions, although present, have been in the background of such commentary (for notable exceptions see Jones 2006; Smith 2006). I suggest, however, that in analyses of the family ideology signalled by the 2008 Act, they must be brought to the fore. This is for two main reasons. First, they are highly significant in and of themselves. This will be discussed further in part 3. Second, developments relating to the typically more talked about means of imposing normative family values in the original legislation – donor anonymity and the statutory duty imposed on clinicians to consider the child's welfare, including his or her need for a father, before offering a woman treatment (s. 13(5), 1990 Act) – render the parenthood provisions increasingly important. Together, donor anonymity and the welfare clause have attracted extensive academic commentary. This may be because they were seen as responding to particularly heightened anxieties about the role of fatherhood and masculinity in the associated reproductive practices (Cooper and Herman 1991; Haimes 1993; McCandless and Sheldon 2010b; Millns 1995; Sheldon 2005; Thomson 2008: 97–126). Moreover, in contrast to the rather technical nature of the parenthood provisions, which run to several pages of legislation and may have been regarded as necessary but complicated 'legal jargon' relating to status, donor anonymity and the welfare clause perhaps had a more direct appeal and polarizing force.

While it is beyond the scope of this chapter to address donor anonymity and the welfare clause in depth, I want to outline a couple of developments which push their significance from the fore. First, there is no longer a policy of donor anonymity in the UK, following the HFEA (Disclosure of Donor Information) Regulations 2004. The removal of donor anonymity is a complex phenomenon with associated debates being highly gendered (Haimes 1993; Thomson 2008: 97–126). However, the crucial point for my purpose is that while donor anonymity was a key method of shoring up the two-parent family form in the 1990 Act, this is no longer the case. There was no serious discussion throughout the reform process of implementing legislation that would entail going back to a policy of donor anonymity. Indeed, while a statutory duty to inform a child that they are donor conceived was rejected, concern was apparent regarding the role of the state in 'deceiving' a child about their parentage (McCandless 2011). It would seem, therefore, that there is considerably less contemporary concern about a gamete donor threatening the security of the child's family unit. While this has clearly been influenced by discourses relating to the significance of so-called 'genetic identity' (for a critical exploration of such, see Fortin 2009; McCandless 2011; Smart 2009; Wallbank 2004), we might also want to suggest that it reflects a sense of confidence in the security of the parental ties formed by law, at least from those charged with making the law (on the continuing sense of insecurity felt by parents with donor-conceived children, see Nordqvist and Smart 2011; and Gurnham, this volume).

Moving now to the welfare clause, described as one of the 'twin pillars' of the 1990 Act (Sheldon 2006). Agreed upon as a compromise measure, its origins lay in an attempt by some parliamentarians to limit access to fertility treatment to married women (McCandless and Sheldon 2010b: 203; see also Lee and Morgan 2001: 159–167). Given that the 1990 Act technically allowed for a child to have only one legal parent (mother) (s. 28(6)), the inclusion of the words 'need for a father' in the welfare clause were a highly significant way of signalling a normative preference for a child to have both a mother and a father and be located within the heterosexual family paradigm. However, as I have discussed elsewhere, the interpretation of the welfare clause in regulatory and clinical practice (as opposed to political and patient interpretation more generally: see respectively Millns 1995 and Harding 2010: 130–4) was becoming increasingly liberal, both in relation to welfare assessments coming to be seen as 'risk assessments' and in light of developments in equality law relating to sexual orientation (McCandless and Sheldon 2010b). Originally then, the Department of Health proposed to retain the welfare clause but remove the words 'the need for a father' from it (2006: paras 2.23 and 2.26; Human Tissues and Embryo (Draft) Bill 2007, s. 21(2)(b)). This suggestion, however, proved highly controversial and after extensive scrutiny and debate, the original wording was instead replaced with 'the child's need for supportive parenting' (2008 Act, s. 14(2)(b)); on the interpretation of this phrase, see further McCandless and Sheldon *ibid.*

While it remains an empirical question how the phrase 'supportive parenting' will be interpreted and applied in practice, there is nothing implicit in the phrase which demands that a child be located within the hetero-nuclear family. However, there seems plenty of scope to argue that the two-parent family paradigm certainly underpinned political understandings of the phrase (McCandless and Sheldon 2010b). Note the following indicative statement made during the parliamentary debates:

If we follow the provisions of the [legislation], we stand to guarantee supportive parenting. We are almost assured that that child will have two parents. Not only that, but should anything happen to one of those parents, there will be another clearly identified parent with parental rights to look after the child. I can see nothing wrong with that: it is entirely logical. (Per Dr Turner, HC Debs, Vol 476, Col 183 (20 May 2008))

To what extent then will those family units which do not centre on dyadic parenting be considered as supporting child welfare? In addition, although there is nothing in the legislation to require two adults to be in an intimate relationship for the parenthood provisions to apply,¹¹ the consistent use of the word 'partner' throughout the parliamentary debates and in the Human Fertilisation and Embryology ('the HFEA') Code of Practice Guidance (2009) on the 2008 Act indicate that this is how the provisions will be understood. As I discuss further in part 3, several other aspects of the parenthood provisions in the 2008 Act indicate a strong normative preference for the two parents to be a sexually intimate couple. What I turn to next, however, is an elaboration of the sexual family concept, which I will then use to help analyse the parenthood provisions of the 2008 Act.

The Sexual Family

Writing 15 years ago in the context of American law and policy relating to the family, Fineman bemoaned the hold of what she termed the 'sexual family' model. She argued that 'our societal and legal images and expectations of family are tenaciously organized around a sexual affiliation between a man and a woman' and that beyond biological imperatives, this has important ideological ramifications regarding perceptions of the 'natural' for the social and cultural organization of intimacy (1995: 143, 145–76). The historically privileged position enjoyed by married couples in relation to family law and policy in most common law legal systems identifies what Fineman describes as the 'pure' form of the sexual family: the formally celebrated (i.e. married) heterosexual couple living with genetically related children (*ibid.*: 143; on the construction of marriage as a site for reproductive sex, see further Collier 1995). Clearly this is similar to the definition of the nuclear family adopted by this collection. However, I have adopted her term in order to highlight the central role of adult sexual partnership in Western socio-legal ideas about family form.

A number of social and demographic realities have significantly challenged the normative value of this family form, such as the increasing numbers of births outside of marriage and fragmentation of genetic families across households, as well as the greater visibility of families headed by single and/or same sex parents (McCandless and Sheldon 2010a: 187–188). Indeed, even in 1995 Fineman was prepared to accept that the pure form of the sexual family was not an 'untarnished icon' given moves to relax the formality of marriage (1995: 156). However, in response to calls for the recognition of the familial relationships of heterosexual couples not formally celebrated through marriage, as well as same sex partnerships and parenthood, Fineman argued that 'by duplicating the privileged form' the legal recognition of alternative relationships 'merely affirms the centrality of sexuality to the fundamental ordering of society and the nature of intimacy' (*ibid.*: 143, 1–2). In other words, in many mooted reforms to family law the conjugal couple remains valorized as the core unit around which families should be recognized and regulated, as opposed to other organizing concepts such as care, (inter)dependency, vulnerability or even child welfare. Family relationships and forms are only rendered legitimate if they can be assimilated under the rubric of a dyadic sexual partnership.

If we return to our context of assisted reproduction, it is well documented how reproductive technology and collaborative reproductive techniques offer to challenge socio-legal ideas about family form and relatedness (Dolgin 1997; Franklin 1997; McCandless 2009: chpt 3; Mykitiuk 2002; Strathern 1992). The 2008 Act therefore represents a very appropriate site to test the 'tenacity' of Fineman's conceptual offering, as if the model was going to buckle, it would be likely to do so first in the context of the reproductive situations covered by the legislation. A primary way in which assisted reproduction offers to reconfigure the sexual family model is its ability to disassociate reproduction and parenting from heterosexual intercourse (McCandless *ibid.*; Nordqvist 2008). While clearly the potential for such a deliberately transformative political exercise is there (Frestone 1970), the more usual reason why people engage in assisted reproduction is as a reaction to the inability of their sexual relationship(s) to produce biologically related children, whether for medical or social reasons. Despite this, and as we will see below in relation to the 2008 Act, an adult sexual partnership often 'rescues' (Whitehead 2008) the formal legality of the 'assisted' family unit and the parent-child connections therein, whether or not there is a formally celebrated relationship between the adults and/or bio-genetic connections with the child(ren). In agreement with Fineman, I argue that this reflects the extent to which the 'sexual-family-as-natural imagery' (1995: 147) has become ingrained in our socio-legal thinking, drawing our attention to the persistent centrality of sexuality and adult sexual partnership in the legal ordering of family life.

Understanding the changes in the 2008 Act

Framing the parenthood provisions

I have elsewhere explored in depth the 'tenacious hold' of the sexual family model on the parenthood provisions in the 2008 Act (McCandless and Sheldon 2010a), observing that the fundamental question of who counts as a parent and on what basis was not particularly high on the legislative reform agenda which culminated in the 2008 Act. Instead, discussions relating to parenthood appeared to be informed by three main concerns. First, building on previous legislative measures relating to the recognition of some same sex partnerships and parenting relationships (Civil Partnership Act 2002 and Adoption and Children Act 2004), as well as the direction in the HFEA's Sixth Code of Practice on the 1990 Act that patients should not be unfairly discriminated against on the grounds of sexual orientation (HFEA 2003: para G.3.2.2), the Government was concerned that the 2008 Act should signify formal equality for families headed by a same sex couple. There was also concern that single-parent families should not be discriminated against by the legislation, with the possibility of single women accessing treatment seemingly proving less objectionable than in the debates leading up to the 1990 Act (McCandless and Sheldon 2010b). However, as I discuss below, this (formal) equality and non-discrimination agenda did not play out in any straightforward way in the final legislation.

Second, there was not only concern, but often anxiety regarding the general use of the reproductive techniques governed by the legislation and specifically what they mean for the position of men and masculinity within the family. For example, in response to the suggestion that the phrase 'need for a father' be removed from the welfare clause, Baroness Deech, a previous chair of the HFEA, asserted the following:

It is where the Bill crosses over into the organization of family life that I have more concerns. There is a risk in the unfolding of IVF and the consequent science that our humanity and the respective roles of men and women are ignored. It would be extraordinary if this House were to ignore the contribution made by half of the human race towards the upbringing of the next generation. It is important that this House should reaffirm the importance of parenting; both mothering and fathering. (HL Debs, Vol 696, Col 672-3 (19 November 2007))

While such strongly termed assertions were typically challenged with equal passion by other parliamentarians and commentators, they do reflect the controversy surrounding fatherhood throughout the passage of the legislation. Although concerns mostly played out in discussions relating to the welfare clause (McCandless and Sheldon 2010b), the parenthood provisions were also evoked. The strategy here appeared to be twofold: either attack was made on the extension of legal parenthood to a second female parent, or suggestions were made which attempted to reassert the male involvement in reproduction. For example, a significant portion of the time spent debating the parenthood provisions in Parliament was dedicated to an amendment which sought to remove the provisions for posthumous female parenthood, with no similar discussion for the pre-existing posthumous fatherhood provisions (see HL Debs, Vol 698, Cols 475-9 (28 January 2008)), while some parliamentarians went as far as suggesting that parenthood – or more accurately, fatherhood – could not be separated from genetic procreation and that all genetic fathers should be legal fathers accordingly (see for example per Lord Patten, HL Debs, Vol 697, Col 30 (10 December 2007); see further McCandless 2011: 195–7).

My third point is less a 'concern' and more of a foundation on which several of the provisions relating to parenthood proceeded: 'common sense'. For example, that the legislation should provide for two legal parents was generally accepted, with only one consultation response and two parliamentarians questioning whether legal parenthood should be extended to three (or more) legal parents in certain situations (AHRC Research Centre for Law, Gender and Sexuality 2005; per Baroness O'Neill and Baroness Barker, HL Debs Vol 696, Col 358-61 (21 November 2007) – note, however, that they did not table any amendments to this effect). Other prominent examples include the attribution of legal motherhood on the basis of gestation alone (1990 Act s. 27; 2008 Act s. 33); the newly inserted provisions relating to prohibited degrees of relationship between persons seeking to avail of the 'agreed parenthood provisions' (2008 Act ss. 37 and 44) and the parental order provisions (s. 54); as well as the explicit prohibition of legal motherhood, or indeed female parenthood, on the basis of the genetic link alone (2008 Act, s. 47). At no stage during the passage of the legislation were these provisions and their formulation seriously questioned or scrutinized.

Elsewhere I have offered two explanations for this lack of attention (McCandless and Sheldon 2010a: 188). The first relates to the politically sensitive nature of the legislation, which resulted in many key assumptions of the original legislation being left undisturbed in order to secure the passage of other prioritized reforms. The second relates to provisions not being questioned because they reflected a strong normative and seemingly 'intuitive' understanding of family. In other words, various provisions relating to parenthood were not discussed because they were regarded as uncontroversial and as 'not needing to be discussed' given that they reflected a sense of adherence and continuity with how family is 'intuitively' understood. Such continuities are detailed further below. The general analytical point to be made is that such an approach resulted in a fairly assimilative piece of legislation which does little to answer the opening question of 'what makes someone a parent'. The tensions in relation to different tests for legal parenthood in different contexts are therefore not sufficiently explained. This is not to say that there is anything intrinsically problematic with having different grounds for legal parenthood in different situations. However, without any explanatory work for these differentiations, the legislation is less an engagement with empirical variety or reasoned conceptual consideration and more an exercise in shoring up the continuing ideological preference for a certain family form in UK family law and policy: a family form which may be 'rescued' by adult sexual partnership when other familiar fault-lines dissipate. I turn now to an explanation of the parenthood provisions in the 2008 Act and how they remain significantly informed by the sexual family model.

The 2008 Act and the Sexual Family

The ongoing significance of the formally recognized adult couple

The 2008 Act maintains the hierarchical structure of the 1990 Act, whereby husbands – and now female civil partners – are given 'first shot' at legal parenthood along with the gestational mother, to include surrogacy arrangements (see further Horsey 2010). Only when there is no father or female parent by virtue of this formally recognized relationship (ss. 35 or 42 respectively) are the courts directed to consider whether there is a father or female parent under the 'agreed parenthood provisions' (ss. 37 and 44 respectively), which provide for the attribution of legal parenthood to a second parent who is not in a formally recognized relationship with the legal mother. As such, while marriage may no longer be the only means of legally recognizing an adult couple, it retains considerable importance and the extension of the marital presumption of parenthood to civil partners in this context¹¹ can be seen as assimilation to this marital ideal rather than any radically new way of legally recognizing parent-child ties.

A further distinction between formally recognized and other partnerships is that while legal parenthood is presumed for husbands and civil partners in both licensed and self-arranged 'artificial insemination' (ss. 35 and 42), the provisions for other partnerships only confer legal recognition in the context of licensed treatment and only where the agreed parenthood provisions are satisfied. While procedures such as IVF can only occur in a medical setting, practices such as donor insemination do not necessarily require medical assistance. The 2008 Act can be seen therefore to respond to the un-governability of donor insemination by again reverting back to the traditional underpinnings of the sexual family model and 'closing the circle' on those reproductive situations which challenge it the most (see further Donovan 2006).

Maintaining this distinction between formally recognized and other adult relationships is noteworthy given the widespread erosion of the relevance of this distinction elsewhere in family law since the original legislation. We see this trend most recently in the Welfare Reform Act 2009 which provides for compulsory joint birth registration (unless an exemption applies) and with it, the automatic conferral of parental responsibility under the Children Act 1989 to virtually all unmarried fathers (Probert 2011; Sheldon 2009; Wallbank 2009). While part of the explanation for retaining and building on this distinction lies in the 2008 Act being an amending statute, the result is a piece of legislation which is now significantly out of line with broader family law principles. This distinction can be explained as a legislative attempt to entrench the sexual family model in reproductive contexts which drive clear inroads into the ideals associated with the model.

The two parent model

Despite the lack of cultural and political consensus on what grounds parents should be recognized, there seems to be widespread acceptance of the notion that we can have two – and only two – 'real' parents. As has been noted elsewhere in this volume (Lotz), claims of authenticity through exclusivity appear to have outlived any inevitable relationship between legal parenthood and either biological connections or marital convention. While the reform of the welfare clause 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 a family headed by a female same sex couple, there was no corresponding discussion of whether having more than two parents might benefit children.

As Lotz's contribution in this volume shows, there are many good reasons for moving beyond the two parent family model for legal parenthood by reference to the interests of would-be parents and children, as well as families and society more generally, marking the silence and lack of scrutiny on this issue as particularly noteworthy. Moreover, it stands in contrast to the increasingly flexible and creative ways in other UK family law contexts of recognizing a range of adults as significant 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 social/legal parents (Children Act 1989; Ball 2002). It also stands in contrast to developments and discussions in a limited number of other common law jurisdictions, namely Canada and New Zealand (see further Lotz, this volume).

While the possibility of recognizing more than two parents was countenanced early in the reform process by the Department of Health, including such a proposal in the menu of legislative reforms was explicitly rejected on the basis that the consequences of this change would be too far reaching and controversial, with the potential to 'hijack' the overall process (McCandless and Sheldon 2010a: 191). The Department may well have been right, given that the issue was not seriously raised throughout the process by any parliamentarian involved and indeed, indirect possibilities for such to happen were explicitly excluded in relation to two women contributing biologically to the reproductive process (s. 47), leaving open the possibility that a third party may try to claim fatherhood or female parenthood through the parenthood provisions (see below). This indicates that the idea that a child may benefit from having more than two parents was seen as too radical, with reformers reverting to the two parent model as the default position without any real explanation seemingly either needed or demanded.

While it is possible for a child to have only one legal parent under the 2008 Act (legal mother), it is important to locate this in the strong normative preference in the legislation for two parents. The possibility of this playing out in interpretations of the welfare clause was mentioned earlier. What I additionally want to refer to here are the parental order provisions for surrogacy arrangements.

As a type of fast-track adoption, a parental order effectively transfers legal parenthood from the birth mother (and her partner, if she has one and he/she is considered the second legal parent) to the persons who commissioned the surrogacy arrangement. To be able to apply for a parental order and thus bypass the full adoption procedure, a number of criteria have to be met. For example, age, residency and time-since-birth requirements, and there must be at least a partial genetic link between the child and the persons applying for the order (s. 54). Under the 1990 Act, only married couples could apply for a parental order (s. 30). The 2008 Act extends the eligibility criteria to couples in a civil partnership and other couples 'who are living as partners in an enduring family relationship' and who are 'not within prohibited degrees of relationship to each other' (see further below). It is not clear from the legislation whether the two persons must be living together in the same household, but the underlying assumption certainly seems to be there. However, what is more important for my purposes is that a person cannot apply for a parental order without a (potentially sexual) partner. When asked why single persons were excluded from this part of the legislation, the then Minister of Health responded that:

The Government are still of the view that [because of] the magnitude of what [surrogacy] means that it is best dealt with by a couple. (Per Dawn Primarolo, HC Debs, Vol. X, Col. 249 (12 June 2008))

The matter was not pressed further and her explanation appears to have been deemed sufficient. However, it is hard to reconcile this with the Government's determination not to discriminate against single-parent families, as evidenced by their earlier rejection of the recommendation by the Joint Committee of the House of Lords and House of Commons (which closely scrutinized the original Bill) that the words, 'the child's need for a father' should be replaced by 'the child's need for a second parent' (Department of Health 2007: para 57). Several questions emerge here. For example, why is a single-parent family acceptable in some contexts, but not others and does this differentiation relate to uncertainty about the acceptability of surrogacy as a reproductive technique, or the creation of families with only one parent? Given the reluctance of various UK governments to properly regulate surrogacy (Gamble and Ghevaert 2009), we may be inclined to point towards surrogacy as the chief difficulty not least because, as previously mentioned, the issue of single women accessing treatment was deemed significantly less problematic than in previous legislative debates. However, I am not convinced that the explanation of 'surrogacy is difficult' is sufficient here. Single parent families remain heavily stigmatized in society (see Graham, this volume) and while marriage and civil partnership are 'protected characteristics' under equality legislation in the UK (Equality Act 2010), status as a single person is not¹¹. As a result, all restrictions placed on single persons in the legislation fall to be governed by the rather nebulous concept of child welfare. Given the clear preference for the two-parent family model in the 2008 Act, as well as other recent legislation such as the Welfare Reform Act 2009, we should not be complacent that single parenthood has become any less objectionable than in years previous.

Parental dimorphism: One mother plus one father/female parent

While UK law has become increasingly open to the idea that a child can have two parents of the same gender, the sexual family model still continues to resonate in a steadfast resistance to the possibility that a child can have two 'mothers' or two 'fathers'¹¹. The two parent model thus also appears to encompass an assumption of what Sheldon and I have previously referred to as 'parental dimorphism', meaning that the two parents are seen as occupying complementary yet different legal roles. This can be seen in the fact that a second female parent is not to be legally recognized as a 'mother' but as a 'female parent'. Legal motherhood is reserved for gestational mothers (s. 33), with gestation holding a significance *per se* given the prohibition of attributing motherhood (or female parenthood) on the basis of the genetic link (s. 47), while female parenthood is attributed on grounds which closely parallel those by which men achieve fatherhood (ss. 35–40 and 42–46).

While Fineman was more concerned with the gendered imagery of the sexual family in relation to care-work and dependency rather than the attribution of parental status *per se*, this sense of complementarity appears to be an implicit part of the sexual family model, whereby each parent occupies a distinctive role in the family unit: a role which somehow relates to their part in the (sexual) reproductive process. The explicit refusal of the possibility that motherhood might be grounded in genetic links, rather than emphatically through gestation, serves to emphasize the distinction between how motherhood and fatherhood are countenanced. What then of female parenthood? It is interesting here to recall an earlier point relating to when the parenthood provisions apply. I noted that when a man donates sperm to his female partner for treatment, his parental status is determined by the common law and not the 2008 Act. In contrast, when a woman donates an egg to her female partner, s. 47 explicitly prohibits her obtaining parental status on the basis of the genetic link. Instead, she must fall within the female parenthood provisions, either as the civil partner of the woman receiving treatment, or by satisfying the 'agreed parenthood conditions', similar to non-genetic fathers. This not only holds the potential for problematic and unequal legal scenarios relating to the use of female and male bio-genetic material (McCandless and Sheldon 2010a: 195–6); it also highlights the difficulty of assimilating family forms which resemble, but are clearly different from, the pure form of the sexual family model into legislation which continues to privilege and retain this family model (Diduck 2007).

To have allowed for the recognition of a second female parent on the basis of a bio-genetic tie appears to have been a step too far for the legislators, either on the basis that it would somehow compromise the certainty of who a child's birth mother was – perhaps casting doubt over who had primary responsibility for the child – or leave open the possibility that a third person might attempt to assert legal parenthood (McCandless and Sheldon 2010a: 194–6). We should also note here that the parenthood provisions are not extended to male same sex partnerships. Although two men can now apply for a parental order following a surrogacy arrangement (if they satisfy the above-mentioned criteria), the possibility of two men being recognized as legal parents from the moment of birth seems not to have been considered throughout the passage of the legislation. To do so would have involved either moving beyond the idea that the birth mother is a legal mother or alternatively, recognizing three parents from the moment of birth. Again, this can be explained by the hold of the two-parent, sexually dimorphic family model on the socio-legal imagination. While reforms which 'compromise' this family model may be allowed, those which fundamentally reconfigure its commitment to gender complementarity and the centrality of adult sexual partnership are either rejected or not deemed worthy of discussion. Indeed, a further possibility – that of a gender-neutral category of legal parent, rather than legal mother, father and female parent – was also rejected early in the reform process by the Department of Health, for reasons similar to the noted rejection of the possibility of a child having more than two recognized parents: that it would simply prove too controversial¹¹.

The potentially sexual couple

As noted above, husbands and civil partners have 'first shot' at obtaining legal parenthood along with the child's legal mother. Although there is no consummation requirement in the Civil Partnership Act 2004 (see further Barker 2006), it is assumed that married and civilly partnered couples will normally be in a sexually intimate relationship and must, at least, be lawfully permitted to be so (Marriage Act 1949, as amended and Civil Partnership Act 2004). While the 'agreed parenthood provisions' were clearly designed to cater for couples not in a formally recognized relationship, they are not explicitly restricted to those in an intimate relationship. However, as mentioned 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 defined by 2008 Act, s. 58(2)). The same provision appears in the eligibility criteria for parental order applications. There is nothing in the published deliberations regarding the rationale for including this prohibition and no significant discussion in any associated debates, suggesting its inclusion to be completely uncontroversial and thus to require no scrutiny or elucidation. Such a prohibition is unlikely to be grounded in eugenic considerations, given the reproductive context. Rather, to recognize 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 appropriate family relationships and form. Thus, while the two-parent family model might be seen as having outlined its moorings in the heterosexual couple, the sexual family continues here to frame socio-legal understandings of family in so far as the couple at the heart of the family remains a sexual one.

I have elsewhere paused to consider the self-evident necessity of this provision, in light of various kinds of collaborative inter-familial parenting arrangements which occur as a matter of social fact, and which in many instances are seen as the ideal arrangement, such as where a mother and father raise a child with their own daughter who has become pregnant at a young age (McCandless and Sheldon 2010a: 198–9). If these circumstances are acceptable, what then is different about allowing individuals in these kinds of relationships to choose to create a child together, especially if we accept that legal parenthood does not always follow genetic links or that it is dependent in some way on a marital (or formally recognized) relationship between the parents (see also Lotz, this volume)? Is there a solid ethical underpinning for refusing to extend legal parenthood to two (or more) individuals who are already in a close kinship relationship? Reading the prohibition alongside the current HFEA Code of Practice guidance, which advises clinics that where they have concern about a woman's ability to provide 'supportive parenting' they may take into account support offered by family and friends (2009: para 8.11), it appears that while it is acceptable – possibly even desirable – for a woman's family to help her 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 recognized through law. Furthermore, the prohibition perhaps also stands in contrast to the permissibility of intra-familial gamete donation – such as when a mother or sister donate eggs to a daughter or sister – the practice of which is currently under consideration by the HFEA, but which looks set to continue in certain circumstances (HFEA 2011).

As well as the incest prohibition in the parenthood provisions and the underlying assumption that those seeking to prevail of the provisions will be in a sexually intimate relationship, we could pose further questions about how partners in non-monogamous intimate relationships will be regarded. Would being explicit about the non-exclusive nature of an intimate relationship raise concerns relating to the welfare of the child and possible refusal of treatment? We currently have very little idea of how clinicians do or might regard such relationships. However, there is anecdotal evidence from the context of fostering that being explicit about the non-exclusive nature of even a long-term and formally recognized partnership will adversely affect an application on the basis of child welfare¹¹. While non-monogamy is practiced by same and opposite sex couples alike, it is perhaps more prevalent in same sex relationships, rendering again as problematic the directly parallel treatment of same sex parenthood with opposite sex parenthood. Although I wish to avoid drawing direct parallels between the different contexts of assisted reproduction and fostering, it would seem that despite the decline of marriage as a life-long permanent commitment to one person, and greater fluidity in how people partner and re-partner, the pure form of the sexual family arguably reasserts itself by presupposing the couple at the heart of it as being exclusive.

Concluding discussion

What we see above is a reshaping of the sexual family form in the legislation pertaining to human fertilization and embryology. In the 1990 Act, there was a very explicit acceptance of the separation of genetic parenthood from social and legal parenthood and a formal recognition that the heterosexual couple (and legal parents) at the heart of the family unit need not be the genetic parents. There was also a step-away from the need for the parenting couple to be in a marital relationship. In the 2008 Act, these shifts are extended further to countenance a second female parent. However, as was discussed above, several possibilities were rendered as steps too removed from the sexual family ideal, stretching the current socio-legal imagination too far. Indeed, several new insertions into the 2008 Act further entrench the sexual family model in UK legislation, such as the incest prohibition and the silencing of the female genetic link for determinations of motherhood and female parenthood.

While these provisions will make sense for a great number of people who seek to avail of them, for many others they will prove problematic. An obvious example is the reproductive possibilities that are now open to transgender parents and several scholars have started to analyse how the explicitly gendered parenthood provisions of the 2008 Act will struggle to accommodate such possibilities (McGuinness and Alghrani 2008; McCandless 2009: chpt 5; McCandless and Sheldon 2010a: 200–3). Just as the parenthood provisions of the 1990 Act were challenged by various scenarios not countenanced by the legislators (see for example *X, Y and Z v UK*; *Leeds Teaching Hospital NHS Trust v A and B*; *Blood v UK*; *Re D/Re R*) it is highly likely that the provisions in the 2008 Act will come under similar challenge. This was surely easy to predict. However, the legislation is in no way 'future-proofed' for scenarios that fall out-with the provisions offered, meaning that the persons involved will simply fall outside legal recognition or have to turn to other child law provisions under the Children Act 1989, such as residence orders (Diduck 2007; McCandless 2005). If we are to accept that it is in the best interests of children, parents and families more generally for legal parenthood to exist (see further Lotz, this volume), we need to be slightly more imaginative in how this is attributed if some of the more vulnerable parent-child relationships are to be fully protected. Highly prescriptive legislation, which relies on an arguably outdated family model, does not sufficiently serve this need.

We saw above how the 2008 Act relied on dyadic adult sexual partnership to 'rescue' certain family relationships, marking the paradox whereby non-sexual reproduction becomes regulated firmly around adult sexual partnership. This seems in contrast to the increasing emphasis placed on vertical bio-genetic ties between adults and children in the context of sexual reproduction, especially for fathers (Collier and Sheldon 2008). Such contrasts illuminate two things: first, that we have now accepted as legitimate a range of grounds for attributing parenthood; and second, that there are ideological motives behind status recognition, in the sense that the different tests for parenthood in different circumstances often serve to shore up common ideals and assumptions about family. While it is generally argued that law represents an *informal* kinship system (Mykitiuk 2002) in contrast to the more *formal* kinship ties inherent in connections formed through shared bio-genetic substance, it could be argued that in today's increasingly bureaucratic society law holds a formative power that is as significant as 'blood ties'. This is not to say that only those ties recognized through law matter, but just that to provide for legal recognition is a powerful way of signalling a relationship as deserving of socio-political recognition. While legal recognition and socio-political acceptance do of course not always neatly follow from each other, law can act as a powerful state-sanctioned discourse (Sheldon and Collier 2008: 15), which sends clear normative indications on 'who' and 'what' counts as family. Extending the legal parenthood provisions to a second female parent in the 2008 Act provides an example of how law can be innovative. However, this innovative move has proceeded without really tackling the bigger question of 'why'? To answer this question in the context of legal parenthood we need to move beyond the various components of the sexual family model and probe more deeply the question that I opened this chapter with: 'what makes someone a parent?' This would be a much more beneficial exercise, rather than simply shifting boundaries that will inevitably need to be redrawn in a short space of time.

There is already a growing body of legal scholarship which provides thoughtful schemas for how relationships between adults and children might be recognized, beyond centring legislation on a linchpin of adult sexual partnership. For example, legal parenthood could be governed primarily by intent (Horsey 2010; Shultz 1990; Zanghellini 2010) or we could look at the potential of relational theory (Boyd 2010) or functionality (Whitehead 2008). Others still, in the context of relationship recognition between adults, have focussed on the realities of care and interdependency as a way of moving beyond 'conjugal' (Barker 2006; Boyd and Young 2005). This important scholarship can be developed further by drawing on research from other disciplines, such as sociology and social anthropology, to better understand how people experience and live their intimate lives. For example, anthropological work which seeks to explain how people understand their kinship connections and disconnections, especially in those contexts where the biological processes of (sexual) reproduction mean very little (Carsten 2004; Franklin 2006; Thompson 2005), or sociological work which examines how people live their personal and intimate lives and their understandings of concepts such as care, interdependency and responsibility. My analysis in this chapter has demonstrated that while the sexual family model continues to retain a powerful hold on UK family law and policy, various social, demographic and even legal developments have strained and undermined the future credibility of this model for law. It is therefore important that legal research and scholarship continues to rethink the role of this model, so that policy and law makers can be convinced of the value of measures that on the surface appear 'too controversial' for law reform.

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Human Tissue and Embryos (Draft) Bill 2007.

Marriage Act 1949.

Surrogacy Arrangements Act 1985.

Welfare Reform Act 2009.

Notes

^[1] This chapter draws on research conducted with Sally Sheldon, Kent Law School, and I am grateful for her permission to draw on this work here. My thanks to the editors of this collection for their very helpful comments on previous drafts of this chapter.

^[2] This process began with the Family Law Reform Act 1987, which provided for the attribution of legal parenthood to the husband of a woman receiving donor insemination, providing he consented to the treatment (s. 27). The Human Fertilisation and Embryology Act 1990 ('the 1990 Act') extended this legal recognition to other fertility procedures such as IVF and to unmarried male partners (s. 28). It also provided for the transferral of parenthood following certain surrogacy arrangements (s. 30). The Human Fertilisation and Embryology (Deceased Fathers) Act 2003 further extended the parenthood provisions to men who had died before their female partner's treatment and/or the birth of the child, for the purposes of birth registration only. The Human Fertilisation and Embryology Act 2008 provides for the recognition of a second female parent along similar lines as fatherhood (ss. 42–47) and for a relaxation of the criteria for parental order applications (s. 54). Note that the Surrogacy Arrangements Act 1985 makes no provision for legal parenthood.

^[3] As will be made clear here, this is mostly in the context of licensed treatment. However, the provisions relating to husbands and civil partners also apply in the context of self-arranged donor insemination.

^[4] To say this is not to deny the continuing operation of the common law presumption *pater est*, but to observe that this presumption can now be rebutted through DNA evidence establishing the genetic link between a man and a child. On the increased willingness of the courts to determine legal fatherhood on the basis of the genetic link, even when the child might otherwise be located within a marital family unit, see Fortin (2009) and Sheldon (2005).

^[5] Note that this was also the case under the 1990 Act in relation to a man and woman who sought treatment together and wanted to avail of the parenthood provisions.

^[6] Note that there is no presumption parallel to the *pater est* presumption in common law for people who enter into a civil partnership and that the extension here is limited to this specific context.

^[7] Neither is it clear that the Human Rights Act 1998 could be used in legal challenges by single persons in such contexts, given that the state can interfere with a person's rights to privacy and family life so long as the interference is proportionate (ECHR, Art 8). Indeed, that some European states explicitly prohibit single women from accessing fertility treatment would indicate the likely failure of such a challenge.

^[8] Although same-sex couples have been able to adopt a child together since changes in the Adoption and Children Act 2002 were implemented, the gendered semantics of parenthood were avoided as adoptive parents have always been recorded gender neutrally as 'parent' rather than as 'mother' and 'father'.

^[9] This information was conveyed in an interview with representatives from the Department of Health, as interviewed by me and Sally Sheldon on 19 January 2009 (transcript on file with author). Those interviewed were: 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.

^[10] This story was conveyed to me in a personal communication. As the couple involved are still in dispute with the local authority over the matter, it is not possible to give any further detail about the situation.



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