

Rewriting Parenthood: Reproductive Technologies and the Sexual Family

Julie McCandless, Oxford Brookes &
Sally Sheldon, Kent Law School

One Plus One
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Sharmila is an infertile woman. She separates from (but does not divorce) her husband, Arun. On the rebound, she meets Boris, who is also infertile and equally keen to have children. Together, they plan the birth of a child using donor embryo. Boris attends the clinic with Sharmila for discussions and counselling and signs all the consent forms. They separate before the embryo is implanted. Sharmila then begins what looks likely to be a long-term relationship with Charlie. Using the embryo, and without telling the clinic about her change in partner, she becomes pregnant and gives birth to a daughter, Ellie.

Who are the legal parents?

- Gestation/birth (Sharmila)
- Ongoing marriage to mother (Arun)
- Intention to create child, compliance with legal formalities (Boris, Sharmila)
- Current partner of mother, most likely to be present as social father (Charlie)
- Genetic parents (embryo donors)

The Human Fertilisation and Embryology Act (2008)

The 'Status Provisions' (regulating legal parenthood under the Act)

- 'a radical and dangerous new departure in family law' (*Christian Institute*, in evidence to Joint Committee)
- a 'lego-kit model of family life' (*Family Education Trust*, in evidence to Joint Committee)
- 'social engineering on the hoof' (David Jones, Professor of Bioethics)
- ignoring the 'basic nature of a man and a woman bringing a child up together' (Ann Widdecombe, MP)
- equating children to 'commodities such as washing machines' (Iris Robinson, MP)
- offering 'a la carte parenthood' (Therese Callus, academic lawyer).
- 'Fourteen pages of legal jargon' (R Smith, *Telegraph*)

The 'Sexual Family'

A nuclear family unit with a heterosexual couple, joined through a formally celebrated union, living with genetically related offspring.

Martha Fineman, *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* (1995)

Determination of Parenthood: 'Mother'

- 1990: The birth mother is the legal mother.

No provision for the recognition of a second female parent.

Determination of Parenthood: 'Father'

Married Men:

- 1990: Husband will be father unless can be shown didn't consent to treatment.

Unmarried Men:

- 1990: will be father where treated together (shared 'joint enterprise') with mother to create a child.

Determination of Parenthood: 'Mother'

- 1990/2008: The birth mother is the legal mother.
- 2008: woman not to be treated as parent merely because of egg donation.

Determination of Parenthood: 'Father'

Married Men:

- 1990/2008: Husband will be father unless can be shown didn't consent to treatment

Unmarried Men:

- 1990: will be father where treated together (shared 'joint enterprise') with mother to create a child.
- 2008: will be father where 'agreed fatherhood conditions apply'.

Determination of Parenthood: 'Father'

Agreed Fatherhood Conditions:

- Both man and woman give written/signed notice that consent to the man being treated as the father;
- Neither the man nor the woman give notice of withdrawal of consent;
- The woman doesn't give further notice that she consents to someone else being deemed the father or female parent;
- The woman and man are not within prohibited degrees of relationship foreseen in incest legislation.

Determination of Parenthood: 'Female Parent'

Woman in Registered Civil Partnership:

- 2008: will be 'female parent' unless can be shown didn't consent to treatment.

Woman not in Registered Civil Partnership:

- 2008: will be 'female parent' where 'agreed female parenthood conditions apply'.

Determination of Parenthood: 'Female Parent'

Agreed 'Female Parenthood' Conditions:

- Both women give written/signed notice that consent to the (legal) mother's partner being treated as the female parent;
- Neither woman gives notice of withdrawal of consent;
- The mother doesn't give further notice that she consents to someone else being deemed the father or female parent;
- The two women are not within prohibited degrees of relationship foreseen in incest legislation.

The Tenacious Hold of the Sexual Family

The 'Sexual Family': a nuclear family unit with a heterosexual couple, joined through a formally celebrated union, living with genetically related offspring.

The Tenacious Hold of the Sexual Family:

- Ongoing significance of marriage (and now CP)
- Only (up to) two parents on birth certificate

Meaning of birth registration?

Baroness Deech: ‘There is still some cloudiness over this issue. A birth certificate is **not a social record but a historical record**. The social situation of children, the legal responsibility for them, and questions of their maintenance and upbringing are quite distinct issues. The birth certificate is a historical record that ought to be as accurate as possible, and should not be used to achieve ends other than the facts.’

‘I am simply making a plea for the truth to be on birth certificates – **or at least no obvious lie**’.

15.01.2008

Meaning of Birth Registration?

Baroness Barker: ‘A birth certificate is not a certificate of someone’s genetic identity. We do not have such a thing, and never have had ... **it is a record of who a child’s social parents are at any time.** ... It would be wrong to suggest to any child who was born into a [same sex family] and whose birth was planned, wanted and much desired by the two people constituting that family – that is, the two people in the partnership – that that was not so. It is not about trying to deceive people; on the contrary, it is a different kind of truth.’

Lord Darzi: ‘Birth registration needs to be updated with our changing times’

15.01.2008

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- ‘Female parents’ as equivalent to fathers
- Transgender parents

Transgender parents

“[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?”

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

HC Deb Vol 418 Col 52 (23 Feb 2004).

A post-operative transsexual woman Rebecca has ... stored sperm pre-operatively. She and her partner, Lois, wish to use this sperm artificially to inseminate Lois so that she may carry their child. Lois is fertile and so the treatment is straightforward and without complication. Nine months later they too give birth to a healthy baby.

Sheelagh McGuinness & Amel Alghrani(2008) 'Gender and Parenthood: the Case for Realignment' 16 *Medical Law Review* 261

A post-operative transsexual woman Jessica has stored sperm pre-operatively. She firmly believed that the day would come when she could have a womb transplant and use the sperm to gestate her own genetically related child. Now, in 2009, she has a womb transplant and receives treatment at a fertility clinic. An embryo created with her sperm and a donor egg is implanted into her new womb. Nine months later she gives birth to a healthy baby.

Sheelagh McGuinness & Amel Alghrani(2008) 'Gender and Parenthood: the Case for Realignment' 16 *Medical Law Review* 261

The Tenacious Hold of the Sexual Family:

- Ongoing significance of marriage (and now CP)
- Only (up to) two parents on birth certificate
- ‘Female parents’ as equivalent to fathers
- Transgender parents
- Incest Prohibition



BBC, 'Sisters make baby with three mums' (24.10.2005).

<http://news.bbc.co.uk/1/hi/health/4370804.stm>

The Tenacious Hold of the Sexual Family:

- Ongoing significance of marriage (and now CP)
- Only two parents
- ‘Female parents’ as equivalent to fathers
- Transgender parents
- Incest prohibition
- Status provisions don’t apply to same sex male couples

Concluding Questions

- how *ought* same sex parents to be legally recognised? What terminology best recognises ‘female parents’?
- Do we need the words ‘mother’ and ‘father’ (rather than just ‘parent’)? What do we mean by these terms, beyond a male parent and a female parent?
- What is the proper role of the birth certificate (historical record or statement of social roles)?
- Is it right only to recognise (up to) two parents on a birth certificate?

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See further: J McCandless & S Sheldon (forthcoming 2010) 'The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Model', *Modern Law Review*.