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# Challenging presumptions: legal parenthood and surrogacy arrangements

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*Kirsty Horsey\**

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*As the law stands, provisions determining parenthood following surrogacy and other forms of assisted conception are inconsistent and reflect – intentionally or unintentionally – a perception that surrogacy is a troublesome, disruptive and less legitimate means of family formation than other methods. In arguing that the law regarding the award of legal parenthood following surrogacy arrangements should be reformulated to recognise pre-conception intentions and commitments to care, this article will attempt to provide an example of a way to iron out those inconsistencies, in part to ensure that some methods of family formation are not reinforced as being superior to others. It will argue that the recognition of the intention to parent should be used as a stable and consistent foundation for all parenthood status provisions in legislation governing assisted reproduction, in turn leading to a greater and easier recognition of ‘alternative’ family forms. It will also acknowledge that, with surrogacy, intention could be used as the basis of protective enforceable agreements between intending parents and surrogates.*

## INTRODUCTION

The practice of surrogacy is fraught with practical, legal and ethical difficulties. Despite there having been a number of regulatory events impacting on its governance, the current legal position with regard to surrogacy in the UK is ‘thoroughly confused, and there is understandably a good deal of dissatisfaction with it’.<sup>1</sup> Not the least of these problems is that it has long been the case that the legal ‘solution’ to the ‘problem’ of surrogacy has been to automatically render the surrogate, as the woman who gives birth to the child, its legal mother. This continues to be the situation under the sections defining legal parenthood (known as ‘status provisions’) in the Human Fertilisation and Embryology (HFE) Act 2008.<sup>2</sup> Further, notwithstanding the dissatisfaction surrounding surrogacy, the implications of this were not questioned during public consultation undertaken prior to the amendment of the earlier version of the legislation.<sup>3</sup> This is perhaps not surprising, given that comparatively little consideration was given to any of the parenthood or ‘status’ provisions while the new

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<sup>1</sup> M. Warnock, *Making Babies: Is There a Right to Have Children?* (Oxford University Press, 2002), at p 91.

<sup>2</sup> Section 33(1) replaces s 27(1) of the Human Fertilisation and Embryology Act 1990, though uses the original wording: ‘The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child’.

<sup>3</sup> Surrogacy was considered in s 7 of the consultation: here it stated that the government had ‘agreed to consider the need to review surrogacy arrangements and [was] therefore keen to gauge public and professional opinions on what, if any, changes may be needed to the law and regulation as it relates to surrogacy’ (para 7.14). The Act’s determinations of legal parenthood were considered in s 8, but the *only* issue raised regarding parenthood following surrogacy was whether unmarried couples should be able to

legislation was being formulated, either by the public, policymakers or the press.<sup>4</sup> But it is particularly surprising that these provisions received so little attention (and the proposed changes so little critique) when they actually work in tandem with one of the more controversial sections of the legislation which commands that the welfare of the putative child should be taken into account by anyone providing licensed fertility treatment services, including the reformed provision that account should be taken of the child's need for 'supportive parenting'.<sup>5</sup>

This perceived 'common-sense' solution to surrogacy engenders a number of complications. First, it serves as an absolute barrier to the automatic legal recognition of the intending mother following surrogacy, even though she will raise the child and when no discussion has been entered into about whether to prevent this is either necessary or desirable, or in the best interests of any prospective child.<sup>6</sup> By extension – and similarly problematic – it prevents automatic recognition of the intending father or female partner. As will be seen, this terminology is problematic in itself and preference would be for both women in such a situation to be 'mothers'.<sup>7</sup> There is also a growing perception that limiting the number of legal parents to two is not to be uncritically accepted.<sup>8</sup>

The legislation covers situations where surrogacy is performed 'formally' – that is where a surrogate is inseminated with sperm (in a clinic or otherwise) or has an embryo or mixed gametes transferred to her.<sup>9</sup> It stipulates that if the surrogate is married, her husband will become the legal father of any child born to her.<sup>10</sup> This is a

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obtain parental orders (the 1990 Act limited this to married couples) (paras 8.17–8.18). There appears to have been no question of changing the status of the birth mother in any circumstance. (Department of Health, *Review of the Human Fertilisation and Embryology Act: A Public Consultation* (August 2005), available at [http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_4123774](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_4123774)).

<sup>4</sup> See J. McCandless and S. Sheldon, 'The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form' (2010) 73(2) *Modern Law Review* 175, at pp 175–176.

<sup>5</sup> Section 14(2)(b).

<sup>6</sup> A principle that is supposed to underpin all clinical assisted reproduction practices, as indicated above (HFE Act 2008, s 14(2)(b)). See also the comments of Edward Webb, a key actor of the Department of Health in the passage of the new legislation, reported in J. McCandless and S. Sheldon, 'The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form' (2010) 73(2) *Modern Law Review* 175, at note 114. Interestingly, the Department of Health's consultation document expressly stated that 'the Government is aware of arguments that differential treatment in law of different family forms could disadvantage children born in those circumstances' (para 8.11).

<sup>7</sup> See, for example, J. Wallbank, 'Too Many Mothers? Surrogacy, Kinship and the Welfare of the Child' (2002) 10(3) *Medical Law Review* 271; E. Jackson, 'What is a Parent?' in A. Diduck and K. O'Donovan, *Feminist Perspectives on Family Law* (Routledge-Cavendish, 2006), at pp 59–74; R. Mackenzie, 'Beyond Genetic and Gestational Dualities: Surrogacy Agreements, Legal Parenthood and Choice in Family Formation' in K. Horsey and H. Biggs (eds), *Human Fertilisation and Embryology: Reproducing Regulation* (Routledge-Cavendish, 2007), at pp 181–204 and more recently J. McCandless and S. Sheldon, 'The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form' (2010) 73(2) *Modern Law Review* 175. This paper should not be read as seeking to limit the number of (intentional) legal parents to two.

<sup>8</sup> Among others, see J. Wallbank, 'Reconstructing the HFEA 1990: is blood really thicker than water?' [2004] CFLQ 387 and *ibid*; R. Mackenzie, *ibid*; J. McCandless and S. Sheldon, *ibid*.

<sup>9</sup> Confusingly, the idea that a gestationally-defined mother could be carrying a child as a result of the 'placing in her' of just sperm (eg by self insemination) is not considered in s 33, though is brought under legislative control in respect of surrogacy by virtue of ss 34 and 35.

<sup>10</sup> Section 35(1) – unless it could be shown that he did not give his consent to her acting as a surrogate. This raises numerous other concerns, which lie outside the scope of this article. Even if the surrogacy was non-formal (ie achieved through sexual intercourse with the intending father), common law presumptions would render the surrogate's husband the legal father.

wholly unnecessary legal fiction and, while reinforcing the notion that motherhood is determined by gestation, does not mirror the way that fatherhood following other forms of assisted reproduction is regulated. This seems particularly strange when no substantive reason has been given for why legal parenthood following surrogacy should continue to be treated any differently.

When donor insemination (DI) is used to create a family,<sup>11</sup> the law has long since recognised – and continues to do so – the intention of the male husband/partner of a woman inseminated with donor sperm to be recognised as the child's father, and has in the new legislation extended this recognition to same-sex partners of a woman who conceives using donated sperm.<sup>12</sup> This extension evidenced a deliberate effort to recognise the realities of modern-day uses of assisted reproduction procedures,<sup>13</sup> though has not been without its critics in terms of the terminology used to define the second parent in each situation or the numerically-limited and dimorphic legal constraints placed on (intended) parenthood.<sup>14</sup> The formulation of the new law so as to include a 'second female parent' can be said to reflect 'the law's obsession with a child only having one mother and one father'.<sup>15</sup> In contrast, where a child is born using surrogacy (with or without donor gametes) the law regarding parenthood was left almost entirely untouched. Intending parents can apply to have their intention to become parents legitimated *after* the child is born but no such recognition can be given to them *upon birth*. What are the reasons for separating surrogacy from other forms of assisted reproduction in this way? Does surrogacy raise particular problems that mean that its regulation should differ from other forms of assisted reproduction? While there is argument elsewhere that 'doing' parenting should not equate to legal 'status' as parents,<sup>16</sup> it is at least open to question that it is a different matter when someone initiates conception (perhaps with others) *and* intends to perform the social role of parent. The concept of intentional parenthood I use here does not only encompass the intention to conceive but also an intended social parenthood role after birth.

The law regarding surrogacy appears to be based on assumptions that surrogates are vulnerable, easily exploited and somehow deserve special protection. However, from the limited empirical evidence that is available on the practice of surrogacy, it is arguable that far from being vulnerable, surrogates feel empowered by their ability to exercise control over their bodies and the altruism that underpins surrogacy arrangements.<sup>17</sup> It can also be argued that those who use surrogates are equally, if not

<sup>11</sup> In any form – by this I mean either by 'natural' fertilisation following vaginal or intrauterine insemination (IUI) or more technologically assisted fertilisation using in vitro fertilisation (IVF) or intra-cytoplasmic sperm injection (ICSI).

<sup>12</sup> Here s 35(1) replaces s 28(2) of the 1990 Act with regard to married fathers, s 36 replaces s 28(3) in relation to non-married fathers, though adds that this is subject to 'agreed fatherhood conditions' (laid out in s 37). Section 42(1) covers female civil partners, with s 43 extending this to female same-sex partners without a formal civil partnership (as long as 'agreed female parenthood conditions' are met; s 44).

<sup>13</sup> This is evidenced by both the consultation document and the White Paper preceding the 2008 Act – see Department of Health, *Review of the Human Fertilisation and Embryology Act: A Public Consultation* (August 2005), para 1.4 and Department of Health, *Review of the Human Fertilisation and Embryology Act*, Cm 6989 (2006), para 2.67.

<sup>14</sup> See J. McCandless and S. Sheldon, 'The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form' (2010) 73(2) *Modern Law Review* 175, at 190–197.

<sup>15</sup> J. Herring, *Family Law* (Pearson, 4th edn, 2009), at p 339.

<sup>16</sup> See, eg A. Bainham, 'Arguments About Parentage' (2008) 67 *Cambridge Law Journal* 322.

<sup>17</sup> See, for example, quotes from interviews of women who have acted as surrogates in E. Blyth, "'I wanted to be interesting. I wanted to be able to say 'I've done something with my life'": Interviews with Surrogate Mothers in Britain' (1994) 12 *Journal of Reproductive and Infant Psychology* 189–198.

more, vulnerable, given the lengths they go to in order to have children via surrogacy.<sup>18</sup> If the assumptions about surrogacy and surrogates are unfounded, further weight is given to the contention that surrogacy should be treated the same way as other forms of assisted conception. Not to do so is overly paternalistic and fails to take into account women's ability to control their own bodies and enter into agreements with others.

### A rough guide to the problems raised by surrogacy

The available methods of creating children by 'non-natural' means have greatly increased over the last four decades, as has popular awareness and acceptance of them. Even before more medicalised methods of assisted conception were developed, beginning with *in vitro* fertilisation (IVF) in 1978, some alternatives to 'natural' sexual reproduction were possible. Notably these include donor insemination (DI) and the non-technical, or non-medicalised form of surrogacy (often known as 'partial' or 'straight' surrogacy), where the surrogate provides the egg and therefore half of the genetic material of any resulting child. This could, of course, always have been achieved via sexual intercourse, or a surrogate could self-inseminate. The alternative – known as 'full', 'host' or 'gestational' surrogacy, where an embryo created using the sperm and eggs of the intending parents (or with either sourced from donors) is transferred to the surrogate to carry to term – has only been possible since the development of IVF.

Surrogacy is defined as 'an understanding or agreement by which a woman . . . agrees to bear a child for another person or couple',<sup>19</sup> or the situation 'where a woman makes a prior arrangement to carry a child with the intention that it will be handed over to someone else at birth'.<sup>20</sup> As with DI and other developments in medicalised reproduction that include a third party in the reproductive process, there is no question that surrogacy fragments the orthodox or 'natural' reproductive process, though as with those forms of assisted reproduction it is designed to replicate it, at least to an extent. Potentially, the historic or more traditional use of assisted reproductive practices (including surrogacy), which were created and then originally utilised in order to imitate the 'normal' (heterosexual sexual) family has helped to shape the normative values that now saturate their use. In this sense, bar the usual cries of 'slippery-slope' that appear whenever new technologies are introduced, assisted conception procedures have only really become contentious since they began to be used to create 'alternative' family forms. Developments in reproductive science mean that the actions of conception, gestation and child-rearing are now quite easily separated. The potential parents are numerous due to the various combinations of gametes and the roles that can be played. Following surrogacy, a child can have up to six potential 'parents': two gamete providers, the gestational/birth mother and her husband or partner (if she has one) and the two intending parents, where these are different people. Notably, this

<sup>18</sup> In parallel interviews to those cited above, see the intending parents' responses in E. Blyth, ' "Not a Primrose Path": Commissioning Parents' Experiences of Surrogacy Arrangements in Britain' (1995) 13 *Journal of Reproductive and Infant Psychology* 185–196. Evidence of intending parents' vulnerability is also apparent in some surrogacy cases: see in particular *Re P (Minors) (Wardship: Surrogacy)* [1987] 2 FLR 421.

<sup>19</sup> D. Morgan, 'Surrogacy: An Introductory Essay' in R. Lee and D. Morgan (eds), *Birthrights: Law and Ethics at the Beginnings of Life* (Routledge, 1989), at p 56.

<sup>20</sup> Department of Health, *Review of the Human Fertilisation and Embryology Act: A Public Consultation* (August 2005), para 7.1.

number is only limited to six because the law is only prepared to recognise two parents – the number could be greater if this were not the case.<sup>21</sup>

How the law responds to this is an indicator of how surrogacy is more generally regarded – or how it has not been properly considered at all.<sup>22</sup> There has been criticism of the failure to embrace the opportunity to do more with the legal parenthood provisions; partially this is a result of the 2008 Act being a piece of amending legislation rather than a wholesale fresh look at the regulation of assisted conception and embryology. As Julie McCandless and Sally Sheldon point out, the way the status provisions are defined in the legislation is really only a reflection of what lawmakers think that 'a family *should* "look like"',<sup>23</sup> thereby reflecting common cultural and political norms. In respect of surrogacy, such criticism can be levelled at more than just the parenthood provisions.

Assisted conception generally (and surrogacy in particular) presents challenges to traditional assumptions about parenthood. The law has compensated for this in some situations: for example, as we have already seen, the intending father is legally recognised if a married or otherwise 'stable' couple uses DI to conceive.<sup>24</sup> A mechanism for family courts to transfer legal parenthood following surrogacy to the intending couple also exists, in the form of a 'parental order', in essence a form of fast-track adoption.<sup>25</sup> Nevertheless, it cannot be said that no inconsistencies remain in the way that legal parenthood is defined. The most obvious of these is the certainty that intending parents in a DI situation are given (and also where a woman conceives using donor eggs, as she will always be regarded as the legal mother by virtue of giving birth), compared to the uncertainty regarding not only the outcome of the arrangement but also the acquisition of legal parenthood for those using surrogacy.

Parenthood and the 'natural' biological/genetic relationship have not always co-existed, as historical use of DI and 'partial' surrogacy demonstrates, as well as the perceived necessity – in days long before paternity tests became possible – to invent a presumption that a married woman's husband is the father of her child. The intending parent where DI is used has no immediate genetic relationship with his child(ren).<sup>26</sup> It

<sup>21</sup> Hill identified sixteen possible 'reproductive combinations' in addition to 'traditional conception and childbirth'. This total was achieved by varying the sources of both male and female gametes, the location of fertilisation (inside or outside of the body) and the site of gestation (J.L. Hill, 'What Does it Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights' (1991) 66 *New York University Law Review* 353, at p 355).

<sup>22</sup> See House of Lords/House of Commons Joint Committee on the Human Tissues and Embryos (Draft) Bill (2007) *Volume 1: Report, Session 2006–2007* (2007), at p 44, and J. McCandless and S. Sheldon, 'The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form' (2010) 73(2) *Modern Law Review* 175, at p 180.

<sup>23</sup> *Ibid.*, at p 176 [emphasis added].

<sup>24</sup> See fn 12, above.

<sup>25</sup> Section 54 of the HFE Act 2008 replaces s 30 of the 1990 Act in this respect. Gamble and Ghaevart LPP, a leading UK law firm specialising in fertility treatments and surrogacy, refer to parental orders as 'designed to *remedy* parenthood issues following surrogacy' [emphasis added], thereby indicating that the current situation is not only in need of rectification but also problematic to lawyers in practice ('Surrogacy: Parental Orders and Other Options', available at <http://www.gambleandghevaert.com/page/Surrogacy:-parental-orders-and-other-options/29/>).

<sup>26</sup> This is perhaps the reason that cases were brought in both the UK and the US arguing that the practice of DI amounts to adultery (see *MacLennan v MacLennan* 1958 S.C. 105). A discussion of the American courts' uncertainty about the issue can be found in K. Daniels and K. Taylor, 'Secrecy and Ownership in Donor Insemination' (1993) 12(2) *Politics and the Life Sciences* 155, at p 156. Additionally, the Archbishop of Canterbury set up a Commission of Inquiry into the practice of DI in 1945 and, following its report (Archbishop of Canterbury's Commission, *Artificial Human Insemination: the Report of a*

is also common for children to be successfully raised by those who are neither genetically nor gestationally related to them. The legal status of parenthood can be and is conferred on non-biologically related persons by statutory adoption, available since the Adoption of Children Act 1926 and, like the practice of surrogacy, it is highly probable that forms of social or non-institutionalised adoption took place before formal regulatory structures were established.

These examples indicate that we already have a strong cultural tradition in which the social and psychological dimensions of parenthood are recognised, even where a biological connection is absent. The question therefore arises as to which contenders should be recognised as *the* parents of a child born from surrogacy or assisted conception and, more importantly, why.<sup>27</sup> Why do some potential parents seem to have stronger claims to legal parenthood than others? What does this say about the relative legitimacy of various methods of family formation? Does it create or maintain a hierarchy of family forms? Assisted reproductive methods necessitate familial situations outside of the 'cornflakes' ideal,<sup>28</sup> where it can usually be safely assumed that a man and woman who have a child are its parents. This assumption is usually based on the perceived genetic link, even if none exists. It can, however, be questioned whether the definition of 'parent', in circumstances where the acts of parenting and (genetic) creation are separated, should be based on an implied perception of the 'ordinary' and (hetero)sexual two-parent model (as is now the case), on biological component parts (the genetic connection), physical input (eg gestation/birth), or on a social/intentional basis. Here, I take intention to mean not only the intention to bring about conception (as there may be multiple issues regarding this, not least that any clinician involved can also be said to have intended this), but also the intention to *be* the parent – that is to provide care and nurturance – after the child is born.

The remainder of this article will explore whether, in surrogacy and assisted conception, whether or not we remain wedded to the two-parent model, those who *intended* to be the parents of the child should be legally recognised as the parents of that child from birth. It will also consider and weigh this against alternative potential determinants of parenthood, such as genetics or gestation/birth. First, we will look more closely at the theoretical case for intention. In so doing, we will compare parenthood claims based on intention to those based on biological links, both genetic and gestational, arguing that to use either biological basis for determining parenthood would be flawed and inadequate. While a general case can be made for intention-based parenthood, this article will then go on to highlight the practicalities of

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*Commission Appointed by His Grace the Archbishop of Canterbury* (1948)), sought to make DI a criminal offence. Similarly, a 1960 report by the Feversham Committee thought that allowing DI might 'lead to indifference towards the marriage vows, and thus weaken the institution of marriage' (*Report of the Departmental Committee on Human Artificial Insemination*, Cmnd 1105 (1960)).

<sup>27</sup> In this sense, I mean both 'parents' in the sense of *being* a parent, ie performing the role of a parent, and *becoming* a parent, ie being legally recognised as such and having parental responsibility from birth. While Andrew Bainham has noted that there are subtle differences between the concepts of parentage, parenthood and parental responsibility and argues that *being a parent* 'should turn on a presumed or actual genetic connection with the child' ('Parentage, Parenthood and Parental Responsibility: Subtle, Elusive Yet Important Distinctions' in A. Bainham, S. Day-Sclater, and M. Richards (eds), *What is a Parent? A Socio-Legal Analysis* (Hart Publishing, 1999), at p 27), I do not believe that this can be applied consistently or fairly to children created by assisted reproduction. This is mainly because, at least implicitly, decisions as to *who* will be the child's parents have been taken before s/he is conceived. These are not decisions being made about an already-born child, where I believe the distinctions are, in the main, worthwhile.

<sup>28</sup> K. O'Donovan, *Family Law Matters* (Pluto Press, 1993), at p 30.

such an approach, by comparing potential alternative claims in the actual contexts of DI, IVF and different forms of surrogacy, showing in realistic terms the problems that recognising intention would solve.

### THE CASE FOR INTENTION

I want to argue here that 'intention' should operate as the pre-birth determinant in 'awarding' parental status when a child is born following surrogacy or assisted conception. Intention, here, encompasses the motivation to have a child, initiation and involvement in the procreative process and a commitment to nurture and care.<sup>29</sup> Parenthood within this concept should not have to be 'awarded' at all, nor be based on unchallenged presumptions or perceptions. If it is correct that a strong social tradition acknowledging social and psychological aspects of parenthood exists, then it should be possible to provide a rational alternative to legal and cultural presumptions currently attached to parenthood, when the processes involved in family creation are not typical. The legal concept of intention, a theoretical notion already recognised and enshrined in various areas of law, would, as will be demonstrated, provide the most consistent result in all fragmented reproductive practices, as well as introducing the benefits of equal treatment to all forms of assisted reproduction. Recognising intention would mean that creating families by surrogacy or assisted conception would not cause differential treatment (in terms of how parental status is achieved) of the infertile from the fertile and nor would surrogacy be treated as inferior to other assisted reproductive techniques in the hierarchy of family formation. This is not to suggest that intentional parenthood should be universally recognised; the concept is utilised here solely in relation to surrogacy and assisted conception, thus leaving the parenthood of children conceived and born 'normally' to be treated in the way it currently is. In fact, intention *could* not become a universal factor in determining the parenthood of all children born, whether by assisted conception or 'naturally'. Some children born 'naturally' are not intended (or at least their conception was not); thus the concept would leave them parentless. Conversely, this serves to illustrate the potential for using intention as the determinant of the parenthood of children born by assisted conception – all such children will be fully intended.<sup>30</sup>

It might be argued that 'inconsistency' merely equals 'flexibility', in that the law rightly recognises different people as parents in different ways depending on the circumstances of their children's conception. I believe, however, that in this sense, 'inconsistency' really does mean that people are differently treated in that more value is placed on some people's intention to parent than others. For infertile couples seeking to have children, recognition of their difference may be exactly the opposite of what should be done. Furthermore, while some people who need to use assisted conception – and who therefore will assume the role of the child's 'parents' both before and after its birth – are readily granted this status by the law, others are not, despite

<sup>29</sup> Gillian Douglas has argued that viewing parenthood as being created by intention reflects a masculine perception of parenthood ('The Intention to be a Parent and the Making of Mothers' (1994) 37 *Modern Law Review* 641). I want to emphasise that intention here includes a commitment to care and is being suggested as a concept that can provide internal coherence to the law while reflecting forward-thinking notions of family and kinship (such as multiple or inter-generational parenthood) and breaking down hierarchies of differently-created families.

<sup>30</sup> Marsha Garrison agrees: '[u]ndeniably, it is easier to assess intention when conception occurs technologically than when it occurs sexually' ('Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage' (2000) 113 *Harvard Law Review* 835, at p 861). This also reflects on 'best interests' or welfare arguments – how can it not be in the good interests of a child to be born to, and legally recognised as the child of, parents who fully intend and desire to raise it?



being similarly situated in terms of both their accepted role and in their intention to create a child. This is particularly true of surrogacy.

Surrogacy has over time been perceived as a direct challenge to both the meaning of motherhood and family. It is *because* of this, rather than in spite of it, that practical issues relating to parenthood, status and rights, and questions regarding who are to be legitimately regarded as parent(s) – and why – are significant. As such, the rules on legal parenthood deserve proper reconsideration, particularly as they have seemingly been overlooked in favour of more general moral and ideological concerns about the overarching regulation. This is illustrated well by the difference in the level of media coverage of the removal of the 'need for a father' provision from the 'welfare clause' of the HFE Act 2008 (s 14(2)(b) now replacing what was s 13(5) of the 1990 Act and replacing the need to consider whether a child born using assisted conception would have a father with the need for 'supportive parenting') with other changes made to status provisions in the new legislation. Similarly, parliamentary debates on the former amounted to some eight hours (and this was curtailed), compared with only about one hour for the latter.<sup>31</sup>

### Intention versus biology

The genetic and gestational contributors to the child (if they are different people) undoubtedly possess compelling claims to parenthood. However, it must be asked whether these claims are as strong or as accurately reflect the social situation that will be in place as those of the intending parents. Moreover, even if they were in an individual case, by making any presumption operating towards the intending parents rebuttable, such instances could be resolved. Because, it is assumed, those who intend a child to be born by surrogacy or assisted conception cannot have a child by 'natural' means, the processes of creation will become fragmented, and the way parenthood is defined may not fit comfortably, or even be untenable.<sup>32</sup> Same-sex couples (or groups) who wish to have children will inevitably have to circumvent the 'natural' process and, because of the family that is intended, are unlikely to be content with the mother/father paradigm. The same is true of single people wishing to have children without recourse to sexual intercourse. While this has, to some extent, been addressed in the new legislation with the potential to register a second female co-parent from birth, this model still very much reflects the *only* model seemingly considered valid by lawmakers: that of a two-parent family emanating from the birth mother. Given the paucity of debate on the new status provisions, it is hardly surprising that nowhere in the process of reform was there consideration that where there *are* two female parents they could both be called 'mother'. This is merely another example of the persistent hold that the notion that the woman who gives birth to a child is the mother, *and no other woman*, has on the legal imagination.<sup>33</sup>

Different situations generate different combinations of those with seemingly valid parenthood claims. Those who invest their time (and very possibly their finances),

<sup>31</sup> Correlatively, in interviewing Edward Webb, one of the Department of Health officials charged with the drafting and passage of the new legislation, McCandless and Sheldon heard that changes to some of the parenthood provisions, particularly those that maintain preference towards marriage or civil unions might have led to criticisms of 'the Government attacking marriage'. He added '[s]o we always have to be mindful of the bigger political picture as well ...' ('The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form' (2010) 73(2) *Modern Law Review* 175, at p 190).

<sup>32</sup> For example, the current definitions may not fit at all with transgender parenting, which inevitably will occur through assisted conception. See further J. McCandless and S. Sheldon, *ibid*, at 199–202.

<sup>33</sup> HFE Act 2008, s 33(1) [emphasis added].

initiate the reproductive process and prepare themselves to gain, raise and care for a child, have the strongest claim. The argument is that:

'The use of reproductive technology is an unambiguous indicator of intent. Users of such technology intend to produce a child *and intend to accept the responsibility of caring for it* . . . Use of the surrogate method, manifesting procreative intent, should invoke the legal presumption that the child belongs to the intenders.'<sup>34</sup>

There are at least four specific arguments for recognising intention-based parenthood in surrogacy and assisted conception. The first is the 'prima facie importance of the intended parents in the procreative relationship':<sup>35</sup> without their initiative and motivation, the child would not have been created. It is undeniable that *but for* them, the conception and birth of that particular child could not have happened.<sup>36</sup> The intending parents can therefore be said to have:

'a unique role as the instigator[s] of the pregnancy. Conception is "ordered" or "commissioned" by the intended parents, who are motivated (it is assumed) by usual parental motivations such as the need for adult status and identity, the opportunity for development of affectionate and intimate relationships, and the need for expansion of the "self".'<sup>37</sup>

The second argument arises from the first: the intending parents created the child *and* intend to be the ones actively involved in its care. While it is possible to argue that childrearing, if recognised in this context, is used merely as a way to legitimise social parenting after birth, it should be remembered that utilising a pre-conception tool to determine legal parenthood offers the only way to achieve internal consistency (and avoid highlighting 'difference') among various types of assisted conception users.<sup>38</sup>

<sup>34</sup> J. Levitt, 'Biology, Technology and Genealogy: A Proposed Uniform Surrogacy Legislation' (1992) 25 *Columbia Journal of Law and Social Problems* 451, at p 470 [emphasis added].

<sup>35</sup> J.L. Hill, 'What Does it Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights' (1991) 66 *New York University Law Review* 353, at p 414.

<sup>36</sup> See *Johnson v Calvert* [1993] 851 P 2d 774. Hill also argues that '[t]hese arguments should trump the relatively weaker claims of either the gestational host or the biological progenitors' (ibid, at 414).

<sup>37</sup> R. Cook, 'Donating Parenthood: Perspectives on Parenthood from Surrogacy and Gamete Donation' in A. Bainham, S. Day Sclater, and M. Richards (eds), *What is a Parent? A Socio-Legal Analysis* (Hart Publishing, 1999), at p 135. While it could be said that the surrogate also passes a 'but for' test and is undeniably true that many women who act as surrogates have their own initiative and motivation to do so prior to the involvement of the commissioning couple, a surrogate's bodily engagement with pregnancy is in the capacity of a donor. Criticism could be made regarding the prioritisation of intention over bodily engagement, but the context is important, as is the intention of the surrogate herself. I thank Sally Sheldon for these points.

<sup>38</sup> Bainham contends that 'social parents' can be afforded recognition by being given parental responsibility for the child and that the 'true' parents of a child are its genetic progenitors. But his arguments tend to be directed at 'social' families outside of the assisted reproduction context. Indeed, he also points out that 'legal parenthood, but not parental responsibility, makes the child a member of a *family*, generating that child a wider kin going well beyond the parental relationship' ('Parentage, Parenthood and Parental Responsibility: Subtle, Elusive Yet Important Distinctions' in A. Bainham, S. Day-Sclater, and M. Richards (eds), *What is a Parent? A Socio-Legal Analysis* (Hart Publishing, 1999, emphasis added) and notes that a 'legal parent will remain a parent for life' (at p 34). This is *exactly* what couples that have children by assisted conception intend, so recognition of parental responsibility only, because they (or perhaps only one out of a partnership) are social rather than biological parents, would again lead to inconsistency and differential treatment. For other social parents (eg step-parents), his formulation may be accurate.

The third argument focuses on the unfairness of permitting the surrogate to renege, when *her* stated intention was always to relinquish the child. Essentially this is an argument founded in contract and/or equity – the principles of which are too broad to go into here – but which clearly both recognise formal or notional intention as an element of exchange and/or enforceable promise. Fourth, there are good pragmatic reasons for acknowledging parenthood before conception, centred upon a need for certainty and uniformity: intending parents would understand from the outset that they will be presumed legal parents and are therefore responsible for the child's well-being. These pragmatic reasons are presumably the reason the law regarding parenthood following the use of donated gametes is formulated as it is. There are already criteria stating what interests should be considered by clinicians treating all fertility patients and these have been subject to extensive review. Why there should be additional criteria for those using surrogacy is a mystery – but is probably explained by the 'hierarchy' point and the fact that surrogacy regulation was initially at least a knee-jerk reaction to perceived abuses of such arrangements in the 1980s and the ongoing perception of surrogates as 'vulnerable' and/or exploited. Extending pre-conception determination of parenthood to surrogacy would mean that parenthood of surrogate-born children need not be settled by court order, rendering unnecessary the additional eligibility assessments currently needed to support a valid parental order application, or by adoption.<sup>39</sup> It may actually be more detrimental to the welfare of children not to do so: our current law means that even '[w]here the surrogate mother is happy to hand over the child at birth, the British approach to parenthood nevertheless demands that the child's life starts with litigation, albeit amicable'.<sup>40</sup> Further, recognising intention as the basis of the presumption may operate to prevent disputes following surrogacy: if it was certain from the outset that the surrogate would not be the parent of the resulting child either legally or socially, arguably only those most committed to bearing a child for someone else would consider becoming a surrogate.<sup>41</sup>

Reasons for not recognising people as parents solely by virtue of either genetic or gestational contributions can also be generalised. If the genetic contributor is not also the intended parent, it can be assumed that s/he acts in the capacity of a donor. Therefore, following the spirit of the legislation as regards donors, s/he should not be recognised as the legal parent. This would extend to a woman acting as a 'partial' surrogate. However, this does not currently apply in the situation where two women have a child together, one providing the egg while the other carries the child. Though the 2008 Act still refers to the woman who provides the egg as a 'donor' in this situation,<sup>42</sup> at best this is a misnomer and at worst it seriously undermines the social reality of lesbian parenting by not recognising both women as mothers.

<sup>39</sup> Importantly, this would bring homosexual male couples in line with other couples – an equality seemingly overlooked when the new legislation was formulated. While automatic parenthood is now possible for same sex female couples, in the case of a male couple using a surrogate, the further requirements relating to parental orders would always be an additional hurdle to surmount post-birth. It would be interesting to see whether, in this regard, the new legislation would stand up to a human rights challenge, particularly as parity between different same-sex couples has already been achieved in adoption (in the Adoption and Children Act 2002) and in regards to civil partners and joint parental responsibility (Children Act 1989 as amended by the Civil Partnership Act 2004).

<sup>40</sup> E. Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Hart Publishing, 2001), at p 270.

<sup>41</sup> Though note that only very few surrogacy arrangements end up with a dispute over parenthood – particularly those cases where the surrogate simply 'changes her mind'. See information provided by the non-profit UK surrogacy agency Childlessness Overcome Through Surrogacy (COTS), 'Do Many Surrogates Keep the Baby?' at <http://www.surrogacy.org.uk/FAQ4.htm> (last accessed 28 June 2010).

<sup>42</sup> Section 47: 'Woman not to be other parent merely because of egg donation'.

The suggestion is that altruism begets the donation act, whether or not the recipients are known by the donor. Moreover, it is questionable whether the status of parent should be given to someone who wholly donates their genetic material in order to create a child for someone else.<sup>43</sup> The extension of this analysis that best illustrates the point is that of the ubiquitous medical student sperm donor – who would typically donate in return for a small payment, but would have no intention to become the ‘father’ of all the children his donation(s) may potentially create.<sup>44</sup> The importance attached to genetic ties is as socially influenced as much as anything else is,<sup>45</sup> and prioritising the genetic relationship would maintain artificial constructions of parenthood.<sup>46</sup> Although in numerous surrogacy arrangements the genetic parents are also the intending parents, this cannot be assumed. In many cases only one intending parent will have a genetic link to the child, and to distinguish between parents in this way is wholly undesirable. Similarly, where neither intending parent has a genetic link to the child, as the law is currently formulated, no parental order can be granted. Those creating their family in this way would be forced to use adoption to achieve legal parenthood.<sup>47</sup> The law also does not answer questions that may be posed by emergent technologies, which allow the creation of a child using the genetic material of three people.

Some may believe, however, that the genetic parents of a child should be presumed its legal parents, no matter how the child was created. This may be based on the premise that they share a unique biological relationship with the child. Hill postulates that ‘an important aspect of parenthood is the experience of creating another in “one’s own likeness”’ and that ‘part of what makes parenthood meaningful is the parent’s ability to see the child grow and develop and see oneself in the process of this

<sup>43</sup> The situation where a known donor’s gamete is used, and there is an intention among all parties that the ‘donor’ will be involved in the child’s life is a different one and in fact can be seen as multiple intentional parenting. In the parental responsibility context, the recognition of informal arrangements where more than two parents have been involved in a child’s life can be seen in *Re D (Contact and Parental Responsibility: Lesbian Mothers and Known Father)* [2006] EWHC 2 (Fam) and *Re B (Role of Biological Father)* [2007] EWHC 1952 (Fam), [2008] 1 FLR 1015.

<sup>44</sup> Arguably, it is absurd to register donors as parents for two simple reasons: (1) they did not intend to become such – their intention, if any, was to allow their ‘product’ to be used by someone else; (2) A sperm donor may make more than one ‘deposit’ and as such become the ‘father’ of many children (it is also unlikely that a single egg would be harvested from an egg donor).

<sup>45</sup> See K. O’Donovan, ‘What Shall We Tell the Children?’ Reflections on Children’s Perspectives and the Reproduction Revolution’ in R Lee, and D Morgan (eds), *Birthrights: Law and Ethics at the Beginnings of Life* (Routledge 1989), at pp 96–114; and O. van den Akker, ‘The Importance of a Genetic Link in Mothers Commissioning a Surrogate Baby in the UK’ (2000) 15(8) *Human Reproduction* 1849–1855.

<sup>46</sup> This is not to negate the importance that many people attach to having knowledge of their genetic parents. While this article cannot go into whether having identifiable gamete/embryo donors and surrogates is preferable to anonymity or not, for reasons of space, even identifiable donors would not, and should not, be legal parents. Knowing one’s genetic heritage for medical or even ‘identity’ purposes is important to many, but this does not make one’s sperm donor one’s father. Social parents who intend a child to be born and who will raise the child from birth should be legally recognised as parents. If such a right exists (knowledge) – and since *Rose v Secretary of State for Health* [2002] EWHC 1593 (Admin), [2002] 2 FLR 962 it seems that it might – this is independent of the determination of *legal parenthood*. The difference in importance between the genetic and the social relationship was implicitly acknowledged in the HFE Act 1990, albeit in ‘a fairly conservative way’ (L. Smith, ‘Clashing Symbols? Reconciling Support of Fathers and Fatherless Families after the Human Fertilisation and Embryology Act 2008’ [2010] CFLQ 46, at p 42) and continued and extended in the 2008 legislation.

<sup>47</sup> HFE Act 2008, s 54(1)(b).

growth'.<sup>48</sup> Infertility consequently becomes a painful experience and creates a desire that may impel some to use surrogacy or assisted conception, rather than choose adoption. While the genetic presumption is not damaging when applied to those who can conceive naturally, and even to some who cannot, for those who *cannot* have a genetically-related child, it offers no solution to an unfulfilled desire to become parents. Neither does it offer anything to partners in relationships who *cannot* provide genetic material when his/her partner can, and who would then be registered as a parent.

The genetic link is synonymous in many people's minds with normality.<sup>49</sup> It is the way in which most children are connected to their parents. Intuitively, therefore, there is a reason to prioritise this connection. Nevertheless, it is at least arguable that because so many genetic ties are broken (both pre and post-birth) the genetic argument is incapable of universally conferring parenthood on those people who will actually care for a child. Even in 'normal' conception situations the registration of genetic parents can be disputed: one estimate suggests that as many as one in 10 of us may not actually be genetically related to our fathers, even though the connection has been assumed or (mis)represented to us.<sup>50</sup> Parenthood based on genetics would also mean that rapists would be the father of a child conceived within their crime, as would men 'duped' into conceiving children.<sup>51</sup> Registering genetic fathers in situations which would otherwise leave the ubiquitous 'single mother' with a child may seem rational, and seems to be reflected in policy and practice,<sup>52</sup> but it is certainly no guarantee that all men will shoulder responsibility any more so than if they were not registered.

In the context of surrogacy, the law is clear that the gestational mother's claim should be prioritised if she changes her mind and elects to keep the child. Not only is she unquestionably given legal motherhood, further legislation provides that surrogacy arrangements are wholly unenforceable.<sup>53</sup> This is more than a presumption – law has made 'a choice between mothers'.<sup>54</sup> This idea – that the birth mother *is* the mother of a child – is not only deeply entrenched in law but is socially and culturally constructed; thus seemingly intuitive and we tend not to confront it. This is 'deep intuition',<sup>55</sup> based on the supposed logic of long-standing legal and social presumptions that a woman giving birth to a child is undisputedly its mother (reflected as '*mater est quam gestatio demonstrat*'), bonding theory, and in arguments that occasionally surface about the practice of surrogacy more generally. These include the belief that it is universally

<sup>48</sup> J.L. Hill, 'What Does it Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights' (1991) 66 *New York University Law Review* 353, at 389.

<sup>49</sup> See K. O'Donovan, 'A Right to Know One's Parentage?' (1988) 2 *International Journal of Law and the Family* 27–45.

<sup>60</sup> R. Baker, *Sperm Wars* (Fourth Estate, 1996), at pp 55–61.

<sup>51</sup> S. Sheldon, 'Sperm Bandits', Birth Control Fraud and the Battle of the Sexes' (2001) 21(3) *Legal Studies* 460–480.

<sup>52</sup> *Ibid.* This is also linked to the prevailing construction of the 'Single Mother' as financially dependent on the state or others. It begs questions (as does the rape point) about the kind of responsibilities society would prefer to be imposed on people creating children. Unintentional parenthood – especially fatherhood – (outside of the donation situation) seems to justify to policymakers that the father must make financial contributions to the upbringing of the child. This may not be required in all cases (or wanted by the mother, particularly if she is in a same-sex relationship).

<sup>53</sup> Surrogacy Arrangements Act 1985, s 1A.

<sup>54</sup> A. Diduck and F. Kaganas, *Family Law, Gender and the State* (Hart Publishing, 1999), at p 110.

<sup>55</sup> It is only a 'modern understanding that parenthood is as much a social, psychological and intentional status as it is a biological one' (J.L. Hill, 'What Does it Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights' (1991) 66 *New York University Law Review* 353, at p 419). As noted above, this has not extended to motherhood in the recent review of the HFE Act.

wrong to agree to bear a child for another, particularly when money (assumed to be linked to exploitation and/or commodification of the reproductive process) is involved,<sup>56</sup> to surrogacy being akin to prostitution,<sup>57</sup> or even slavery.<sup>58</sup>

Moving from the genetic to the gestational biological link, three general reasons can be identified in support of the idea that the gestational claim carries more weight than any other, but each has persuasive counter-arguments:

#### *Bonding occurs between the gestational mother and child*

The first argument centres on the claim that an immutable bond develops between mother and child during gestation. There are many different theoretical formulations and interpretations of this supposed bond – in fact there is a 'lack of uniformity (of opinion) [which] has important implications for the claim that bonding is an inevitable concomitant of pregnancy and childbirth'.<sup>59</sup> Notably, the Warnock Committee said while discussing surrogacy (to which it was generally resistant) that 'no great claims should be made' in respect of bonding because of a paucity of evidence about the process.<sup>60</sup> Pregnancy is a different experience for every woman, and although there is both scientific and anecdotal evidence to support the bonding hypothesis, it should be recognised too that there is evidence in direct opposition to it.<sup>61</sup> As far as bonding theory reflects upon the determination of legal parenthood, it could be argued that changing the way this is determined in assisted conception and especially surrogacy may actually serve to negate any bonding process. So-called 'bonding' in the sense it is used here is arguably as much a reflection of social construction as it is of biology so, if for example the surrogate did not ever expect to be legally recognised as the parent of the child she carries (and she knows that the intending parents do), bonding may not take place at all, not to the same extent, or in a different, more disconnected, way:

'Numerous studies indicate that external circumstances affect the bonding process between the surrogate and the foetus. If a surrogate knows from the

<sup>56</sup> See generally M. Radin, 'Market Inalienability' (1987) 100 *Harvard Law Review* 1849 and also M. Field, *Surrogate Motherhood: The Legal and Human Issues* (Harvard University Press, 1990), at p 28; V.E. Munro, 'Surrogacy and the Construction of the Maternal-Foetal Relationship: The Feminist Dilemma Explained' (2001) 7 *Res Publica* 13, at p 18.

<sup>57</sup> Among others, see A. Dworkin, *Right Wing Women* (The Women's Press, 1983), at p 182; G. Corea, *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs* (The Women's Press, 1987), at p 39; T. Shannon, *Surrogate Motherhood: The Ethics of Using Human Beings* (Crossroad Publishing, 1988), at p 152; K. Pollitt, *Reasonable Creatures: Essays on Women and Feminism* (Vintage Books, 1995), at p 69.

<sup>58</sup> J. Levitt, 'Biology, Technology and Genealogy: A Proposed Uniform Surrogacy Legislation' (1992) 25 *Columbia Journal of Law and Social Problems* 451, at 459. This idea is also apparent in Margaret Atwood's dystopian future vision of surrogacy in *The Handmaid's Tale*, first published in 1985.

<sup>59</sup> 'What Does it Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights' (1991) 66 *New York University Law Review* 353, at p 396.

<sup>60</sup> *Committee of Inquiry into Human Fertilisation and Embryology*, Cmnd 9314 (1984), at 36.

<sup>61</sup> J.L. Hill, 'What Does it Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights' (1991) 66 *New York University Law Review* 353, at p 397. Also see more generally D. Eyer, *Mother-Infant Bonding: A Scientific Fiction* (Yale University Press, 1992) and N.M. Else-Quest, J.S. Hyde and R. Clark, 'Breast-feeding, Bonding and the Mother-Infant Relationship' (2003) 49 *Merrill-Palmer Quarterly* 4.

outset that the contract is binding and that the baby belongs to the intentional parents, her expectations and thus emotional ties to the child are therefore likely to be different.<sup>62</sup>

Supporting this view, Rachel Cook discusses a controlled study undertaken by Fischer and Gillman in 1991, in which surrogates 'indeed showed less attachment to the foetus and different experiences of pregnancy when compared to non-surrogate mothers'.<sup>63</sup> In addition, it could be argued that if bonding is at least in part based on involvement, intending parents who both initiate and continue to be involved with a pregnancy and preparation for birth may actually have a similar or even stronger claim.

The argument that relinquishing a child may psychologically *harm* the gestational mother applies (in this context) only to surrogacy, and is potentially one basis for the rigidity of the legal definition of motherhood.<sup>64</sup> In the main, this argument is based on adoption experiences and studies that show that many relinquishing mothers grieve and/or search for the child that they surrender. Surrogacy is, however, conceptually distinct from adoption: central to any knowledge of relinquishment in adoption is that it came *after* the child already existed. It can also be assumed that the reasons for surrendering a child for adoption are very different to those involved in surrogacy relinquishment: it is largely situational, not based on a pre-conception agreement and does not involve other parties from the pre-conception stage. Additionally, it can be suggested that any harm felt by the surrogate is at least comparable to the 'loss' that may be felt by the intended parents if the child is not passed to them – must these 'losses' be weighed against each other? If so, on what basis would we then determine who was to be regarded as the parent of the child? Does two people's loss outweigh the loss felt by one?

*It is generally better for a child to stay with its gestational mother*

A second argument raised for favouring the gestational link is loosely based on a 'best interests' argument. Hill notes that every US state has recognised a presumption that it is in the best interests of a child to remain with or be placed with its natural parent(s).<sup>65</sup> This clearly seems to favour a genetic link, though depends entirely on how we define 'natural'. The argument appears to be based on an assumption that children having an uncertain biological legacy, or detachment from their 'natural' mother, may be psychologically harmed. This argument does not stand up for many reasons, mostly because it implies that all adoptees – and potentially stepchildren – would suffer psychological harm, merely through lack of a genetic link to the woman raising them. This therefore adds weight to the argument for favouring intention over the gestational link in the case of a dispute over parenthood. The best interests argument in this sense does not support the claim that gestational mothers (like genetic parents) have a claim to parenthood that trumps the intending parents' claim, although this appears to be a popular belief and is recognised in a legal fiction. In fact the opposite may be true: '[t]o ignore the centrality of . . . intention and instead ascribe *prima facie* parenthood to a

<sup>62</sup> J. Levitt, 'Biology, Technology and Genealogy: A Proposed Uniform Surrogacy Legislation' (1992) 25 *Columbia Journal of Law and Social Problems* 451, at p 476.

<sup>63</sup> R. Cook, 'Donating Parenthood: Perspectives on Parenthood from Surrogacy and Gamete Donation' in A. Bainham, S. Day Sclater, and M. Richards (eds), *What is a Parent? A Socio-Legal Analysis* (Hart Publishing, 1999), at p 133.

<sup>64</sup> E. Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Hart Publishing, 2001), at p 266.

<sup>65</sup> J.L. Hill, 'What Does it Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights' (1991) 66 *New York University Law Review* 353, at p 400.

couple that never intended to keep the child may not promote the child's welfare'.<sup>66</sup> Any claim based on the gestational link is clearly a rather speculative empirical assertion: there is no evidence to support the claim that children are better cared for by biological, rather than intentional, parents and, as such, the law should err on the side of protecting the autonomy interests of the adults involved.

*The gestational mother contributes most to the creation of the child*

The gestational mother's parenthood claim may centre on the fact that she makes the largest single physical contribution to the child. Does sheer physical involvement mean that, in the event of a dispute, a surrogate (or any gestational parent) has the greatest claim to parenthood? One argument is that children 'belong' to the gestational mother on the basis of input.<sup>67</sup> Obviously this is linked to the bonding and relinquishment arguments discussed above, and can probably be dismissed for similar reasons. Again, definition is the key: what is 'involvement'? Intending parents are 'involved' in the creation of the pregnancy *prior* to a surrogate's involvement; they also invest more emotion (and often money) in the pregnancy and in preparation for the child – might this in fact mean that their claim to parenthood is stronger? The significance of social parenthood means that the involvement of the intending parents is essential. Surrogacy agencies both in this country and abroad hold this out to have great importance, and consider it to factor highly in the success of the majority of surrogacy arrangements brokered through them.<sup>68</sup> In addition, '[i]t is suggested that this involvement can simultaneously provide much-needed social support for the surrogate mother as well as a *continued reminder of the identity of the "real" parents*'.<sup>69</sup> This, then, serves the dual purpose of accentuating the physical, mental and financial involvement of the intending parents while encouraging and increasing the surrogate's 'detachment'.

The argument that without the surrogate, pregnancy and birth would not occur seems, but is not, analogous to the argument for recognising the intending parents. In fact, it is more analogous to the position of a donor – she donates gestational time/use of her body – and should be treated similarly. The intending parents initiate the conception, gestation and birth of a child. In that equation, if they need to commission a surrogate, it seems intuitively reasonable to argue that 'but for' the surrogate, the child could not be born. While this is literally true, as a theoretical argument about *how* law chooses to assign legal parenthood, this argument falls short because of the element of *choice*; the difference between the claim of the surrogate and that of the intending parents is that they chose her (presumably, too, she chose to be a surrogate), and could choose someone else. Still, they are the initiators of the arrangement: 'but for' *them*, that child would not exist. Surrogates are not passive, they make their choice to be a surrogate deliberately and in the context of altruism, particularly in this country where commercial surrogacy is an impossibility. They make an autonomous decision to have a child for someone else. For this reason, women who act as surrogates should be presumptively held to their agreements: the burden should

<sup>66</sup> E. Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Hart Publishing, 2001), at p 270.

<sup>67</sup> B. Katz-Rothman, *Recreating Motherhood: Ideology and Technology in a Patriarchal Society* (Norton, 1989), at p 44.

<sup>68</sup> COTS, *Comprehensive Guide to Surrogacy* (unpublished, 2000).

<sup>69</sup> R. Cook, 'Donating Parenthood: Perspectives on Parenthood from Surrogacy and Gamete Donation' in A. Bainham, S. Day Sclater, and M. Richards (eds), *What is a Parent? A Socio-Legal Analysis* (Hart Publishing, 1999), at p 136 [emphasis added].



be placed on the surrogate (should she wish to challenge) to show that legal parenthood should be altered and awarded to her.

While the enforcement of surrogates' promises might seem distasteful, there are collateral benefits to be obtained by doing so. Surrogacy arrangements by their very nature appear to be a form of relational contract, yet this aspect of them is denied in substantive law. Grounding the regulation of surrogacy arrangements in contract, relying on the principles of autonomous bargaining, freedom of contract and the built-in ability of contract law to police unconscionable bargains, would offer protection to all parties. In particular, facilitating the making of surrogacy agreements in an environment in which the potential of exploitation is minimised is a constructive use of existing law. Additionally, in surrogacy arrangements, preferences are likely to be expressed by the intending parents, such as a requirement that the surrogate does not smoke, attends certain medical examinations, allows amniocentesis or other medical procedures during pregnancy, or even would terminate the pregnancy if certain eventualities occur.<sup>70</sup>

It is clear, however, that subject to her having capacity, no term taking away a surrogate's ability to control her own body would be supported in law, particularly one that purported to take away her right to a legal abortion. On this, Margaret Radin has argued that the choice of having an abortion is not commodifiable.<sup>71</sup> Similarly, Joan Mahoney argues that '[t]he prospect of women being forced to undergo medical procedures against their will is truly horrifying'.<sup>72</sup> This also begs the question of what happens to children born from surrogacy arrangements who do not end up being cared for in a stable family relationship, or where intentions change. For example, if a child is born disabled, the intending couple may feel that it would be too difficult to raise it. The surrogate, too, may choose not to keep it.<sup>73</sup> Although sad, this is arguably little different to what might happen if a disabled child was born in 'normal' circumstances. The difference is that three people, rather than two, make this choice, but in this circumstance, insisting that any of the parties *must* continue to care for the child would be contrary to the situation and choices faced by fertile people. Nevertheless, current law establishes that the surrogate is the legal mother and, therefore if the situation were to become reality, it will be her, despite the prior intentions of the parties involved, who ultimately has to make this decision. By recognising the intending parents as the legal parents, it would be them who had to make the choice, and the surrogate would be absolved of the responsibility of doing so. Her agreement to become a surrogate presupposes that she did not intend to have parental responsibility or to make such decisions while, by intentionally organising and creating the pregnancy, the intending parents may be taken to have assumed it. Matters of bodily integrity aside, if the contract model was followed, failing to conform to any other accepted term of the

<sup>70</sup> In fact such requirements are expressly stated in the 'Information for Surrogates' (p 7) and 'Information for Intended Parents' (p 11) sections of the information booklet provided by COTS (COTS Information Booklet (available online at <http://www.surrogacy.org.uk/pdf/COTS%20booklet.pdf>).

<sup>71</sup> M. Radin, 'Market Inalienability' (1987) 100 *Harvard Law Review* 1849, at p 1934.

<sup>72</sup> J. Mahoney, 'An Essay on Surrogacy and Feminist Thought' in L. Gostin (ed), *Surrogate Motherhood: Politics and Privacy* (Indiana University Press, 1990), at p 187.

<sup>73</sup> This happened in the US Stiver/Malahoff case: see C. Shalev, *Birth Power: The Case for Surrogacy* (Yale University Press, 1989), at p 97.

contract, not least refusing to hand over the child, would constitute breach of contract and would potentially result in a claim for damages for any lost expenditure and probably also for mental distress.<sup>74</sup>

It has been suggested that there can only be one real reason for maintaining the unenforceability of all surrogacy arrangements: to further discourage the practice of surrogacy: 'surrogacy contracts will seem precarious, and people will be unwilling to risk so much upon such a patently insecure arrangement'.<sup>75</sup> However, given that there is no empirical evidence that surrogacy is in itself harmful, and that the public perception of surrogacy has changed dramatically from its early days, it can be argued that there is no need to deter surrogacy arrangements and so the legal response – and the normative messages implicit within it – must too. If deterrence of surrogacy is not manifestly necessary, then the rigid and absolute unenforceability of all surrogacy arrangements needs to be reappraised. Not to do so implies a fundamental and paternalistic mistrust of the decision-making capacity of women in relation to their own bodies and childbirth.

## RECOGNISING INTENTION: PRACTICAL EXAMPLES

Families in general, and children specifically, in surrogacy or other assisted conception situations would benefit from legal reform allowing intention to be the presumptive factor determining parenthood. To recap, intention (broadly encompassing the intention to conceive, raise and care for a child, coupled with the surrogate's intention to gestate it but not raise it) would become the general presumption in such circumstances, and challenges to parenthood would have to be directed *at* the intending parents, instead of *by* them. The remainder of this article will look at the practicalities of determining parenthood in surrogacy, DI and IVF in an internally consistent way, using pre-conception intentions as the starting presumption. Intention will be contrasted to other potentially valid parenthood claims – those of the genetic and gestational 'parent(s)'.

### Children by donor insemination (DI)

DI provides a good model to compare potential parenthood claims of genetic contributors with those of the intending parent(s). Here, the intending parent(s) could be a heterosexual couple where there is male sub- or infertility, a lesbian couple wishing to become parents together, a single woman, or even more than two people in a collaborative parenting context. Some *fertile* heterosexual couples might also use DI in a clinical context – to avoid the inheritance of sex-linked (male line) genetic diseases, for example. It is likely in these situations that the woman who becomes pregnant will be genetically related to the child she will raise and will also be the intending mother.<sup>76</sup> Thus, without intention, in any of these formulations the only other participant with a potential claim would be the sperm donor, because of the genetic

<sup>74</sup> *Farley v Skinner* [2001] UKHL 49. There are obviously difficulties in this in the sense that a surrogate having to pay damages would potentially not be in the child's best interest. An alternative remedy, specific performance, is also problematic because of autonomy issues – there is no history of its use in contracts for personal services.

<sup>75</sup> E. Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Hart Publishing, 2001), at p 308.

<sup>76</sup> Though it is possible that both intending parents do not provide gametes. If an egg donor is used, the law will still only support the gestational (intending) mother's parenthood claim, even though the two partners had equal intentions.

link. While the nature and definition of donation should arguably preclude his claim in any case,<sup>77</sup> problems nevertheless arise with his recognition, adding strength to the intending parents' claim.

If the genetic link were held to determine parenthood, absurd legal situations would arise. In the most common DI situation, the genetically-related mother would share parental status, rights and responsibilities with a man who, in his donor capacity, would typically be a stranger, would live outside the home, and who never would have intended to become the child's father.<sup>78</sup> Thus, where a heterosexual couple intends to raise the child together, the legal father of the child would not be the man fulfilling the social role of father. This would, in effect, discriminate against the intending father because of his inability to provide genetic material. It would also fly in the face of the nature and spirit of donation. Where a same-sex female couple use a sperm donor to enable one of them to bear a child that they both intend to raise, without the input of a man, recognising the genetic donor as the father of the child would be entirely unrealistic.<sup>79</sup> And a single woman choosing DI will do so for a variety of reasons, which may even include the desire for her child to remain fatherless. Again, recognising the sperm donor as the father would not fit the intended situation or reflect social reality.

If *intention* was the pre-birth determinant of parenthood, then those who intended to play the social parental roles (whether a heterosexual or lesbian couple, a single person or a collaboration) could legitimately (and more easily) be recognised as parents of the child that they collectively or singly, in all senses other than the doubly biological, created. Moreover, the donor in this circumstance would be exonerated from the responsibilities that parenthood entails – as it would be assumed was always *his* (negative) intention.<sup>80</sup> The way the law was changed in 2008 now almost reflects this position, extending the recognition of both positive and negative intentions in all situations outlined, other than to collaborative parenting arrangements, and subject to certain 'agreed conditions' where a couple are unmarried or not in a civil partnership.

In surrogacy and assisted conception there are two other situations in which genetic links can be said either to not give enough to justify automatic legal parenthood or may give *too much*. Although some of these points have been raised briefly elsewhere, it is worth paying them specific attention here:

#### *Gamete donors would become parents*

Usually gamete donors have no other involvement in the creation of any child from their donation than the act of offering their genetic material for use by others. The

<sup>77</sup> And in fact already does, according to the HFE Act 2008, s 41(1).

<sup>78</sup> It is helpful to distinguish between the positive intention to be a parent, and the negative intention *not* to become a parent during processes of assisted conception. It seems that 'negative intention' is already recognised: when a child is born from DI s 41(1) of the HFE Act 2008 (replacing s 28(6)(a) of the 1990 Act) outlines that the sperm donor will not be the child's legal father. Section 27, by recognising the birth mother as the legal mother in all circumstances, also effectively removes motherhood from egg donors, but does *not* recognise the negative intentions of surrogates. Interesting here is the decision in the case *Leeds Teaching Hospitals NHS Trust v Mr and Mrs A and Others* [2003] EWCH 259 (QB), in which, following a mistake at a fertility clinic, legal parenthood was awarded by the court to the genetic father, who had neither intended to be a father to the twins that resulted, nor would raise them (see further K. Horsey, 'Unconsidered Inconsistencies: Parenthood and Assisted Conception' in K. Horsey and H. Biggs, *Human Fertilisation and Embryology: Reproducing Regulation* (Routledge-Cavendish, 2007).

<sup>79</sup> It has already been argued that the situation where the sperm provider's continued involvement is desired by a same-sex female (or heterosexual, should it arise) couple is not in fact a 'donor' situation but a form of collaborative parenthood. As also stated, none of the arguments made here are intended to preclude the possibility of a child having more than two parents.

<sup>80</sup> Though there is the possibility that a known donor may be part of a collaborative parenting exercise.

commonly understood meaning of 'donation' is to voluntarily give something, requiring nothing in return, inferring that donors gift not only gametes,<sup>81</sup> but the possibility of (legal) parenthood. Gamete donors do not intend to raise the child(ren) that may result from their act. If they did, it is arguable that they should be prevented from donating (this must be misrepresentation), and almost certain that prospective parents would not accept their 'donations' if this were known. This passive contribution to the creation of a child should not be the basis of parenthood, particularly as it cannot be universally applied. This is true of both sperm and egg donors, in spite of the greater physical intervention required in donating eggs.

#### *The genetic claim may be based on property arguments*

The potential argument that genetic parents should be legally recognised because of 'property rights' they have in their own material has been dismissed by Hill. Notwithstanding the fact that one cannot actually have property rights in a child, the major premise of this argument appears to be that 'persons possess property rights in the products, processes, and organs of their bodies and in any commodities developed from these sources'.<sup>82</sup> The conclusion drawn would be, therefore, that all genetic contributors would have property (or quasi-property) rights in resultant children. Many arguments arise from this formulation. First, genetic contributors would only have a half-interest in a child, that child being the result of a fusion between two people's genetic material. If the argument were to be logically extended, each genetic contributor would have an equal property share in the child. Therefore, this proposition could only be feasible where both genetic contributors intend to raise the child together – that is, in 'normal' heterosexual conception, conception by insemination or IVF (non-donor), or in full surrogacy where both genetic contributors are the intending parents. It would not work for DI or partial surrogacy and should therefore be rejected as a basis for the presumption of parenthood.

A second and more interesting property argument involves paying for donated gametes. As a consequence of payment, the genetic material would become, according to traditional analysis, the property of the particular clinic or hospital, which would then be free to dispose of it as seen fit.<sup>83</sup> Clearly it would not be expected that as the 'owner' of genetic material provided in assisted conception, a clinic would become the 'parent' of a child. Furthermore, even if gametes were not 'bought' but merely donated, the doctrine of accession, at least in US law, 'might bar the claims of the genetic progenitors',<sup>84</sup> because where a raw material (in this case, 'raw' genetic material) has been altered significantly so as to change its function or increase its value, the doctrine requires that the title or ownership of the goods in question passes to the one who provided the greatest labour input. In assisted conception where donated gametes were used, this would mean that those who gave the greatest input to the resulting pregnancy would have the property-based parenthood claim. For DI this could raise dispute; no great effort is required for s/he who performed the insemination, seemingly leaving the parenthood claim resting with the gestational

<sup>81</sup> Or in the surrogacy context, the gestational process.

<sup>82</sup> J.L. Hill, 'What Does it Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights' (1991) 66 *New York University Law Review* 353, at p 391

<sup>83</sup> *Ibid.*, at p 392. Note, however, that in the UK gamete donors are not paid, though legitimate expenses may be reimbursed. It is also illegal to pay for gametes (s 12(1)(e) and 41(8) of the HFEA 1990 as amended) though not, obviously, unlawful to pay for the services of clinics who pass on donated gametes.

<sup>84</sup> *Ibid.*, at p 393.

mother.<sup>85</sup> Notwithstanding, there is a more fundamental difficulty with utilising property-based genetic arguments to determine parenthood: '[w]hile people may possess property rights in their genetic issue, they certainly do not possess property rights in the result of their genetic contributions. Put more simply, children are not property'.<sup>86</sup>

### Children by IVF

In IVF the intending parents are those who, for one reason or another, cannot conceive 'naturally' and will have unsuccessfully tried to have a baby by other means. They may also require one or other gamete to be provided by a donor. In this section, parenthood following IVF using donors will be considered in addition to IVF using the gametes of the intending parents.

Parenthood after IVF with either a sperm or egg donor (or both) would be subject to the same qualifications as above: the donor in each case is presumed to donate his/her genetic material, while not wishing to become the parent of any resulting child. Conversely, the recipients of the donated gametes do intend to be parents and have initiated the process of becoming so. If intention was not used as the determining factor, then the genetic link may be championed instead, again possibly discriminating against whichever partner was unable to provide genetic material. As with DI, this determination of parenthood would create the unrealistic situation that one of the intending parents (who provided genetic material) will be recognised as the legal and social parent of the child along with the donor of the other genetic material, but not their own partner.

As the law stands, even if the IVF recipient female was not a genetic contributor, she would be the legal mother of the child simply because of the fact that she gives birth to it. Thus, while the genetic link is denied, her intention is implicitly recognised via gestation. The IVF recipient male is presumed to be the father (because he *intended* to be?) of the child of his partner,<sup>87</sup> thus recognising intention would do little to change either status, even if the man was not genetically related. The position is now mirrored for female same-sex couples undergoing IVF treatment.<sup>88</sup> Thus, while intention would have been important under the old legislation as it would have brought in unmarried men and female partners, it may be argued that all this has been done, so the concept of intention is redundant in IVF situations. However, intention retains importance for the concept of universality: an intention-based presumption may produce the same result as existing law in some situations, but has the benefit of being able to be extended to cover all forms of assisted conception, including surrogacy. Further, this result is achieved for the right reasons, not accidentally – that is, where a situation (such as IVF within marriage) fits with traditional belief about what a family 'ought' to be – and would

<sup>85</sup> Note that in the case of full surrogacy with gamete donors it would be hard to argue the difference in input between the surrogate, the intending parents, or even the clinic itself if technological assistance (such as IVF or even ICSI) was given.

<sup>86</sup> J.L. Hill, 'What Does it Mean to be a "Parent"?' The Claims of Biology as the Basis for Parental Rights' (1991) 66 *New York University Law Review* 353, at p 393.

<sup>87</sup> If married, by virtue of s 35 of the HFE Act 2008. If unmarried, ss 36–37 apply, with the same effect as long as both parties consent. Note however that the parenthood of the *married* man can be rebutted if it is shown that he did not consent, or that his consent was in some way undermined, as in *Leeds Teaching Hospitals NHS Trust v Mr and Mrs A and Others* [2003] EWCH 259 (QB).

<sup>88</sup> If civil partners, by virtue of s 42 of the HFE Act 2008. If not, ss 43–44 apply, with the same effect as long as both parties consent.

mean no distinction would need to be drawn between IVF using donated gametes (which would always be necessary for two females, thus setting them apart) and genetic IVF.

### Children by surrogacy

IVF and DI become more contentious when used within a surrogacy arrangement. It therefore becomes necessary to consider surrogacy here in its two separate forms; 'partial' and 'full'. In full surrogacy, the intending couple and/or donors may have provided the genetic material.

#### *Partial surrogacy*

Intention in partial surrogacy would eliminate the possibility of the surrogate's legal recognition as the mother – thus reversing the traditional presumption that the legal mother must be the birth mother, at the same time as negating her genetic link to the child. Historically, the maternity presumption was incontrovertible, but the advent and development of sophisticated reproductive technologies and the use of surrogacy in tandem with these now enables it to be challenged.

There have been discussions as to exactly what the surrogate is a substitute for or even whether it is she who is the substitute at all.<sup>89</sup> I would argue that it is more correct to say that the surrogate is a substitute for part of the *process* involved in having a child, not actually for the *person* (mother) herself. Further, if one does not accept the current legal definition of mother, the term 'surrogate mother' becomes incorrect, while 'surrogate' alone does not. A surrogate agrees to carry a child for another person(s) (here a gender-neutral and plural-free definition is best as potentially surrogacy could be for a single person of either sex or either a heterosexual or same-sex (male or female) couple, or a collaboration of potential parents) and to present that child to them after birth. Putting to one side arguments that surrogates are/may be exploited within such a relationship, and other arguments against surrogacy in general, it is the notion of this agreement that motivates the intending parents to initiate that particular pregnancy at the outset, whether this comes about (unusually) by natural conception between the surrogate and the intending father, or by the surrogate being inseminated with the intending father's or donor sperm, either privately or in a clinical setting.

The presumption that the surrogate is the mother can be rebutted on a similar basis as with gamete donors – a surrogate also makes a donation. In partial surrogacy she donates genetic material and time, energy and bodily resources throughout the gestation period. At the time she enters the agreement, she does not intend to parent the child, *despite* the genetic link. In itself this points to the need for change in the legal presumption of parenthood following surrogacy. If the surrogate later wishes to claim parenthood then it should be for her to do so.<sup>90</sup> While this leaves room for argument

<sup>89</sup> See in particular D. Morgan, 'Surrogacy: An Introductory Essay' in R. Lee and D. Morgan (eds), *Birthrights: Law and Ethics at the Beginnings of Life* (Routledge, 1989) 55–84, at p 56.

<sup>90</sup> A further argument for reversing the registration of surrogate born children centres on the bizarre combinations of parenthood that can arise after a surrogate arrangement and before a parental order is awarded by the courts (if it is). The husband of a woman acting as surrogate (if she is married) will be registered as the father of the child, when it is unlikely that he will ever have had anything more than a supporting role. He will have made no input genetically or physically to the child, and certainly did not intend to become the father.

that partial surrogacy should not be utilised – that a surrogate should *not* provide any of the genetic material for a child she carries for someone else<sup>91</sup> – that discussion must take place elsewhere.

### *Full surrogacy*

In full surrogacy, a surrogate has no genetic connection to the child she carries (unless she is related to either of the commissioning couple). The child may be the result of the fusion of the gametes of the intending couple in IVF or, if one or both of the couple produces poor quality or no gametes, donor material may be used. Again, donors would not be legal parents and this logic would extend to the surrogate. In full surrogacy the surrogate does not 'donate' her genetic material, but she does still give her time, energy and bodily resources to enable the commissioning couple to have a child. In cases of full surrogacy the child is not linked to the surrogate other than by (donated) gestation and, more importantly, the intending parents are the ones who were motivated to initiate its conception and intend to care for it. They should be legally recognised as the parents of that child, whether they are genetically linked or not.

Using intention to determine parenthood following surrogacy also precludes the necessity for the troublesome 'parental order' device, which is used to transfer parental status to the intending parents between six weeks and six months after the birth of the child when all parties remain in agreement. However, overly stringent requirements exist that serve to limit the availability of parental orders to prospective parents. Given the difficulties already faced by those requiring surrogacy, alongside the fact that commercial surrogacy is criminalised,<sup>92</sup> it has to be questioned whether further hurdles are necessary. While it is no longer the case that to qualify for a parental order a couple must be married,<sup>93</sup> they must be no more than a *couple*, while at least one of them must be genetically related to the child. Why this is the case is unclear. Establishing parenthood in surrogacy on the basis of intention would be fairer to all parties concerned, particularly with the certainty it would give at the outset of the arrangement. The intending couple and the surrogate would be recognised for the actual roles they play: the commissioning parents intend to be parents and the surrogate intends to have the child for others.

## CONCLUSIONS

Because methods of creating children by 'non-natural' means or by those requiring medical intervention have greatly increased, and perhaps also because of increased popular exposure to assisted reproductive techniques, it has become necessary for us to rethink how parenthood is defined in such situations. This was clearly the thinking behind the alterations made to the 'status provisions' in the HFE Act 2008, where it was recognised that changes elsewhere in law (for example, in adoption law and in

<sup>91</sup> This was in fact proposed in s 5(1)(2) of the Minnesota Assisted Reproduction Act, Bill No 792, March 2003, though this never reached the statute books. Interestingly, the same piece of legislation would have recognised the intending parent(s) as the legal parents (s 6(1)). Information provided by the UK non-profit surrogacy agency COTS (Childlessness Overcome Through Surrogacy) states that 'the advantages of host [full] surrogacy are that the couple, if they use their own egg and sperm, get their own baby *and that a host baby has never been kept by the surrogate against the wishes of the intended parents* (COTS Information Booklet (available online at <http://www.surrogacy.org.uk/pdf/COTS%20booklet.pdf>), at p 2 (emphasis added). It goes on to say that '[s]tatistically speaking, the dozen or so cases where the baby has been kept by the surrogate since 1988 have all been straight [partial] surrogacy cases.'

<sup>92</sup> Surrogacy Arrangements Act 1985.

<sup>93</sup> Section 54 of the HFE Act 2008 extends to civil partners (of either sex) and also those 'living as partners in an enduring family relationship'.

relation to civil partnerships) made the existing provisions somewhat out of date.<sup>94</sup> However, despite the changes made to legal parenthood in the 2008 Act, there is more to be done, particularly in order to achieve consistency and parity of treatment between all those who utilise assisted reproductive techniques. Because it is possible that many different combinations of people may claim parenthood of a child born from assisted conception, a universal principle enabling consistency and presumptively recognising the people who are most likely to care for the child as parents in any given case is desirable. It seems that a presumption based on intention might be one way of providing this, and it may be that this test has become appropriate following the development of technologies that mean that parenthood, especially motherhood, can be broken down into component parts. Furthermore, because we are able, to a large extent, to control our fertility, 'procreation increasingly involves both the biological process of reproduction *and the intention to become a parent*'.<sup>95</sup>

Though the genetic link argument may engender some support, it does not withstand scrutiny. As has been shown, the claim of the genetically-linked contributor is based upon the premise of a unique biological tie between them and the child. The claim necessarily fails in assisted conception situations because it would mean that donors would become the legally recognised parents of any or all children that their participation helped create. To allow this would contradict the spirit of donation. Recognising donors would also lead to the unrealistic situation that two entirely separate individuals become the parents of a child, when they may be complete strangers. The genetic link is also rejected as the determining factor in parenthood because it could be seen to be a property-based claim, again creating an indefensible situation whereby two unrelated parties may have equal proprietary interests in a child. Additionally, if the property analogy were further extended, a clinic may also claim 'ownership'. In itself the claim is inherently imperfect, as it could not produce a universal outcome for *all* assisted conception techniques.

Claims based on gestation are similarly flawed in a number of respects. The claim merely perpetuates the existing normative constructions of motherhood, and should thus not be a basis for the continued recognition of parenthood. It also prioritises the mother whilst doing nothing for fathers. A 'best-interests' argument is not convincing, especially when turned on its head and the position of the gestational 'mother' is challenged on the basis of her agreement to relinquish the child. For the same reasons, a claim based on the potential harm caused by relinquishment or upon the fact that pregnant mothers might bond with the child they carry must also fail. It would be hard to argue that gestational 'mothers' have *no* claim to the child, but it is not difficult to see that her claim is outweighed by the claim of the intending parent(s). Furthermore, it is suggested that perhaps gestational mothers bond with a child because of an inherently 'natural' expectation of raising it.<sup>96</sup> Thus, a surrogate may potentially 'bond' with the child precisely *because* she always retains the capacity to challenge the claim of genetic or intentional parents because of the entrenched culturally and legally constructed presumption that gestation equals motherhood.

<sup>94</sup> Department of Health, *Review of the Human Fertilisation and Embryology Act: A Public Consultation* (August 2005), available at [http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_4123774](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_4123774), at paras 8.3, 8.12, 8.13 and 8.21.

<sup>95</sup> E. Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Hart Publishing, 2001), at p 269 [emphasis in original]. See also S. Sheldon, 'Unwilling Fathers and Abortion: Terminating Men's Child Support Obligations?' (2003) 66 (2) *Modern Law Review* 175.

<sup>96</sup> Although van Zyl and van Niekerk argue that the surrogate may actually perceive 'that the child is not her own' and this perception 'tends to shape her entire experience of pregnancy'. The authors quote surrogates interviewed by Helene Ragone as saying, for example, 'I never think of the child as mine. After



There are, therefore, compelling reasons for not leaving this avenue open – if it is known from the outset that it will be the intending parents who will be the legal parents of the child she carries, the surrogate may not form this bond, or any bond formed will be different.

It is therefore clearly arguable that because the intended parents initiate, plan and prepare for the birth of the child, they should be legally recognised as the parents of that child that, *but for* them, would not exist. It is they who choose to use assisted conception, thus choosing whether to use a donor of genetic material or a surrogate. They are the 'first cause' of the child and as such are of *prima facie* importance in the procreational relationship.<sup>97</sup> Recognising intentional parenthood depends upon a rejection of biologically-based traditional assumptions: an acknowledgement that parenthood following assisted conception does not depend upon anything inherently biological, but rather upon a pre-conception intention to have a child, and to initiate the process with which that child is to be brought into the world. While '[i]t might be argued that this is a peculiar approach to the determination of parental status since it places a mental element, intention, over the tangible, biological tie',<sup>98</sup> such an argument can be challenged with reference to other areas of law where mental factors (including intention) are given legal weight, including the formation of contractual agreements or the commission of criminal acts. It is also clear from comparisons with other methods of family formation, notably adoption, that although:

'other elements [than intention] may be valued, [they] are indeed unnecessary. It is clear from a psychological perspective neither the genetic, sexual or gestational elements are necessary for successful parenting.'<sup>99</sup>

An intention-based argument succeeds because the current law regarding the parenthood of children born from assisted conception, though improved, still fails to recognise the people who will care for the child as the legal parent(s) in all situations, and results in a lack of consistency in parental determination between different forms of assisted conception and between different types of parent(s). This means that a hierarchy of forms of family creation continues to exist. It is not the 'mechanics' involved that are important, but the relationships that will continue.<sup>100</sup>

The causal relationship between intended parents and child (coupled with the negative intention of the surrogate) should mean that they are, legally, 'parents': the recognition of intention would more precisely reflect the expected outcome for all parties concerned. In any assisted reproduction situation it would be inequitable for the genetic contributors or the gestational host to renege on their implied promises to make no further claim on the child. In an agreement such as a surrogacy arrangement, or even an agreement between donor and clinic, all parties make corresponding

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I had the baby, the mother came into the room and held the baby. I couldn't relate that it had any part of me'; 'I don't think of the baby as my child. I donated an egg I wasn't going to be using'; 'The baby isn't mine. I'm only carrying the baby' (L. van Zyl and A. van Niekerk, 'Interpretations, Perspectives and Intentions in Surrogate Motherhood' (2000) 26 *Journal of Medical Ethics* 404, at p 405).

<sup>97</sup> J.L. Hill, 'What Does it Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights' (1991) 66 *New York University Law Review* 353, at p 414.

<sup>98</sup> *Ibid.*

<sup>99</sup> R. Cook, 'Donating Parenthood: Perspectives on Parenthood from Surrogacy and Gamete Donation' in A. Bainham, S. Day Sclater, and M. Richards (eds), *What is a Parent? A Socio-Legal Analysis* (Hart Publishing, 1999), at p 136. Also see generally S. Golombok, *Parenting: What Really Counts?* (Routledge, 2000).

<sup>100</sup> M. Garrison, 'Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage' (2000) 113 *Harvard Law Review* 835, at pp 878–882.

pre-conception commitments: '[i]nitially it is the intention of all adults in a surrogacy arrangement that the intended parents become the social parents'.<sup>101</sup> It is implicit that both surrogates and donors should refrain from claiming automatic legal parenthood. A surrogate agrees to bear and give birth to a child for someone else – her 'intention is clear, even though her motivations may not be'.<sup>102</sup> The intending parents in a surrogacy arrangement base all expectations upon the agreement and the implied promise contained within it. Thus, it could be argued that it is unfair for the surrogate to break her promise and that there are good reasons for holding her to it and for legally recognising intending parents, based upon their (detrimental) reliance upon her promise, and their expectations:

'legal rules governing modern procreative arrangements and parental status should recognize the importance and the legitimacy of individual efforts to project intentions and decisions into the future. Where such intentions are deliberate, explicit and bargained for, where they are the catalyst for reliance and expectations . . . they should be honored.'<sup>103</sup>

Reliance in surrogacy often extends to the payment of a great deal of money to a surrogate (in the form of expenses reimbursed) and, in any case, is likely to involve alternative forms of financial and emotional expenditure in preparation for having a child. Arguments against a contractual formulation are mainly based in arguments previously expounded. For example, if it is argued that the gestational mother should not be held contractually liable to the intending parents if she reneges on the agreement, then this must be based upon arguments that seek to prioritise her claim over any other. Consequently, it must also be based in the presumption of motherhood based on gestation and birth that is currently enshrined in law and deeply embedded in our cultural imagination. An alternative challenge to the reliance or expectation theory may rest on distaste for allowing what is primarily a commercial mechanism to become a defining factor in an inherently private process. However, the use of contractual principles, in conjunction with the acknowledgement of intention, would benefit future surrogacy regulation, in that consistency could be achieved in the determination of legal parenthood, as could some degree of protection for the participating parties.

There are valid reasons to assure the identity of the parents of a child born from assisted conception at the time of conception: it is surely better all round for the parents of a planned child to be determined prior to its birth – and where better than at conception (or pre-conception) to avoid uncertainty or dispute? It is not in a child's best interests to have any or all of its potential parents involved in dispute over parenthood after it is born: 'permitting challenges to the parental status of the intended parents virtually ensures that the child will grow up in the functional equivalent of a broken home'.<sup>104</sup> Making surrogacy arrangements enforceable may also help to prevent disputes, even if this risks fewer women being prepared to become surrogates. Certainty and completeness is obviously important if intending parents are recognised, as it would allow them to prepare for the child that 'but for' them, would not come into

<sup>101</sup> R. Cook, 'Donating Parenthood: Perspectives on Parenthood from Surrogacy and Gamete Donation' in A. Bainham, S. Day Sclater, and M. Richards (eds), *What is a Parent? A Socio-Legal Analysis* (Hart Publishing, 1999), at p 135.

<sup>102</sup> *Ibid.*

<sup>103</sup> M.M. Schultz, 'Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality' (1990) *Wisconsin Law Review* 297, at p 302.

<sup>104</sup> J.L. Hill, 'What Does it Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights' (1991) 66 *New York University Law Review* 353, at p 417.

existence. The certainty argument would continue to work in the event of the intending parents refusing to take the child. If, for some reason, they decided that they did not want it: if it were born disabled, for example, they too would be held to their agreement, on the basis of their intention. The current formulation of the law simply *cannot* be correct if it means that a surrogate mother would have automatic parental responsibility if there was a refusal on the part of the intending parents, when the child was one that she never intended to have.<sup>105</sup>

It seems, therefore, that neither the gestational claim nor an argument based upon the genetic link present a clear reason why either should be championed when determining parenthood of a child born from surrogacy or assisted conception. Intending parents in surrogacy and assisted conception have a claim to parenthood that is both stronger and less flawed than the claim of either the genetically related contributor(s) or of the gestational mother (where these processes are separated). In order to accept this, cultural assumptions that current provisions in the law uphold and perpetuate must be challenged. Families in themselves have changed as society has transformed, not only because of technological developments, but also due to modern attitudes and beliefs about what is acceptable in reproduction. In recognition of this, and so as not to treat people seeking parenthood through assisted conception or surrogacy differently, the method of determining legal parenthood must also be reformulated.

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<sup>105</sup> E. Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Hart Publishing, 2001), at p 269.