

COLLABORATIVE CO-PARENTING: A COMPARATIVE STUDY OF THE LEGAL RESPONSE TO POLY- PARENTING IN CANADA AND THE UK

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Abstract

This socio-legal thesis explores the highly topical and underexplored issue of the legal regulation of gay and lesbian collaborative co-parenting in England & Wales, drawing on British Columbia (Canada) as a jurisdiction where this issue has been considered in more detail. These families involve reproductive collaborations between single or partnered lesbians and gay men where a child is conceived through assisted reproduction and each of the adults remain involved in the child's life. Collaborative co-parenting can take a variety of forms, each of which is distinguishable from gamete donation or surrogacy because each of the adults continues to exercise some sort of parental role in relation to the child.

Since the adoption of the UK Human Fertilisation and Embryology Act 2008, it has been possible for two female parents to appear on a child's birth certificate following birth and for two male parents to be registered following a court parental order. The UK parliament has not, however, gone so far as to allow more than two parents to be legally recognised. This contrasts with the approach in British Columbia, which allows three parents to be registered on the birth certificate in cases of same-sex parenting involving assisted reproduction. In both Canada and the UK, however, courts have struggled to balance the interests of those involved in these collaborative co-parenting arrangements with varying degrees of success.

This thesis combines detailed, comparative doctrinal analysis with a series of case studies of collaborative co-parenting families gathered from in-depth

interviews with co-parents and legal professionals in Canada and the UK. In doing this, a typology of collaborative co-parenting families is advanced. The conclusion the thesis draws from this is that gay and lesbian collaborative co-parents are not an homogenous group and the law's adherence, in England & Wales, to a one-size-fits-all, dyadic approach to parenthood based on the intimate couple does not adequately reflect the needs of the adults in this situation nor what is in the best interests of the child.

One of the key findings to emerge from this study and the typology of collaborative co-parenting it advances is that the legal framework in England & Wales risks overlooking the interests of gay men who are involved in collaborative co-parenting in its attempt to protect women-led homonuclear families, even where this is not consistent with their agreed role in the child's life. Therefore, a central recommendation is that any reform to this area of law should move away from a prescribed dyadic parenting model as the basis for regulating parent-child relationships in collaborative co-parenting families. Instead, it should require a careful consideration of pre-conception intentions, recorded where possible in a parenting solidarity agreement.

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Human Fertilisation and Embryology Act 2008

Marriage (Same-Sex Couples) Act 2013

Marriage and Civil Partnership (Scotland) Act 2014

Canada

Alberta Domestic Relations Act 2000

Alberta Family Law Act 2003

Assisted Human Reproduction Act 2006

British Columbia Adoption Act 1996

British Columbia Family Law Act 2011

British Columbia Family Relations Act 1996

British Columbia Law and Equity Act 1996

Canadian Constitution Act 1987

Ontario Children Law Reform Act 1990

Ontario Family Law Reform Act 1969

Ontario Family Law Reform Act 1987

Ontario Vital Statistics Act 1990

Quebec Act Establishing Civil Unions and Establishing New Rules of Filiation
2002

Quebec Civil Code 1991

Quebec Interpretation Act 1985

Uniform Child Status Act 2010

Other

Convention for the Protection of Human Rights and Fundamental Freedoms
1950 (European Convention on Human Rights)

European Convention on the Legal Status of Children Born Out of Wedlock
1978

United Nations Convention on the Rights of the Child 1989

List of Abbreviations

Human Fertilisation and Embryology Act 2008 (HFEA 2008)

British Columbia Family Law Act 2011 (FLA 2011)

England & Wales (E&W)

British Columbia (BC)

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Thesis Outline

In the first part of the thesis, Chapter One outlines the study's research questions and how they will be addressed, as well as highlighting the significance of the research and situating it within the existing literature. Chapter Two goes on to justify the methodological choices made in terms of research design and the specific research methods decisions that were made.

The three chapters of Part Two engage in a detailed comparative doctrinal analysis of the legal framework surrounding collaborative co-parenting drawing on critical perspectives that emerge from the socio-legal literature, as well as participant data from legal professionals. In doing this, Chapter Three focuses on the way legislation in a number of jurisdictions privileges a heteronormative understanding of the family; Chapter Four considers how this influences judicial reasoning when resolving collaborative co-parenting disputes in these jurisdictions and Chapter Five examines the role of pre-conception intentions in regulating parent-child relationships in these families.

Part Three of this thesis presents the collaborative co-parenting case studies gathered in this study and examines what insights these provide in terms of legal regulation. Chapter Six introduces the families involved in this study and advances a typology of collaborative co-parenting arrangements based on this. Chapter Seven draws on the theoretical framework of procreative consciousness¹ to explore the extent to which gay men and lesbians have complementary and competing interests in the context of collaborative co-parenting. Finally, Chapter

¹ W Marsiglio, "Male Procreative Consciousness and Responsibility: A Conceptual Analysis and Research Agenda" (1991) 12 *Journal of Family Issues* 268.

Eight links together the doctrinal, empirical and theoretical insights of the previous chapters as each challenging from a different perspective the rigidity and implicit heteronormativity of existing legal frameworks around parenthood and parenting.

The argument that this thesis pursues is that detailed consideration of the legal regulation of gay and lesbian collaborative co-parenting, set alongside an in-depth examination of empirical case studies, commends a model of family law and policy predicated on valuing difference within family life rather than the promotion of a homogeneous ideal family form against which other families are measured. It is only in this way that the often overlooked interests of gay men in collaborative co-parenting can be recognised alongside those of single women/female couples in a way that is consistent with the best interests of the child.

Part One: Setting the Scene

Part One comprises the first two chapters of this thesis, which lay the foundation for the research project as a whole. '**Chapter One: Introduction**' highlights the importance and timeliness of research into gay and lesbian collaborative co-parenting arrangements, while also delineating the focus of the project. It sets the scene for the rest of the thesis by outlining the study's theoretical focus and the contribution it makes to existing studies and the academic literature.

'**Chapter Two: Doing the Research**,' expands on the overall aim of and general approach to the research. This chapter explores the methodological decisions made during the research in more detail as well as justifying the adoption of a comparative, socio-legal approach. Finally, it discusses how the empirical data were collected and analysed in order to address the study's research questions.

Chapter One: Introduction

The increasing number of planned families formed through the use of assisted reproduction technologies requires an expanded concept of family to reflect the reality of the myriad forms that exist, and to ensure that children's interests are adequately protected...Assisted reproduction is used by heterosexual couples experiencing infertility, including those who are concerned about genetic issues or are unable to carry a fetus to term, and by lesbian couples, gay male couples, persons intending to become single parents and persons intending to form families with more than two parents. They may use anonymous or known donor sperm, ova or embryos, or some combination of donor genetic material and surrogacy. The families that result are varied and diverse, and each has a unique and distinct network of social and extended family relationships.²

Gay and lesbian collaborative co-parenting arrangements are part of the variety and diversity referred to in the quote above. Such families, for the purposes of this thesis, are defined as -

families, usually created through assisted reproduction, where children are being raised by a gay/lesbian individual or couple and the other biological parent³ is involved too (plus often their (same-sex) partner).

These families can involve a variety of parenting arrangements. These range from a situation where a same-sex couple is primarily responsible for raising the child and the other biological parent is somewhat involved at one end of the

² Manitoba Law Reform Commission, 'Assisted Reproduction: Legal Parentage and Birth Registration', 2014, 2 – 4.

³ This thesis employs the terms biological father and birth mother in an attempt to neutrally denote the male progenitor and woman who gives birth to the child. In some ways, this would seem to give priority to biological discourses and the centrality of the reproductive relationship over other claims to parenthood. However, this is not the intention. Donor and surrogate seems appropriate in a clinical context where either anonymous sperm donation occurs or the birth mother essentially relinquishes the child for adoption. However, when discussing a 'known donor' or 'surrogate' who is going to be involved in the child's life to some extent, these terms could convey a somewhat misleading impression. Therefore, the terms 'biological father' and 'birth mother' seems preferable, on the understanding that it is not an attempt to privilege biological discourses but merely as descriptive nomenclature.

spectrum, to a full poly-parenting situation where everyone is a fully involved parent at the other, with a further diversity of parenting arrangements and family configurations existing in-between.

The legal recognition of collaborative co-parenting arrangements has been discussed, and has resulted in legislative reforms, in a number of jurisdictions. Yet in England & Wales (hereafter E&W) the issue of whether these parenting arrangements should be legally recognised as families has not been addressed through legislation but has been left to the courts to resolve in a piecemeal fashion. While this approach has also been adopted in a number of Canadian provinces, such as Ontario, it stands in contrast to the approach in British Columbia (hereafter BC), which legislatively recognises a range of collaborative co-parenting families.

The intention of this thesis is to compare the approaches of BC and E&W to the legal recognition of collaborative co-parenting, drawing on other jurisdictions as appropriate. In doing this, this thesis argues that these families are not currently afforded the legal recognition they deserve in E&W, largely because collaborative co-parenting is not contemplated by the legislation governing parenthood following assisted reproduction. As a result, the courts are having to make the best use they can of legal concepts that were not designed for this purpose to achieve some sort of recognition for these families. This contrast between the approaches in BC and E&W suggests there needs to be greater legislative clarity about the legal recognition of collaborative co-parenting families in order to guide the courts in this jurisdiction.

However, this does not necessarily involve a wholesale adoption of the reforms in BC, which are predicated on legally enforceable intentions with respect to a

narrow range of collaborative co-parenting families. This thesis argues for a more flexible approach to legal parenthood, which can accommodate a range of legally recognised parental figures in a child's life, not all of whom necessarily have the full status of legal parent. By adopting a flexible legislative approach, it is possible to reach a more nuanced understanding of legal parenthood and afford an appropriate level of legal recognition to the adults in a child's life.

A key aspect of the legal regulation of parent/child relationships in collaborative co-parenting arrangements, as with other parenting situations, is the discretion that courts have to decide what is in the best interests of the child. One concern about the case law in E&W relating to collaborative co-parenting is that the courts use the best interests of the child less as a genuine assessment of child welfare and more as a disguised means of inscribing a particular family form. In arguing for a more flexible legislative approach to legal parenthood, the hope is that this would also translate to a more flexible exercise of the courts' discretion in recognising a range of family forms, while also being sensitive to the impact of gendered power dynamics on child welfare.⁴

Family law and policy in the UK and Canada have undergone considerable changes in recent years as reproductive technologies have facilitated the creation of alternative parenting structures.⁵ These changes have occurred against the

⁴ See Alison Diduck, *Law's Families* (Butterworths 2003) 142; See also Jonathan Herring, 'Why Financial Orders on Divorce Should Be Unfair' (2005) 19 *International Journal of Law, Policy and the Family* 218, 221; Lisa Glennon, 'Obligations between Adult Partners : Moving from Form to Function ?' (2008) 22 *International Journal of Law, Policy and the Family*, Policy and the Family 1.

⁵ See for example, Caroline Jones, *Why Donor Insemination Requires Developments in Family Law: The Need for New Definitions of Parenthood* (Edwin Mellen Press 2007). For an insightful summary of such developments and how these issues are having to be addressed in practice see Natalie Gamble and Louisa Ghevaert, 'The Human Fertilisation and Embryology Act 2008: Revolution or Evolution?' (2009) August *Family Law* 730; Sophie Pryor, 'HFEA Launches Public Consultation on Mitochondrial Replacement Techniques' (2012) 673 *BioNews*.

background of debates surrounding the recognition of same-sex marriages and alternative families more generally. The normative paradigm of parenthood (and to a lesser extent parenting)⁶ in today's society, however, remains firmly embedded as occurring within the context of an ongoing, sexually intimate, dyadic relationship between a man and a woman. Despite this, the normative paradigm is continually being challenged on a number of fronts including in relation to post-separation social parenting, single parenting, gay and lesbian parenting and parenting following assisted reproduction.

It is beyond the scope of this PhD thesis to consider, in-depth, the legal implications of the 'myriad' of family forms that are being created through assisted reproduction because of the different complexities each of the types of families mentioned in the opening quote raises.⁷ However, the ill-suited fit between the normative model underpinning the legal archetype of the family and parenting reality in a number of modern families is brought into stark relief by an examination of the hidden narratives and largely unacknowledged legal needs of some families, which are intentionally created through the rejection of the intimate couple two-parent norm.

This thesis is interested in gay and lesbian collaborative co-parenting as an example of families that challenge both the need for parents to be in an intimate relationship and the limitation to two parents. Planned gay and lesbian families, created through assisted reproduction, involving (often more than two) parents, not all of whom are in a sexually intimate relationship with each other, is an

⁶ Although parenting is separate from parenthood and arguably more flexible because of the way parental responsibility has been used, parenthood and parenting are closely interwoven, particularly in the context of collaborative co-parenting.

⁷ For a consideration of the legal response to a variety of family forms see Machteld Vonk, *Children and their parents* (Intersentia 2007).

increasingly visible example of such a challenge to traditional notions of the family.⁸ It is more and more the case, for example, that same-sex couples and single people are choosing to conceive and raise children with someone they are not in an intimate relationship with. As a result, law and policy makers in a number of jurisdictions are gradually becoming more aware of the need to address the legal implications of families where there are children, intentionally conceived with more than two parents.⁹ Despite this, the sexually intimate, heteronormative couple ideal continues to exert considerable influence on the legal imagination in relation to parenthood, if not also parenting (as discussed further below).

At this early stage, it is worth highlighting that this thesis refers to heteronormative notions of the family throughout. However, it is important to acknowledge that heteronormativity is a contested theoretical concept that cannot straightforwardly and uncritically be applied to legal norms. While this thesis implicitly identifies the tensions inherent in its application when critiquing the legal framework and acknowledges it is not an unproblematic descriptor, it principally uses the term 'heteronormative' here to denote the ideal parenting model which requires a sexually intimate couple relationship even in the same-sex context. Nevertheless, this thesis adopts Wiegman and Wilson's recent challenge to queer theory by not 'assuming a position of antinormativity from the outset.'¹⁰ In this way, this thesis challenges some of the existing readings of the case law that arguably too readily identify judicial thinking as 'heteronormative'.

⁸ As an example of this increasing social visibility see Charlie Condou, 'The Three of Us' *The Guardian* (July 2012) <<http://www.guardian.co.uk/lifeandstyle/series/the-three-of-us>> accessed 2 October 2015.

⁹ See for example New Zealand Law Commission, 'New Issues in Legal Parenthood' (2005) 88

¹⁰ For an insightful discussion of the implications of rendering queer theory's commitment to antinormativity less secure see Robyn Wiegman and Elizabeth S. Wilson, 'Introduction: Antinormativity's Queer Conventions' (2015) 26(1) *Differences* 1 – 25.

Different collaborative co-parenting families may challenge different aspects of the normative paradigm. An example of a collaborative co-parenting family that challenges the intimate couple as the ideal basis for parenting is a single woman and a male friend, who have reached a stage in their lives where they are not in an intimate relationship but wish to care for a child of their own. This arrangement would challenge the idea that parenting should occur within the context of an intimate couple relationship but not the limitation to two parents. By contrast, where two (usually same-sex) couples or a couple and a single person collaborate to have a child, the arrangement further complicates the legal situation by challenging not only the need for an intimate relationship between (all) the parents but also the limitation to two parents.

This thesis focuses on gay and lesbian 'collaborative co-parenting' arrangements, which some commentators refer to as 'poly-parenting arrangements' or the 'multiple-parent model',¹¹ as these families often involve more than two parents. The characteristic feature of gay and lesbian collaborative co-parenting is that the birth mother, typically a single or partnered lesbian, is not in an intimate relationship with the biological father, typically a single or partnered gay man. Nevertheless, they collaborate to conceive a child, which they, together with their respective partners, if they are not single, will co-parent. This might be contrasted with the homonuclear family,¹² where the child is being parented by a same-sex couple without the involvement of the biological father, if it is a female couple, or the birth mother (and genetic mother if different), if it is a male couple.

¹¹ Aleardo Zanghellini, 'Lesbian and Gay Parents and Reproductive Technologies: The 2008 Australian and UK Reforms' (2010) 18 *Feminist Legal Studies* 227–251; Fiona Kelly, 'Nuclear Norms or Fluid Families - Incorporating Lesbian and Gay Parents and Their Children into Canadian Family Law' (2004) 21 *Canadian Journal of Family Law* 133–178

¹² This term is referred to in the Australian case of *Re Patrick (An Application Concerning Contact)* (2002) 218 *Family Law reports* 579.

The reason for narrowing the focus of the thesis in this way is that research evidence suggests that collaborative co-parenting is an established practice within this community and yet this is very rarely reflected in parenthood laws.¹³

Gay and lesbian parenthood and innovative parenting frameworks have also been the focus of recent legislative reform in a number of jurisdictions, each of which deals with the issues involved somewhat differently.¹⁴ An increasing number of jurisdictions are beginning to question the limitation to two parents and exploring options for recognising collaborative co-parenting, while others are reluctant to move away from the heteronormative model of parenthood/parenting. Given this divergence, the time is right to question whether the approach in E&W adequately meets the evolving needs of the full range of same-sex parenting arrangements. Therefore, the present study aims to make a very timely contribution to discussions surrounding gay and lesbian collaborative co-parenting, which, as evidenced by new approaches within case law and legislation in a number of jurisdictions, is currently of sufficient moment to warrant further investigation. While a heteronormative approach to reform in this area underpinned by equality and non-discrimination arguments has prompted significant legal reform, this thesis will consider whether the law should now be looking to encapsulate a pluralistic response to the divergent needs of the regulation of parenthood and parenting within the same-sex community.

The difficulty with setting up 'homonuclear' and 'collaborative co-parenting' as distinct categories of same-sex family is that, in reality, there is a continuum of

¹³ See for example Deborah Dempsey, 'Conceiving and Negotiating Reproductive Relationships: Lesbians and Gay Men Forming Families with Children' (2010) 44 *Sociology* 1145

¹⁴ For more on this see Aleardo Zanghellini, "Lesbian and Gay Parents and Reproductive Technologies: The 2008 Australian and UK Reforms" (2010) 18 *Feminist Legal Studies* 227.

family and relatedness practices that exists between what we might think of as the archetype of these two categories. This thesis is premised on the idea that there is significant value in identifying that these different models of family life exist so that they can be accommodated within a more flexible system of legal recognition of parent-child relationships. This does not mean, however, that the diversity of parenting arrangements that exists within same-sex families' needs to be shoehorned into mutually exclusive, binary categories. Family life is fluid and the legal system, which is ostensibly there to serve all families, needs to be flexible enough to respond to the creative parenting practices that same-sex families engage in. Part of this flexibility involves recognising that collaborative co-parenting arrangements may raise different issues in terms of legal recognition than homonuclear families do and that many family practices may fall somewhere between these two camps.

By exploring, both empirically and doctrinally, how the law regulates gay and lesbian collaborative co-parenting arrangements, this thesis questions the assumptions on which the current law in E&W in relation to parenthood and parenting is predicated and argues for a more nuanced approach. This has implications not only for gay and lesbian parenting but also potentially post-separation parenting, step-parenting and single parenting because gay and lesbian collaborative co-parenting both exposes and represents a challenge to the heteronormative assumptions underpinning the dyadic nature of parenting law. In other words, an analysis of the legal regulation of gay and lesbian collaborative co-parenting arrangements poses questions for the legal regulation of parenthood and parenting beyond that specific context. The opportunity this provides for us to fundamentally question the function of family law in terms of regulating parenthood and parenting relationships, therefore, should be seized.

Aim and Research Questions

The overall aim of this thesis is to explore, within a comparative context, how well the law regulating parenthood and parenting following assisted reproduction in E&W, balances the interests of those involved in gay and lesbian collaborative co-parenting arrangements and to consider any wider implications for family law. This involves answering three discrete research questions (RQs):

- RQ1: How well does the legal framework in E&W reflect and accommodate the procreative autonomy of gay men and lesbians engaging in or considering collaborative co-parenting?
- RQ2: How well should and could the legal framework respond to the needs of such collaborative co-parents, taking account of developments in other jurisdictions such as Canada?
- RQ3: What are the potential implications, if any, for the wider legal regulation of gay and lesbian parenting and family life of expanding a legal response to gay and lesbian collaborative co-parenting beyond the heteronormative model?

General Approach to the Research

The nature of this topic lends itself to socio-legal inquiry because in assessing how well the law balances the various interests involved in the legal recognition of collaborative co-parenting, it is necessary to adopt a fairly broad approach that takes into account both family law and family policy considerations. This may be informed by a number of other disciplines, notably sociology and psychology, both of which the thesis draws on at various points. The socio-legal approach this thesis adopts is broadly one that aims to set the legal framework in its societal

context and to bring to bear theoretically-informed critique and empirical insights in order to complement doctrinal analyses of case law and legislation.¹⁵

Furthermore, given the growing global nature of the need for law and policy to respond to the phenomenon of collaborative co-parenting, a study within one jurisdiction was not thought sufficient. As a result, the comparative element of the study allows differing approaches to the issue to be contrasted when considering law reform options.¹⁶ Such an analysis would seem both timely and apposite given the increasing number of jurisdictions that are engaging with these issues either legislatively or through the courts.¹⁷

Therefore, adopting a comparative approach with a jurisdiction taking a quite different approach (i.e. BC), the starting point for the legal analysis of how well the law in E&W is currently responding (RQ1), is an examination of the legislative regulation and judicial resolution of what are often referred to as 'known (sperm) donor disputes' involving female couples, in E&W and the relatively few other jurisdictions where they have been dealt with.¹⁸ Characteristic of 'known donor disputes' is the tension between the birth mother's female partner and the biological father, both of whom are vying for some sort of parental recognition. This tension is exacerbated by the inability, in the vast majority of jurisdictions, to simultaneously recognise the status of all three parties due to the limitation to two legal parents and the unavailability of any alternative legal status in relation to the child. The exception to this is BC in Canada, the main comparator jurisdiction for

¹⁵ See page 56 for more details.

¹⁶ See page 61 for more details.

¹⁷ In addition to the UK and Canadian legislation and case law discussed in Part Two of this thesis, see also Manitoba Law Reform Commission; New Zealand Law Commission, 'New Issues in Legal Parenthood Report' (2005); Kalsbeek Commissie, 'Rapport Lesbisch Ouderschap' (2007).

¹⁸ This is the focus of Part Two: Comparative Legal Insights.

this study, which recognises three legal parents in certain circumstances, such as ‘known donor’ situations where a pre-conception agreement exists. This stands in contrast to the recently reformed legal framework in E&W, which failed to consider the needs of such families during the reform process.¹⁹

The general methodological choices, including the adoption of a comparative socio-legal approach, and research methods decisions underpinning the empirical aspect of the project are set out in more detail in the next chapter. However, it is worth noting at this stage that this thesis also draws on a comparative, qualitative empirical study, which involved the thematic analysis of twenty-five in-depth, semi-structured interviews with parents engaged in collaborative co-parenting, potential parents and legal professionals who have worked with such families, in E&W and BC. In relation to this topic, qualitative inquiry allows us to socially locate family law. It also provides the most effective way of exploring in depth the interests and values of those engaged in collaborative co-parenting.²⁰ Furthermore, the thematic analysis of the interviews allows for the exploration of themes emerging from the data in relation to those present in the literature and case law.²¹ This also provides a basis for investigating the relationship between legal recognition, and the expectations and lived experiences of these families, which provides insights not otherwise available when assessing the fairness of current frameworks of legal recognition.

In term of theoretical influences, which are discussed more in the following section, the project is broadly speaking influenced by theorising around the

¹⁹ See Seamus Burns, *The Law of Assisted Reproduction* (Bloomsbury Professional 2012) Part 5.

²⁰ For a more detailed discussion of the decision to use a qualitative research strategy see page 70.

²¹ For a more detailed discussion of the data analysis process see page 87.

procreative consciousness²² and autonomy of the adults involved in collaborative co-parenting, set alongside the ubiquitous child welfare standard employed by courts and legislation. Furthermore, this study draws on the 'diversity model' of parenthood,²³ which recognises value in the diversity of family relationships and focuses on the quality of these relationships rather than their form.²⁴ Considered through this theoretical lens, a critical examination of the legislation, case law and empirical data in the two jurisdictions reveals different degrees of willingness to engage with the needs of families involved in collaborative co-parenting rather than attempting to assimilate them into pre-existing legal models of parental recognition.

Thus, the thesis adopts a comparative approach in terms of both the doctrinal analysis and the empirical study. The main comparator jurisdiction is BC, Canada because there have been recent legislative amendments recognising the possibility of having more than two parents in the context of gay and lesbian collaborative co-parenting. This is the focus of the comparative doctrinal and empirical investigation, which combines to addresses RQ2. However, the thesis draws on insights from a number of other jurisdictions where relevant, given the sporadic nature of reform in this area across jurisdictions.

The cases that have come before the courts in E&W in recent years indicate that many gay and lesbian co-parenting arrangements involve conception at home and would, therefore, fall outside the legislative framework unless the women were in a civil partnership/same-sex marriage. This begs the question whether

²² For more on this see W Marsiglio, "Male Procreative Consciousness and Responsibility: A Conceptual Analysis and Research Agenda" (1991) 12 *Journal of Family Issues* 268.

²³ Linda McClain, 'A Diversity Approach to Parenthood in Family Life and Family Law' in Linda McClain and Daniel Cere (eds), *What is Parenthood? Contemporary Debates About the Family* (New York University Press 2013).

²⁴ This is discussed further at page 51.

the current law in E&W on this issue is fit for purpose and is, in fact, able to represent the interests of families that may fall outside the legal framework. In exploring this question, the project hopes to make a timely contribution to the policy debate over how the law regulates these families. In common with recent critiques of the legal recognition of adult same-sex relationships, the argument this thesis advances is that the interests of the adults and children in these relationships might be better protected by a legal model of parenting that is sensitive to the potentially different requirements, in terms of legal recognition, that these families may have.

Situating the Research

The aim of this section is to situate the current study in relation to existing doctrinal, theoretical and empirical socio-legal scholarship that may be relevant. Importantly, this section does not attempt to summarise the current state of knowledge of family studies/law and policy as it relates to same-sex parenting. Such a task would certainly be beyond the scope of this thesis.²⁵ Instead, I treat this section as an opportunity to ‘claim, locate and defend’²⁶ my overall thesis while critiquing and entering into a dialogue with existing research.

²⁵ For a recent overview of the law relating to same-sex parenting see Anthony Hayden, Marisa Allman, Sarah Greenan, Elina Nhinda-Latvio, and Jai Penna, *Children and Same Sex Families A Legal Handbook* (Jordan Publishing 2012) For a recent discussion of same-sex parenting from a family studies/family sociology perspective see Stephen Hicks, *Lesbian, Gay and Queer Parenting: Families, Intimacies, Genealogies* (Palgrave Macmillan 2011)

²⁶ Kathy Charmaz, *Constructing Grounded Theory* (Sage 2006) 163.

As gay and lesbian planned co-parenting arrangements generally involve assisted reproduction, the UK Human Fertilisation and Embryology Act 2008²⁷ is a key piece of legislation in terms of determining legal parenthood. Part Two of HFEA 2008 allows two female partners to be automatically recognised as the legal parents of a child, born through artificial conception, from birth.²⁸ Mr Justice Baker, sitting in the High Court observed in a recent case that parliament's intention in enacting this legislative reform was 'to put lesbian couples and their children in exactly the same legal position as other types of parent and children.'²⁹ While recognising the progressive nature of some aspects of the reforms, a number of commentators have remarked on their limited scope, given that they do not apply to female couples conceiving at home unless they are in a civil partnership/same-sex marriage and, what is more, they do not countenance the legal recognition of the biological father alongside the female couple.³⁰ This stands in contrast to Part Three of the BC Family Law Act 2011 which does not make legal recognition dependent on the existence of a formal partnership and also allows for the legal recognition of the biological father as a parent alongside the female couple, provided all parties agree.³¹

In terms of male-led families, neither the E&W provisions nor those in BC allow for the automatic recognition of two men as the sole parents of a child because

²⁷ Hereafter referred to as HFEA 2008. For a more detailed discussion of the UK legislative context see page 96.

²⁸ Human Fertilisation and Embryology Act 2008 ss. 42 – 44.

²⁹ *Re G (A Minor); Re Z (A Minor)* [2013] EWHC 134 (Fam) [114].

³⁰ Julie Wallbank, 'Channelling the Messiness of Diverse Family Lives: Resisting the Calls to Order and De-Centring the Hetero-Normative Family' (2010) 32 *Journal of Social Welfare and Family Law* 353, 354; Julie McCandless and Sally Sheldon, 'The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family' (2010) 73 *Modern Law Review* 175, 191.

³¹ For a more detailed discussion of the Canadian legislative position see page 106.

the gestational mother is always considered to be one of the child's parents on birth. However, section 54 of the HFEA 2008 allows male partners, who are either civil-partnered/married or living in an 'enduring family relationship' and one partner is the child's biological father, to apply for a parental order, between six weeks and six months after birth, making them and not the gestational mother (provided she consents) the legal parents. However, as with women-led families, it is not possible for the gestational mother to remain an additional parent. By contrast, it is possible under the BC Family Law Act 2011 for the gestational mother to remain as a third parent or have the two men as the sole parents, provided there is an agreement prior to conception and another one after birth.

This divergence of approach in different jurisdictions makes it particularly unsatisfactory that issues surrounding who should be recognised as a parent were not fully considered in the UK reform process. The approach in E&W evidences a heteronormative dyadic model that underpins the legislation and excludes families that do not conform to the dominant and legally privileged two-parent model based on a formalised, sexually intimate union. As Wallbank puts it, 'mimicry of the legally sanctioned heterosexual two-parent family is rewarded'.³² This has the implicit effect of delegitimising families that do not conform because, as Pickford notes, 'it is not possible to favour one particular form of family without undermining others'.³³

³² Wallbank, 'Channelling the Messiness of Diverse Family Lives: Resisting the Calls to Order and De-Centring the Hetero-Normative Family' (n 29) 354.

³³ Ros Pickford, 'Unmarried Fathers and the Law' in Andrew Bainham and others (eds), *What is a Parent? : a Socio-Legal Analysis* (Hart Publishing 1999) 45.

Recent critiques of same-sex marriage have focused on the tension between formal equality, which in many jurisdictions has resulted in the opening up of marriage to same-sex couples, and substantive equality, which suggests a marriage regime that is more sensitive to the different needs of same-sex couples might be more appropriate.³⁴ This argument has also been extended to the legal recognition of parent-child relationships within same-sex families. As Boyd argues:

Family law generally, and laws on parenthood in particular, have moved over the past three decades towards enhancing the formal legal equality of mothers and fathers. This trend, while reflecting important initiatives to undermine the sexual division of labour and to encourage engaged fatherhood, has had unintended consequences for mothers who take primary responsibility for the care of their children, for same sex partners who wish to co-parent, and for women who attempt to parent autonomously of a genetic father.³⁵

Of particular interest in this study is the fact that, despite considerable progress having been made, the legal recognition of parenthood 'remains wedded to the problematic aspects of the sexual family'³⁶ and, what has been termed, 'parental dimorphism'³⁷. Monk argues for the need to 'draw attention to potentially "hidden stories" of contemporary gay and lesbian connections with children within legal frameworks premised on equality' as '[these] experiences take place outside of

³⁴ Robert Leckey, 'Must equal mean identical? Same-sex couples and marriage' (2014) 10 *International Journal of Law in Context* 5–25.

³⁵ Susan B Boyd, 'Equality: An Uncomfortable Fit in Parenting Law' in Robert Leckey (ed), *After legal equality: family, sex, kinship* (Routledge 2014) 55.

³⁶ *Ibid.*

³⁷ Parent dimorphism refers to the fact a child can only legally have one mother and either one father or one second female parent. See Julie McCandless and Sally Sheldon, "The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family" (2010) 73 *Modern Law Review* 175, 188.

statutory reform agendas and litigation strategies'.³⁸ Given that legal recognition may be lagging behind social practices, therefore, it is important to identify whether the legal framework does justice to the family members involved.

Building on Monk's call for increased scrutiny of these legal frameworks, this thesis aims to draw out the narratives of those involved in gay and lesbian collaborative co-parenting arrangements, as an example of the type of contemporary connections with children that he describes. The legal frameworks are viewed through a theoretical lens drawing on the diversity model of parenthood,³⁹ which challenges the idea that legal equality means assimilating same-sex families on the basis of heteronormative standards. The original combination of this theoretical framework, which is discussed further in a subsequent section,⁴⁰ and qualitative data on the experiences of gay and lesbian collaborative co-parenting families in two jurisdictions, provides a strong basis for critiquing legislative and judicial approaches to parenting structures that challenge current normative assumptions.

The significance of this project lies in the fact that it is important, from children's and adults' point of view, that the law has a settled understanding of who a child's parents are. Therefore, it is important to explicitly consider the nascent collaborative co-parenting family form in order to determine how to appropriately recognise potentially competing claims to parenthood. In addition to this, previous research has largely considered collaborative co-parenting only incidentally as

³⁸ Daniel Monk, 'Sexuality and Children Post-Equality' in Robert Leckey (ed), *After legal equality: family, sex, kinship* (Routledge 2014) 201.

³⁹ McClain (n 22).

⁴⁰ See page 4752.

part of a focus on lesbian parenting.⁴¹ The current project fills a gap in the research through its sustained focus on a broader range of collaborative co-parenting families and explicit consideration of how gay men are positioned in relation to parenthood and parenting. It encompasses not only lesbians' and female couples' perspectives but also the perspectives of gay men and male couples who are involved in collaborative co-parenting and are underrepresented in the research, as Chapter Seven indicates.

Socially Locating the Research

When discussing same-sex families, it is important to consider what we mean by family because it is such a ubiquitous term. Family values are said to underpin our society; family law purports to regulate our intimate relationships with others; and family studies tries to explain and understand the way we order our intimate and personal lives. An awareness of how same-sex partners engage in family life has seeped into the public consciousness through US TV shows such as *Brothers and Sisters*,⁴² *The New Normal*⁴³ and *Modern Family*⁴⁴ as well as plotlines portraying same-sex relationships in British soaps such as *Coronation Street*,⁴⁵ *Emmerdale*⁴⁶ and *Hollyoaks*.⁴⁷ Despite this, there is still some reluctance to recognise same-sex partners (with or without children) as being families.

⁴¹ See for example Gillian Dunne, 'Opting into Motherhood: Lesbians Blurring the Boundaries and Transforming the Meaning of Parenthood and Kinship' (2000) 14 *Gender & Society* 11; Leanne Smith, 'Is Three a Crowd: Lesbian Mothers' Perspectives on Parental Status in Law' (2006) 18 *Child and Family Law Quarterly* 231; Fiona J Kelly, *Transforming Law's Family the Legal Recognition of Planned Lesbian Motherhood* (UBC Press 2011)..

⁴² Jon Robin Baitz [Creator] *Brothers & Sisters* (ABC Network 2006 – 2011).

⁴³ Ali Adler, Ryan Murphy and Katherine Shaffer [Creators] *The New Normal* (NBC Network 2012 – 2013).

⁴⁴ Steven Levitan and Christopher Lloyd [Creators] *Modern Family* (ABC Network 2009 – Present).

⁴⁵ Tony Warren [Creator] *Coronation Street* (ITV 1960 – Present).

⁴⁶ Kevin Laffan [Creator] *Emmerdale* (ITV 1972 – Present).

⁴⁷ Phil Redmond [Creator] *Hollyoaks* (Channel 4 1995 – Present).

This thesis focuses on families that are created within the LGBTQ community as contrasted with the traditional nuclear family, which consists of a married heterosexual couple and children. These families may differ from the traditional family in that they do not necessarily involve a formalised legal union, may involve a limited degree of cohabitation and may include members who have been chosen to be part of the family and who are not traditionally considered as such.⁴⁸ The families that exist within the LGBTQ community are not homogenous. Therefore, a one-size-fits-all approach might fail to appreciate the varying needs of different families. As a result, this thesis challenges the apparent heteronormative ordering of LGBTQ families that seems to underpin the legal framework in the majority of jurisdictions.

The law's response to same-sex families, although highly relevant in itself, also raises broader questions within family law and policy about the meaning of family and how the law should regulate the way people structure their personal/intimate lives. In arguing for greater legal recognition of these families, therefore, the thesis discusses the implications of this on the legal regulation of gay and lesbian parenting and family life more generally (RQ 3). In particular the thesis advances the argument that the law continues to embody heteronormative assumptions, which fail to do justice to the lived experiences of a growing number of families that challenge normative expectations.

Law does not exist in a vacuum but operates within a given social context that comprises governmental and social policy as well as societal attitudes. Therefore, when discussing legal reform in relation to alternative families, it is necessary to

⁴⁸ See Kath Weston, *Families We Choose: Lesbians, Gays, Kinship* (Columbia University Press 1991); Jeffrey Weeks, Brian Heaphy and Catherine Donovan, *Same Sex Intimacies: Families of Choice and Other Life Experiments* (Routledge 2001)

at least acknowledge the views of society and the policy orientation of Government towards these issues. Same-sex couples openly having children is more common nowadays than it has been in the past, with a number of high profile (and less high profile)⁴⁹ cases being reported in the media.⁵⁰ There is also considerably more support in society at large for same-sex parenting than there has been in the past.⁵¹ However, the view continues to exist in some quarters (perhaps to a more extreme degree in the US than the UK)⁵² that the traditional nuclear family is the most suitable environment for raising children and, therefore, same-sex couples should not have children.⁵³ This view persists despite the widespread reporting in the media of studies that appear to contradict it.⁵⁴ There are even suggestions that proponents of this view have drawn on methodologically unsound studies in an attempt to support their opinion.⁵⁵ The view that same-sex parenting is inferior to different-sex parenting emanates not only from religious groups⁵⁶ but also within the LGBTQ community itself.⁵⁷

⁴⁹ Shekhar Bhatia, 'India surrogacy industry: we could never have imagined we'd be parents' *The Sunday Telegraph* (26 May 2012).

⁵⁰ Angela Pertusini, 'Pioneering gay fathers set up advice service on surrogacy' *The Times* (1 January 2011).

⁵¹ A Park, C Bryson, E Clery, J Curtice, and M Phillips, 'British Social Attitudes : the 30th Report', (NatCen Social Research 2013) ix. Steve Doughty, 'Gays Make Fine Parents Says Barnardo's Boss' *Daily Mail* (London, 31 January 2011).

⁵² Walter Olson, 'The New Campaign Against Gay Parenting' *Huffington Post* (10 August 2012) <http://www.huffingtonpost.com/walter-olson/gay-parenting_b_1758633.html> accessed 8 August 2015.

⁵³ Letters, 'We Should Be Protecting Children Not Gay Parents' *The Sunday Times* (18 July 2010).

⁵⁴ Shahesta Shaitly, 'Lesbian Mothers: My Two Mums' *The Observer* (12 December 2010).

⁵⁵ Stephanie Pappas, 'Gay Parents Study Suggesting Downside For Kids Draws Fire From Social Scientists' *Huffington Post* (6 December 2012) <http://www.huffingtonpost.com/2012/06/12/gay-parents-study-kids-social-scientists_n_1589177.html> accessed 8 August 2015.

⁵⁶ Riazat Butt, 'Bishop hits out at adoption agency over gay couples rule' *The Guardian* (21 December 2008) <<http://www.guardian.co.uk/world/2008/dec/21/catholicism-gay-rights?INTCMP=SRCH>> accessed 8 August 2015.

⁵⁷ Rupert Everett, 'There's Nothing Worse Than Gay Parents' *The Telegraph* (16 September 2012) <<http://www.telegraph.co.uk/relationships/9546091/Rupert-Everett-Theres-nothing-worse-than-gay-parents.html>> accessed 8 August 2015.

The polarisation of views in relation to same-sex parenting needs to be understood in the context of the broader societal response to alternative families and in particular in relation to the gay marriage debate. Alongside the increasing recognition of same-sex unions between adults,⁵⁸ in E&W and other jurisdictions around the world, same-sex parenting is becoming more visible and increasingly recognised.⁵⁹ Gradually, legislators and courts in various countries are making progress towards facilitating the creation of same-sex families and recognising the parent-child relationships in these families.

At the time of the passage of the Civil Partnership Act 2004, society's acceptance of such relationships was still quite tentative.⁶⁰ Since then, there have been some considerable advances in the promotion of same-sex relationships, not least of which has been the introduction of same-sex marriage in E&W, and even the legal recognition of same-sex parenting. Now in E&W same-sex couples are able to foster and adopt,⁶¹ female couples can be automatically recognised as the parents of a child born through artificial conception,⁶² and male couples can be declared the parents of a child born through surrogacy shortly after the birth provided the birth mother consents.⁶³ Much of this advancement has been made through legislative reform, some of which has actually led the way in terms of social attitudes. Despite this progress, the legislative framework continues to

⁵⁸ See for example Katharina Boele-Woelki and Angelika Fuchs (eds), *Legal Recognition of Same-Sex Relationships in Europe: National, Cross-border and European Perspectives* (Intersentia 2012).

⁵⁹ See for example David Hill, 'The Recognition of Homosexual Parents in the United Kingdom' in Katharina Boele-Woelki and Tone Sverdrup (eds), *European Challenges in Contemporary Family Law* (Intersentia 2008).

⁶⁰ See the discussion of the parliamentary debates that led to the passage of the Civil Partnership Act in Carl Stychin, 'Not (Quite) A Horse And Carriage' (2006) 14 *Feminist Legal Studies* 79, 80-81.

⁶¹ Adoption and Children Act 2002, s.144 (4).

⁶² Human Fertilisation and Embryology Act 2008 ss.42-44.

⁶³ *Ibid.* s.54.

automatically assume a heteronormative approach, which may not appropriately recognise the relationships that exist in collaborative co-parenting arrangements.

Research Context

This research is being conducted against the background of dramatic changes in family life and family law over many years. These changes have been extensively documented and discussed elsewhere.⁶⁴ Therefore, it is not necessary to rehearse them in full here. Instead this section intends to highlight some of the key developments in our thinking about family life and family law that are particularly pertinent for this study. After discussing some general ideas from family sociology and family law scholarship, this section narrows the focus to the recognition of men's involvement in the reproductive process and how we recognise family diversity, each of which are important considerations in the recognition of collaborative co-parenting.

The notion of the family, traditionally, has been closely circumscribed to conform to a heterosexually-dominated ideal form based on child rearing within the context of dyadic conjugality. In the past fifty years, this conception of the family has faced challenge from a number of different quarters, to the extent that it has not been uncritically accepted, at least within academic discourse, for some time.⁶⁵ In

⁶⁴ See for example John Eekelaar and Ronald Thandabantu Nhlapo, *The Changing Family : International Perspectives on the Family and Family Law* (John Eekelaar and Ronald Thandabantu Nhlapo eds, Hart 1998); Mavis Maclean, *Family Law and Family Values* (Mavis Maclean ed, Hart 2005); Alison Diduck, 'Shifting Familiarity' (2005) 58 *Current Legal Problems* 235; Elizabeth B Silva and Carol Smart, *The New Family?* (Sage 1999); Carol Smart, 'Close Relationships and Personal Life' in Vanessa May (ed), *Sociology of Personal Life* (Palgrave Macmillan 2011); Jones, *Why Donor Insemination Requires Developments in Family Law: The Need for New Definitions of Parenthood* (n 5).

⁶⁵ See for example the debates surrounding social parenting and the acquisition of parental responsibility under the Children Act 1989. In particular see: John Eekelaar and Petar Sarcevic, *Parenthood in Modern Society: Legal and Social Issues for the Twenty-First Century* (Martinus Nijhoff Publishers 1993); John Eekelaar, 'Parental Responsibility - a New Legal Status ?' (1996) 112 *Law Quarterly Review* 233; Andrew Bainham, 'Parentage, Parenthood and Parental

recent decades, diminishing the social and legal prominence of such a conception of the family has been a theoretical and philosophical focus of some, particularly feminist, family theorists.⁶⁶ A particular instantiation of this ongoing challenge to the hegemony of traditional conceptions of the family is the theorising that has taken place around same-sex families.⁶⁷

It is worth acknowledging the broader scholarship that surrounds this area of work, particularly if researchers are 'not only creators of new knowledge, but protectors and transmitters of old knowledge'.⁶⁸ An often-quoted definitional starting point in family studies is the American anthropologist George Murdock's definition of the family:

The family is a social group characterized by common residence, economic co-operation and reproduction. It includes adults of both sexes, at least two of whom maintain a socially approved sexual relationship, and one or more children, own or adopted, of the sexually cohabiting adults.⁶⁹

It is not my intention to comment on or critique this dated definition of the family, although there are many feminist critiques of traditional conceptions of the family.⁷⁰ It is worth noting, however, the centrality of dyadic conjugality in terms of parenting under this definition of the family, which will be discussed in relation to law's involvement with the family later on in this section.

Responsibility: Subtle, Elusive Yet Important Distinctions' in Andrew Bainham and others (eds), *What is a parent? : a socio-legal analysis* (Hart Pub. 1999).

⁶⁶ See in particular Carol Smart, *The ties that bind : law, marriage and the reproduction of patriarchal relations* (Routledge & Kegan Paul 1984); Carol Smart and Bren Neale, 'Rethinking Family Life' in *Family fragments?* (Polity Press 1999); Silva and Smart, *The New Family?* (n 62).

⁶⁷ For example, Ruthann Robson, 'Resisting the Family: Repositioning Lesbians in Legal Theory' (1994) 19 *Signs* 975–996; Rosie Harding, *Regulating sexuality : legal consciousness in lesbian and gay lives* (Routledge 2011); Nicola Barker, 'Sex and the civil partnership act: the future of (non) conjugality?' (2006) 14 *Feminist Legal Studies* 241–259.

⁶⁸ Gary Marx, 'Of Methods and Manners for Aspiring Sociologists: 37 Moral Imperatives' [1997] *The American Sociologist* 102, 106.

⁶⁹ George Murdock, *Social Structure* (The Free Press 1965) 1.

⁷⁰ For an excellent example see Carol Smart, *The ties that bind : law, marriage and the reproduction of patriarchal relations* (Routledge & Kegan Paul 1984)

Before turning to examine how the family is conceived of in law, it is instructive to consider how conceptions of the family have changed in family sociology since George Murdock's early contribution on this topic. Anthony Giddens and Ulrich Beck/Elizabeth Beck-Gernsheim are often cited in this regard. Giddens argues that rather than being based on biological imperatives, or 'a socially approved sexual relationship' in Murdock's words, intimate relationships are more democratic and based on ongoing negotiation. Giddens' idea of the 'pure relationship' is 'where a social relation is entered into for its own sake, for what can be derived by each person from a sustained association with another; and which is continued only in so far as it is thought by both parties to deliver enough satisfactions for each individual to stay within it'.⁷¹ Smart criticises Giddens' conception of intimate life based on individual agency because of its failure, amongst other things, to engage with enduring relationships between parents and children.⁷² Nevertheless, Smart and Neale acknowledge the utility of Giddens' arguments as a means of adding to our (perhaps still incomplete) understanding of family life.⁷³

While Giddens' comments mainly focus on the nature of romantic relationships between adults, Beck and Beck-Gernsheim highlight the centrality of relationships with children.

...traditional bonds play only a minor role and the love between men and women has likewise proved vulnerable and prone to failure. What remains is the child. It promises a tie which is more elemental, profound and durable than any other in this society.⁷⁴

⁷¹ Anthony Giddens, *The transformation of intimacy: sexuality, love and eroticism in modern societies* (Polity 1992) 58

⁷² Carol Smart, 'Wishful Thinking and Harmful Tinkering? Sociological Reflection on Family Policy' (1997) 53 *Journal of Social Policy* 3

⁷³ Smart and Neale (n 64) 9.

⁷⁴ Ulrich Beck and Elizabeth Beck-Gernsheim, *The Normal Chaos of Love* (Polity Press 1995) 73.

It seems to be well accepted, therefore, that since Murdock proposed his definition of the family, there has been a shift in how the family is conceived of sociologically. While an enduring sexually intimate relationship has traditionally been thought of as the defining feature of the family, the account of the family suggested by Beck and Beck-Gernsheim implies a greater focus on the parent-child relationship.

In addition to this, traditional conceptions of the family have been challenged by the early seminal research on same-sex families.⁷⁵ Stacey has even gone so far as to suggest that same-sex parenthood is 'the pioneer outpost of the post-modern family condition, confronting most directly its features of improvisation, ambiguity, diversity, contradiction and flux'.⁷⁶ In a related way, our traditional understandings of kinship have also been challenged by assisted reproductive technologies.⁷⁷ The impact of this is that reproduction is no longer inextricably tied to sexuality.⁷⁸ Consequently, the link between parenting and biology is weakened despite the continuing influence of biological essentialism and conjugality in laws concerning parenthood.⁷⁹

These developments in family sociology attempt to elucidate how 'family practices'⁸⁰ have changed to reduce the once pervasive significance of the

⁷⁵ See for example Kath Weston, *Families We Choose: Lesbians, Gays, Kinship* (Columbia University Press 1991); Dunne (n 40); Jeffrey Weeks, Brian Heaphy and Catherine Donovan, *Same Sex Intimacies: Families of Choice and Other Life Experiments* (Routledge 2001).

⁷⁶ Judith Stacey, *In the Name of the Family: Rethinking Family Values in the Post-Modern Age* (Beacon Press 1996) 142.

⁷⁷ See Naomi Cahn, *The New Kinship: Constructing Donor-Conceived Families* (New York University Press 2013); Jeanette Edwards and others, *Technologies of Procreation: Kinship in the Age of Assisted Conception* (Manchester University Press 1993).

⁷⁸ For more on this see Anthony Giddens, *Modernity and Self-Identity* (Stanford University Press 1991) 219.

⁷⁹ See Jones, *Why Donor Insemination Requires Developments in Family Law: The Need for New Definitions of Parenthood* (n 5); McCandless and Sheldon, 'The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family' (n 5).

⁸⁰ D H J Morgan, *Family connections : an introduction to family studies* (Polity 1996)

sexually intimate dyad as the basis of the traditional, essentialised notion of the family. By contrast, socio-legal scholars⁸¹ have demonstrated the ‘tenacious hold’⁸² that the sexually intimate couple still has as the central organising concept of law’s regulation of the family. Martha Fineman has notably argued that:

the shared assumption is that the appropriate family is founded on the heterosexual couple – a reproductive, biological pairing that is designated as divinely ordained in religion, crucial in social policy, and a normative imperative in ideology.⁸³

Echoing Beck and Beck-Gernsheim emphasis on parent-child relationships, Fineman argues that the sexually intimate couple should be replaced by the mother-child dyad as the legal foundation of the family. It is noteworthy here that Fineman argues in favour of the mother-child dyad rather than Beck and Beck-Gernsheim’s gender-neutral formulation. This is no doubt partly based on the notion that it appears to continue to be largely women rather than men who care for children in our society despite attempts to achieve gender equality.⁸⁴

It is beyond the scope of this thesis to engage in a discussion of this social phenomenon and critique Fineman’s argument. However, importantly for the purposes of this thesis, her focus on the mother-child dyad highlights the gendered nature of reproduction and caring for children. McCandless and Sheldon have recently developed this line of thinking to reveal the heteronormative bias implicit in recently reformed legislation regulating

⁸¹ Some notable socio-legal discussions of the family include Smart and Neale (n 64); Diduck, *Law’s Families* (n 4).

⁸² Martha Albertson Fineman, *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies* (Routledge 1995). For an insightful discussion of Fineman’s argument see Julie McCandless, “Reproducing the Sexual Family: Law, Parenthood and Gender in Assisted Reproduction” (PhD Thesis, Keele University 2009).

⁸³ *Ibid.* 145

⁸⁴ See Nicola Taylor and Marilyn Freeman, ‘The Gender Agenda and Relocation Disputes’ (2012) 2 *International Family Law* 184, 185.

parenthood following assisted reproduction in the UK, which will be discussed in more detail when the legal framework is considered.⁸⁵

(Gay) Men and Reproduction

Traditionally, arguments about the gendered nature of reproduction and caring for children relate to how a disproportionate burden of caring duties fall on women because it is somehow seen as natural that it should be women who care for children. As Smart and Neale comment,

Feminists have long striven to challenge the myth of motherhood in which it has been assumed that the birthing process gives rise to love and bonding and that mothers and children unambiguously love one another.⁸⁶

However, Beck and Beck-Gernsheim stress that the gendered nature of reproduction can cut both ways, with men now feeling at a disadvantage in relation to reproduction. As Beck highlights, ‘... fathers become aware of their disadvantage, partially naturally and partially legally. The woman has possession of the child as a product of her womb, which we all know does belong to her, biologically and legally...’⁸⁷ This insight, that men may feel somewhat disenfranchised and disempowered in terms of reproduction is one that this thesis builds on in relation to gay men’s involvement in collaborative co-parenting arrangements.

In order to explore how men, particularly gay men, can feel at a disadvantage in the procreative realm, this thesis draws on William Marsiglio’s notion of men’s ‘procreative consciousness’. For Marsiglio, men’s procreative consciousness

⁸⁵ McCandless and Sheldon, ‘The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family’ (n 36).

⁸⁶ Smart and Neale, ‘Rethinking Family Life’ (n 64) 18

⁸⁷ Ulrich Beck, *Risk Society: Towards and New Modernity* (Sage 1992) 113

refers to 'men's cognitive and affective activity within the reproductive realm'.⁸⁸

There is a considerable body of feminist scholarship about women's experiences of reproduction and having children.⁸⁹ However, there is a lack of theorising around men's participation in the procreative realm. As Marsiglio has recently highlighted:

Every day, all over the world, men think about having babies, imagine themselves as parents, struggle with infertility, donate gametes, hear of unintended pregnancies, receive news of fetal abnormalities, make decisions about abortions, and become parents. Although feminist scholarship has centred these experiences in women's lives, it has inadequately explored their meanings in men's lives.⁹⁰

As this section will go on to explore, much of the scholarship on same-sex parenting has focused on the autonomy of single women and female couples with the experiences of men being situated in relation to female reproductive autonomy. However, as Inhorn *et al.* argue, 'men need to be considered reproductive in their own right'.⁹¹

An aspect of men's procreative consciousness, given biological and gender differences in relation to reproduction, is, Marsiglio contends, that 'at various times during their lives men are likely to feel as though many or all of the aspects

⁸⁸ Marsiglio (n 21) 269.

⁸⁹ See for example Adrienne Rich, "Anger and Tenderness: The Experience of Motherhood" in Elizabeth Whitelegg (ed), *The Changing Experience of Women* (Blackwell 1985); Jane Ribbens, *Mothers and Their Children: A Feminist Sociology of Childrearing* (Sage 1995); Christine Everingham, *Motherhood and Modernity: An Investigation into the Rational Dimension of Mothering* (Open University Press 1994)

⁹⁰ William Marsiglio, Maria Lohan, and Lorraine Culley, 'Framing Men's Experience in the Procreative Realm' (2013) 34 *Journal of Family Issues* 1011, 1013

⁹¹ Marcia Claire Inhorn, Tine Tjornhoj-Thomsen, Helene Goldberg and Mauska la Cour Mosegaard, *Reconceiving the Second Sex: Men, Masculinity and Reproduction* (Berghahn 2009), 3.

of the reproductive realm are not relevant to them'.⁹² Writing in the US context, Marsiglio makes the point that males:

have seldom had a phenomenological experience comparable, or even remotely similar, to what females have experienced during gestation and labor. Although it is impossible to determine the extent to which these factors have shaped and suppressed males' procreative consciousness and sense of responsibility, it appears that these physiological and cultural forces, in combination with more structural conditions associated with males' relationship to the economic and family/household spheres of social activity, have had a significant impact.⁹³

How these physiological and structural differences impact on heterosexual partners' experiences in the reproductive realm is beyond the scope of this thesis. Therefore, the thesis focuses on the impact of the gendered nature of reproduction on collaborative co-parenting arrangements within the gay and lesbian community.

While much of the sociological work discussed above is aimed at critiquing and explaining heterosexual families, the implications of this work are relevant to same-sex families too. As Alison Diduck notes, Giddens' work 'has vast implications for heterosexually active women, but also has profound consequences for male heterosexuality and for gay men and lesbian women'.⁹⁴ Smart and Neale also highlight the salience of Giddens' work to gay and lesbian relationships, which, in line with Giddens' notion of the pure relationship, are 'more likely to be based on negotiations between individuals than simple adherence to social norms which govern marital relations'.⁹⁵ The idea of the

⁹² Marsiglio (n 21).

⁹³ *Ibid.*

⁹⁴ Alison Diduck, *Law's Families* (Butterworths 2003) 5.

⁹⁵ Smart and Neale (n 64) 10.

negotiated nature of gay and lesbian families is revisited in Part Two when discussing the legal framework that governs parenting within them.

Berkowitz and Marsiglio have explicitly applied the conceptual framework of men's procreative consciousness, developed in the context of heterosexual men, to gay men who are negotiating their procreative identities.⁹⁶ Gay men have arguably been conceived of as reproductive beings in their own right to an even lesser degree than heterosexual men. Historically, gay male identity has been seen as inconsistent with conceiving and raising children. Mallon notes that:

Many people, including some child welfare professionals, are more than a little uncomfortable discussing gay men who are the primary parents raising children...the enduring belief in our society that parenting is the natural and sole domain of women...The concepts of heterosexuality and parenthood are so inextricably intertwined in our culture that the suggestion of gay fatherhood appears alien, unnatural, even impossible.⁹⁷

There have been a number of qualitative empirical studies, including the current one as discussed in Chapter Seven, where the gay male participants seem to have internalised and echoed these sentiments.⁹⁸ Therefore, the parenting journeys contained in Chapter Six of the gay men who have overcome this and pursued parenthood through involvement in collaborative co-parenting are of particular interest.

Recognising Diversity through Law

The final research question in this study asks about the potential implications (if any) for the wider legal regulation of family life of expanding a legal response to gay and lesbian collaborative co-parenting beyond the heteronormative model.

⁹⁶ Dana Berkowitz and William Marsiglio, "Gay Men : Negotiating Procreative, Father, and Family Identities" (2007) 69 *Journal of Marriage and Family* 366.

⁹⁷ Gerald P Mallon, *Gay Men Choosing Parenthood* (Columbia University Press 2004) 1

⁹⁸ See for example *ibid* 20; Berkowitz and Marsiglio (n 94) 372.

This implies that law reform has some potential for affecting social change (in this case recognising collaborative co-parenting arrangements as families) but it may be limited in what it can achieve. Despite the considerable progress made in many jurisdictions throughout the world, there are arguably still gaps between the needs of same-sex families and the rights and responsibilities UK legislation is willing to confer on them, which still bears the hallmarks of heteronormative assumptions about adult relationships and parenting.

Historically, 'family' has been a problematic notion for gay and lesbian individuals, particularly in relation to raising children. Since the gay and lesbian rights movement in the 1970s and 1980s, gay and lesbian individuals have had to position themselves in relation to a heterosexually dominated conception of raising children and the family, from which they had largely been excluded. As Kelly notes, 'law plays a significant role in the lives of marginalized communities, not only because it is capable of extending concrete rights to them, but also because of the symbolic content of that action.' Therefore, it is understandable that 'the power of law'⁹⁹ takes on a special significance for same-sex parents.

However, it is important to recognise that law reform is not necessarily a complete solution. A number of commentators have highlighted the fact that law reform does not always lead to the desired social change.¹⁰⁰ As Kelly highlights, 'one cannot presume that broad-based social transformation will simply flow from the legal recognition of lesbian motherhood'.¹⁰¹ These comments could apply equally to collaborative co-parenting: just because the legal system recognises

⁹⁹ Carol Smart, *Feminism and the Power of Law* (Routledge 1989) 7.

¹⁰⁰ See for example Judy Fudge, 'What Do We Mean by Law and Social Transformation' (1991) 5 *Journal of Law and Society* 47.

¹⁰¹ Fiona Jane Kelly, 'Transforming Law's Family: The Legal Recognition of Planned Lesbian Families' (University of British Columbia 2007) 30.

collaborative co-parenting does not mean this will lead to greater social recognition of these parenting arrangements. Nevertheless, legal advocacy and activism can be a key motivator for social change.¹⁰² In Brickey and Comack's words, law 'offers and important (although by no means the sole) source for realizing substantive social change'.¹⁰³ What is more in relation to this project, law can play an important, although not necessarily determinative, role in deciding who qualifies as a parent, which in itself is a socially constructed idea.¹⁰⁴

Recognising this and as a reaction to historic exclusion, LGBTQ activists have long argued for legal recognition on the basis of equality between same-sex and different-sex families. Considerable progress has been made towards achieving at least formal legal equality. However, equal treatment in the statute books does not always result in a practical outcome that is consistent with substantive equality.¹⁰⁵ Furthermore, those seeking formal legal equality may see this as the sole desired outcome without challenging the institution, in this case legal parenthood, they wish to be included in. As Leckey comments:

Groups seeking equality sometimes take a legal victory as the end of the line. Once judgment is granted, or a law is passed, coalitions disband, and life goes on in a new state of equality. For their part, policymakers may assume a troublesome file is now closed.¹⁰⁶

¹⁰² For a discussion of this in relation to the Civil Partnership Act see Stychin, 'Not (Quite) a Horse and Carriage' (n 58).

¹⁰³ Stephen Brickey and Elizabeth Comack, 'The Role of Law in Social Transformation: Is a Jurisprudence of Insurgency Possible?' [1987] *Canadian Journal of Law and Society* 102.

¹⁰⁴ For more on this see Katharine K Baker, 'Bionormativity and the Construction of Parenthood' (2008) 42 *Georgia Law Review* 649.

¹⁰⁵ Some of the judicial decisions in Quebec discussed at page 108 demonstrate the salience of the distinction between 'law-as-legislation' and 'law-as-practice'. See further Dorothy Chunn and Dany Lacombe, 'Introduction' in Dorothy Chunn and Dany Lacombe (eds), *Law as Gendering Practice* (Oxford University Press 2000) 11.

¹⁰⁶ Robert Leckey, 'Introduction' in Robert Leckey (ed), *After legal equality: family, sex, kinship* (Routledge 2014) 1.

The campaign for marriage equality, particularly in the United States, is a notable example of this.¹⁰⁷

Despite this, early contributions to the same-sex marriage debate demonstrated different approaches within the gay and lesbian community in terms of advocacy and resistance.¹⁰⁸ Alongside mainstream voices in the gay and lesbian community arguing for same-sex marriage on the basis of equality, more radical commentators highlighted that 'the equality model that seeks a right to marry on equal terms with heterosexuals, and the incantation of "choice," as in "lesbians and gay men should have the choice to marry," fail to envision a truly transformative model of family for all people'.¹⁰⁹ This idea of the potential of gay and lesbian relationships to transform the marriage model has been built on both in relation to same-sex and different-sex marriage, to argue for greater recognition of a diverse range of adult relationships.¹¹⁰

Some scholars, although still relatively few, have also echoed these arguments in relation to same-sex parenting.¹¹¹ As Kelly notes:

While an equivalency approach, typically grounded in formal equality, may be adopted because of the strategic advantages it presents in the courtroom, the risk is that it will underplay the

¹⁰⁷ See <<http://www.marriageequality.org/>> accessed 7 August 2015.

¹⁰⁸ See for example, Paula Ettelbrick, 'Since When is Marriage a Path to Liberation?' in Andrew Sullivan (ed), *Same-sex marriage, pro and con: a reader* (Vintage Books 1997); Thomas Stoddard, 'Why Gay People Should Seek the Right to Marry' in Andrew Sullivan (ed), *Same-sex marriage, pro and con: a reader* (Vintage Books 1997)

¹⁰⁹ Nancy Polikoff, 'Why Lesbians and Gay Men Should Read Martha Fineman' (2000) 8 *American University Journal of Gender, Social Policy and the Law* 167. See also Susan Boyd and Claire Young, "'From Same-Sex to No Sex'?: Trends Towards Recognition of (Same-Sex) Relationships in Canada' (2003) 1 *Seattle Journal for Social Justice* 757, 763; Judith Butler, 'Is Kinship Always Already Heterosexual?' (2002) 13 *Differences: A Journal of Feminist Cultural Studies* 14.

¹¹⁰ Nancy D Polikoff, *Beyond straight and gay marriage: valuing all families under the law* (Beacon Press 2008); Nicola Barker, *Not the marrying kind: a feminist critique of same-sex marriage* (Palgrave Macmillan 2012).

¹¹¹ See for example, K Arnup and Susan B Boyd, 'Familial Disputes? Sperm Donors, Lesbian Mothers and Legal Parenthood' in D Herman and Carl Stychin (eds), *Legal Inversions* (Temple University Press 1995); Kelly, 'Nuclear Norms or Fluid Families - Incorporating Lesbian and Gay Parents and Their Children into Canadian Family Law' (n 10); Kelly, *Transforming law's family the legal recognition of planned lesbian motherhood* (n 40).

differences between lesbian and heterosexual parenting relationships and thus limit reform to that which can be understood within the existing normative framework.¹¹²

These concerns are engaged by the reforms instituted by the UK Human Fertilisation and Embryology Act 2008. It is commendable that female parents can be automatically recognised as a child's legal parents from birth. However, it is not necessarily the case that in each of these families the intention is for the biological father to be a legal stranger to the child. This is premised on a heteronormative approach to parenthood, to which some same-sex couples do conform. However, in taking this as the basis for including same-sex parents rather than asking whether the existing approach is suitable for their needs, the law limits the possibilities for recognising the range of same-sex families. As Leckey highlights, '[r]edrawing the lines of legal 'family' might also further marginalize non-normative caring kinship networks.'¹¹³

As an alternative to a legal model of parenthood premised on formal equality and the inclusion of same-sex parents within a heteronormative conception of legal parenthood, McClain, writing in the US context, advocates a 'diversity model' of parenthood. As McClain explains '[t]he diversity model captures the diverse pathways to parenthood in social practice. It also fits changes in family law giving legal protection to these pathways.'¹¹⁴ Her conception of the diversity model is based on a 'continuum approach to mapping parenthood,'¹¹⁵ which 'acknowledges various pathways to parenthood' and 'often includes a normative

¹¹² *Ibid* 5.

¹¹³ Leckey, 'Introduction' (n 104) 1.

¹¹⁴ McClain, 'A Diversity Approach to Parenthood in Family Life and Family Law' (n 22) 57.

¹¹⁵ *Ibid*.

judgment that this diversity has value'.¹¹⁶ Similar to the substantive equality approach that Kelly advocates, this model 'is much more likely to produce laws that cater to families of difference, whether they include three parents, non-conjugal co-parents or involved known donors'.¹¹⁷

This section has aimed to demonstrate some of the fundamental changes in family life and family law in so far as they may have an impact upon the legal recognition of collaborative co-parenting. The intention has been to build up a picture of sociological and socio-legal scholarship in relation to the family and how a diversity model of parenthood on which this study is based fits in with that. In particular it was important to demonstrate that the appearance of formal equality between same-sex and different-sex couples may in fact obscure the exclusion from the legal framework of parenting arrangements that do not conform to the heteronormative ideal of parenthood based on the intimate couple relationship. In this way, the present study of collaborative co-parenting not only considers these specific parenting arrangements but also contributes to wider debates surrounding the regulation and recognition of family diversity more generally.

¹¹⁶ Linda C McClain and Daniel Cere, 'Introduction' in Linda C McClain and Daniel Cere (eds), *What is Parenthood? Contemporary Debates About the Family* (New York University Press 2013) 3.

¹¹⁷ Kelly, *Transforming law's family the legal recognition of planned lesbian motherhood* (n 40) 46.

Chapter Two: Doing the Research

Choice of Research Topic and Research Questions

Having introduced the broad aims and research context of the project in the previous chapter, this chapter considers the study's research questions in more detail and reflects on the research methodology and research methods employed to address them. The impetus for this project was an awareness during my previous studies of a judicial decision in Ontario, Canada in 2007 that recognised a five-year-old child as having three legal parents: two female partners, one of whom was the child's birth and biological mother, and a single gay man, who was the child's biological father.¹¹⁸ This legal decision led me to reflect upon the options open to same-sex attracted individuals for having children. Immediately, the gendered nature of reproduction presented itself, which is reflected in the different options that are open to female same-sex attracted individuals as compared to male same-sex attracted individuals. In addition to this, the options open to single men and women, as well as same-sex couples, who wanted to have a child came to mind.

This led me to explore these issues further through the research questions that guide this study, as set out in the introduction and for ease of reference are repeated below:

¹¹⁸ *AA v BB* 2007 ONCA 2.

- RQ1: How well does the legal framework in E&W reflect and accommodate the procreative autonomy of gay men and lesbians engaging in or considering collaborative co-parenting?

This question is primarily addressed in Chapters, Three, Four and Five and involves an analysis of legislation and case law in E&W relating to collaborative co-parenting as well as a discussion of data collected through semi-structured interviews with legal professionals about how the law might meet the needs of these families. These issues are also reflected on in light of participants' views of the legal framework in E&W in Chapter Seven.

- RQ2: How well should and could the legal framework respond to the needs of such collaborative co-parents, taking account of developments in other jurisdictions such as Canada?

This question is addressed through the incorporation of a comparative perspective again in Chapters Three, Four and Five, drawing on the analysis of case law and legislation in a number of Canadian provinces. This is complemented by analysis of participants' parenting journeys and the typology of collaborative co-parenting discussed in Chapter Six.

- RQ3: What are the potential implications, if any, for the wider legal regulation of gay and lesbian parenting and family life of expanding a legal response to gay and lesbian collaborative co-parenting beyond the heteronormative model?

This question is addressed in Chapters Six and Seven primarily from a theoretical perspective drawing on empirical insights from the interviews with collaborative co-parents in this study as well as on data from other empirical studies.

Research Approach

Overview

The observed difference in approach in BC, Ontario and E&W led me to consider how well the law regulating parenthood and parenting following assisted reproduction in E&W balances the interests of those involved in gay and lesbian collaborative co-parenting arrangements and whether there are any broader implications of this for family law. As mentioned in the introductory chapter of this thesis, an exploration of these issues is the overall aim of the project. The thesis, therefore, adopts a comparative doctrinal approach, comparing the laws of E&W, BC and Ontario. Empirical approaches are also well suited to exploring how well legal frameworks operate in practice.¹¹⁹ Consequently, a comparative empirical study in the UK and Canada complements the comparative doctrinal analysis. This is set within a socio-legal framework because a more contextual approach that takes into account social and policy variations in the respective jurisdictions may be helpful when interpreting differences in the legal frameworks and empirical data.¹²⁰

In assessing the importance of legal recognition for poly-parenting families, this study draws on insights from a number of different disciplines and discourses including UK and Canadian family law and policy, psychology, sociology, and LGBTQ family studies. The nature of this topic lends itself well to socio-legal enquiry because, in addressing the issues raised, it is necessary to take into account both family law and family policy considerations, which may be informed

¹¹⁹ For more on this see for instance Reza Banakar, 'Studying Cases Empirically: A Sociological Method for Studying Discrimination Cases in Sweden' in Reza Banakar and Max Travers (eds), *Theory and method in socio-legal research* (Hart Publishing 2005).

¹²⁰ Reza Banakar, 'Having One's Cake and Eating It: The Paradox of Contextualisation in Socio-Legal Research' (2011) 74 *International Journal of Law in Context* 487.

by these other disciplines. In addition to this, the project draws on empirical evidence in order to investigate the relationship between legal recognition and the expectations and lived experiences of these families, which can provide some insights when assessing the fairness of legal recognition. Furthermore, this project will adopt a comparative approach, which seems appropriate because this is a developing area of law (and of family life) and different jurisdictions approach the issue differently. The project will compare the law of E&W with that of BC (drawing, to a limited extent, on the experiences of other Canadian and international jurisdictions as points of comparison) because in each of these jurisdictions there has been recent legislative or judicial reform which has taken divergent approaches to the issue, despite their shared heritage as common-law jurisdictions.

Adopting a Socio-Legal Perspective

Doctrinal legal scholarship rarely acknowledges the disciplinary assumptions that underpin the work of legal scholars.¹²¹ Legal scholarship tends to claim objectivity about a positivist conception of a largely self-contained legal framework.¹²² Furthermore, much doctrinal legal research clarifies and evaluates the internal coherency of this legal framework without reference to extra-legal influences.¹²³ Despite the largely self-referential nature of doctrinal legal scholarship, Stychin and Herman recognise the continuing importance of the 'traditional doctrinal approach' (alongside more contextual and theoretical approaches) when discussing the legal interests of lesbians and gay men.¹²⁴ Building on this, the

¹²¹ Michael Salter and Julie Mason, *Writing Law Dissertations* (Pearson Longman 2007) 46.

¹²² Leslie J Moran, 'Legal Studies after the Cultural Turn: A Case Study of Judicial Research' in Sasha Roseneil and Stephen Frosh (eds), *Social Research After the Cultural Turn* (Palgrave Macmillan 2012) 124.

¹²³ William Twining, *Blackstone's Tower: The English Law School* (Stevens 1994) 104.

¹²⁴ D Herman and Carl Stychin, *Legal Inversions : Lesbians, Gay Men, and the Politics of Law* (Temple University Press 1995) x.

present study comprises a significant element of legal doctrinal analysis, which examines how consistent judicial decisions in this area in each of the jurisdictions are with previous decisions and legislative frameworks.

However, the legal recognition of parenthood, and perhaps family law more generally,¹²⁵ lends itself particularly well to a more contextually-sensitive socio-legal approach.¹²⁶ While doctrinal legal research tends to view law as a self-contained system governed by distinctively legal rather than sociological concerns, the socio-legal approach that this study adopts considers the social contexts that the legal rules operate within in each of the jurisdictions. In addition to this, the study incorporates critical jurisprudential and theoretical perspectives, which broadly relate to social exclusion based on difference.¹²⁷

This contextual, socio-legal approach is arguably more suitable for examining the legal recognition of same-sex parenting than a purely doctrinal legal approach for a number of reasons. The, at least historically, contentious nature of same-sex parenting within society means that social attitudes are more deeply implicated in this area of law than might be the case in other more technical areas. Furthermore, law's regulation of family life can have a very personal impact and is closely related to a person's identity and ability to seek fulfilment in life. This indicates that not only a critical and contextual approach to legal research, as described above, would be appropriate but also an empirical one that allows a

¹²⁵ Simon Jolly, 'Family Law' in Philip Thomas (ed), *Socio-legal studies*, vol Leeds (Dartmouth 1997); Rebecca Probert, *Family Life and the Law: Under One Roof* (Ashgate Publishing 2007) 3.

¹²⁶ Richard Collier and Sally Sheldon, *Fragmenting Fatherhood: A Socio-Legal Study* (Hart Publishing 2008) 23.

¹²⁷ See the discussion of the theoretical framework that underpins this study in the previous chapter at page 50.

degree of insight into the lived experiences of families affected by legal regulation, which will be discussed in more detail in a subsequent section.¹²⁸

A doctrinal approach to this topic might consider the extent to which the revised parenthood provisions of the Human Fertilisation and Embryology Act 2008 are consistent with the principle of non-discrimination on the basis of gender and sexual orientation contained within the ECHR, as well as the right to respect for private and family life. Such an analysis may reveal that the legislation has removed any difference in terms of the legal recognition of parenthood for female same-sex couples and heterosexual couples which have conceived through donor conception. While recognising female same-sex parents is a progressive step, the doctrinal analysis does not reveal the complete picture. A doctrinal legal analysis would proceed on the basis that providing the same legal recognition for female same-sex couples as for heterosexual couples means the legislation no longer discriminates and would not necessarily go any deeper than this. However, by empirically examining the needs of same-sex parents in terms of legal recognition, it becomes apparent that some of the family practices of same-sex parents differ from their heterosexual counter-parts. This reveals that, by emulating the current legal recognition of parenthood for different-sex couples, the law does not fully recognise the families that LGBTQ individuals create. The insight that a number of same-sex families are falling outside the scope of legal recognition is one that an empirical, socio-legal rather than doctrinal, black-letter approach reveals.

Similarly, a doctrinal approach to the case law in this area might seek to ensure that the right to private and family life of the individuals involved, as well as child

¹²⁸ See the section in this chapter on Empirical Research Methodology at page 69.

welfare, are being protected. The majority of the case law in this area concerns disputes between a female same-sex couple, who are the resident carers of a child, and a non-resident biological father who seeks contact and perhaps parental responsibility. On the one hand, a doctrinal analysis might seek to demonstrate that the family life of the same-sex couple should be protected from interference from the biological father. Alternatively, it might suggest that it is in the best interests of the child to be able to develop a relationship with his or her biological father. Although arguments relating to child welfare and the right to private and family life could be marshalled in either direction, these would invariably be the primary focus of any doctrinal analysis. However, such a formal legal analysis would fail to address the reasons why such tensions emerge and whether alternative forms of legal recognition might be appropriate. This is the type of insight that can be derived from a theoretically driven, empirical socio-legal project.

Socio-legal research can encompass a broad range of approaches, such that it resists a unitary definition.¹²⁹ One common element of socio-legal research is that it goes beyond a purely doctrinal legal analysis. That is to say that socio-legal approaches may take into account policy factors, law's social context and empirical perspectives on the impact of law in society. Salter and Mason argue that 'a central goal of black-letter analysis is to reveal the presence of a series of rules based upon a smaller number of general legal principles'. According to Salter and Mason, 'the central assumption is that the detailed rules give effect to, and specify, certain underlying and more general legal principles'.¹³⁰ This

¹²⁹ Roger Cotterrell, 'Subverting Orthodoxy, Making Law Central: A View of Sociolegal Studies' (2002) 29 *Journal of Law and Society* 632, 632; Philip Thomas, *Socio-Legal Studies*, (Dartmouth 1997) 2.

¹³⁰ Salter and Mason, *Writing Law Dissertations* (n 119) 44.

suggests that doctrinal legal research's focus is on the internal coherency of legal rules and principles without necessarily engaging in an in-depth consideration of extra-legal factors.

By contrast, Phil Thomas emphasises the way that socio-legal research contextualises the law in society rather than treats it merely as a self-referential system when he states:

Empirically, law is a component part of the wider social and political structure, is inextricably related to it in an infinite variety of ways, and can therefore only be properly understood if studied in that context.¹³¹

In advocating a more contextually sensitive approach to researching the law, it is, however, not necessary to adopt a full-blown sociology of law approach, which brings the disciplinary perspective of sociology to bear in the examination of law as a sociological phenomenon.¹³² This theoretically-driven sociological approach could be conceived of as lying at one end of the spectrum of socio-legal research with a very policy-orientated, empirical approach at the other end. The current project lies somewhere in between. This research draws on mid-range theoretical concerns emanating from critical legal perspectives on the legal framework and explores them empirically in relation to the extent to which this legal framework is consistent with certain family practices in society.

Comparative Approach

The change in social attitudes, and accompanying legislative reform, surrounding non-traditional families and same-sex parenting has been observed in quite a

¹³¹ Philip Thomas, 'Curriculum Development in Legal Studies' (1986) 20 Law Teacher 110, 112.

¹³² Reza Banakar, 'Reflections on the Methodological Issues of the Sociology of Law' (2000) 27 Journal of Law and Society 273, 280.

number of western jurisdictions.¹³³ Each of these jurisdictions has approached the regulation of same-sex families in different ways, affording varying degrees of recognition. Broadly speaking, there is a divide between the way in which civil law systems have achieved reform through top-down legislation, on the one hand, and the common-law's combination of legislative and judge-led reform, on the other. While Scandinavian and civil law systems such as Sweden and the Netherlands may have been at the forefront of recognising same-sex adult relationships, the common law jurisdictions seem to be leading the way in recognising, through a separate legal framework, the relationships between same-sex parents and the children born into such couple relationships. However, this has also thrown up difficulties for and challenges to thinking based on traditional family notions. While notions of equality between same-sex and different-sex parents may have driven reforms in a number of jurisdictions, the degree to which the needs of same-sex families are being met varies from jurisdiction to jurisdiction. Some of these reforms may not be sufficient to meet the potentially different needs of such families and perhaps more flexible approaches to legal parenthood may be appropriate.

As outlined in the introduction,¹³⁴ the overall aim of the thesis is to explore, within a comparative context, how well the law regulating parenthood and parenting following assisted reproduction in E&W, balances the interests of those involved

¹³³ 'More and more countries have changed their laws, and this tendency appears to be on the rise. The Netherlands in 2000, Belgium in February 2003, Spain and Canada in July 2005, South Africa in November 2006, Norway, Connecticut and Massachusetts in 2008,² Sweden, Iowa, Vermont, Maine and New Hampshire in 2009, Portugal, Washington, D.C. and soon Luxembourg in the first three months of 2010, have opened marriage to same-sex couples. The debate is raging in Mexico, Argentina and several other countries, with legal battles and "rogue" marriages being performed in order to bring about change in the law by calling more attention to the issue'. Hugues Fulchiron, '18th Annual Congress of the International Academy of Comparative Law; National Report: France' (2011) 19 *American University Journal of Gender, Social Policy & the Law* 123.

¹³⁴ See page 25.

in gay and lesbian collaborative co-parenting arrangements and to consider any wider implications for family law. Given this, insights from other jurisdictions undergoing similar reforms are highly relevant. Therefore, the changing legal landscape in a number of countries means that this research question lends itself to and would benefit considerably from a comparative approach.¹³⁵

The focus of this project, namely the legal recognition of LGBTQ poly-parenting, has been subject to recent judicial consideration in a number of common-law jurisdictions. As mentioned previously, recent legislative amendments and judicial decisions in BC, Ontario and E&W are noteworthy in this regard as they have paved the way for recognising that more than two adults may, in effect, be thought of as a child's parents. These three jurisdictions stand out as particularly forward thinking in relation to multiple-parent families. However, each has approached the issue of legal recognition in a different way.

One of the functions of comparative law can be 'for considering the desirability of introducing forms of legal recognition that have been successfully introduced in other jurisdictions as a response to analogous issues'.¹³⁶ BC and Ontario, through legislative amendment and judicial decisions respectively, have recognised the possibility of having more than two legal parents in a same-sex poly-parenting situation. While the courts of E&W have afforded some legal recognition for multiple adults in this type of situation, legal parenthood remains limited to two adults regardless of their gender. Therefore, in considering the type of legal recognition which should be afforded to same-sex poly-parenting families in

¹³⁵ For more on comparative family law research see D Bradley 'A note on comparative family law: perspectives, issues and politics' (2005) Oxford University Comparative Law Forum 6.

¹³⁶ Salter and Mason, *Writing Law Dissertations* (n 119) 183.

E&W, these jurisdictions seem well suited as research sites for the comparative doctrinal (and empirical) element of this project.

Furthermore, Canada and the UK were chosen as sites for the research because of the similar yet distinctive ways in which the laws of each country have dealt with multiple-parent families. Both countries consist of a number of different jurisdictions and in both countries the co-existence of the common law and civil law can be seen in differing degrees. Although within the UK Scotland's mixed legal system follows the same approach to parentage law as E&W, in Canada, Quebec's civil law system provides a distinctive take on filiation compared to the other Canadian common-law provinces.¹³⁷

In addition to the different approaches of the civil-law and common-law within Canada, there are also important distinctions between how UK and Canadian legislation and courts address the issue of multiple parents. In Canada the issue of parentage following assisted reproduction is dealt with at the provincial level, whereas in the UK it is addressed in a piece of national legislation.¹³⁸ As a result, the Supreme Court of a given province in Canada is entitled to rule that a piece of legislation is incompatible with the Canadian Charter of Fundamental rights and reach a different outcome than that stated in the legislation. This can be seen in the case of *AA v BB and CC*¹³⁹ where the Ontario Supreme Court ruled that the Ontario Legislation that limited the number of parents to two did not apply in the case before it. The case concerned a lesbian couple and gay friend who were

¹³⁷ Robert Leckey, "'Where the parents are of the same sex': Quebec's reforms to filiation" (2009) *International Journal of Law, Policy and the Family* 62.

¹³⁸ See page 96 below.

¹³⁹ *AA v BB* (n 116).

raising a child together. In that case, the court used their inherent jurisdiction to hold that all three adults were parents of the child.

In contrast to the Canadian courts, the UK courts do not have a similar power to deviate from the legislation in that way. Instead, the UK courts have, to an extent, compensated for the limitation to two parents in UK legislation through a flexible use of parental responsibility. In the case of *T v T*,¹⁴⁰ for example, the Court of Appeal granted each partner in a lesbian couple and the biological father parental responsibility. In the father's case, the parental responsibility was essentially a badge of status in recognition of the limited role he played in the child's life, while the lesbian couple were the primary caregivers.¹⁴¹ The tenor of these two cases are different because in the Canadian case a declaration of parentage was sought with all parties consenting, whereas in the UK case the court had to resolve a dispute about parental responsibility. Nevertheless, it will be instructive to compare these distinctive judicial approaches, as well as their respective legislative frameworks, when considering the type of legal recognition that should be afforded multiple-parent families.

In addition to their distinctive legal frameworks, each country's social context provides a background for legal reform and therefore needs to be considered. As Khan-Freund highlights, the comparative method 'requires a knowledge not only of the foreign law, but also of its social, and above all its political, context'.¹⁴² In relation to the present study, legal comparisons need to be set alongside a social

¹⁴⁰ *T v T* [2010] EWCA Civ 1366.

¹⁴¹ For further discussion of this case see page 172.

¹⁴² Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1, 27.

context where research indicates that lesbian women in Canada¹⁴³ and the UK¹⁴⁴ are quite likely to use a known donor (e.g. gay male friend) which contrasts with the U.S. where using an unknown donor is the preferred option.¹⁴⁵ Furthermore, since these studies were conducted, the law in the UK was reformed to allow the automatic recognition of a lesbian couple as the parents of a child born using an unknown donor through a clinic.¹⁴⁶

This possibility does not exist in many provinces in Canada, with the non-biological mother having to formally adopt the child. However, the courts in Canada have been more progressive in this regard than the legislature in order to ensure their decisions are in line with the Canadian Charter of Fundamental Rights. In addition to this, Canada has traditionally been more progressive in terms of social attitudes and legal recognition of same-sex families, with the UK following suit. In the UK, legislative reform relating to same-sex families has often led social attitudes rather than the other way around.¹⁴⁷ Therefore, the similarities and differences in terms of the political and social contexts in each of these jurisdictions will be instructive when considering the possibilities of law reform in the UK.

The relationship, outlined above, between these two, predominantly common-law, countries make the comparison between Canada and the UK highly suitable for exploring how the law should respond to the issue of multiple parents. In addition, the collection of empirical data from LGBTQ parents in each country will

¹⁴³ Fiona Nelson, *Lesbian Motherhood: An Exploration of Canadian Lesbian Families* (University of Toronto Press 1996).

¹⁴⁴ G A Dunne, 'Opting into Motherhood: Lesbians Blurring the Boundaries and Transforming the Meaning of Parenthood and Kinship' (2000) 14 *Gender & Society* 11.

¹⁴⁵ Fiona Kelly, 'Nuclear Norms or Fluid Families - Incorporating Lesbian and Gay Parents and Their Children into Canadian Family Law' (2004) 21 *Canadian Journal of Family Law* 133, 157.

¹⁴⁶ See page 28 above.

¹⁴⁷ Herman and Stychin (n 122).

add to the discussion of the impact that the socio-legal context has had on law reform in each jurisdiction. Given that a number of different legal frameworks exist within the various Canadian provinces, it is necessary to focus on the provinces that will be particularly useful in relation to this project, namely BC because of its recently reformed, progressive legislative approach¹⁴⁸ to the issue of multiple parents and Ontario because of its recent judicial reforms.

The comparative approach adopted in this thesis sits well within the context of a broader socio-legal approach. As the UK Economic and Social Research Council noted in its review of socio-legal studies, '[s]ocio-legal studies may also embrace a significant comparative methodology, investigating the social scientific context of law across and between legal systems, both spatially and temporally, including supra national developments'.¹⁴⁹ Some have gone further to argue that comparative law should not treat legal rules and institutions as abstract, self-contained entities but as being culturally embedded.¹⁵⁰ Geoffrey Samuel has identified this as 'a paradigm dichotomy...between a 'natural' and a 'cultural' approach,' each of which Samuel argues 'brings with it a number of methodological approaches and attitudes'.¹⁵¹

¹⁴⁸ In British Columbia, for example, it is possible for child to have more than two legal parents in the context of assisted reproduction. See British Columbia Family Law Act 2011 s. 29.

¹⁴⁹ Cited in Salter and Mason, *Writing Law Dissertations* (n 119) 184. See also Annelise Riles, 'Comparative Law and Socio-Legal Studies' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006).

¹⁵⁰ See for example Roger Cotterrell, 'Comparative Law and Legal Culture' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 710; David Nelken, 'Legal Culture' in Jan M Smits (ed), *Elgar Encyclopedia of Comparative Law* (Edward Elgar 2006) 372; Pierre Legrand, 'How to Compare Now' (1996) 16 *Legal Studies* 232..

¹⁵¹ Geoffrey Samuel, 'Comparative Law and Its Methodology' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) 101.

Zweigert and Kötz advocate a more functionalist approach to comparative law that is mainly concerned with comparing legal outcomes.¹⁵² Operating within this framework, Kamba has suggested a practical approach to conducting comparative legal research that has been influential in this study.¹⁵³ Kamba suggests that comparative law research comprises three key stages: description of the relevant norms and institutions, identification of similarities and differences and an explanation of why these exist. De Cruz has built on this to set out an eight-stage blueprint as a method of engaging in comparative law.¹⁵⁴ The eight stages are as follows: frame the legal problem; identify the comparator jurisdictions; identify the key sources of law; assemble the relevant material including legal commentary; organise this material thematically according to the guiding principles of the legal system; formulate provisional answers to the legal problem; critically analyse the legal principles with reference to the legal system they operate in and finally present the conclusion of the comparative analysis relating it back to the initial purpose of the enquiry. This type of approach sits well alongside the qualitative empirical element of this study, which relies on a framework of thematic analysis, with which there are notable areas of overlap.¹⁵⁵

While there is a significant element of this functional comparative law analysis in the present study (in this case who is considered equivalent to a legal parent), it is also important to consider the symbolic impact of legal rules, which Zweigert and Kötz have been criticised for overlooking.¹⁵⁶ Given its commitment to

¹⁵² Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3rd Ed, Oxford University Press 1998) Chapter 2.

¹⁵³ Walter J Kamba, 'Comparative Law: A Theoretical Framework' (1974) 23 *International and Comparative Law Quarterly* 485.

¹⁵⁴ See Peter De Cruz, *Comparative Law in a Changing World* (3rd Ed, Routledge Cavendish 2007) 242.

¹⁵⁵ This is discussed further at page 80.

¹⁵⁶ See John Bell, 'Comparative Law' in Peter Cane and Conaghan Joanne (eds), *The New Oxford Companion to Law* (Oxford University Press 2008).

adopting a socio-legal rather than purely doctrinal approach, the present study does not treat a given legal rule or institution as 'an objective phenomenon in itself and thus one that transcends any particular state' as Samuel cautions against.¹⁵⁷ However, nor does it try to engage in what some have termed 'deep level comparative law'.¹⁵⁸ This relies on a hermeneutical approach, which, in Pierre Legrand's words focuses 'on the cognitive structure of a given legal culture and, more specifically, on the epistemological foundations of that cognitive structure'.¹⁵⁹ Such in-depth comparative inquiry is beyond the scope of this PhD thesis and is not required in order to achieve the types of insights implied by the research questions that guide this study.

Instead, this thesis combines the comparison of socially located legal approaches to collaborative co-parenting within the comparator jurisdictions with an in-depth empirical investigation. A number of commentators have noted the utility of combining comparative law approaches with empirical research, especially when considering law reform options.¹⁶⁰ Therefore, in a project such as this which is considering domestic law reform options by comparing two legal systems operating within the same legal tradition it is not necessary to engage in a detailed comparison of legal cultures as some might advocate.¹⁶¹ What is more, Örüçü advances a view of law reform as relying on 'transpositions' from other legal

¹⁵⁷ Samuel, 'Comparative Law and its Methodology' (n 148) 102.

¹⁵⁸ Mark Van Hoecke, 'Deep Level Comparative Law' in Mark Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart 2004).

¹⁵⁹ Pierre Legrand, 'European Legal Systems Are Not Converging' (1996) 45 *International and Comparative Law Quarterly* 52, 60.

¹⁶⁰ See for example, Riles, 'Comparative Law and Socio-legal Studies' (n 146); Cotterrell, 'Comparative Law and Legal Culture' (n 147)

¹⁶¹ See for example, Nelken, 'Legal Culture' (n 147). For a critique of the concept of legal culture see Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate Pub Co 2006) 81.

systems as sources of inspiration, which are subsequently fine-tuned.¹⁶² However, this study recognises the importance of being sensitive to the context in which legal rules operate,¹⁶³ which is why the comparative analysis of legal rules and cases is combined with empirical data from legal professionals and parents on the operation of the law.

Empirical Research Methodology

Overview

Drawing on her extensive experience of researching families and relationships, Jennifer Mason adopts an approach to research that assumes that 'it is useful and possible to frame intellectual puzzles about the social world, and that these can be answered or addressed through empirical research rather than simply through abstract theorising'.¹⁶⁴ In a similar vein, this research project is predicated on the idea that empirical research adds to our understanding of legal rules and their impact in society, building on a well-established tradition of empirical socio-legal research in the UK.¹⁶⁵ Moreover, an empirical study is well suited to exploring how well the law regulates parenthood and parenting in collaborative co-parenting families because a significant element of assessing that involves investigating the lived experiences of those who are affected by the law.

In explicating this thesis's approach to the empirical element of the study, it is important to distinguish between the overall empirical research methodology/methodological strategy and the research methods employed to

¹⁶² Esin Örucü, 'Law as Transposition' (2002) 51 *International and Comparative Law Quarterly* 205.

¹⁶³ Reza Banakar and Max Travers, *Theory and Method in Socio-Legal Research* (Hart Publishing 2005) 240.

¹⁶⁴ Jennifer Mason, *Qualitative researching*, (Sage Publications 2002) 22.

¹⁶⁵ See Banakar and Travers, *Theory and method in socio-legal research* (n 160) 279.

carry out the research, intertwined as they are. Mason reminds us that '[t]he concept of methodological strategy should be distinguished from that of method...your methodological strategy is *the logic by which you go about answering your research questions*,' which, Mason contends, express the type of intellectual puzzle under investigation.¹⁶⁶

The present study is aimed at exploring what Mason terms a 'comparative puzzle... [which] could involve comparing legal or social institutions internationally...' ¹⁶⁷ This is reflected in the overall aim of the study, which sets the legal regulation of collaborative co-parenting in a comparative context, ¹⁶⁸ as well as more specifically in the second research question (repeated above), ¹⁶⁹ which takes into account developments in other jurisdictions such as Canada. The methodological strategy that underpins this research is, therefore, closely connected to the type of enquiry implied by the research questions and the comparative legal puzzle being explored.

Research Design and Strategy

Given that the research questions are aimed at exploring comparative legal responses to a specific social phenomenon, namely collaborative co-parenting, within a fairly small segment of the population, i.e. the LGBTQ community, a case study approach is well suited to this type of inquiry. Keith Punch characterises the case study approach as being one where 'one case (or perhaps a small number of cases) will be studied in detail, using whatever methods seem

¹⁶⁶ Mason, *Qualitative researching* (n 161) 30.

¹⁶⁷ *Ibid* 18.

¹⁶⁸ See page 25.

¹⁶⁹ See page 53.

appropriate...to develop as full an understanding of that case as possible'.¹⁷⁰ The type of case study the present research is concerned with is what Robert Stake refers to as the instrumental case study, in which 'a particular case is examined mainly to provide insight into an issue or to redraw a generalization'.¹⁷¹ In this thesis, the case study of LGBTQ collaborative co-parenting is examined in order to question the heteronormative generalisation, on the basis of which the law of parenthood operates, that parenting ideally occurs within the context of an intimate couple relationship.

Furthermore, the types of research questions that are under consideration lend themselves particularly well to qualitative inquiry. In discussing how the rights and interests of various parties should be balanced and how legal parenthood and parental responsibility should operate in poly-parenting situations, the study aims to explore the law's impact on these families in-depth. In this way, the study is trying to capture a snapshot of collaborative co-parenting/poly-parenting family practices and arrangements and how this relates to legal recognition. Although the study also canvasses the attitudes of these families towards legal recognition, this requires the opportunity for participants to expand on these complex issues at length, as the participants' detailed responses indicate. Qualitative inquiry, therefore, is an appropriate approach, which was informed by the research questions.

At an earlier stage in the process a mixed methods approach combining qualitative and quantitative modes of inquiry was considered. As Bryman notes,

¹⁷⁰ Keith Punch, *Introduction to Social Research: Quantitative and Qualitative Approaches* (Sage 1998) 150.

¹⁷¹ Robert Stake, 'Qualitative Case Studies' in Norman K Denzin and Yvonna S Lincoln (eds), *The SAGE handbook of qualitative research* (3rd Ed, Sage 2005) 445..

a mixed methods approach can be a useful way of corroborating or triangulating data in a way that may be seen as increasing its validity.¹⁷² Upon further reflection, however, the epistemological orientation that underpins quantitative research did not seem consistent with the aims of this research project as reflected in the research questions. Bryman comments that the preoccupations of quantitative research, which ‘reflect epistemologically grounded beliefs about what constitutes acceptable knowledge’, are ‘measurement, causality, generalization and replication’.¹⁷³ However, this thesis is not trying to measure instances of collaborative co-parenting in order to reflect causal relationships in a generalizable way. Instead, the thesis aims to reflect on the lived experiences of individuals affected by the legal framework in a way that ‘shows an interest in subjectivity and the authenticity of human experience,’ which Silverman describes as ‘a strong feature of some qualitative research’.¹⁷⁴

The qualitative approach aims to ensure coherence through an approach to the research that ‘meaningfully interconnects literature, research questions/foci, findings, and interpretations with each other’.¹⁷⁵ The way this thesis has sought to achieve this is through integrating comparative doctrinal analysis, insights from the literature and empirical analysis in each of the chapters that comprise parts two and three of the thesis. Moreover, this approach to structuring the thesis is also an attempt to ensure the credibility of the research through a form of triangulation, which Tracy advocates as a means of demonstrating a study’s credibility.¹⁷⁶ The study did not adopt a mixed methods approach combining

¹⁷² Alan Bryman, ‘Integrating Quantitative and Qualitative Research: How Is It Done?’ [2006] *Qualitative Research* 105.

¹⁷³ Alan Bryman, *Social Research Methods* (4th Ed, Oxford University Press 2012) 175.

¹⁷⁴ David Silverman, *Doing Qualitative Research* (4th Ed, Sage 2013) 6.

¹⁷⁵ Tracy SJ, ‘Qualitative Quality: Eight “Big-Tent” Criteria for Excellent Qualitative Research’ (2010) 16 *Qualitative Inquiry* 837–840.

¹⁷⁶ *Ibid* 843.

qualitative and quantitative inquiry, largely because the types of research questions the study is exploring do not lend themselves well to quantitative enquiry, which can be viewed as quite reductive. Therefore, little would have been gained by triangulation of the empirical data in the context of this study. In addition to this, the hard-to-access nature and limited size of the target population makes quantitative enquiry less feasible. The study does, however, adopt a triangulation of sorts between the doctrinal/socio-legal analysis and the empirical study. This is advanced in the way the thematic chapters of parts two and three are structured to integrate insights from different modes of inquiry.

Participant Recruitment and Sampling

The empirical element of this project involved a small-scale qualitative study consisting of twenty-five semi-structured interviews in total, twelve of which were in the UK and thirteen in Canada. The UK sample comprised six (prospective and current) collaborative co-parents and six (mainly legal with one health) professionals who have been involved with LGBTQ collaborative co-parenting. The Canadian sample included six collaborative co-parents and seven (mainly legal with one third sector) professionals who have been involved with LGBTQ collaborative co-parenting.¹⁷⁷

The sample recruitment strategy relied on, in common with other studies with gay and lesbian participants,¹⁷⁸ was targeted convenience sampling. This largely involved advertising for participants in the gay and lesbian press, through online mailing lists and by placing adverts in various physical locations where potential

¹⁷⁷ See table at page 77.

¹⁷⁸ See for example, James M Donovan, 'Homosexual, Gay and Lesbian: Defining the Words and Sampling the Populations' in Henry Minton (ed), *Gay and Lesbian Studies* (Haworth Press 1992).

participants might see them. This was complemented by snowball sampling whereby details of the study were passed on by current participants to contacts who might be interested in participating.¹⁷⁹ One of the criticisms of convenience sampling is that it can produce skewed samples, for example, in terms of participants with particularly strong opinions.¹⁸⁰ Despite having to rely to an extent on which participants initially responded, a successful attempt was then made in snowballing to purposively select participants into the sample to ensure that a diverse range of collaborative co-parenting arrangements was represented.

Previous studies have mainly focused on lesbian parenting and have only incidentally come across instances of collaborative co-parenting.¹⁸¹ The present study is distinctive from those earlier projects because of its sustained focus on recruiting participants who are collaboratively co-parenting. Even studies that might be thought of as largely focused on collaborative co-parenting such as Dempsey's 2006 study¹⁸² did not directly attempt to recruit participants that were actively engaged in poly-parenting where everyone is fully involved in the co-parenting but sought to investigate more typical 'known donor' arrangements. This study succeeded in recruiting a number of participants involved in a range of different types of collaborative co-parenting.

Therefore, the aim in terms of participant recruitment was to include a range of parenting arrangements that could be loosely considered as collaborative co-parenting, so as to explore the experiences and views of people engaged in different types of poly-parenting arrangements. One of the sampling objectives

¹⁷⁹ Mason, *Qualitative researching* (n 161) 140.

¹⁸⁰ Robert Burgess, *In the Field: An Introduction to Field Research* (Allen & Unwin 1984) 57.

¹⁸¹ See for example Fiona J Kelly, *Transforming law's family the legal recognition of planned lesbian motherhood* (UBC Press 2011); Leanne Smith, 'Is Three a Crowd: Lesbian Mothers' Perspectives on Parental Status in Law' (2006) 18 *Child and Family Law Quarterly* 231.

¹⁸² Deborah Dempsey, 'Beyond Choice Family and Kinship in the Australian Lesbian and Gay "baby Boom"' (La Trobe University 2006).

was to recruit men and women engaged in a range of roles. This included the more typical female couple and single male donor, a female couple and a male couple, and also a male couple and a single female. Although the sample recruitment strategy was one of targeted convenience rather than purposive sampling at the outset, this diverse range of parenting arrangements were reflected in the final sample.¹⁸³

In addition to this, legal (and two other) professionals were recruited as elite interviewees because of their extensive experience working with collaborative co-parenting families. These interviews with legal professionals were included on the basis that they allowed access to the experiences of a wider range of collaborative co-parenting families and complemented the data gathered from the co-parenting sample. As Tansey notes:

as well as serving a corroborative purpose, elite interviews can also be used for additive purposes—to provide new information that will advance the research process...One such additive function is to establish what people think—what their “attitudes, values, and beliefs” are.¹⁸⁴

In line with this, the data gathered from interviews with lawyers in E&W, alongside the doctrinal analysis, were invaluable in answering the first research question (how the legal system regulates the issue), as well as contributing to the second research question (how the legal system could and should regulate the issue), alongside interviews with lawyers in Canada. The interviews with collaborative co-parents were primarily drawn on in answering the third research question (implications of expanding legal regulation of parenthood beyond the

¹⁸³ For more details on the sample see 77.

¹⁸⁴ Oisín Tansey, ‘Process Tracing and Elite Interviewing: A Case for Non-Probability Sampling’ (2007) 40 PS: Political Science and Politics 765, 766. See also Joel D Aberbach and Bert A Rockman, ‘Conducting and Coding Elite Interviews’ (2002) 35 PS: Political Science and Politics 673.

heteronormative model) but also contributed to discussing the second research question. Therefore, the combined picture from lawyers and lay participants builds a good and original picture of the developing terrain around collaborative co-parenting in terms of decision making and changing attitudes.

One of the limitations of this study was the difficulty of recruiting participants. Various strategies were employed to overcome this such as drawing on existing contacts through snowball sampling as well as other convenience sampling through online discussion forums, support groups and face-to-face recruitment. The sample was drawn from both individuals to whom this type of parenting is relevant and also professionals (such as lawyers and counsellors) who work with these families. In the end the sample that was achieved is suitable for the intended purpose of demonstrating the difficulties faced by collaborative co-parents as a result of the legal framework through a selection of case studies, rather than by gathering data that can be generalised more broadly, which is beyond the remit of this thesis.

Initial attempts at participant recruitment included posting online adverts on same-sex parenting and assisted reproduction discussion forums and support group websites. This was supplemented by asking the solicitors interviewed if they would be comfortable passing on details of the study to any clients/contacts they might have. An advert was also taken out on the website of a magazine targeted at the LGBTQ community. One of the most effective participant recruitment methods in the UK was attending the Alternative Parenting Show in London, which is designed as an educational and networking opportunity for prospective same-sex parents and included information sessions on collaborative co-parenting. One of the most effective recruitment methods in Canada was

posting an advert on a listserv mailing list, which served the same-sex parenting community in Vancouver and making contact with the LGBTQ Parenting Network based in Toronto.

These recruitment strategies met with varying levels of success. It is well documented that representative samples of stigmatised groups such as lesbians and gay men are difficult to obtain.¹⁸⁵ Same-sex parents, particularly those co-parenting collaboratively, seem to be an even more hard-to-access group perhaps because of the small numbers involved. However, those that did participate had strongly held opinions and some of the participants were quite active within the same-sex parenting community.

One of the hardest to access samples were male co-parents. It is generally the case that in social science research men are often less willing to participate than women. Furthermore, previous studies in this area have had considerable difficulty recruiting men in this situation.¹⁸⁶ Despite that a number of men did volunteer to take part in the study and they provide an interesting perspective that has not previously been explored in great detail. The recruitment of legal professionals went well and a good number of solicitors and attorneys were willing to share their experiences.

Participant Overview

Table 1: Participant Breakdown

| | UK | Canada |
|---------------------|----|--------|
| Legal Professionals | 5 | 6 |

¹⁸⁵ Judith Stacey and Timothy J Biblarz, '(How) Does the Sexual Orientation of Parents Matter?' (2001) 66 *American Sociological Review* 159; Raymond M Lee, *Doing Research on Sensitive Topics* (Sage 1993).
¹⁸⁶ See Fiona Kelly, 'Transforming Law's Family: The Legal Recognition of Planned Lesbian Families' (University of British Columbia 2007) 100.

| | | |
|---------------------|---|---|
| Health/Third Sector | 1 | 1 |
| Co-Parents | 6 | 6 |

The intention was to recruit a number of participants who were engaged in different forms of 'plus two'¹⁸⁷ parenting or who were considering/had considered this possibility, as well as legal and other professionals who had experience working with these families. Of the twenty-five participants, there were six parents/prospective parents in the UK, six parents/prospective parents in Canada, six solicitors/health professionals in the UK and seven legal/other professionals in Canada (see table 1 above). Although it was not possible to interview every member of each family, four families from the UK and three from Canada are represented.

Table 2: Overview of Parenting Arrangements

| | | Single Male | | Partnered Male | | Separated Male Couple |
|-------------------------|----------|------------------------------|--------------|----------------|----------------------------|-------------------------|
| | | Gay | Straight | Gay | Straight | |
| Female couple | | -Betty, Eliza and Lenny (UK) | | Colin (UK) | | Sally and Rachael (Can) |
| Separated Female Couple | | | | | Angela, Ruth and Rob (Can) | |
| Single Woman | Gay | Frieda (Canada) | | | | |
| | Straight | | Delilah (UK) | Chris (Can) | | |

Each of these families and the parenting arrangements they engaged in were unique. There are, however, various ways these families can be grouped

¹⁸⁷ For a definition of this term see Julie Wallbank and Chris Dietz, 'Lesbian Mothers, Fathers and Other Animals: Is the Political Personal in Multiple Parent Families?' [2013] Child and Family Law Quarterly 451, 452.

together. In terms of family configuration, three broad set ups emerged. There were female couples that 'co-parented' with a gay man who may or may not have had a partner; there were male couples that co-parented with a woman who may or may not have had a partner; and there were female couples and single women who had a known donor with whom they did not co-parent. The sample, therefore, presents a series of case studies of different collaborative co-parenting arrangements (see Table 2 above) that fits in well with the project's case study design described above.¹⁸⁸

Participant recruitment was mainly targeted at those families where the biological parents were involved to some extent with the child, particularly if that involvement tended towards co-parenting. It is unsurprising, therefore, that four of the seven families were intending to co-parent or were co-parenting to some extent. Two of the other families had what might be better described as a 'known donor' arrangement. There was also a single heterosexual woman who had considered co-parenting in the past but did not go down that route because she became pregnant with a partner.

Although there were examples of male couples and female couples collaborating and male couples and single women collaborating there were no male participants, which had a 'known surrogate' arrangement where they were the primary parents and the birth mother only played a secondary role (as opposed to a full co-parent). This is compounded by the small size of the population of gay men who have had children through surrogacy and how difficult to access that sample is. Given the study's focus on co-parenting, this is not surprising and this is not a group that was specifically targeted in terms of recruitment. However, in

¹⁸⁸ See page 70.

some senses it is the fourth family configuration that is missing from this data sample. As the focus of the study is on co-parenting, any discussion of known and potentially involved 'surrogates' is a tangential one. However, where it becomes relevant, perhaps as a point of contrast with arrangements involving known donors, insights from other studies and the reported experience of high profile male couples will be drawn on. The experiences of gay men having children with involved and more distant surrogates would be a fruitful topic of further research.

Data Collection

As described above, twenty five in-depth semi-structured interviews were conducted with a mixture of parents and legal professionals in an attempt to explore experiences of engaging in collaborative co-parenting and the impact legal regulation has on this. As Strauss and Corbin note qualitative interviews are well suited to 'research that attempts to uncover the nature of persons' experiences with a phenomenon.'¹⁸⁹ Mason build on this by suggesting that the aim of qualitative research is 'to produce rounded understandings on the basis of rich, contextual and detailed data' and on that basis 'a qualitative interview is always and necessarily semi-structured or loosely structured.'¹⁹⁰ Consequently, in order to encourage participants to answer expansively a 'conversational style'¹⁹¹ was adopted. Some have described this as a 'dialogical' interview¹⁹² because it tries to encourage 'fluid conversations with a purpose'.¹⁹³ Semi-

¹⁸⁹ Juliet M Corbin and Anselm L Strauss, *Basics of Qualitative Research : Techniques and Procedures for Developing Grounded Theory* (Sage 2008) 19.

¹⁹⁰ Mason, *Qualitative researching* (n 161) 39 – 41.

¹⁹¹ Weeks, Brian Heaphy, and Catherine Donovan, *Same sex intimacies: families of choice and other life experiments* (Routledge 2001) 203.

¹⁹² Gillian Dunne, *Lesbian Lifestyles: Women's Work and the Politics of Sexuality* (MacMillan 1997) 29.

¹⁹³ Kelly, 'Transforming Law's Family: The Legal Recognition of Planned Lesbian Families' (n 183) 108.

structured interviews were considered the most suitable method of data collection, therefore, because they provide a means of gaining deeper insights into the lived experiences of these collaborative co-parents and their relationship to the legal framework.

Despite the difficulties in recruiting participants described above, interviews were conducted with participants engaged in a diverse range of co-parenting arrangements so as to be able to address the research questions in a meaningful way. Jennifer Mason suggests that what qualifies as a sufficient number of interviews depends on the phenomenon under investigation and what the research questions demand.¹⁹⁴ Julia Brannen builds on this by saying '[f]or me, the most important issue in deciding how many qualitative interviews are enough concerns the purpose of the research – the type of research question to be addressed and the methodology it is proposed to adopt'.¹⁹⁵

In this study, therefore, the decision to include interviews with approximately six legal professionals and six collaborative co-parents in each jurisdiction stems partly from the case study approach of the research. Howard Becker notes that 'it may not take many interviews to show that something people have not thought about as taking a variety of forms in fact does take such a variety of forms'. Each of the interviews with collaborative co-parents could, therefore, be thought of as a case study in itself of a different form of collaborative co-parenting, as each family is configured slightly differently.¹⁹⁶ When these are combined with the

¹⁹⁴ Sarah Elsie Baker and Rosalind Edwards, 'How many qualitative interviews is enough? Expert voices and early career reflections on sampling and cases in qualitative research' National Centre for Research Methods Review Paper, 29.

¹⁹⁵ *Ibid* 16.

¹⁹⁶ See Chapter Six for more details.

broader range of experiences of the legal professionals, it provides an in-depth understanding of collaborative co-parenting from a number of different angles.

The interview data consist of a mixture of telephone and face-to-face interviews in both Canada and the UK. The study was advertised to collaborative co-parents as involving telephone interviews in order to minimise any potential disruption to research participants or reluctance to participate that face-to-face interviews might engender. By contrast, legal professionals that were situated locally were interviewed in person at their place of work as it seemed less likely that face-to-face interviewing might discourage participation. A number of legal professionals that were not situated locally were also interviewed via the telephone.

Conducting telephone interviews with participants has a number of benefits, aside from being able to interview participants across a range of geographical locations. For example, Greenfield *et al.* have reported that telephone interviewing may facilitate the exploration of more sensitive topics due to the increased feeling of anonymity.¹⁹⁷ While conducting the interviews in the present study it certainly felt that the fact that the conversations were over the telephone facilitated discussion of sensitive issues such as previous unsuccessful attempts to have children. As well as this it seemed to encourage participants to open up more about the concerns they had (as well as the hopes) about the parenting arrangement they had set up.

What is more, Tausig and Freeman have observed that conducting the interviews over the telephone is a way to encourage participants to take part and overcome

¹⁹⁷ See for example Thomas Greenfield, Lorraine T Midanik and John D Rogers, 'Effects of Telephone versus Face-to-Face Interview Modes on Reports of Alcohol Consumption' (2000) 95 *Addiction* 277.

participation reluctance.¹⁹⁸ Conducting the interview via telephone notably facilitated the involvement of one key participant in this study whose interview was carried out during a twenty minute taxi ride while he was on his way to pick up his children from school. This occurred when the participant spontaneously phoned up after having to cancel several previously arranged appointments to conduct the interview. It is, nevertheless, fortunate to have been able to include this data, as the participant's parenting arrangement was the only one of its type included in the study. Therefore, the combination of face-to-face and telephone interviews in this study has facilitated the data collection process. In addition to this, the quality of data produced by both methods has been similar, which has also been the experience of other researchers that have adopted a similar approach.¹⁹⁹

At an early stage it was decided that both the collaborative co-parenting participants and the legal professionals would be interviewed individually. Initially group interviews were considered for the co-parenting participants because they often formed part of a family unit that consisted of three, four and in one case six individuals. May argues that 'we should also be sensitive to group and individual interviews producing *different* perspectives on the *same* issue'.²⁰⁰ Frey and Fontana note that 'group interviewing will provide data on group interaction, on realities as defined in a group context, and on interpretations of events that reflect group input'.²⁰¹ However, the research questions of this study are not primarily

¹⁹⁸ Jane E Tausig and Ellen W Freeman, 'The Next Best Thing to Being There: Conducting the Clinical Research Interview by Telephone' (1988) 58 *American Journal of Orthopsychiatry* 418, 420.

¹⁹⁹ JE Sturges and KJ Hanrahan, 'Comparing Telephone and Face-to-Face Qualitative Interviewing: A Research Note' (2004) 4 *Qualitative Research* 107.

²⁰⁰ Tim May, *Social Research : Issues, Methods and Process*, vol 3rd (Open University Press 2011) 138.

²⁰¹ James H Frey and Andrea Fontana, 'The Group Interview in Social Research' (1991) 28 *The Social Science Journal* 175, 175.

concerned with investigating group dynamics in relation to this issue and as a result group interviews were ruled out.

A number of studies on reproductive decision-making have used couple interviews about having children because this is a joint decision.²⁰² However, given that collaborative co-parenting necessarily involves parenting relationships beyond the intimate couple relationship, this method did not seem appropriate. As Dempsey found in her study, '[i]ndividual interviews were sought for this study because varied relationship combinations beyond the couple are known to be relevant in the lesbian and gay planned parenthood context'.²⁰³ What is more, researchers have suggested that couple interviews might produce more limited data than individual interviews, as participants may be less willing to discuss sensitive issues or areas of conflict in front of their partner.²⁰⁴ Some researchers have interviewed couples together and separately on the basis that what the participant says in each interview can be compared.²⁰⁵ However, during the process of ethical review the potential psychological stress this might cause participants was considered and the idea was not pursued.

The study focused on the subjective meanings that research participants assign relationships within their family as well as how this relates to legal recognition, which the interview schedule was designed to elicit. The interview schedule²⁰⁶ was divided into two sections, each covering approximately half of the interview.

²⁰² See for example Gay Becker, *The Elusive Embryo: How Women and Men Approach the New Reproductive Technologies* (University of California Press 2000).

²⁰³ Dempsey, 'Beyond Choice Family and Kinship in the Australian lesbian and gay "baby boom"' (n 179) 92.

²⁰⁴ Jacqui Gabb, 'Querying the Discourses of Love: An Analysis of Contemporary Patterns of Love and the Stratification of Intimacy within Lesbian Families' (2001) 8 *The European Journal of Women's Studies* 313.

²⁰⁵ See for example Sara M Morris, 'Joint and Individual Interviewing in the Context of Cancer' (2001) 11 *Qualitative Health Research* 553; J Lindsay, 'Coupling Up' (La Trobe University, Melbourne 1997).

²⁰⁶ Included in appendix 1.

The first section was described as biographical in that it asked about the families' journeys to parenthood. For the interviews with legal professionals, this section focused on the types of parenting arrangements they had encountered and the factors they picked up on as being important to these families. In this section of the interview, participants discussed the type of family they were creating and revealed the difficulties they had encountered in relation to co-parenting. The intention here was to elicit short, topical 'life stories'²⁰⁷ about the participants' parenting journeys. This allowed research participants to explain fully their family's experiences while encouraging them to critically reflect on these.

The second section of the interview asked questions relating to the participants' thoughts on legal recognition, the role of written agreements and law reform. This section attempted to elicit responses in relation to certain themes, which had emerged from the doctrinal analysis such as the use of parental responsibility and the importance of legal parenthood. The data that resulted from these interviews, therefore, were not only participants' biographical narratives but also their reasoned position in terms of some of the discourses within the literature and case law.

However, unlike the first section of the interview, which concerned participants' own parenting journeys, the second section may have explored issues that did not relate as closely to participants' own experiences. For example, some participants made written agreements when setting up their parenting arrangement, whereas others did not. As well as exploring the reasons for this, it was also important to gauge participants' views on the legal consequences of these agreements, regardless of whether they had one or not. Vignettes were

²⁰⁷ Ken Plummer, *Documents of Life 2* (Sage 2001).

useful in this regard because it allowed the legal framework to be contextualised in a way that participants could relate to. As Stets and Serp observe, through the use of vignettes 'individuals typically are exposed to a hypothetical situation and asked to imagine how they would think, act, and feel as an actor or observer in the situation'.²⁰⁸ In this way the issues under discussion are made more concrete for the participants.²⁰⁹

In addition to this, vignettes are particularly useful for exploring sensitive topics, which issues around parenthood and parenting are, because, as Hughes highlights, they present the question in a less direct and threatening way.²¹⁰ As May stresses, vignettes also offer participants 'a safe place where they can talk about an issue that has affected their lives without requiring them to disclose their own experiences'.²¹¹ Although participants were asked to discuss their own experiences in detail in the first section of the interviews, the second section probed further about potential conflict that might arise, which participants may not have wished to expand on too much in relation to their personal experience. Moreover, vignettes are advantageous in eliciting normative responses,²¹² which in this context took the form of ascertaining what rights and responsibilities the law should recognise each of the adults as having in a collaborative co-parenting situation.

²⁰⁸ Jan E Stets and Richard T Serp, 'Identity Theory' in John Delamater and Amanda Ward (eds), *Handbook of Social Psychology* (Springer 2013) 39.

²⁰⁹ Christine Barter and Emma Renold. 'The use of vignettes in qualitative research' (1999) 25 *Social Research Update*.

²¹⁰ Rhidian Hughes, 'Considering the Vignette Technique and Its Application to a Study of Drug Injecting and HIV Risk and Safer Behaviour' (1998) 20 *Sociology of Health and Illness* 381.

²¹¹ Vanessa May, 'Researching Personal Life' in Vanessa May (ed), *Sociology of Personal Life* (Palgrave Macmillan 2011) 164.

²¹² Bryman, *Social research methods* (n 170) 245.

It is important to acknowledge that qualitative data analysis is a somewhat organic process that does not necessarily involve the straightforward application of a set of techniques to produce neat and tidy results.²¹³ A crucial aspect of the data analysis process in qualitative research involves navigating ‘how to keep the participants’ voices and perspectives alive, while at the same time recognizing the researcher’s role in shaping the research process and product.’²¹⁴ It is especially important to accurately and respectfully represent what participants have communicated because of the level of trust involved when sharing these highly personal experiences.²¹⁵ This can be a difficult undertaking given the large volume of material qualitative interviewing produces alongside other sources such as case law and secondary literature. Having said that, as other researchers have acknowledged, none of this ‘undermine[s] as futile the attempt to find out about social phenomena through the act of talking to, and writing about, real people. Instead, the aim is to maintain a degree of healthy scepticism about achieving a singular ‘truth’. The end result is best thought of as part of an ongoing conversation with a community of interested readers and fellow writers’.²¹⁶

Data analysis began concurrently with ongoing data collection as interviews were transcribed on a continuing basis shortly after each interview was conducted. A

²¹³ See for example, M Alvesson, *Post Modernism and Social Research* (Open University Press 2002).

²¹⁴ Natasha Mauthner and Andrea Doucet, ‘Reflections on a Voice-Centred Relational Method: Analysing Maternal and Domestic Voices’ in Jane Ribbens and Rosalind Edwards (eds), *Feminist Dilemmas in Qualitative Research: Public Knowledge and Private Lives* (Sage 1998) 119..

²¹⁵ Janet Finch, “‘It’s Great to Have Someone to Talk to’: Ethics and Politics of Interviewing Women’ in C Bell and H Roberts (eds), *Social Researching: Politics, Problems, Practice* (Routledge 1984); M Patton, *Qualitative Research and Evaluation Methods* (3rd Ed, Sage 2002) 405 – 8.

²¹⁶ Dempsey, ‘Beyond Choice Family and Kinship in the Australian lesbian and gay “baby boom”’ (n 179) 96.

number of the interviews were manually transcribed with the remainder being transcribed by a professional transcriber. The decision was taken to involve a professional transcriber because of the depth of the interviews and the time-consuming nature of interviews, which other researchers have also noted.²¹⁷ Although engagement with and immersion in the data occurred while reading over these transcripts, it is also important to be involved in the actual transcription process by manually transcribing some interviews, which some have argued is influenced by the values and theoretical framework of the transcriber.²¹⁸

During the transcription process/reading of the transcripts, any initial ideas about emerging themes were noted down. Initially potential codes and themes in the printed transcripts were identified manually. Other researchers have noted the repeated, thorough reading of transcripts and cross-referencing of themes that this method requires allows for greater immersion in the data.²¹⁹ This stage of familiarisation with the data is the initial step in various methods of qualitative data analysis. Drawing on Dempsey's 2006 study²²⁰ this study combines an interpretative case study approach to the data resulting from the biographical section of the co-parenting interviews with a thematic analysis of the interviews with legal professionals and the second part of the co-parenting interviews.

The interpretative case study approach to the co-parenting interviews involved creating 'family portraits' based on the responses given by participants as the basis of the analysis. Where more than one participant was interviewed from one

²¹⁷ Hilary Arksey and Peter T Knight, *Interviewing for Social Scientists Approaches to Interviewing* (Sage 1999) 88.

²¹⁸ Audra Skukauskaitė, 'Transparency in Transcribing: Making Visible Theoretical Bases Impacting Knowledge Construction for Open-Ended Interview Records' (2012) 13 *Forum Qualitative Social Research* 14.

²¹⁹ Leanne Smith, 'The Problem of Parenting in Lesbian Families and Family Law' (Queen's University Belfast 2007) 110.

²²⁰ Deborah Dempsey, 'Beyond Choice Family and Kinship in the Australian lesbian and gay "baby boom"' (n 182).

poly-parenting family, the overall portrait provided a richer picture of family life but it was sometimes necessary to accommodate potentially conflicting viewpoints about how the family was created or the meaning attached to certain family practices. These conflicts were often very instructive as they spoke to the potential for disputes and how this had been resolved within the family. A summary version of these family portraits form the basis of Chapter Six.

At an early stage in the project, grounded theory was considered as a potential approach to the data analysis (which would have inevitably informed other stages of the research).²²¹ However, the research questions of this study are primarily aimed at exploring concepts and themes present in the legal framework in relation to the lived experiences of collaborative co-parenting families. Given the way concepts and theory from the doctrinal analysis and literature review were drawn on to inform the empirical analysis of the second section of the interviews, thematic analysis was chosen, rather than a grounded theory approach.

As a general proposition ‘thematic analysis involves the searching *across* a data set – be that a number of interviews or focus groups or a range of texts – to find repeated patterns of meaning.’²²² This accords with Pope *et al.*’s suggestion that ‘[i]n most qualitative analyses the data are preserved in their textual form and “indexed” to generate or develop analytical categories and theoretical explanations’.²²³ Pope *et al.* go on to explain that:

Qualitative research uses analytical categories to describe and explain social phenomena. These categories may be derived inductively—that is, obtained gradually from the data—or used

²²¹ Corbin and Strauss (n 186) 105.

²²² Virginia Braun and Victoria Clarke, ‘Using Thematic Analysis in Psychology’ (2006) 3 *Qualitative Research in Psychology* 77, 86.

²²³ Catherine Pope, Sue Ziebland and Nicholas Mays, ‘Analysing Qualitative Data’ (2000) 320 *British Medical Journal* 114, 114.

deductively, either at the beginning or part way through the analysis as a way of approaching the data.

As discussed above the study does not adopt a primarily inductive approach as grounded theory would require. Instead categories and concepts derived from the doctrinal analysis were used to guide the analysis of the empirical data. Pope *et al.* note that such deductive analysis is being increasingly used particularly in the 'framework approach' they describe.²²⁴

The framework approach to qualitative analysis requires the identification of a thematic framework. As Pope *et al.* describe it, '[t]his is carried out by drawing on a priori issues and questions derived from the aims and objectives of the study as well as issues raised by the respondents themselves and views or experiences that recur'. Examples of a priori issues deriving from the aims of the present study would include implicit heteronormative bias in the legal framework and the privileging of the intimate couple relationship. This was reflected in the experiences of a number of participants in the interactions with officialdom such as at school or when trying to travel internationally with their child. In this way, the combination of inductive and deductive approaches to thematic analysis within the context of the framework approach could be seen as enhancing the rigour of the analysis.²²⁵

The process of thematic analysis, broadly as outlined by Braun and Clark, was conducted on the case law in order to generate part of the thematic framework. This involved close *in vivo* coding of the judgments using NVivo 10 drawing on

²²⁴ *Ibid.*

²²⁵ See for example Jennifer Fereday and Eimear Muir-Cochrane, 'Demonstrating Rigor Using Thematic Analysis: A Hybrid Approach of Inductive and Deductive Coding and Theme Development' (2006) 5 International Journal of Qualitative Methods 80 <http://www.ualberta.ca/~iiqm/backissues/5_1/pdf/fereday.pdf>.

participants' own language to generate codes. These were then grouped together and refined into more abstract, theoretically-informed axial codes and then collated into broader themes.²²⁶ The interviews were then coded in a similar way using a paper-based approach. I found that this facilitated closer engagement with the empirical data where using NVivo might have created some distance.

These codes were then combined with the themes generated from the case law analysis, in order to produce more refined themes, which formed the basis of the further analysis. Common themes between the case law and interview analysis were identified and this was used as the thematic framework in a process of 'indexing', 'charting' and 'mapping' of the data in order to advance plausible arguments and interpretations based on this combined analysis in order to answer the research questions. As Pope *et al.* identify '[t]he process of mapping and interpretation is influenced by the original research objectives as well as by the themes that have emerged from the data themselves'.²²⁷

The thematic analysis provides a plausible representation of the views of these alternative families, which may be transferrable to other families and is therefore relevant, but not decisive, for family law and policy. This is combined, in Chapter Seven with insights from the doctrinal analysis and review of the literature, in order to examine the different perspectives that emerge and contribute to our understanding of the impact of the law on these families.

²²⁶ See the six stage approach outlined in Braun and Clarke, 'Using thematic analysis in psychology' (n 219) 87.

²²⁷ Pope *et al.* (n 220) 116.

Ethical Considerations

Ethical approval for this project was obtained from the University of Exeter College of Social Science and International Studies Ethics Committee (Certificate Reference: 11.07.11-xxii).²²⁸ Ethics approval was also obtained for the overseas fieldwork from the University of BC Behavioural Research Ethics Board (Certificate Reference: H1300073).²²⁹ As part of the participant recruitment, participants were asked to complete a brief online form with their contact information and details of their family. It was at this point they were provided with information about the study and were asked to complete an online consent form, in order to ensure there was informed consent. Some of the salient information (such as issues around confidentiality, anonymity and right to withdraw at any time) were reiterated at the start of the interviews. Participants were asked if they were happy to proceed and whether they had any questions.

Although the ethical review process determined that this was a low risk study, the interviews were exploring sensitive issues and it was, therefore, necessary to consider the risks associated with this in advance. Therefore, the researcher would have been able to refer participants to appropriate support services (and even legal services) had the interview caused any difficulties for any of the participants. In addition to this, everything participants said was treated as confidential. In order to ensure this, transcripts were anonymised, data were securely stored and pseudonyms were used in writing up the thesis.²³⁰

²²⁸ See Appendix 4.

²²⁹ See Appendix 4.

²³⁰ This was done in compliance with the Data Protection Act 1998 and the University of Exeter, School of Law's Ethical Checklist.

Conclusion

This chapter has demonstrated how the combination of qualitative, socio-legal and comparative research methodologies has been a beneficial way of investigating the research questions set out in the introductory chapter. This chapter has also explained how the research was conducted and why particular decisions were made in relation to sample selection, participant recruitment, data collection and analysis. In addition to an explanation of the research methodology, the previous section has also outlined the composition of the sample.

Part Two: Comparative Legal Insights

‘I believe very strongly that everybody should be entitled to have a family and that's really the basis upon which I and any other person in my situation should be worth their salt’.

- Lizzie, Solicitor in E&W

‘My views are that I would like to see or support any kind of parental unit and family unit that they want to create and see that there's adequate support for what's intended by them’.

- David, Attorney in BC

Part Two consists of three chapters, each of which explores a different facet of the legal regulation of collaborative co-parenting. As such, each of the chapters contains detailed doctrinal analysis so as to explore how well the legal framework in E&W, when set in a comparative context, reflects and accommodates the procreative autonomy of gay men and lesbians engaging in or considering collaborative co-parenting. Implicit in this approach is the inclusion, in each of the chapters, of comparative legal perspectives mainly from BC and Ontario but also drawing on a small number of other jurisdictions. Each of these chapters also draws on critical perspectives that emerge from the socio-legal literature as well as analysis of the interviews with legal professionals in Canada and the UK.

This allows for a detailed consideration, in '**Chapter Three: Collaborative Co-Parenting and the Hierarchy of Families – Navigating Legislative Tensions**', of how the legislative framework continues to perpetuate a hierarchy of families to the detriment of collaborative co-parenting families. '**Chapter Four: Normativity and Vulnerability – Judicial Resolution of Collaborative Co-Parenting Disputes**' then considers the case law in more depth and how a heteronormative conception of the family impacts upon the judicial resolution of collaborative co-parenting disputes. Finally, '**Chapter Five: Valuing Autonomy – Indeterminate Intentions and Collaborative Parenthood**' considers the role that intentions do and should play when deciding issues of parental responsibility and contact.

Chapter Three: Collaborative Co-Parenting and the Hierarchy of Families - Navigating Legislative Tensions

Introduction

This chapter examines the legislative frameworks that exist in England & Wales (E&W) and various provinces in Canada around parenthood in collaborative co-parenting situations. In doing this, it explores the ways in which collaborative co-parenting arrangements are excluded from the legal framework in E&W by the way it establishes a hierarchy of families through privileging those family forms that conform to a heteronormative understanding of the family. This chapter contrasts reforms instituted by the Human Fertilisation and Embryology Act 2008 (HFEA 2008) with the more far reaching changes made in British Columbia (BC) by the Family Law Act 2013 (FLA 2013). The interaction between the legislatively prescribed concept of legal parenthood and the more flexible use of parental responsibility in E&W will also be considered.

Legislative Reform in England & Wales

Given the focus of the thesis on gay and lesbian collaborative co-parenting arrangements it is important first to consider the legal recognition that the law

affords gay and lesbian parents, who conceive either as single parents or as a same-sex couple. Historically, recognition of parent-child relationships has been problematic in E&W (and internationally)²³¹ in relation to non-traditional, and in particular same-sex, families. Social attitudes towards same-sex relationships have changed considerably in the period between the enactment of the Civil Partnership Act 2004²³² and the recognition of same-sex marriage in E&W²³³ and Scotland.²³⁴ Alongside the increasing recognition of same-sex unions between adults, in the UK and other countries around the world, same-sex parenting is becoming more visible and increasingly recognised.²³⁵ Gradually, legislators and courts in various countries are making progress towards facilitating the creation of same-sex families and recognising the parent-child relationships in these families.²³⁶ Despite this progress, there are arguably still gaps between the needs of same-sex families and the rights and responsibilities UK legislation is willing to confer on them, which still bears the hallmarks of hetero-normative assumptions about parenting.

²³¹ See for example Katharina Boele-Woelki and Angelika Fuchs (eds), *Legal Recognition of Same-Sex Relationships in Europe: National, Cross-border and European Perspectives* (Intersentia 2012).

²³² See the discussion of the parliamentary debates that led to the passage of the Civil Partnership Act in Carl Stychin, 'Not (Quite) A Horse And Carriage' (2006) 14 *Feminist Legal Studies* 79, 80-81.

²³³ 'Marriage (Same-Sex Couples) Act 2013.

²³⁴ 'Marriage and Civil Partnership (Scotland) Act 2014.

²³⁵ See for example David Hill, 'The Recognition of Homosexual Parents in the United Kingdom' in Katharina Boele-woelki and Tone Sverdrup (eds), *European challenges in contemporary family law* (Intersentia 2008)..

²³⁶ See for example Katharina Boele-Woelki and Angelika Fuchs (eds), *Legal Recognition of Same-Sex Relationships in Europe: National, Cross-border and European Perspectives* (Intersentia 2012); Machteld Vonk, *Children and their parents* (Intersentia 2007); Anna Singer, 'Equal Treatment of Same-Sex Couples in Sweden' in Bill Atkin (ed), *International Survey of Family Law*, 2010; Bill Atkin and Fareda Banda (eds), 'Family, Pluralism and Equality: Marriage and Sexual Orientation in Argentine Law' in *International Survey of Family Law*, 2011; Bill Atkin and Fareda Banda (eds), 'Homoaffective Parentage in Relation to Medically Assisted Reproduction: a Parallel between Brazil and Portugal' in *International Survey of Family Law*, 2011; Marianna Chaves, 'Same-Sex Families in Brazil: An Overview after the Trial of ADI and ADPF 132 by the Supreme Court' in Bill Atkins and Fareda Banda (eds), *International Survey of Family Law*, 2014.

In this regard, there is a distinction to be drawn between single women and female couples, on the one hand, and single men and male couples, on the other. In some circumstances, it is possible for a single woman or a female couple to be a child's sole legal parent(s) from birth. However, although it may be possible for a single man to be one of the child's legal parents at birth, both partners in a male couple will never be considered to be the child's legal parents from birth. This distinction in terms of legal parenthood for men and women derives from the common law principle that parturition identifies a child's mother.²³⁷ This position is enshrined in recently reformed legislation governing parenthood following assisted reproduction.²³⁸ Therefore, upon birth, one of the child's, and perhaps his or her only, legal parent(s) will be his or her birth mother.²³⁹

HFEA 2008 makes it clear that a child can only have one other legal parent in addition to the birth mother.²⁴⁰ However, who this second parent will be depends on the circumstances of conception. If the child is conceived through sexual intercourse then the common-law presumption of *pater est quem nuptiae demonstrant* will operate, which is rebuttable by DNA evidence.²⁴¹ The effect of this is that, on birth, the legal father of a child born through sexual intercourse will be the genetic father or, if no DNA tests have been conducted, the mother's husband if she has one. Although conception through sexual intercourse could conceivably feature in collaborative co-parenting arrangements for a variety of

²³⁷ *Amphill Peerage Case* [1977] AC 547, 577.

²³⁸ Human Fertilisation and Embryology Act 2008 s 33(1).

²³⁹ Compare the position in France where there is the possibility of having motherless children because women have the right to conceive anonymously. See Nadine Lefaucheur, 'French Tradition of Anonymous Birth: The Lines of Argument' (2004) 18 *International Journal of Law, Policy and the Family* 319.

²⁴⁰ Human Fertilisation Act 2008 ss 36 and 42.

²⁴¹ Family Law Reform Act 1969 s 26.

reasons, the evidence from the case law and empirical studies is that some form of assisted reproduction is more common.²⁴²

Even if conception occurs through assisted reproduction the law distinguishes between situations where single women and female couples not in a civil partnership/marriage conceive at home, on the one hand, as compared to single women and female couples who conceive at a licensed fertility clinic or female couples in a civil partnership/marriage who conceive at home, on the other. In the former situation, the common-law rules apply, whereas female civil partners/married couples are both treated as the child's parents from birth, regardless of whether assisted conception occurs at a clinic or elsewhere, provided no absence of consent can be shown.²⁴³ In addition to this, where the appropriate consent forms have been signed,²⁴⁴ female couples who are not in a civil partnership/marriage can be the legal parents on birth provided they are treated at a licensed fertility clinic.²⁴⁵ In each of these cases, the biological father would not be considered one of the child's legal parents.²⁴⁶

The position in relation to male parents who conceive through assisted reproduction is different. Because the birth mother is always initially one of the child's two legal parents, a male couple cannot be considered the child's legal parents from birth. However, section 54 of the HFEA 2008 allows a male couple, who are either civil partners or living in an 'enduring family relationship' and one of whom is the child's biological father, to apply for a parental order, between six

²⁴² See Fiona J Kelly, *Transforming law's family the legal recognition of planned lesbian motherhood* (University of British Columbia Press 2011) 15 – 16.

²⁴³ 'Human Fertilisation and Embryology Act 2008 s 42.

²⁴⁴ For an example of where the appropriate consent forms had not been signed see *AB v CD* [2013] EWHC 1418 (Fam).

²⁴⁵ Human Fertilisation and Embryology Act 2008 ss 43 and 44.

²⁴⁶ *Ibid* s 45(1).

weeks and six months after birth, making them and not the gestational mother (provided she consents) the legal parents. This option is not, however, available for single men.²⁴⁷ Therefore, even if the birth mother was happy for a man to be the sole legal parent, for example in a surrogacy situation, this would only be possible following adoption.

While the legislative framework does facilitate the automatic legal recognition of female-led parenting and provides mechanisms for acquiring the legal recognition of male-led parenting, the restriction to two parents limits the possibilities open for the legal recognition of collaborative co-parenting arrangements involving more than two parents. The legislative provisions relating to legal parenthood, however, need to be considered in light of the separate legal concept of parental responsibility, which currently may be of more utility in terms of collaborative co-parenting.

Parental responsibility is defined in the Children Act 1989 as ‘all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property’.²⁴⁸ As well as automatically becoming a legal parent, a birth mother also acquires parental responsibility for her child upon birth. Thinking particularly about collaborative co-parenting situations involving a female couple, the mother’s female partner would acquire parental responsibility on birth if the mother’s partner was the child’s legal parent under HFEA 2008 and was either in a civil partnership with the mother at any time between conception and birth,²⁴⁹ was registered as the child’s second parent on the birth certificate or

²⁴⁷ See for example *B v C (Surrogacy: Adoption)* [2015] EWFC 17.

²⁴⁸ Children Act 1989 s 3.

²⁴⁹ Family Law Reform Act 1987 s 1(3)(bb).

had entered into a parental responsibility agreement with the mother.²⁵⁰ The same would be true, *mutatis mutandis*, of the biological father.²⁵¹

In terms of acquiring parental responsibility, the Children Act makes a seemingly unwarranted distinction between unmarried fathers, on the one hand, and female partners who are not in a civil partnership/marriage, on the other. As mentioned above, unmarried fathers, such as the biological father in a collaborative co-parenting arrangement, are able to acquire parental responsibility by making an agreement with the mother or by being registered on the birth certificate. These options are, however, only open to female partners who are considered legal parents under HFEA 2008. Therefore, as with legal parenthood, female partners who are not in a civil partnership and conceive at home are in a more precarious position. In that situation, the mother's female partner would have to either enter into a civil partnership with the mother and make a parental responsibility agreement as a step-parent²⁵² or be granted a child arrangements order naming her as one of the people the child is to live with, which also confers parental responsibility.²⁵³

Unlike legal parenthood, it is possible for the court to make a child arrangements order in favour of more than two adults, including people who are not the child's legal parents. Various adults are entitled to apply for a child arrangements order as a matter of right. These include the child's parent, guardian or step-parent with parental responsibility;²⁵⁴ a spouse or civil partner where the child is treated as a child of the family; and someone with whom the child has lived for at least three

²⁵⁰ Children Act 1989 s 4ZA.

²⁵¹ *Ibid* s 4.

²⁵² *Ibid* s 4A.

²⁵³ *Ibid* s 12(1) and (2).

²⁵⁴ *Ibid* s 10(4).

years.²⁵⁵ Other people such as a mother's female partner where conception occurred at home and who is not in a civil partnership with the mother must apply to the court for leave to apply for a child arrangements order, which can confer parental responsibility. The biological father may also be in this position if he is not considered to be a legal parent.²⁵⁶

The centrality of lesbian parenting as the type of same-sex parenting that is embedded in the legal imagination²⁵⁷ can be seen in the way the parenthood provisions in part two of the Human Fertilisation and Embryology Act 2008 focuses on the legal position of lesbian couples as parents without explicitly considering the position of male couples. This suggests that, rather than attempting to address the needs of same-sex parents generally, the legislation was focused primarily on the legal recognition of lesbian parenting. Mr Justice Baker expressed a similar understanding of the 2008 Act in the 2013 case of *Re G; Re Z*, where he stated that 'the policy underpinning [the 2008 Act] reforms is an acknowledgement that alternative family forms without fathers are sufficient to meet a child's need.'²⁵⁸

The sufficiency of women-led families without fathers, therefore, is primarily what underpins reform in this area. That is to say, that legal discourse purports to promote the equality of lesbian families and different sex families. Much of the commentary, consequently, is directed at the extent to which the law achieves this aim. However, this exists alongside fathers' rights discourse in the context of

²⁵⁵ *Ibid* s 10(5).

²⁵⁶ For an example of this see *Re G (A Minor)*; *Re Z (A Minor)* [2013] EWHC 134.

²⁵⁷ For more on the limitations and assimilationist approach of the legal imagination in this regard see Caroline Jones, 'The Impossible Parents in Law' in Craig Lind and others (eds), *Taking Responsibility, Law and the Changing Family* (Ashgate Publishing 2011); Julie Wallbank and Chris Dietz, 'Lesbian mothers, fathers and other animals: is the political personal in multiple parent families?' [2013] *Child and Family Law Quarterly* 451, 459.

²⁵⁸ *Re G (A Minor)*; *Re Z (A Minor)* (n 253) [113].

post-separation different sex parenting, which emphasizes the importance of fathers to children. Given this, it is a logical concern that fathers' rights discourse may influence the judicial interpretation of legislation supposedly predicated on the sufficiency of lesbian families in such a way that may result in the father having a stronger legal relationship with the child than would otherwise be the case. Therefore, it is important to acknowledge the broader social context in which these scholars are writing, which asserts the importance of fathers and biology.

The central claim with respect to the heteronormativity of the legal regulation of parenthood is that it is wedded to the notion of dyadic gendered parenting.²⁵⁹ In relation to lesbian couples who become parents the dyadic or two-parent element is not necessarily problematic, particularly for those couples who wish to form a homonuclear family.²⁶⁰ However, the gendered element becomes problematic where the lesbian couple wish to form a homonuclear family without the involvement of the biological father. This type of family has garnered both legislative and judicial support and commentators (such as Harding)²⁶¹ are particularly critical of judicial interventions that might jeopardise this.

²⁵⁹ For more on this see Susan B Boyd, 'Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility' (2007) 25 Windsor Yearbook of Access to Justice 63–94; Julie McCandless and Sally Sheldon, "The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family" (2010) 73 Modern Law Review 175.

²⁶⁰ This phrase was used in the Australian case *Re Patrick (An Application Concerning Contact)* (2002) 218 Fam. L. R 579. Discussed in Fiona J Kelly, 'Redfining Parenthood: Gay and Lesbian Families in the Family Court - the Case of *Re Patrick*' (2002) 16 Australian Journal of Family Law 1.

²⁶¹ See for example Rosie Harding, '(Re)inscribing the Heteronormative Family' in Robert Leckey (ed), *After legal equality: family, sex, kinship*, 2014; K Arnup and Susan B Boyd, 'Familial Disputes? Sperm Donors, Lesbian Mothers and Legal Parenthood' in D Herman and Carl Stychin (eds), *Legal Inversions* (Temple University Press 1995); Nancy Polikoff, 'Breaking the Link Between Biology and Parental Rights in Planned Lesbian Families: When Semen Donors are not Fathers' (2000) 2 Georgetown Journal of Gender & the Law 57; Nancy Polikoff, 'The Deliberate Construction of Families Without Fathers: Is it an Option for Lesbian and Heterosexual Mothers?' (1996) 36 Santa Clara Law review 375; Nancy Polikoff, 'This Child

However, the parenting practices and families that lesbians form are not homogenous. While some lesbians wish to form homonuclear families others seek to challenge the traditional model of the family. For those lesbians who seek to engage in a form of collaborative co-parenting it is the two-parent rather than gendered element of the heteronormative legal framework that is problematic. Therefore, while some may perceive a legal framework that facilitates the involvement of the biological father alongside a lesbian couple as heteronormative because it promotes gendered parenting,²⁶² others may perceive a legal framework that did not facilitate the involvement of the biological father alongside a lesbian couple as heteronormative because it promoted dyadic parenting based on conjugality.²⁶³

Given that being dyadic, gendered and resulting from a conjugal relationship are each elements of heteronormative parenting, it is difficult to reconcile the different challenges to heteronormativity that commentators make based on only one of these. Therefore, it is suggested here that a somewhat more nuanced approach is required which recognises that legal provisions that are potentially heteronormative in one respect may in fact be necessary in order to resist heteronormativity in other ways. In doing this, however, it is important to make sure that the justifications behind legislative and judicial approaches are in line

Does have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families' (1990) 78 Georgetown Law Journal 459.

²⁶² *Ibid.*

²⁶³ Fred A Bernstein, 'The Child Does Have Two Mothers...And a Sperm Donor with Visitation' (1996) 22 New York University Review of Law & Social Change 1–58; Melanie B Jacobs, 'Why Just Two - Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents' (2007) 9 Journal of Law & Family Studies 309–340; Leanne Smith, 'Is Three a Crowd: Lesbian Mothers' Perspectives on Parental Status in Law' (2006) 18 Child and Family Law Quarterly 231; McCandless and Sheldon, 'The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family' (n 256).

with this way of thinking and are not merely disguised versions of heteronormativity.²⁶⁴

The explanatory note to Part Two of the HFEA 2008 indicates one of its purposes is to bring the position of female couples 'into line' with that of different-sex couples through the enactment of legal provisions which are the same or at least substantially similar.²⁶⁵ This aim, predicated as it is on the sameness of different-sex and same-sex couples is not uncontroversial, not least because it fails to accommodate potential differences in the types of families the two groups may wish to form.

In some ways, the apparent tension within attempts to resist heteronormative conceptions of parenting relates to the long-standing tension, evident in the debates around same-sex marriage, between arguing for equality based on the sameness and assimilation of same-sex families to heterosexual norms or based on difference and resistance to the hegemonic conception of the family. In the same-sex marriage debate²⁶⁶ some radical feminist critiques have tried to demonstrate that marriage is not an institution that same-sex couples should buy into.²⁶⁷ Other commentators have focused on the heteronormative way marriage has been characterised rather than the intrinsically flawed nature of marriage as an institution.²⁶⁸ Harding, for example, argues in the context of E&W that, '[t]he parliamentary discourse about procreation as the foundation of marriage is,

²⁶⁴ For more on this see page 152.

²⁶⁵ Explanatory Note, Human Fertilisation and Embryology Act 2008, C 22 [179] – [180].

²⁶⁶ See for example Rosemary Auchmuty, 'Same-sex Marriage Revived: Feminist Critique and Legal Strategy' (2004) 14 *Feminism & Psychology* 101 – 126; Rosie Harding, 'Sir Mark Potter and the Protection of the Traditional Family: Why Same-Sex Marriage is (Still) a Feminist Issue' (2007) 15 *Feminist Legal Studies* 223–34; Nicola Barker, *Not the marrying kind: a feminist critique of same-sex marriage* (Palgrave Macmillan 2012).

²⁶⁷ Auchmuty (n 263).

²⁶⁸ Harding, '(Re)inscribing the Heteronormative Family' (n 263).

therefore, better read as another means of protecting (heteronormative) marriage from the threat of same-sex couples'.²⁶⁹

Provincial vs. Federal Legislation in Canada

One of the reasons that Canadian jurisdictions are useful comparators is that, in the words of one commentator, 'Canada is a global leader in the worldwide civil rights movement for the equality of same-sex families'.²⁷⁰ However, the legal recognition of same-sex families is not uniform throughout Canada, with some jurisdictions affording a greater level of recognition than others. Therefore, the way that same-sex parenting and parenthood following assisted reproduction is regulated in the various Canadian provinces and territories provides an important backdrop to a discussion surrounding the possibilities that exist for recognising parent-child relationships in collaborative co-parenting situations. Of the thirteen provinces and territories, only Quebec,²⁷¹ Alberta,²⁷² and BC²⁷³ have a comprehensive framework to establish legal parenthood following assisted reproduction. Reforms in other provinces, such as Saskatchewan, have been piecemeal and have largely related to birth registration.²⁷⁴ This lacuna would have been addressed by the Uniform Child Status Act, which was drafted in 2010 but has not been implemented by the individual provinces and territories.²⁷⁵

²⁶⁹ *Ibid* 191.

²⁷⁰ Joanna Radbord, 'Same-Sex Parents and the Law' (2013) 33 Windsor Review of Legal and Social Issues 1, 22.

²⁷¹ Quebec Civil Code arts 538 – 542.

²⁷² Alberta Family Law Act s 8.1.

²⁷³ British Columbia Family Law Act, Division 2.

²⁷⁴ Wanda Wiegers, 'Assisted Conception and Equality of Familial Status in Parentage Law' (2012) 28 Canadian Journal of Family Law 147, 148.

²⁷⁵ Civil Law Section of the Uniform Law Conference of Canada, 'Uniform Child Status Act' (2010).

As a matter of constitutional law, legal parenthood on birth in Canada is dealt with at the provincial rather than federal level.²⁷⁶ The Canadian Federal Government attempted to regulate parenthood following assisted reproduction, amongst other things, in the 2006 Assisted Human Reproduction Act (AHRA). However, the Quebec government successfully challenged the validity of these provisions before the Supreme Court of Canada in the case of *Reference re Assisted Human Reproduction Act*²⁷⁷ on the basis that they exceeded the federal government's constitutionally circumscribed legislative authority.

In terms of same-sex parenting through ART, the Assisted Human Reproduction Act (AHRA) establishes that 'persons who seek to undergo assisted reproduction procedures must not be discriminated against, including on the basis of their sexual orientation or marital status'.²⁷⁸ The provisions of the AHRA would not have been an unqualified success in this regard. Same-sex families would have been considerably disadvantaged by the restriction on the use of sperm from men who have had sex with men, for example.²⁷⁹ In addition to this, the act raises questions about the legality of home insemination, a practice which is wide spread in the creation of same-sex families.²⁸⁰

However, what protection AHRA did afford is preferable to the absence of any regulation, other than where individual provinces and territories choose to legislate. As a result of Quebec's constitutional challenge, the Supreme Court

²⁷⁶ According to Canadian Constitution Act 1987, s 92 (13), property and civil rights fall within the purview of the provinces, except marriage and divorce, which, according to s 91(26) fall within the federal legislature's remit. In practice the formalities surrounding marriage are dealt with at the provincial level, whereas the capacity to marry is determined at federal level.

²⁷⁷ *Reference re Assisted Human Reproduction Act* 2010 SCC 61.

²⁷⁸ Assisted Human Reproduction Act S.C. 2004, c. 2, s 2 (e).

²⁷⁹ Angela Cameron, 'Regulating the Queer Family: The Assisted Human Reproduction Act Case Comment' (2008) 24 Canadian Journal of Family Law 101, 110.

²⁸⁰ Fiona Kelly, 'An Alternative Conception: The Legality of Home Insemination under Canada's Assisted Human Reproduction Act' (2010) 26 Canadian Journal of Family Law 149.

struck out many of the provisions of the AHRA, leaving a lacuna in the regulation of assisted reproductive technologies in the majority of provinces apart from Quebec. As Cameron and Gruben highlight:

[t]he best examples are in family law where provinces and territories hold clear jurisdiction. For example, while the AHRA protects the anonymity of gamete donors, the legal status of the donor remains undetermined in most provinces, despite the fact that legal parentage falls squarely within their domain.²⁸¹

Legal parentage following assisted reproduction has now been addressed through legislation in BC, Quebec and Alberta but this is not the case in many other provinces, such as Ontario, where ‘the rights and responsibilities of the donor vis a vis donor offspring are left undefined’.²⁸²

Parental Projects in Quebec’s Civil Law

It is worth considering the framework surrounding legal parentage following assisted reproduction in Quebec in some depth because it is one of the few jurisdictions to have such a legislative framework and it is also where many of the legal cases have been decided.²⁸³ The civil law jurisdiction of Quebec relies on the concept of filiation, which, while being a distinct concept, performs many of the functions of legal parenthood in common-law jurisdictions.²⁸⁴ The Quebec

²⁸¹ Angela Cameron and Vanessa Gruben, ‘Quebec’s Constitutional Challenge to the Assisted Human Reproduction Act: Overlooking Women’s Reproductive Autonomy’ in Stephanie Patterson and others (eds), *Fertile Ground: Exploring Reproduction in Canada* (Queen’s University Press 2011) 146.

²⁸² *Ibid.*

²⁸³ For a more comprehensive discussion of the legal position in Quebec see Leckey Robert, “Where the Parents Are of the Same Sex: Quebec’s Reforms to Filiation” (2009) 23 *International Journal of Law, Policy and the Family* 62; Robert Leckey, “The Practices of Lesbian Mothers and Quebec’s Reforms The Practices of Lesbian Mothers and Quebec ’ S Reforms” (2011) 23 *Canadian Journal of Women and the Law* 579; Angela Campbell, “Conceiving Parents Through Law” (2007) 21 *International Journal of Law , Policy and the Family* 242.

²⁸⁴ For a more detailed discussion of filiation see Robert Leckey, “ ‘ Where the Parents Are of the Same Sex ’: Quebec’s Reforms to Filiation” [2009] *International Journal of Law , Policy and the Family* 62, 63 – 65.

legislature amended Quebec's Civil Code (CCQ) in 2002 to allow for the possibility of recognising two people of the same sex as the parents of a child from birth.²⁸⁵ In order for two women to be considered the parents of a child born through assisted reproduction, they must have been party to a parental project, which 'exists from the moment a person alone decides or spouses by mutual consent decide, in order to have a child, to resort to the genetic material of a person who is not party to the parental project'.²⁸⁶ As the section will go on to discuss, the term spouse includes *de facto* spouses who live together. In such a situation, only the two women would be the child's parents and not the biological father.²⁸⁷

Two cases decided since the 2002 amendments to Quebec's Civil Code are particularly relevant. *SG v LC* concerns three adults (SG, LC and KS) and the roles they play in the lives of a child, M. LC and KS are female partners who began their relationship in 1999, prior to which LC had dated SG, a man, for a year. It is worth highlighting at the outset that a media publication ban has meant that there is not an extensive record of the facts of this case. Therefore, it has been necessary to rely on the outline of the facts set out in the interim judgment.²⁸⁸ Furthermore, this judgment is largely based on the facts as set out in the plaintiff (SG)'s affidavit, which was not contested by the defendants (LC, KS and M)

According to SG's affidavit, in 2000, LC and SG began to talk about the possibility of having a child together. Following lengthy discussions and a number of visits to a fertility specialist, LC was inseminated with SG's sperm in October 2002.

²⁸⁵ Article 539.1 CCQ.

²⁸⁶ Article 538 CCQ.

²⁸⁷ Article 538.2 CCQ.

²⁸⁸ 2004 CarswellQue 1262, [2004] R.J.Q. 1685.

During this time LC and KS's relationship continued and they entered into a civil union in July 2003. M was born shortly after this. SG asserts that throughout the discussions he had with LC, the agreement was that they would both be actively involved in the child's life as mother and father. He contends that KS was, in fact, against the idea of having a child and threatened to end her relationship with LC.

As LC and KS did not file affidavits, there is no basis for challenging SG's version of events, unusual as it may seem. SG now seeks a considerable degree of access to M and recognition as M's father. SG has never lived with M but has had regular and consistent contact with M since birth, which had been cut off shortly before commencing legal proceedings. Notwithstanding this, LC and KS argue that SG has no standing to apply for access to M under article 538.2 CCQ as conception did not occur through sexual intercourse.

The court, in reviewing the applicable legal provisions, reiterated that the relevant provisions of Quebec's civil code relating to filiation (articles 538 – 542) came into force in June 2002. As conception occurred in October 2002, these provisions consequently govern issues relating to filiation with respect to M. The court accepted that where article 538 CCQ applies such that a parental project exists between female partners, the birth mother's spouse would be the second legal parent under article 538.2. However, the court emphasised that in order for this to be the case, the genetic material (i.e. the sperm) must come from a man who is not party to the parental project. In this case, however, the court held that a parental project existed between LC and SG, the birth mother and biological father, not LC and KS, the birth mother and her spouse who were raising the child together and, therefore, article 538 does not apply. This decision did not operate to confer legal parenthood on SG, as that matter was the subject of a different

application. However, the finding was sufficient to recognise that SG had standing to apply for access to M. Given that SG and M had been having regular contact, the court awarded interim access to SG, which was to increase over time.

Some commentators, such as Kelly, have been critical of the court's approach in this case. In particular Kelly finds the idea that SG, rather than KS, was part of the parental project 'baffling'. In support of this, she highlights that '[t]he child was planned by a lesbian couple and born into a lesbian relationship that was later solemnized via a civil union. The two mothers had parented the child from birth within their nuclear family'.²⁸⁹ The case is unusual because the version of the facts relied on was provided entirely by the plaintiff. However, even this version of the facts, which portrays the plaintiff as being heavily involved in the decision to conceive the child, does not undermine the important role that KS played in M's life. It is regrettable that the court did not make any attempt to emphasise this fact. Instead the court seemed to sympathise with the assertion in SG's affidavit that LC and KS's attitude to access was 'totally destructive' because it was 'depriving M's rights to her father'.²⁹⁰ Kelly characterises the court's approach as highlighting the judge's 'refusal to accept that lesbian families, like their heterosexual counterparts, are entitled to a degree of family autonomy'.²⁹¹

SG v LC illustrates the persistence of heteronormative standards in the legal recognition of family life, even when applying legislative provisions that purport to recognise same-sex parenting. The case revealed tensions between the weight afforded to biological connection and the rights of biological parents and the

²⁸⁹ Kelly, *Transforming law's family the legal recognition of planned lesbian motherhood* (n 239) 39.

²⁹⁰ S.G. v. L.C [2004] Q.J. No. 6915 (S.C.) [54].

²⁹¹ Kelly, *Transforming law's family the legal recognition of planned lesbian motherhood* (n 239) 39.

weight afforded to social parenting and the autonomy of same-sex parenting units. In unpicking these issues, it is important not to obscure the vulnerability of historically disadvantaged and unrecognised same-sex families. It is also important not to underestimate the impact of fathers' rights discourse in the context of post-separation, different-sex parenting and the potential this could have for undermining the autonomy of same-sex families. This is not something the court took into account, or even seemed to be cognisant of, in reaching its decision.

Despite this, and perhaps because of it, a number of commentators have this issue at the forefront of their minds when discussing the case. Cameron, for example, notes that 'Courteau J. relies on a biologically essentialist view of procreation in erroneously applying the Civil Code...Courteau J. also leans heavily on heteronormative notions of the importance of fatherhood in granting S.G. interim access to M, against the wishes of her mothers'.²⁹² This implies that the court was more concerned with approximating a heteronormative family form than they were with recognising parenting autonomy within a same-sex family unit. This is particularly surprising given that the court was interpreting legislative provisions that were designed to achieve the latter end.

Despite the legislative intention to remove the differences between same-sex and different-sex couples relating to legal recognition in terms of parenting, it seems that differences do persist in the courts' approach to this issue. As Cameron goes on to stress, '[h]aving a 'loving and caring' third party, no matter how long you have known them, allowed unsupervised access to your infant daughter against

²⁹² Angela Cameron, "'A chip off the old (ice) block?': Women-led families, sperm donors and family law" in Jennifer Kilty (ed), *Women and the Law* (Canadian Scholar's Press 2013) 260.

your wishes is an affront to parental autonomy, and very difficult to imagine in cases involving an intact, heterosexual couple'.²⁹³ This highlights the tension between a legislative framework that attempts to achieve parity between same- and different-sex couples and a judicial approach that, seemingly, prioritises the claims of biology in the context of same-sex parenting without acknowledging the sensitivities involved.

The 2002 amendments to the filiation provisions of Quebec's Civil Code are progressive in that they allow two female parents, at least in situations involving unknown donors, to be recognised as a child's legal parents. However, cases such as *SG v LC* illustrate that these amendments have created a legal framework whereby the interests of biological and social parents in the context of same-sex families are allowed to compete over the limited recognition of status. As a result of the legislature's limitation to recognising only two adults as being capable of having a parental connection with a child, the courts are forced to make a choice between competing claims, leaving some parties more akin to legal strangers than parents. As Cameron notes:

While acrimony between the parties may have prevented a three parent family from forming, the law in Quebec would have prevented legal recognition of three parents, making S.G.'s bid for legal recognition a zero-sum game. Either he or M's non-biological mother could be recognized as parents, not both.

While allowing for the possibility of recognising that more than two adults may form a parental project would not have eliminated the tensions and competing claims involved, it may have provided a way for resolving them without

²⁹³ *Ibid.* 261.

undermining existing parenting roles. This is similar to the approach advocated by the Ontario court in *C (MA) v K (M)*.²⁹⁴

The Quebec case of *L.O. v S.J.*²⁹⁵ raises related issues. The case concerns female partners, CH and SJ, who had been living together since early 1996, which meant they were *de facto* spouses. The term *de facto* spouse is defined in the law of Quebec as '[t]wo persons of opposite sex or the same sex who live together and represent themselves publicly as a couple'.²⁹⁶ Quebec's Interpretation Act provides that 'the word "spouse" includes a *de facto* spouse unless the context indicates otherwise'.²⁹⁷ Furthermore, the Explanatory Notes for the 2002 Act instituting the reforms to the rules of filiation in the Quebec Civil Code confirms that 'the bill extends not only to civil union spouses but also to same-sex or traditional *de facto* spouses...'.²⁹⁸ Therefore, as the judge explicitly confirmed in *L.O. v S.J.* 'the expression *spouses* as used in article 538 [CCQ] includes ***de facto* spouses, whatever their sexual orientation**'²⁹⁹ (emphasis in original).

SJ and CH had been talking about having a child for some time and due to the lack of sperm banks where they lived, they had travelled to Boston to visit a fertility clinic, where SJ unsuccessfully underwent artificial insemination three times. Due to the costs involved, they decided to search for a known donor, shortly after which LO, a friend of CH offered to be involved. Discussion about this started in

²⁹⁴ *C (MA) v K (M)* [2009] ONCJ 18. See page 182.

²⁹⁵ [2006] J.Q. No. 450.

²⁹⁶ Quebec Interpretation Act s 61.1.

²⁹⁷ http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/116/116_A.HTM accessed 16 August 2015.

²⁹⁸ *Ibid.*

²⁹⁹ Explanatory Notes, Bill 84 (2002, chapter 6) An Act Instituting Civil Unions and Establishing New Rules of Filiation.

²⁹⁹ *L.O. v. S.J.* [2006] J.Q. No. 450 [47].

late 1998 where SJ and CH made it clear that ‘they would be the parents and assume all responsibilities’.³⁰⁰ According to SJ and CH, LO’s only stipulation was that he be able to see the child ‘once in a while growing up’.³⁰¹ However, LO argues that he agreed on condition that he was ‘part of the parental project and to be allowed to act as a father’.³⁰² Notwithstanding this, insemination occurred in 1999 at the home of a mutual friend. In July 1999, SJ informed LO that she was pregnant and they signed a written document entitled *Sperm Donor*, whereby LO gave SJ ‘full responsibility in the event of a birth, and she accepted all responsibilities and consequences arising from a birth’.³⁰³

In 2000, A was born with SJ registered as her mother and no father recorded. In February 2003, after the new filiation provisions of Quebec’s Civil Code had come into force in June 2002, CH sought and was granted a declaration to establish filiation between her and the child alongside SJ and the child. In March 2003, a new birth certificate was issued with both SJ and CH’s names. In May 2003, LO wrote to SJ requesting, as the letter put it, ‘visitation rights with my biological daughter’.³⁰⁴ According to SJ and CH’s reply, the women felt that ‘since our daughter was born, we have allowed you to see her only to meet your needs, not those of our child’. SJ and CH, therefore, refused LO’s request in June 2003. In September 2003, LO launched court proceedings in an attempt to challenge CH’s filiation and establish filiation between himself and A.

The court found that there was sufficient evidence to suggest that a parental project existed between the female partners in 1999 and continues. Although this

³⁰⁰ *Ibid.* [52].

³⁰¹ *Ibid.*

³⁰² *Ibid.* [57].

³⁰³ *Ibid.* [63].

³⁰⁴ *Ibid.* [19.9].

occurred prior to the coming into force of the amended filiation provisions of the Civil Code in 2002, the court held that these provisions have retroactive effect.³⁰⁵ This conclusion resulted from the court's interpretation of section 240 of Bill 84 introducing the amendments, which allows for 'tardy declarations of filiation in respect of a child born of a mutual parental project before the coming into force of the new provisions' and section 239, which states that '[a]cts made before the date of coming into force of the new provisions shall produce the effects attached thereto by the new provisions'.³⁰⁶ Therefore, just as in *SG v LC*, the courts were tasked with applying articles 538 – 542 CCQ. However, unlike the previous case, the court's interpretation of those articles in *LO v SJ* led to the conclusion that a parental project existed between SJ and CH and did not involve LO.

In reaching this conclusion, the judge was influenced by the evidence that SJ and CH were *de facto* spouses who embarked on the process of finding a donor together and that they were the ones to bear the responsibility of being parents.

The Honourable René Hurtubise notes that:

[t]he fact they continued this lifestyle lends **verisimilitude** to and **corroborates** the testimony of the respondents: the evidence reveals that they continued to live together...and now have three children, all conceived using the same method, but the petitioner only contributed to the parental project with respect to A...Accordingly, we have no hesitation in **finding that a mutual parental project involving Ms. J and Ms. H is clearly established**.³⁰⁷

Having established this, the court goes on to 'address the second and third conditions, namely that the donor must not be a party to the project and that he must knowingly act as an assistant'.³⁰⁸ The court, similarly, have no difficulty

³⁰⁵ *Ibid.* [40].

³⁰⁶ SS 239 and 240, Bill 84 (2002, chapter 6) An Act Instituting Civil Unions and Establishing New Rules of Filiation.

³⁰⁷ *L.O. v. S.J.* [2006] J.Q. No. 450 [54] – [55].

³⁰⁸ *Ibid.* [56].

dealing with this point on the basis of the testimony of the respondents and the existence of the donor agreement.

Although the court seems to have reached the logical outcome on the basis of the evidence, the way it reached this conclusion seems somewhat artificial. It appears unnecessary to adopt a two stage approach, as the court did, in firstly ascertaining whether a parental project exists between the two women and secondly whether the biological father was part of this. This approach implies that it would have been possible for a parental project to have existed between all three adults. Despite this, as highlighted above, this would not have been possible under the law of Quebec.

On the facts of the case, the court was not faced with this conflict. However, had the two stage approach explicated in *LO v SJ* been applied to *SG v LC*, it could have arguably led to the conclusion that a parental project existed between the female partner to which the biological father was party rather than the seemingly incongruous conclusion that a parental project existed exclusively between the biological father and the birth mother, not including her life partner. When analysed in this way, the case law suggests that the limitation to the recognition of two legal parents adds to the difficulties faced by these families by setting up the interests of the various adults as competing claims when they need not be mutually exclusive.

As Cameron notes, ‘...in the Quebec case discussed above, *LO v SG*, Justice Gaetan Dumas notes that, in part, his decision to sever the non-biological mother’s parenting rights was dictated by the fact that it is impossible to have

three parents under Quebec law'.³⁰⁹ Kelly also stresses that the clarity of Quebec's legislation combined with the clarity of the facts in this case 'left the court with little choice but to make the decision it did'.³¹⁰ However, she suggests that decisions in favour of access for biological fathers are more likely in 'common law Canada, where no legislation exists to protect planned lesbian families'.³¹¹

What is more, the clear legislative provisions of Quebec's Civil Code in relation to filiation notwithstanding, the court did not rule out granting access to the biological father in *LO v SJ*. Despite the fact that in *SG v LC* the biological father was granted 'access rights' on the basis of being able to establish filiation with the child resulting from being in a parental project with the birth mother, access rights were not foreclosed for the biological father in *LO v SJ* regardless of the fact that he was not party to the parental project. As the Honourable René Hurtubise notes:

...we must point out that this judgment does not dispose of the access rights claimed by Mr. O in the final submission of his amended motion. This is because access rights are not reserved exclusively for those who have filiation with the child. If necessary, the Court will decide, taking into consideration the best interests of the child.³¹²

Without prejudging the court's decision in term of access, the decision gives some indication of the court's leaning, stating that the respondents 'will perhaps be able to reach an **accommodation**' to fulfil the petitioner's wish to see the child grow up 'given the fact that the sperm did not originate from a bank of anonymous

³⁰⁹ Cameron, "A chip off the old (ice) block?: Women-led families, sperm donors and family law" (n 289) 264.

³¹⁰ Kelly, *Transforming law's family the legal recognition of planned lesbian motherhood* (n 239) 40.

³¹¹ *Ibid.*

³¹² *L.O. v. S.J.* [2006] J.Q. No. 450 (n 335) [101].

donors but was donated by a known individual who did so as a friend'.³¹³ These remarks are reminiscent of the position adopted by the Ontario courts in *C (MA) v K (M)* and also the courts of E&W in *A v B*,³¹⁴ both of which are discussed below,³¹⁵ that the decision to involve a known donor, particularly as in this case knowing that the biological father wished to see the child grow up, may have certain consequences when it comes to deciding whether the biological father can spend time with the child.

Furthermore, the court seems to make an implicit link between access and what they describe as the “need” to know one’s biological origins’. In the middle of their discussion of access for the biological father, the court muses on the future possibility for the legislation to erase this need ‘for all children born of a parental project involving assisted procreation’.³¹⁶ By invoking the powerful discourse of knowledge of biological origins, the courts risk conflating the issues that are at stake. Knowledge of biological origins is an issue that all donor conceived children face and there has been considerable discussion of this in the UK and elsewhere recently.

Nordqvist and Smart, in their recent study on donor conception in England and Wales, discuss how recent changes in policy and legislation have moved towards a greater emphasis on openness about knowledge of biological origins and how this has shaped what is considered a ‘proper family’.³¹⁷ Turkmendag goes further than this to stress the genetic essentialism that underpins the way these reform

³¹³ *Ibid.* [100].

³¹⁴ *A v B and C* [2012] EWCA Civ 285.

³¹⁵ See pages 182 and 211.

³¹⁶ *Ibid.* [54] – [55].

³¹⁷ Petra Nordqvist and Carol Smart, *Relative strangers : family life, genes and donor conception* (Palgrave Macmillan 2014) 5 – 6.

are being linked to personal identity. According to Turkmendag, 'the decision to abolish donor anonymity was strongly influenced by a discourse that asserted donor-conceived children's 'right to personal identity'...[and] that genealogical knowledge is central to the development of personal identity'.³¹⁸

Given the purchase this discourse of knowledge of genetic origins has had in a number of jurisdictions, it is understandable that the court may wish to make reference to it. However, the court does not make explicit the relevance of this to the issue of access. Given that access decisions are taken on the basis of the best interests of the child, the court would need to be clear about whether its reasoning was underpinned by an assumption that contact with a genetic progenitor is seen as being in the best interests of the child. If this were the case, however, the court would be equating knowledge of genetic origins with ongoing relationships with genetic progenitors, which does not seem a necessary component of the former. By casually associating knowledge of biological origins and access in the context of same-sex parenting without addressing the implications of this association, the courts run the risk of being influenced by these social policy shifts without being explicit about their legal relevance to access disputes.

The Honourable René Hurtubise's remark is noteworthy, not only because of the way it links knowledge of genetic origin and access but also because of its characterisation of the intended effect of the filiation provisions. The effect of the filiation provisions is to provide a mechanism for different-sex and same-sex couples and individuals which conceive through assisted reproduction to

³¹⁸ Ilke Turkmendag, "The Donor-Conceived Child's 'Right to Personal Identity': The Public Debate on Donor Anonymity in the United Kingdom" (2012) 39 *Journal of Law and Society* 58, 69 – 70.

establish filiation with their child. While filiation is an important status, it is not immediately apparent how this would erase or indeed affect a child's arguable need to know his or her biological origins. Turkmendag draws the distinction between disclosing to children the nature of their conception and somehow 'imposing on them that their genetic relatedness to the gamete donor is an indispensable component of their personal identity'.³¹⁹ Similarly, it could be said that providing a mechanism for establishing legal parenthood for the people who intend to raise a child has a different function than the recognition of biological origins. However, the court seems to conflate filiation with knowledge of genetic origins in a way that suggests they are competing interests that are mutually incompatible.

This conflation could be seen as understandable in light of Nordqvist and Smart's discussion of how genetics are seen as the cornerstone of identity. They argue that identity is presented as a 'fixed thing or cluster of attributes which are inherited through genetic connection but which cannot come to fruition without full knowledge of the person(s) from whom the genes derive'.³²⁰ On this basis, genetic connection could be seen as foundational of families. Therefore, the court's invocation of genetics in the context of access and filiation can be interpreted in this light.

However, this does not fully take into account the importance of other factors in relation to family formation. Nordqvist and Smart comment that, '[w]e therefore suggest that family practices create relatedness', which provides somewhat of a counter-narrative to the genetic essentialism of the importance of genetic connection to identity formation. Consequently, this issue is not a straight forward

³¹⁹ *Ibid.* 73.

³²⁰ Nordqvist and Smart, *Relative strangers : family life, genes and donor conception* (n 311) 24.

one and not one that can be adequately dealt with in passing. It requires courts to explicitly address the complexity of the matter. The way in which the courts reconcile these competing interests will be discussed in more detail in the next Chapter.

Filling the Legislative Gap in Ontario

Ontario was importantly the first jurisdiction in Canada to recognise that it is possible for a child to have more than two legal parents, albeit through judicial rather than legislative means. The Ontario Children Law Reform Act (CLRA) 1990 determines the legal parenthood of children. The primary purpose of this statute was to remove any difference in the legal treatment of children born within and outside wedlock. Therefore, it was not specifically designed with assisted reproduction or same-sex parenting in mind. The same was true of Ontario's system of birth registration established by the Vital Statistics Act 1990 (VSA). Until 2007, it was only possible under that statute to register one man as a child's father and one woman as a child's mother. This was challenged in *Rutherford v Ontario (Deputy Registrar General)*, where the Ontario Court of Appeal declared the VSA's birth registration scheme to be unconstitutionally discriminatory against same-sex parents.³²¹ As a result of this Ontario's legislature amended the VSA to allow two women to be registered as a child's parents but only if the father is unknown and conception occurred through assisted reproduction.

Registration under the VSA as the parents of a child is presumptive but not conclusive proof of legal parenthood. It is, consequently, possible to seek a declaration of parentage under the CLRA, which is conclusive proof of legal

³²¹ *Rutherford v Ontario* 2006 CarswellOnt 3463.

parentage. As the applicants in *Rutherford*, a married lesbian couple whose children were conceived using anonymous donor sperm, were unable to register as the parents of the child under the VSA, they sought a declaration under the CLRA. The Court of Appeal held that, while the Act did not specifically allow for this, they were able to use their inherent jurisdiction to grant such a declaration.

A single gay man had also previously successfully obtained a declaration that he was the sole parent of a child born through surrogacy, with the surrogate's consent.³²² In that case, *D (KG) v P (CA)*, the court held that Ontario's VSA's birth registration scheme was inadequate because it required the applicant to go to court to be registered as a legal parent of the child. The same was true for the *Rutherford* applicants who were required to go to court to obtain a declaration of parentage rather than being able to automatically register as the child's parents. This has been remedied to an extent in Ontario by the 2007 legislative amendments outlined above. However, as Radford notes, '[t]he violation of equality rights of lesbian families continues for those who use known donor sperm, and for families involving two biological mothers'.³²³

These judicial and legislative developments in Ontario reveal important distinctions in the treatment of male-led and women-led families when it comes to family recognition. The argument that was made in *Rutherford* and subsequently, at least partially, accepted by the legislature was that it is discriminatory to require female partners to go to court to register, as the parents of their child when different-sex couples are not required to do this. The legislature only provided a partial remedy to this by allowing the automatic registration on the birth certificate of two female parents provided the sperm

³²² *D (KG) v P (CA)* 2004 CarswellOnt 8819 (SCJ).

³²³ Radford, 'Same-Sex Parents and the Law' (n 267) 11.

donor was unknown. This echoes the way in which the AHRA focuses on anonymous sperm donation leaving the situation of known sperm donors unregulated. As this section will go on to discuss, other provinces that have systematically legislated in relation to assisted reproduction have not made this distinction. For example, in Quebec, BC and Alberta, as in England and Wales, it is possible for two female partners to register as the legal parents of a child regardless of whether the sperm donor is known or unknown.

However, with the exception of BC, none of these jurisdictions have extended the possibility of allowing automatic registration on the birth certificate to male couples. The UK HFEA provides a mechanism whereby a male couple can apply to the court following birth to obtain a birth certificate listing them as the legal parents, as discussed above.³²⁴ However, in *D (KG) v P (CA)*, the Ontario Superior Court questioned whether it was 'fair and just that the applicant, and all those who may follow him, be subjected to a payment of considerable legal costs in order to secure and finalize the very important right of birth registration'.³²⁵ The question was posed in the context of an application for the costs of a single man having to go to court to obtain a birth certificate recognising him as the sole legal parent, with the consent of the birth mother.

In awarding the applicant his costs, the Ontario court seem to have reached a more equitable position than the HFEA 2008 does in the UK. Naturally, the Ontario court did not have the power to amend the legislation to allow future parents in the applicant's position to register as parents automatically. However, by awarding the applicant's costs, the court signalled that men in the applicant's position should not have to bear the burden of going to court in order to obtain a

³²⁴ Human Fertilisation and Embryology Act 2008 s 54.

³²⁵ *D (KG) v P (CA)* (n 316) [19].

birth certificate for their child. Not only did the UK legislature affirm the opposite position, that a court order is required to become a legal parent in a surrogacy situation, it also foreclosed that option to single men by requiring that two applicants 'in an enduring relationship' apply. This contrasts yet again with the position in BC, where the legislature has explicitly provided a mechanism for the intended parents to obtain a birth certificate following birth in the context of a surrogacy arrangement without having to go to court.³²⁶

The legal recognition of male-led families will be revisited in more detail in Chapter Seven.³²⁷ For the moment, it is simply worth noting the differing approaches to both women-led and male-led families in the different Canadian jurisdictions and how this contrasts with the position in England and Wales. These differences are understandable because there are different interests at stake in relation to known donor arrangements as compared to situations involving surrogacy. Although Ontario has not adopted a comprehensive legislative position in relation to same-sex families formed through assisted reproduction, there has been judicial consideration of a wide range of families, including not only women-led and male-led families, as discussed above, but also multiple-parent families.

The case of *A (A) v B (B)*³²⁸ provides some insight into how the Ontario Court of Appeal has addressed the issue of recognising multiple parents. As discussed above, there is no legal framework specifically concerning assisted reproduction in Ontario. The legal parenthood of a child is determined by the Children's Law Reform Act (CLRA) 1990. Section 1 of the CLRA provides that '...for all purposes

³²⁶ See page 133.

³²⁷ See page 337.

³²⁸ *AA v BB* 2007 ONCA 2.

of the law of Ontario a person is the child of his or her natural parents...'³²⁹ In addition to this, section 4 provides that '[a]ny person having an interest may apply to the court for a declaration that a male person is recognized in law to be the father of a child or that a female person is the mother of a child'. In *Rutherford v Ontario (Deputy Registrar General)*³³⁰ the Ontario Superior Court of Justice held that such a declaration could be made in favour of same-sex parents and that they should be allowed to be registered as the parents of the child under Ontario's Vital Statistics Act. However, such a declaration would mean that the biological father was not recognised as a legal parent.

In *A (A) v B (B)*, A and C, female partners in a stable, long-term relationship, asked their male friend B to help them start a family by biologically fathering a child with them. The arrangement was for A and C to be the child's primary caregivers. However, they felt that it would be in the child's best interests if B remained involved in the child's life. C gave birth to D in 2001, whereupon C and B were D's legal parents under the CLRA. All three adults wished A to have equal recognition as a parent alongside B and C. Consequently, A and C did not wish to adopt D because that would mean extinguishing B's parental connection with D. Therefore, A sought a declaration under the CLRA that, like B and C, she was also one of D's legal parents. The judge at first instance would have made such a declaration but he did not consider he had the power to do so either under the CLRA or using the court's inherent *parens patriae* jurisdiction.

Although the Ontario Court of Appeal confirmed the trial judge's finding that the court has no power under the CLRA to declare a child to have more than two parents, the court held that a legislative gap existed and the court was, therefore,

³²⁹ Children's Law Reform Act 1990 c. 12.

³³⁰ *Rutherford v Ontario* (n 315).

empowered to use their *parens patriae* jurisdiction to fill that gap. The Court of Appeal found that the original legislation was designed to remove any legal effects of illegitimacy and did not seek to address parentage following assisted conception. The Court held, therefore, that rather than being deliberate the legislative gap was a 'product of the social conditions and medical knowledge at the time'.³³¹ In light of this and the Court's finding that 'It is contrary to D's best interests that he is deprived of the legal recognition of the parentage of his mothers',³³² the court made a declaration that A was one of D's legal parents alongside B and C.

This finding is particularly significant because of the central importance the court places on the concept of legal parenthood in recognising same-sex parenting. Lowe contends that the family unit should enjoy 'adequate and equal legal recognition' whatever form it takes.³³³ In the context of gay/lesbian co-parenting projects, 'adequate and equal legal recognition and protection' means granting full parental status to those who all parties intend to be social parents to the child. The reason for this is that being considered a parent is an important part of being considered a member of the family.³³⁴ The court in *A (A) v B (B)* acknowledged this by implying that being considered a parent is not only important in terms of

³³¹ [38].

³³² [37].

³³³ Nigel Lowe. 'A study into the rights and legal status of children being brought up in various forms of marital or non-marital partnerships and cohabitation: A Report for the attention of the Committee of Experts on Family Law of the Council of Europe' (2009) <http://www.coe.int/t/DGHL/STANDARDSETTING/FAMILY/CJ-FA%20_2008_%205%20E%2025%2009%2009.pdf> accessed 16 August 2015.

³³⁴ Caroline Jones, 'Parents in Law: Subjective Impacts and Status Implications around the Use of Licensed Donor Insemination' in Alison Diduck and Katherine O'Donovan (eds), *Feminist perspectives on family law* (Routledge-Cavendish 2006) 78.

its legal effects (e.g. the right to inherit) but also its extra-legal effects such as a feeling of connection between the social parent and child.³³⁵

A (A) v B (B) can be seen as an affirmation that legal parenthood is considered as being that which 'makes the child a member of a family, generating for that child a legal relationship with wider kin going well beyond the parental relationship'.³³⁶ Therefore, the way in which the law confers legal parenthood is significant because this determines whether children and potential parents are considered as part of a family unit. As Professor Lowe highlights, 'children do not live in a vacuum, but within a family and an important part of their protection is that the family unit, no matter what form it takes, enjoys adequate and equal legal recognition and protection. In other words, it is as discriminating to the child to limit legal parenthood or to deny significant carers legal right and responsibilities as to accord the child a different status and legal rights according to the circumstance of their birth or upbringing'.³³⁷ This goes to the very heart of family law and engages tensions within the European Convention on Human Rights, which guarantees the right to marry and found a family³³⁸ and a right to private and family life³³⁹ as well as the Canadian Charter of Rights and Fundamental Freedoms. Therefore, the status of legal parenthood is not simply about

³³⁵ *AA v BB* (n 322) [35].

³³⁶ Andrew Bainham, 'Parentage, Parenthood and Parental Responsibility: Subtle, Elusive Yet Important Distinctions' in Andrew Bainham, Shelley Day Sclater and Martin Richards (eds), *What is a parent? : a socio-legal analysis* (Hart Pub., Oxford 1999) 33.

³³⁷ Lowe, 'A study into the rights and legal status of children being brought up in various forms of marital or non-marital partnerships and cohabitation: A Report for the attention of the Committee of Experts on Family Law of the Council of Europe' (n 327).

³³⁸ European Convention on Human Rights art 12.

³³⁹ *Ibid* art 8.

protecting the interests of adults. It extends beyond this and impacts on the rights of children, which there is a clear international political mandate to protect.³⁴⁰

Given the importance of legal parenthood, however, reliance on a court's inherent jurisdiction to recognise the legal parenthood of children is not entirely satisfactory. One reason for this is that it is highly discretionary and dependent on the factual circumstances of the case. Therefore, this does not provide any sense of security for those embarking on creating these types of family that their family will be legally recognised. Radford argues that, '[a]nother constitutional case...is needed to recognize and affirm the realities of all families, rather than enforce traditional family forms as privileged'.³⁴¹ At the very least courts require statutory powers to recognise multiple parents, similar to the power the courts in England and Wales have to recognise two parents of a child born through surrogacy. However, it may be desirable to go even further as BC has done to allow multiple parents to be registered on the birth certificate without having to go to court.

The Legal Recognition of Former Partners in Alberta

One of the most recent cases to consider the legal implications of gay and lesbian collaborative conceptions is *H (D.W.) v R (D.J.)*,³⁴² which was decided by the Alberta Court of Appeal. Unlike many of the other cases, however, this case did not concern a dispute between the adults in a collaborative co-parenting arrangement but a dispute between male partners in relation to a child born as a

³⁴⁰ European Convention on the Legal Status of Children Born Out of Wedlock, 1975; United Nations Convention on the Rights of the Child 1989; Geraldine Van Beuren, 'Child Rights in Europe, Convergence and Divergence in Judicial Protection' (Council of Europe 2008).

³⁴¹ Radford, 'Same-Sex Parents and the Law' (n 267) 15.

³⁴² *H (D.W.) v R (D.J.)* 2013 ABCA 240.

result of a collaborative conception with a female couple. Nevertheless, the case raises a number of pertinent issues in relation to the legal recognition of the relationships that exist between the adults and children in these arrangements.

In this case, H and R, a male couple, collaborated with C and D, a female couple, to have a child S. The arrangement was that R would provide sperm and D would give birth. H and R would then raise the child and R would donate sperm to D and S so that they could also raise a child together. S was born in May 2003 and was cared for jointly by H and R until they broke up in June 2006. During this time D and C enjoyed regular visits. Following H and R's break up, their relationship was marked with conflict. As a result, R and D, the biological parents, entered into a parenting agreement declaring themselves to be the legal guardians with R being the primary carer. H sought to determine parentage, guardianship and custody of S. He also sought a declaration that the legal regime surrounding legal parenthood in Alberta infringed his rights as a gay man under the equality protection of s. 15 of the Canadian Charter of Rights and Freedoms.

At this stage it is worth exploring the legal framework around legal parentage in Alberta. Alberta's Family Law Act 2003 was amended in 2010 in order to regulate legal parentage following assisted reproduction and surrogacy more thoroughly. The previous version of the Family Law Act provided that in situations involving assisted reproduction a man is the legal parent of a child if he is in a relationship of interdependence with the birth mother or is her spouse and one of the following apply: 1) his sperm was used in the assisted reproduction; or 2) he consents in advance to being the parent. Otherwise he is not considered to be a legal parent and has no rights or responsibilities in relation to the child. Prior to this, the situation was regulated by the Domestic Relations Act, which similarly made the

legal recognition of the father dependent on his relationship with the mother and, therefore, only available to heterosexual couples.

At first instance, there was some confusion about whether the old Family Law Act or the Domestic Relations Act 2000 determined the legal parentage of S. In the end, it was decided that the Domestic Relations Act applied but that in any event both contravened s. 15 of the Charter. The Chambers of Justice (court of first instance) held that requiring gay partners to be satisfied with guardianship, which they must apply for, and denying them the status of legal parent has a negative effect on human dignity. Therefore, they relied on their inherent *parens patriae* jurisdiction, based on the case of *A (A) v B (B)*,³⁴³ discussed above, to fill what they saw as a legislative gap whereby parentage by operation of law was not available to intended gay male fathers. In doing so, the court of first instance declared H to be a legal parent and guardian of S.

On appeal by R, the Alberta Court of Appeal upheld this decision in respect of the declaration of incompatibility with the charter. Furthermore, they agreed with the court of first instance that an appropriate remedy for this was to exercise the court's inherent jurisdiction to make a declaration of parentage in favour of H, which they held to be in S's best interests. The Court of Appeal was also required to address an argument in relation to the incompatibility of recognising more than two legal parents with the current legal framework in Alberta. Through some creative judicial reasoning, the court was able to side step this issue without having to address how such a conflict would be resolved.

Section 9(7) (b) of Alberta's current Family Law Act provides that 'An application or declaration [of parentage] may not be made under this section if...the

³⁴³ *AA v BB* (n 322).

declaration sought would result in the child having more than 2 parents'. Faced with such a clear legislative statement it would seem that the Alberta courts are foreclosed from exercising the inherent jurisdiction if the effect would be to recognise more than two parents. The Alberta Court of Appeal found two potential ways of addressing this issue. Firstly, they made it clear that neither the old Family Law Act nor the Domestic Relations Act contained such a provision. The implication being that as the case was to be determined under the Domestic Relations Act, the court was free to recognise more than two parents. Indeed, this does seem to have been the effect of the declaration of parentage: under the Domestic Relations Act, D was already a legal parent as a result of having given birth to S and R was already a legal parent as a result of being registered as such.³⁴⁴

It is noteworthy that the court felt able to recognise three legal parents under the previous legal regime but would be unable to do so under the current one. The court, however, found that it may not have been necessary to recognise more than two legal parents under the current regime. As the majority decision explains:

Under section 8(3) of [the current version of the Family Law Act] Mr. R. does not benefit from a presumption of parentage because S. was born as a result of assisted reproduction. Under section 8.1(2), a male person who contributes reproductive material for an assisted reproduction is assumed to be the parent, unless the birth mother is a 'surrogate'.³⁴⁵

Although the court did not decide whether D was a surrogate they held that if she were a surrogate, 'in order for Mr. R to qualify as a legal parent to S., he would

³⁴⁴ S 78(1)(e) Alberta Domestic Relations Act.

³⁴⁵ *H (D.W.) v R (D.J.)* (n 336) [67].

need Ms. D's consent to an application for a declaration under section 8.2(1) (b) as well as the declaration itself.³⁴⁶ As this had not occurred, the court were of the opinion that under the current Family Law Act, D would have been S's sole legal parent when the court made a declaration of parentage in favour of H.

While this reasoning creatively avoids any conflict between the court's decision and the current legislative framework, it was neither necessary for disposing of the case nor, lamentably, helpful in advancing the debate on the possibility of recognising more than two legal parents. The court chose not to extend its reasoning to its logical conclusion and consider what the position would be under the current legal framework if R did subsequently pursue a declaration of parentage with the consent of D and H, both of whom would already be considered legal parents. In such a situation there would arguably be a strong case for recognising R, the primary carer with whom the child lives, as a legal parent alongside H, who has a declaration of parentage in his favour, and D, who is a legal parent by operation of law.

Legislative Recognition of Poly-Parenting in British Columbia

In BC, this issue is regulated by the recently enacted Family Law Act 2013 (FLA 2013). Prior to this 'BC was one of the few provinces without a comprehensive legal parentage regime',³⁴⁷ with the matter being addressed in a number of

³⁴⁶ *Ibid.* [69].

³⁴⁷ Fiona Kelly, "Multiple-Parent Families under British Columbia's New Family Law Act: A Challenge to the Supremacy of the Nuclear Family or a Method by Which to Preserve Biological Ties and Opposite-Sex Parenting?" (2014) 47 University of British Columbia Law Review 565, 577; See also British Columbia, Ministry of Attorney General Justice Services Branch Civil Policy and Legislation Office, *White Paper on Family Relations Act Reform: Proposals for a New Family Law Act* (British Columbia: Civil and Family Law Policy Office, 2010) 86.

separate statutes.³⁴⁸ FLA 2013 confirms that, similar to the law in E&W, in situations not involving assisted reproduction, the child's birth mother and biological father are the child's legal parents.³⁴⁹ Where the child is conceived through assisted reproduction, the law in BC has broader application than the law in E&W.

Whereas the equivalent provisions of the UK HFEA 2008 apply to female couples in a civil partnership or those being treated at a licensed fertility clinic, the BC FLA 2013 applies generally to cases of assisted reproduction, defined as conception other than by sexual intercourse.³⁵⁰ In such situations, a donor is not considered a legal parent of the child, nor can he be declared such other than under the provisions of the statute.³⁵¹ As in E&W, the child's birth mother is also one of the child's legal parents in cases of assisted reproduction.³⁵² Unlike in E&W, however, the BC FLA 2013 distinguishes neither on the basis of whether the birth mother and her partner were in a formalised union nor on the basis of where conception takes place. Provided the birth mother's partner was 'a person who was married to, or in a marriage-like relationship with, the child's birth mother' at the time of conception and it has not been shown that he or she did not consent to be the child's parent, he or she will be the child's legal parent.³⁵³

So far the basic parenthood provisions of the BC FLA 2013 reach a similar result as the UK HFEA 2008, albeit that they apply to assisted reproduction generally rather than restricting their application in the way HFEA 2008 does. However, the FLA 2013 adopts a slightly different approach to parenthood following surrogacy.

³⁴⁸ For example, The Law and Equity Act RSBC 1996, c. 253; the Adoption Act RSBC 1996, c. 5; Family Relations Act RSNC 1996 c. 128.

³⁴⁹ Family Law Act 2013, s 26 (1).

³⁵⁰ Family Law Act 2013, s 20 (1).

³⁵¹ Family Law Act 2013, s 24 (1).

³⁵² Family Law Act 2013, s 27 (1).

³⁵³ Family Law Act 2013, s 27 (3).

As described above, the HFEA 2008 empowers the court to make a parental order in favour of a commissioning couple between six weeks and six months after birth provided one member of the couple is genetically related to the child and the birth mother consents. By contrast, the FLA 2013 allows the commissioning couple to automatically become the legal parents of the child on birth without the involvement of the court, provided the birth mother consents after the birth and there is also a pre-conception agreement to that effect.³⁵⁴

The truly innovative aspect of the FLA 2013 is that it allows three parents to be automatically recognised at birth in certain circumstances. Kelly notes that ‘the scenario commonly envisaged by the provision – section 30 of the Act – is one in which a couple conceives a child with the assistance of a sperm donor or surrogate with the shared pre-conception intention that the donor or surrogate be the child’s third legal parent’.³⁵⁵ Therefore, s 30 of the FLA 2013 envisages two scenarios: one where the intended parent or parents make an agreement with the birth mother that they will each be parents; and one where the birth mother, her partner, with whom the birth mother is in a marriage or ‘marriage-like relationship with’, and a donor agree to parent together.³⁵⁶ In these situations, provided there is a pre-conception agreement to the effect that all three intend to be the child’s legal parents, each will become a legal parent on birth.

These provisions of the FLA 2013, therefore, recognise same-sex parenting in a similar way to the HFEA 2008 but go further towards recognising the legal parenthood of more than two parents in same-sex collaborative parenting

³⁵⁴ Family Law Act 2013, s 29.

³⁵⁵ Fiona Kelly, “Multiple-Parent Families under BC’s New Family Law Act: A Challenge to the Supremacy of the Nuclear Family or a Method by Which to Preserve Biological Ties and Opposite-Sex Parenting?” (n 341) 566.

³⁵⁶ Family Law Act 2013, s 30.

arrangements in a way that the HFEA 2008 failed to do. Despite this, it is disappointing that the intention appears to have been to limit the number of legal parents to three in each of these situations. This would seem to leave same-sex parents who co-parent collaboratively as two couples without sufficient legal protection. As Kelly notes, ‘...the White Paper explicitly allowed for more than three parents via two different arrangements...It is not known why the provisions were changed when the FLA was drafted, but the removal of the express reference to four legal parents suggests that it was not intended that such a family be afforded legal recognition.’ This seems an unwarranted distinction given the likelihood that a birth mother’s or biological father’s partner may well want the option of being included as a legal parent.

In addition to setting down who is the legal parent of a child, the FLA 2013 regulates who is the child’s guardian. In Canada, the notion of guardianship is different from that in E&W and is more akin to parental responsibility. According to the FLA 2013, ‘[o]nly a guardian may have parental responsibilities and parenting time with respect to a child’.³⁵⁷ Ordinarily under the FLA 2013 a child’s parent is also the child’s guardian, provided he or she has resided with the child.³⁵⁸ The Supreme Court of BC has held that the act creates a ‘default position of joint guardianship unless the court orders or the parties agree otherwise’.³⁵⁹ There are various exceptions to this rule, including when s 30 applies as described above. In this situation, each of the legal parents is also the child’s guardian.³⁶⁰ The parents and guardians can also all agree that a non-resident

³⁵⁷ Family Law Act 2013, s 40 (1).

³⁵⁸ Family Law Act 2013, s 39 (3).

³⁵⁹ *Rashtian v. Baraghoush* 2013 BCSC 994, 2013 CarswellBC 1670, [2013] B.C.J. No. 1180 (B.C. S.C.) [26].

³⁶⁰ Family Law Act 2013, s 39 (3) (a).

parent should be a guardian and a parent who regularly cares for the child is also a guardian.³⁶¹

Although it is mainly legal parents that can become guardians by agreement, the court may appoint someone other than a parent to be a child's guardian if that is in his or her best interests. Boyd and Ledger comment that 'when it comes to appointing parties as guardians, the courts have thus far set a fairly low bar'.³⁶² Non-parental guardians, for example, are able to apply for guardianship without first requiring the leave of the court as is the case in the UK. In terms of how the courts respond to applications from parents for guardianship, Boyd and Ledger note that '[t]o the extent that a parent's behaviour and access needs to be controlled or limited, the courts so far seem to favour doing so by restricting the scope of their parenting responsibilities or decision-making authority, rather than denying them guardianship'.³⁶³ Although the cases that have arisen concern post-separation heterosexual parenting, the restriction of parental responsibilities in this way is reminiscent of the way the courts have dealt with 'known donor' disputes in E&W.

Although there have yet to be any cases dealing with this issue, the statutory framework set up in the FLA 2013, therefore, allows that in collaborative co-parenting arrangements involving three parents, each of the adults can automatically be recognised as being the legal parents and having parental responsibilities and parenting time with respect to the child. Under the FLA 2013

³⁶¹ Family Law Act 2013, s 39 (3) (a). See for example *F. (T.) v. D. (A.)* 2013 BCPC 205, 2013 CarswellBC 2277, [2013] B.C.J. No. 1695 (B.C. Prov. Ct.) where a father was held to be one of the child's guardian as a result of regular care despite a previous court order recognising the mother as the sole guardian.

³⁶² Susan B Boyd and Matt Ledger, 'British Columbia's New Family Law on Guardianship, Relocation, and Family Violence: The First Year of Judicial Interpretation' (2014) 33 Canadian Family Law Quarterly 317

³⁶³ *Ibid.*

parental responsibilities and parenting time need not be shared equally amongst the guardians.³⁶⁴ Therefore, the parents are free to agree amongst themselves how decision-making and caring for the child is to be divided. It will be interesting to see how the courts in BC will strike the appropriate balance in the division of parental responsibilities if they are asked to resolve disputes in relation to same-sex collaborative co-parenting in the future, as the courts in E&W have done.

Insights from Practice

Given that the Family Law Act had only recently come into force at the time of the interviews with legal professionals in BC in April 2013, the study canvassed their views on the likely success of the reforms. Unsurprisingly, they were quite tentative about its likely impact. For example, Belinda, an attorney in BC with extensive experience of same-sex family law, commented that:

Literally too soon to say. Because the only time we'll know if there are problems is if we run into some... However, I suppose another answer to your question is that the one reform as it currently exists makes no provision for existing multi-parent families. Those children are conceived and born already. And that's unfortunate.³⁶⁵

An important point that Belinda picks up on in the view she expresses above is that the legislative reforms do not apply to existing families that might be parenting in this way, which is a source of regret. This raises the question of whether perhaps legislative reform should include a mechanism for retroactively recognising arrangements that existed prior to the enactment of the new legislation. Such a provision existed in Quebec when it became possible in 2002 for two women to register as the parents of a child and create a parental project.

³⁶⁴ Family Law Act 2013, s 40 (4).

³⁶⁵ CAPB5.

This was achieved through the introduction of a transitional period following the constitutional amendments in Quebec, whereby existing women-led families could register as the parents of the child and parties to a parental project.

It is worth noting, as will be developed in Chapter Six, that none of the Canadian participants in this study, all of whom were in fact from BC, were involved in full poly-parenting. The Canadian families that were interviewed were closer to an involved donor type situation on the collaborative co-parenting spectrum, identified earlier in this chapter. This stands in contrast to the participants in E&W, the majority of which were engaged in or planning to engage in a parenting arrangement that was closer to full poly-parenting. This is ironic given that BC is now the only jurisdiction to legislatively recognise these families. It is difficult to draw any firm conclusions from this. The simplest explanation is perhaps that participant recruitment in Canada went through more formalised, legal channels, as Chapter Two explains more fully, whereas participant recruitment in the UK benefited from a more wide-ranging parenting conference that happened to be running at the time. However it may also be the case that these families are less visible in Canada than they are in the UK, with a number of UK-based social media networks for these families.

In addition to the fact that poly-parenting families in BC were less accessible as research participants in this study as they were in the UK, it also seems to be the case that legal professionals in BC working in this field had considerably less experience with LGBTQ poly-parenting families than those in Ontario. In fact, none of the four legal professionals from BC interviewed, each of whom had an extensive same-sex family law practice, had much experience with full poly-parenting situations. They had much more experience with situations akin to an

involved known donor who was not being treated as a third parent. Belinda noted that 'I don't have very much experience with that, and the reason is that there was no legal framework that would give substance to a multi-parent arrangement'. This suggests that poly-parenting families in BC may have had little desire to seek legal advice because they were not recognised by the legal framework.

However, a number of legal professionals interviewed felt that such families did exist in BC and would gradually become more visible following the legal reforms.

David reported a similar experience as Belinda commenting that:

I haven't had the family where they come in as a threesome, the two women and the guy, saying, "We are thinking of having a family. We consider ourselves all really close even though we don't have sex. We are, like, best friends." And started from that. So I know that those people exist, but they are not my clients.

Zabrina has had a similar experience but also adds in the context of BC 'I think it will happen. I think more and more'. Therefore, although BC is now the most progressive jurisdiction in terms of legislatively recognising LGBTQ poly-parenting there is not a body of experience amongst legal professionals and the court of dealing with these families.

This contrasts with the position in Ontario where LGBTQ poly-parenting has been visible since the 2007 case of *A (A) v B (B)*, discussed above, which concerned a female couple and their gay male friend, each of whom wanted all three to be recognised as legal parents. Unsurprisingly, legal professionals who specialise in this area in Ontario have more experience dealing with poly-parenting families. Kerry, an attorney in Ontario with extensive experience of same-sex parenting disputes, comments that:

I've come across many such arrangements in both the pre... the family building part of the relationship, but also, of course, I am a family lawyer, what happens when these relationships break down...I'm not talking about same-sex parents only, I'm not talking about, like, a lesbian or a gay couple, but I mean a poly-parenting situation...And I have multiple of them going on at any one time. Yeah, I have a lot of experience doing these types of cases.

This experience contrasts quite starkly with the experience of legal professionals in BC. It does not appear to be a coincidence that there is increased visibility of poly-parenting families in Ontario as compared to BC considering that these families were judicially recognised for six year in Ontario before the legislatively recognition came into force in BC. Therefore, it will be interesting to see how the practice of legal professionals involved in same-sex parenting disputes in BC changes as a result of the legislative reforms.

While the lack of visibility of poly-parenting families in BC may be partly due to the lack of legal recognition of these families until recently, geographical location can also play a big part. Although Vancouver in BC has a well-developed LGBTQ community the city and province are not very densely populated compared to say Toronto in Ontario. Given that the legal professionals that were interviewed in Ontario each worked in and around Toronto, this may in part account for why they had more experience with a wider range of LGBTQ collaborative co-parenting families. Similarly, the legal professionals interviewed in the UK each worked in and around London and a number of them also reported experience with a diverse range of families. For example, Naomi, a solicitor in E&W specialising in fertility law reports having dealt with 'the whole spectrum' of LGBTQ collaborative co-parenting families ranging from known donor arrangements to full co-parenting. The impact of the geographical locality on the visibility of poly-parenting families, while something to bear in mind when considering the

empirical data, is beyond the scope of this thesis but would form the basis of an interesting follow-up study.

Conclusion

This chapter has considered a range of approaches to the issue of collaborative co-parenting adopted in various Canadian provinces and contrasted this with the approach in E&W. At one end of the spectrum, there are provinces, such as Ontario and Alberta, which have not legislatively addressed this issue. This has meant that the courts have had to step in to address the legislative gap. While a desirable outcome may have been achieved in this way, failure to legislate and a consequent lack of legislation addressing the needs of collaborative co-parenting families has a negative symbolic impact around the wider recognition of collaborative families as well as creating greater legal uncertainty in that situation.

This can be contrasted with a province like Quebec, which adopted a progressive legislative stance to same-sex parenting early on, which may have been somewhat undermined by the subsequent judicial application of that legislative framework. Quebec and E&W both have the limitation to two parents in common. However, as will be discussed in the following chapter, the courts in E&W have attempted to reduce the impact of this restriction unlike the courts in Quebec.

Perhaps the most promising comparison in terms of a potential law reform model is the approach that has been taken in BC, which legislatively recognises more than two parents in a collaborative co-parenting situation. This option was not even mooted during the law reform process in E&W leading to the Human

Fertilisation and Embryology Act 2008, largely because it was too complicated an issue and thought to lie outside the remit of the reform.

It is too early to comment on how well BC's reforms are working in practice and it will likely be some time before disputes surrounding this legislation come to court. Furthermore, these reforms are not wholly unproblematic in terms of their seemingly arbitrary limit in the number of parents recognised. The way that pre-conception intentions are automatically enforced may also be problematic in the context of the courts discretion in terms of child welfare.³⁶⁶ Nevertheless, BC's legislative model recognising multiple parents in collaborative co-parenting situations is a good exemplar (or at least source of inspiration) of a potentially workable option for law reform in E&W.

³⁶⁶ This issue is discussed further in Chapter Five.

Chapter Four: Normativity and Vulnerability – Judicial Resolution of Collaborative Co-Parenting Disputes

Introduction

This chapter considers how the courts in E&W and various Canadian jurisdictions reconcile the competing claims to legal parenthood and parental responsibility that exist in collaborative co-parenting situations. In particular the way in which the courts in E&W prioritise the protection of the homonuclear family at the expense of recognising collaborative co-parenting arrangements will be examined. This chapter suggests that, in doing this, the courts pay insufficient attention to the relational aspects of child welfare,³⁶⁷ and in particular the psychological utility of legal recognition in relation to gay fathers. Consequently the law often does not manage to strike a fair balance between the competing interests of those involved with the result that appropriate legal recognition is denied to one or more of the potential parents, which tends to have a detrimental impact on the legal position of gay fathers.

³⁶⁷ For more on this see Jonathan Herring and Charles Foster, 'Welfare Means Relationality, Virtue and Altruism' (2012) 32 Legal Studies 480.

The desire to be a parent is widely felt and it can intuitively be understood that, for those who experience it, it seems like an intrinsic part of who they are as a person. While parental responsibility is undoubtedly of practical importance in terms of the ability to care for a child, legal parenthood plays a significant psychological role by recognising the parent and child as part of each other's family. What is more, the relative weight of intention and biology as determining legal parenthood has been extensively discussed in E&W and other jurisdictions,³⁶⁸ in what is a long-standing discussion in family law about who should be considered a legal parent.³⁶⁹ Although other authors have discussed this in the context of assisted reproduction and same-sex parenting generally,³⁷⁰ this chapter will explore these issues in relation to collaborative co-parenting.

Characterising the (Collaborative Co-Parenting?) Cases

Having discussed the pertinent legislative framework that operates in E&W and various Canadian jurisdictions in the previous chapter, this section will discuss a, still relatively small, body of case law that has built up in recent years, which is relevant to the study's first research question of how the legal framework accommodates the procreative autonomy of gay men and lesbians engaging in or considering collaborative co-parenting arrangements. The courts in E&W

³⁶⁸ See for example Gillian Douglas, 'The Intention to be a Parent and the Making of Mothers' (1994) 57 *Modern Law Review* 636–641; John Lawrence 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; Marjorie Maguire Shultz, 'Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality' [1990] *Wisconsin Law Review* 297–398.

³⁶⁹ See Andrew Bainham, Shelly Day Sclater and Martin Richards, *What Is a Parent? A Socio-Legal Analysis* (Hart 1999) for a multi-disciplinary analysis from a number of different substantive perspectives.

³⁷⁰ See for example Jeanette Edwards, Sarah Franklin, Eric Hirsch, Frances Price, and Marilyn Strathern, *Technologies of Procreation: Kinship in the age of assisted conception* (Manchester University Press 1993); Caroline Jones, 'Parents in Law: Subjective Impacts and Status Implications around the Use of Licensed Donor Insemination' in Alison Diduck and Katherine O'Donovan (eds), *Feminist perspectives on family law* (Routledge-Cavendish 2006); G A Dunne, 'Opting into Motherhood: Lesbians Blurring the Boundaries and Transforming the Meaning of Parenthood and Kinship' (2000) 14 *Gender & Society* 11.

invariably become involved in deciding how collaborative co-parenting arrangements should be recognised at the stage where there is a dispute between the adults. As a result of this, the courts in this jurisdiction have not typically been asked to recognise collaborative co-parenting arrangements with the consent of all parties as they have, for example, in Ontario. Therefore, the starting point of this analysis is how the courts resolve disputes between female couples and gay fathers who collaborate to conceive a child but subsequently disagree about their respective roles in the child's life. It is important to recognise that the majority of these cases concern children born prior to the reforms instituted by the HFEA 2008. Therefore, these cases will be considered on the basis of the legal framework that existed at the time but also bearing in mind the effect the subsequent amendments would have.

The cases discussed in this section relate to situations that might arguably be characterised as collaborative co-parenting arrangements, although this will have inevitably been contested by one of the parties. The characterisation of these cases as potentially involving collaborative co-parenting arrangements is a preliminary issue that is worth highlighting at this stage before considering the case law in any depth. As mentioned in the introductory chapter of this thesis, an arrangement whereby a single or partnered lesbian conceives a child (normally not through sexual intercourse) with a single or partnered gay man and they co-parent that child (along with their partners if they are not single) typifies this study's conception of collaborative co-parenting. However, there are certain parenting practices within same-sex families, evident in, what is commonly

referred to as, the known donor cases³⁷¹ discussed in this section, which may approximate this model but also differ from it in certain key respects.

Consequently, a central issue raised in each of these cases is whether it concerns a collaborative co-parenting family, a homonuclear family or a *sui generis* family that lies somewhere in between. This is the subtext of what the parties are arguing about in each of these cases. Therefore, it is important to ascertain to what extent these distinctions are important or relevant and what, if any, legal consequences this should have.

The vast majority of relevant cases that have come before the courts, and therefore each of the cases that this section will consider, concerns a female couple that wishes to have a child to whom one of the partners has given birth. That element of these cases is never in dispute. However, the desires and intentions of the single men and male couples when entering into these arrangements is difficult to ascertain from the reported case law as there is invariably a lack of agreement between the parties. As a result, it is difficult to know what type of family the courts are dealing with.

In addition to this, it is difficult to ascertain what legal weight the courts attach to the different factual circumstances of the case because the courts are not always clear whether the outcome is influenced by a particular finding in fact, or whether the courts are applying some sort of general principle despite specific factual difference. What is more, the cases on this issue involve adults, which already have a range of legal relationships with the child and seek a range of legal remedies. In the majority of the cases, conception occurred prior to the coming

³⁷¹ See for example Leanne Smith, 'Tangling the Web of Legal Parenthood: Legal Responses to the Use of Known Donors in Lesbian Parenting Arrangements' (2013) 33 Legal Studies 355.

into force of the Human Fertilisation and Embryology Act 2008. Therefore, the birth mother and biological father are considered the legal parents, with the former invariably having parental responsibility for the child and the latter often having parental responsibility as a result of being registered on the birth certificate.

These cases were being decided within a legislative framework that did not specifically contemplate the family forms that are involved and arguably the HFEA 2008 reforms did little to change this. Therefore, the way the courts interpret and apply the legislative framework of the Children Act 1989 in resolving these disputes remains instructive not only from the point of view of judicial willingness to accommodate the needs of collaborative co-parenting families but also in terms of the limitations of the legislative framework itself, which can be assessed in light of subsequent amendments.

A number of common themes are present in these female parenting known donor cases discussed below, which are highly relevant to a consideration of the legal response to gay and lesbian collaborative co-parenting. Issues relating to the legal weight attached to pre-conception intentions and post-birth parenting reality emerge as significant alongside the importance of genetics, caregiving and the possession of parental responsibility/legal parenthood. Nevertheless, the cases can be broadly separated into three categories. Firstly there are the cases involving disputes around both parental responsibility and contact. These include the High Court cases of *Re D*,³⁷² *Re B*,³⁷³ *R v E and F*³⁷⁴ and the Court of Appeal case of *T v T*. It will become evident that the courts do not always adopt a

³⁷² *Re D* [2006] EWHC 2 (Fam).

³⁷³ *Re B (Role of Biological Father)* [2007] EWHC 1952 (Fam).

³⁷⁴ *R v E and F (Female Parents: Known Father)* [2010] EWHC EWHC 417 (Fam).

consistent approach to the use of parental responsibility in relation to these families. Secondly, there are the cases primarily concerning contact, which include the High Court cases *ML v RW, P & L (Minors)* and the Court of Appeal case *A v B*. Here the courts seem to strike a more consistent line in relation to contact. Finally, there is the case of *Re G; Re Z*, which is an application for leave to apply to the court for contact and residence orders and is the only case so far to be decided under the framework established by the Human Fertilisation and Embryology Act 2008. The remainder of this section will outline how these issues have been addressed by the courts in *E&W*, which will form the basis of a more theoretically-informed discussion of the courts' approach in a number of jurisdictions in Chapter Four.

In these cases where the biological father does not have parental responsibility he may be seeking this, under the Children Act 1989, by way of, what was at the time, a joint residence order and he would also be seeking a contact order. The courts would now deal with these issues by way of a child arrangements order.³⁷⁵ In some of these cases, the mother's female partner may already have parental responsibility pursuant to a parental responsibility agreement with the mother³⁷⁶ and in other cases the mother's partner may be seeking to acquire this by way of a shared residence order. Each of these scenarios has different legal implications, which will be explored more fully when discussing the relevant cases. While this discussion may seem somewhat abstract at this stage, it is worth bearing in mind, and will hopefully become more concrete, through the subsequent analysis of the case law.

³⁷⁵ See s. 8 Children Act 1989 as amended by the Children and Families Act 2014.

³⁷⁶ Children Act 1989, s 4A.

The courts have been very reluctant to lay down general guidance for these sorts of cases, arguing that they are so fact specific that it would be impossible to decide them on the basis of general rules. While the best interests of the children remain the courts' paramount concern there is room for judicial discretion as to which outcome best serves these interests.³⁷⁷ As Zanghellini comments:

The welfare standard is sufficiently amorphous that, when applied free of heteronormative preconceptions about what constitutes ideal parenthood and ideal parenting configurations, it will rarely dictate one single outcome, rather than suggesting a range of possible outcomes equally compatible with the child's best interest.³⁷⁸

In some cases the courts have been explicit about the sufficiency of same-sex parenting and their desire to protect the same-sex nuclear (or homonuclear)³⁷⁹ family.³⁸⁰ However, in other cases the way the courts have disposed of the applications suggest that they are considerably influenced by the biological connection between father and child *per se*.³⁸¹

Legal professionals in E&W have highlighted this inconsistency in how what is in the best interests of the child is determined and the difficulty this can cause in advising clients about the likely legal outcome. Lizzie, a solicitor in E&W, comments that:

You've got one couple's word against another or one party's word against another and you've got two very different dialogues going on - one perception and one story from one side and a very different story and dialogue from another and how do you reach a middle

³⁷⁷ See for example Helen Reece, 'The Paramountcy Principle: Consensus or Construct?' [1996] Current Legal Problems 267.

³⁷⁸ Aleardo Zanghellini, 'A v B and C [2012] EWCA Civ 285' (2012) 24 Child and Family Law Quarterly 475, 480

³⁷⁹ This term is used in the Australian case of *Re Patrick (An Application Concerning Contact)* (2002) 28 Fam LR 579. For a discussion of this case see Fiona Kelly, 'Redefining Parenthood: Gay and Lesbian Families in the Family Court — the Case of *Re Patrick*' (2002) 16 Australian Journal of Family Law 1.

³⁸⁰ See for example the discussion below of *A v B and C* at page 210.

³⁸¹ See for example the discussion below of *Re B* at page 163.

ground on that and that and that's what the courts are finding and the courts will say well we're looking at the best interests of the child but is the best interests of the child to work with say the lesbian couple and to give them the legal status and to make the donor or quasi-donor just that or is it to try and reach a more nuanced agreement.³⁸²

This seems a fairly accurate characterisation of how child welfare has emerged in the case law as an indeterminate standard that does not in fact call for a particular outcome in the case.

An analysis of the case law reveals that the courts' struggle to reconcile the various parental claims in these families with what is in the best interests of the child. The pattern that has emerged is that the courts have aligned child welfare with the protection of the lesbian homonuclear family as the child's central family with the duty and privilege of raising the child. However, child welfare does not definitively determine the outcome in favour of the homonuclear family in all cases but suggests a number of different outcomes that are consistent with the best interests of the child, as discussed above.³⁸³ As John Eekelaar has suggested 'the very ease of the welfare test encourages a laziness and unwillingness to pay proper attention to all the interests that are at stake in these decisions'.³⁸⁴ I argue, therefore, that by interpreting child welfare in this way, the courts are paying insufficient attention to the psychological utility of legal recognition in relation to gay fathers.

In respect of legal parenthood, the courts are constrained by a restrictive legislative framework that affords no discretion over who to recognise as legal

³⁸² UKPB9LG.

³⁸³ See page 150.

³⁸⁴ John Eekelaar, 'Beyond the Welfare Principle' (2002) 14(3) Child and Family Law Quarterly 237 – 249.

parents. Therefore, in some respects, the courts may be trying to achieve through parental responsibility, in relation to which they do have discretion, an outcome that might be better reached through a more flexible approach to legal parenthood.³⁸⁵ In making decisions about PR, whether through a PR order or a child arrangements order, the courts are required to the child's welfare as the paramount consideration.³⁸⁶ This may be understandable with regards to parental responsibility, which, at least in theory, concerns the practical decision-making powers in relation to a child's upbringing. However, the best interests of the child does not necessarily need to take the same precedence in relation to legal parenthood and does not explicitly do so in the legislative framework.³⁸⁷ Therefore, the ubiquitous best interests standard is being invoked in these cases, as it must in disputes over parental responsibility, but somewhat unnecessarily to the extent that the dispute is around status than parental responsibility, properly so-called.

The Various Manifestations of Heteronormativity

A number of commentators have suggested that the law relating to parenthood and parenting promotes an inherently heteronormative model of the family.³⁸⁸ This implies that law is, if not entirely resistant to, not wholeheartedly accepting of the multiplicity of gay and lesbian families. The legislative and judicial approach

³⁸⁵ For more on this see Craig Lind and Tom Hewitt, 'Law and the Complexities of Parenting: Parental Status and Parental Function' (2009) 31 *Journal of Social Welfare and Family Law* 391.

³⁸⁶ Children Act 1989, s1.

³⁸⁷ See Emily Jackson, 'Conception and the Irrelevance of the Welfare Principle' (2002) 65 *Modern Law Review* 176.

³⁸⁸ See for example Rosie Harding, '(Re)inscribing the Heteronormative Family' in Robert Leckey (ed), *After legal equality: family, sex, kinship*, 2014; Julie Wallbank, 'Channelling the Messiness of Diverse Family Lives: Resisting the Calls to Order and De-Centring the Heteronormative Family' (2010) 32 *Journal of Social Welfare and Family Law* 353; Julie McCandless and Sally Sheldon, 'The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family' (2010) 73 *Modern Law Review* 175.

to collaborative co-parenting has been criticised for adopting a heteronormative approach, rather than affording appropriate legal recognition to these families in a number of different ways. However, in commenting on the way the law reflects heteronormative conceptions of parenthood in relation to collaborative co-parenting, many of these critiques do not address the vulnerability of the gay men in these arrangements who want to become parents. Instead, much of the commentary focuses on the vulnerability and protection of the lesbian parents.

Furthermore, the female couples in these cases often seek to highlight the vulnerability of lesbian families and their need for protection. This is an argument that the judiciary has been particularly receptive to in the reasoning that supports their decisions, whether or not the outcome of the cases is ultimately seen as supporting lesbian parenting. In one of the earliest 'known donor' cases in E&W Lady Justice Black (as she then was) held that 'particular care must be taken to protect the couple's relationship from undue stress at what was still an early stage in the formation of their family'.³⁸⁹ At a subsequent hearing the same judge reinforced how mindful she is of the difficulties lesbian families face, noting that:

...it may be more difficult for them than for heterosexual couples to establish themselves as a family, as the family which is providing the primary parenting for D. This difficulty may be in establishing their status to outsiders who they meet day to day in their lives, but there will also be work to be done with regard to Mr B's perception of them as a family and I think with regard to D's too.³⁹⁰

Lady Justice Black adopted a similar position in the later case of *R v D and E*, which similarly concerned a known donor and is discussed more fully below. In that case the judge was heavily influenced by expert psychiatric evidence which

³⁸⁹ *Re M (Sperm Donor A Father)* [2001] Family Law 94.

³⁹⁰ *Re D* [2006] EWHC 2 (Fam) [9]. This case is discussed in more detail at page 202.

indicated that, '[the child's] needs, which were all important, was to belong...to a nuclear family. That would provide security for [the child], and clarity for what was in [the child's] best interests'.³⁹¹

It is understandable why the vulnerability and protection of lesbian parents is a central feature of these cases. Empirical research suggests that a considerable number of lesbian parents engage in collaborative conception with a man who is known to them, as opposed to an unknown donor, for a variety of reasons.³⁹² Until recently, the bulk of legal and academic discourse on same-sex parenting focused on the experiences of lesbian parenting.³⁹³ Therefore, collaborative co-parenting has largely been viewed as a means for lesbians to have children.

Having outlined some of the key themes and controversies that run throughout the case law, the first case this section will consider in detail is *Re G (A Minor) and Re Z (A Minor)*.³⁹⁴ Harding draws on this case in an attempt to demonstrate that 'the implicit heteronormativity of the family survive[s] in contemporary...judicial discourse.' Furthermore, she characterises the case as 'the reinscription of heteronormative understandings of family into a situation where the children in question were legally fatherless'.³⁹⁵ *Re G*; *Re Z* concerns distinct but related applications by two men for leave to apply for orders under s. 8 of the Children Act 1989 (i.e. residence and/or contact orders as they then were). In each of the men's cases, a child was conceived using their sperm and

³⁹¹ *R v E and F (Female Parents: Known Father)* (n 368) [88]. This case is discussed in more detail at page 168.

³⁹² Dunne, 'Opting into Motherhood: Lesbians Blurring the Boundaries and Transforming the Meaning of Parenthood and Kinship' (n 364); Leanne Smith, 'Is Three a Crowd: Lesbian Mothers' Perspectives on Parental Status in Law' (2006) 18 *Child and Family Law Quarterly* 231; Fiona J Kelly, *Transforming law's family the legal recognition of planned lesbian motherhood* (UBC Press 2011).

³⁹³ *Ibid.*

³⁹⁴ *Re G (A Minor)*; *Re Z (A Minor)* [2013] EWHC 134 (Fam).

³⁹⁵ Harding, '(Re)inscribing the Heteronormative Family' (n 380) 186.

was born to a woman in a civil partnership. Since the adoption of the Human Fertilisation and Embryology Act 2008, the civil partners, and not the biological father, are the legal parents. As a result, the biological father would not be 'entitled to apply for a section 8 order' with respect to the child'.³⁹⁶ Instead, he would have to 'obtain 'the leave of the court to make the application'.³⁹⁷ This case, therefore, turned on whether the men should be granted leave to apply for such orders rather than on whether such orders should actually be granted.

The facts of the two cases are somewhat separate but linked. D and E, two females in a long-term relationship who subsequently became civil-partners, approached a male couple with whom they were friendly (S and T), who were also in a long-term relationship and subsequently became civil-partners, with whom they were friendly about having a child. S agreed to be the biological father and E would be the biological mother. In December 2008, shortly after D and E's civil partnership, F was born as a result of home insemination. At this stage the 2008 reforms had not come into force and, therefore, S would be considered as one of F's legal parents and would, as a result, have an automatic right to apply to the court for a s. 8 order. Following F's birth, there seems to have been regular contact between S and F, although the frequency and quality of that contact is disputed. About a year after F's birth, E became pregnant again following home insemination using S's sperm and subsequently gave birth to G.

At the same time that E was pregnant with F, T provided sperm for X and Y (who were friends of D and E) and X subsequently became pregnant and gave birth to Z. Following birth, there was a high degree of contact between T and Z. As G and Z were born to women in a civil partnership, following the coming into force of the

³⁹⁶ As required by Children Act 1989 s.10 (2) (a).

³⁹⁷ *Ibid.* s. 10 (2) (b).

2008 act, S applied for leave to apply for a contact and residence order in respect of G, and T applied for leave to apply for a contact order in respect of Z. In granting leave to apply for the contact orders (but not a residence order), the judge held that biological fathers in the applicants' position should not automatically be denied leave to apply for a s.8 order and that under the facts of this case a relationship was allowed to develop between the biological fathers and the children that suggests they should be granted leave to apply for a contact order.

Returning to Harding's comment above that the case represents 'the reinscription of heteronormative understandings of family into a situation where the children in question were legally fatherless', this is not immediately apparent from the outcome of the case. The effect of the decision was not, in fact, to make any orders relating to the biological fathers' relationships with the children but to grant them the opportunity to make their case in court just as any other adult with a close relationship with the child (such as a grandparent might). As Baker J noted:

...no other person is absolutely excluded from seeking redress and...biological fathers who are deprived of legal parenthood by the 2008 Act should be treated no differently. Had parliament intended that a person in a position of the applicants in this case should be entirely stripped of legal remedies, it would have expressly provided that a person in the position of S and T in these circumstances would be disqualified even from seeking the court's leave.³⁹⁸

Furthermore, Baker J makes it clear that granting leave to apply is more about providing the biological fathers with access to justice than a sense that the substantive case will or should succeed. He stresses that 'it is well established that the granting of leave under s.10 (9) does not create a presumption in favour

³⁹⁸ *Re G (A Minor)*; *Re Z (A Minor)* (n 386) [119].

of a substantive order'.³⁹⁹ In his conclusion he further emphasises this point, perhaps even indicating that their chances of success are slimmer than the biological fathers may anticipate:

‘I make it clear, however, that it does not follow that any substantive order for contact will be made in either case. Furthermore, if contact is ordered, it may well be significantly less frequent than the applicants are seeking’.⁴⁰⁰

However, Harding’s criticisms are not primarily aimed at the outcome of the case but the use of language in the judgement. Harding cites the judge’s use of ‘biological father’ to refer to the applicant rather than the respondents’ preferred term of ‘known donor’ in support of her argument. In Harding’s submission:

‘By referring to the men as ‘biological fathers’, Baker J is drawing the discursive power of ‘father’ on to their side of the dispute.

Other commentators have made the link between reference to biological father in *Re G*; *Re Z* and the promotion of heteronormative understandings of the family. Brown, for example, notes that ‘[Baker J’s] chosen language suggests that the judgment is underpinned by assumptions and ideals that promote the traditional, heterosexual, ‘nuclear family’ model’.⁴⁰¹

However, Harding’s and Brown’s criticism of the judgment for referring to the biological father, supposedly as a way of reasserting the heteronormative family model, needs to be interpreted in light of the specific context in which these comments were made. Had the case concerned a female couple that had adopted a child or had conceived with the sperm of an unknown donor, it would

³⁹⁹ *Ibid.* [65].

⁴⁰⁰ *Ibid.* [134].

⁴⁰¹ Alan Brown, ‘Re G; Re Z (Children: Sperm Donors: Leave to Apply for Children Act Orders): Essential “Biological Fathers” and Invisible “Legal Parents”’ (2014) 26 *Child and Family Law Quarterly* 237, 240.

have been a very different scenario. In those situations, it is unlikely the father would make any sort of parental claim and in the latter situation would not even know the child existed. It is also unlikely that the court would contemplate allowing such a claim. Therefore, it seems that any underlying normative assumptions (such as right to knowledge of biological origins) would be applied in a similar way to a same-sex couple as to a different-sex couple without any suggestion that a heteronormative bias would result in different treatment.

Both Harding and Brown are constructing the dispute in *Re G; Re Z* as one where a female couple seek to have a child through the involvement of a sperm donor that is known to them in order to facilitate their aims. This would suggest in their eyes that from a legal point of view there is little to distinguish this situation from one where there is a sperm donor that is not known to the couple. However, even if one did not accept that heteronormative ideas of the family did not seem to have a detrimental impact on the recognition of lesbian families created through unknown sperm donation, there is a strong case to suggest that the reproductive involvement of a man who is known to the family creates a different set of considerations that may need to be judged differently from unknown donation. Therefore, the way Baker J uses the term 'biological father' may not be as straightforwardly heteronormative as it might have been had the case involved conception with an unknown donor.⁴⁰²

On a related note, Brown criticises Baker J's statement that 'alternative family forms without fathers are sufficient to meet a child's need'.⁴⁰³ He contends that

⁴⁰² For more on the effect of the language used to describe biological fathers in these families see Catherine Donovan, 'Who Needs a Father? Negotiating Biological Fatherhood in British Lesbian Families Using Self-Insemination' (2000) 3 *Sexualities* 149, 156.

⁴⁰³ *Re G (A Minor)*; *Re Z (A Minor)* (n 386) [113].

the use of the word 'sufficient' reflects 'the implicit assumption that children ordinarily benefit from having a relationship with their "biological father"'⁴⁰⁴ because the statement suggests that same-sex families are merely adequate but less than the ideal. The suggestion that law has a tendency to view lesbian families as not complete is a valid one and has been reinforced by arguments made by other commentators.⁴⁰⁵ However, in this specific context it may be a less than generous interpretation of the judge's comments especially as they draw on arguments that counsel for the respondents made in their submissions.⁴⁰⁶

In some senses, these comments go beyond the literal meaning of what judges say in a particular case. They may be an attempt to second guess what meaning a judge has in his or her own contemplation when making particular remarks or an attempt to expose hidden assumptions or biases that may be operating. Therefore, the judgments in these cases can be read in a number of different ways. These deeper critiques about the role of language in these cases is almost an attempt to read between the lines, which may or may not reflect the judge's actual approach but which is, nonetheless, a plausible, if not very generous, interpretation. This almost deconstructionist approach to judicial reasoning has been important in revealing the unquestioned assumptions upon which the law is based and can be a means of encouraging a more critical and reflective engagement with how laws are expressed.

While there is a need for this sort of work to continue in order to avoid complacency in the way in which legal norms are constructed and invoked in

⁴⁰⁴ Brown (n 393) 244.

⁴⁰⁵ For example, Jenni Millbank, 'The Limits of Functional Family : Lesbian Mother Litigation in the Era of the Eternal Biological Family' [2008] International Journal of Law , Policy and the Family 149, 162.

⁴⁰⁶ *Re G (A Minor)*; *Re Z (A Minor)* (n 386) [71].

various situations, it is also important to genuinely engage with the apparent reasoning and meanings judges ascribe to their interpretation of the law. In this way, it is possible to elucidate the legal constructions and normative frameworks that judicial comments, on their surface, might imply, while also indicating where less obvious agendas and assumptions may be operating and the effect they may have.

In that spirit, when Baker J refers to lesbian families as sufficient he need not be understood as invoking an ideal notion of the family against which lesbian families fall short despite being passable as families. He could simply be understood as indicating that, as far as the HFEA 2008 is concerned, lesbian couples that have children through ART are in the same position as different-sex couples. In that sense, Baker J could be seen as affirming the fact that there are no longer any questions remaining about the sufficiency of same-sex parenting as there once was.

In order to support his argument that the language used in *Re G; Re Z* betrays a certain reticence about same-sex parenting, Brown argues that:

the law now accepts that lesbian couples are capable of parenting children sufficiently. However the emphasis placed on the importance of fatherhood leads the courts to stop short of fully endorsing, in the context of lesbian-led families, the two-parent 'nuclear family' model (which it usually embraces).⁴⁰⁷

However, I would suggest that there is considerable indication in the case law of the courts' endorsement of the two-parent '(homo) nuclear family' model. In *Re G; Re Z*, for example, Baker J notes that '[t]o my mind, the policy underpinning sections 42(1), 45(1) and 48(2) of the 2008 Act is simply to put lesbian couples

⁴⁰⁷ Brown (n 393) 245

and their children in exactly the same legal position as other types of parent and children'.⁴⁰⁸ Baker J goes on to say that '[i]n this regard, the position of a lesbian couple who have been granted the status of legal parents by the 2008 Act is exactly the same as any other legal parent'.⁴⁰⁹

Furthermore, Baker J recognises the continuing vulnerability and need for protection of lesbian families noting that 'the integrity of their family' and protection from 'the risk of disruption' are 'manifestly material considerations for the court'.⁴¹⁰ This is the latest judicial expression of concern for protecting the homonuclear family dating back to the judgment of Lady Justice Black (as she then was) in *Re D* in 2006 where she states, echoing her earlier judgment on contact in 2003:

I confess that I have been anxious about whether making a parental responsibility order would be in D's interests for the sort of reasons that have influenced Dr Sturge, notably the potential threat to the stability of D's immediate family from what I may loosely call "interference" from Mr B as well as the impact on society's perception of the family if he were, in fact, to use it to become more visible in D's life.⁴¹¹

These judicial dicta paint a picture of a family judiciary that is grappling with unfamiliar and challenging legal situations but are doing so in a genuine attempt to achieve justice for the parties and promote child welfare.

It is, nevertheless, important to remain vigilant, as commentators such as Harding and Brown are, to implicit heteronormative and gender bias in judicial reasoning in these cases. This is especially so because judges are still operating within a gendered and heteronormative framework in relation to parenthood and

⁴⁰⁸ *Re G (A Minor); Re Z (A Minor)* (n 386) [114].

⁴⁰⁹ *Ibid.* [115].

⁴¹⁰ *Ibid.* [134].

⁴¹¹ *Ibid.* [89].

parenting. Consequently, it is not surprising that certain problematic assumptions may be uncritically (and sometimes unwittingly) drawn on in their decision-making. However, this does not suggest that judges are deliberately and systematically marshalling heteronormative conceptions of the family to the detriment of the lesbian homonuclear family when they are resolving collaborative co-parenting disputes. Therefore, it is just as important to commend genuine judicial attempts to accommodate the various interests of those involved within the context of a less than ideal legislative framework.

The Vulnerability of Female Parents, Biological Fathers and their Partners

So far, this has largely focused on the impact of the judicial resolution of 'known donor' disputes on lesbian homonuclear families. This has resulted from the fact that known donor disputes are for the most part characterised in the case law and academic commentary as being about the creation of women-led families and whether or not the biological father can fit into that somehow. I would suggest, by contrast, that what are typically referred to as 'known donor' disputes concern parenting practices that sit on a continuum of collaborative co-parenting arrangements.⁴¹² At one end of the continuum there is the scenario that is being treated as the archetype of known donor disputes whereby a female couple approaches a (often gay) male friend and asks him if he is willing to donate sperm in order to enable them to have a family and the friend agrees to this out of altruism and solidarity with the female couple.

⁴¹² Deborah Dempsey, 'Donor, Father or Parent - Conceiving Paternity in the Australian Family Court' (2004) 18 *International Journal of Law, Policy and the Family* 76.

However, at the other end of the continuum is what might be termed poly-parenting arrangements where a lesbian homonuclear family was not the intended outcome but a parenting arrangement that involved both biological parents (and potentially both of their partners). These poly-parenting arrangements are the core focus of this thesis but it is also important to unpack the implications of the judicial resolution of known donor disputes. I would suggest, therefore, that not all of the cases that are loosely termed 'known donor' disputes conform to the archetype detailed above but sit somewhere between that and poly-parenting. Consequently, this section will explore how tensions between the vulnerability of female parents and the vulnerability of biological fathers play out in the different types of 'known donor' cases and how this is resolved in the case law.

*Re B*⁴¹³ could be seen as coming close to the archetype of a known donor dispute, although it involved a heterosexual family member rather than a gay friend. In *Re B* the man (TJ) agreed to donate his sperm to his sister (S) and her civil partner (CV), who was also the child's biological and birth mother. There was some controversy as to how conception occurred (whether through intercourse or artificial insemination) but the judge did not consider it necessary to make any finding on this matter; as discussed in more detail below, he held that this would not have any impact on the outcome of the case. The case came before the court because the father was applying for a contact order and parental responsibility order following disputes with the female couple about his role in the child's life. In the end, the judge held that the man should be allowed some contact (i.e. 4 times per year) but made no order in relation to parental responsibility. He attempted to

⁴¹³ *Re B (Role of Biological Father)* (2007) 3 EWHC 1952 (Fam).

make this a long-term solution by making an order under s.91 (14) of the Children Act 1989 on all three parties to the affect that they could not initiate further litigation on this matter without the leave of the court for a period of five years.

Had TJ been an anonymous donor, presumably the judge would have had no difficulties in refusing both of the father's applications thereby denying him any legal relationship with the child. Although there has been no case on this, the Human Fertilisation and Embryology Act 1990 provided that the donor was not a legal parent for any purpose⁴¹⁴ and this has not been changed in the Human Fertilisation and Embryology Act 2008.⁴¹⁵ The factual scenario in *Re B* comes closer than the other 'known donor' disputes to a situation where a lesbian couple try to achieve their aim of starting a family through sperm donation but rather than the donor being anonymous/unknown they turn to a family member for help.

This raises the question of whether the mere fact that the man was known to the female couple should impact on his relationship with the child or imply a certain role in the child's life. Nordqvist and Smart argue that this is not a straightforward or clear-cut issue as it might be in relation to anonymous/unknown donation. The author's note that in these cases:

there are important social values and ethical questions at stake. For example, in any situation where a gamete donor is already known to a recipient...there are commanding questions about how much of a role a donor should have in the life of a child they have helped to create.⁴¹⁶

This does not, however, necessarily imply that the decision to involve a known donor should result in him being legally recognised as a parent. It also does not

⁴¹⁴ s 29 (2).

⁴¹⁵ s 48 (2).

⁴¹⁶ Petra Nordqvist and Carol Smart, *Relative strangers : family life, genes and donor conception* (Palgrave Macmillan 2014) 14.

imply that the donor should necessarily have any involvement with the child. However, as will be evident from the subsequent cases that will be discussed, the courts rarely exclude the biological father altogether.

To some extent, the judge in *Re B* did consider that there was some role for TJ to play in the child's life, as can be seen from his judgment. Mr Justice Hedley held that:

it is essential that the door is kept open for BA so that without artificiality he can picture TJ as someone significant but not ordinarily important in his life yet someone with whom (in time and if he so wishes) he can explore the implications of the kind man who enabled him to be and he can ask questions to satisfy his own natural curiosity.⁴¹⁷

In some ways the law does try to keep the door open for a relationship to develop even between an anonymous donor and the child by allowing the child to identify the donor once he or she has reached the age of 18.⁴¹⁸ However, the judge's solution in this case, of allowing contact to happen 4 times a year, seems to go above and beyond this.

This approach to contact is noteworthy because it exceeds the amount of contact offered by the female couple (i.e. once a year at family gatherings) but does not really come close to meeting the man's expectations. This raises the question of why a contact order was made at all given the statement in the Children Act 1989 that the court 'shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all'.⁴¹⁹ Furthermore, as the judge highlighted, 'the fulfilment of an avuncular role needs no contribution from the court'.⁴²⁰ Indeed the female couple in this case accepts

⁴¹⁷ *Re B (Role of Biological Father)* (n 405) [29].

⁴¹⁸ Disclosure of Donor Information Regulations 2004 SI 2004/1511.

⁴¹⁹ Children Act 1989 s 1(5).

⁴²⁰ *Re B (Role of Biological Father)* (n 405) [28].

that TJ would continue to fulfil this role in the context of the child's extended family and the contact that might be associated with this. Therefore, why should the court institute a contact regime that goes beyond the role of an uncle? The judge in this case seems highly influenced by what he characterises as the man's 'unique biological position'. This led him to conclude that it was 'in BA's interests to maintain some kind of relationship with TJ' in order to be able to deal with any questions the child has as he grows up.

There are parallels here with the move towards increasing openness in the adoption process and the removal of donor anonymity.⁴²¹ However, in each of these situations the courts do not impose a contact regime on the parties but merely leave open the possibility of a future relationship developing at the child's instigation by allowing access to identifying information about the donor once the child reaches the age of eighteen. In the context of anonymous donation, the law precludes any kind of relationship with the child until he or she is eighteen. Therefore, in the judge's eyes it would appear that there is a distinction (although not one that is specifically addressed in the judgement) between an anonymous donor and a known donor in terms of the relationship that ought to be allowed to develop between the donor and child.

It is, however, far from clear that merely donating sperm to help a lesbian couple conceive entitles a man that is known to the couple to play a significant role in the life of the child that is born as a result. Allowing such known donors to play a significant role in the life of the child would suggest that heteronormative conceptions of parenting influenced by biological essentialism were at play to a greater extent than in unknown donor situations. It would, therefore, be

⁴²¹ Jane Lewis, 'Adoption: The Nature of Policy Shifts in England and Wales, 1972 - 2002' (2004) 18 *International Journal of Law, Policy and the Family* 235.

inappropriate to consider the biological father in this case as a legal parent or as having parental rights and responsibilities in relation to the child because the intra-familial nature of the arrangement (without evidence of contrary intentions) suggests that the arrangement was one of donation and not ongoing parental involvement.

It may be the case that the decision to conceive with a known donor does and should carry with it certain implications. Perhaps it would be reasonable for a court to say that the very nature of a known donor arrangement implies a greater degree of contact than an anonymous donor arrangement. However, in *Re B*, the judge was quite clear that the purpose of contact was 'not to give TJ parental status in the eyes of BA or indeed anyone else. It is not to allow the development of a relationship which would amount to parental.'⁴²² Therefore, one might conclude that the biological relationship between TJ and BA was appropriately reflected in the four days a year contact and that the female couple's homonuclear family was protected from perceived threat by the known donor through the judge's refusal to grant TJ parental responsibility. As the judge correctly noted to do so would be inconsistent with the autonomy of the homonuclear family,⁴²³ and I would suggest that, on the facts of this case, this would have been done for no better reason than to advance a heteronormative conception of the family based on biological essentialism.

These comments are likely to apply in situations where there is a clear inference that the overriding motivation on the part of the known donor for donating sperm is to facilitate the creation of a lesbian homonuclear family. However, not all collaborative co-parenting situations can be characterised in this way and the

⁴²² 'Re B (Role of Biological Father)' (n 405) [29].

⁴²³ *Ibid.*

issues are considerably more complicated where lesbians and gay men collaborate to have children.

Two cases stand out where the issues were particularly finely balanced: *R v E*⁴²⁴ and *T v T*.⁴²⁵ *R v E* involved a female couple (who were civil partners) and a biological father who was in a same-sex relationship. The child's primary carers were the female couple but the child had frequent contact with the male couple. In terms of the legal position, the father did not have parental responsibility (because at that time being on the birth certificate did not automatically confer parental responsibility unlike now).⁴²⁶ However, the second female parent did have parental responsibility by virtue of a parental responsibility agreement with the mother.⁴²⁷ Following a dispute between the two couples, the biological father sought a contact order, which allowed for overnight staying contact, as well as parental responsibility and shared residence. The issue of overnight staying contact proved relatively unproblematic and that developed at the child's request. However, the female couple did not agree to shared residence or parental responsibility and, in fact, sought a residence order in their favour, which the trial judge granted, denying the father's application for parental responsibility and shared residence.

In reaching this conclusion, the judge seems to have been strongly influenced both by pre-conception intentions and the post-birth parenting reality. In this regard, the judge found that the intention was never for the father to be a co-parent nor is that how things had turned out.⁴²⁸ One factor that may have been

⁴²⁴ *R v E and F (Female Parents: Known Father)* (n 368).

⁴²⁵ *T v T (Shared Residence)* [2010] EWCA Civ 1366.

⁴²⁶ Children Act 1989 s. 4 (1) (a).

⁴²⁷ Children Act 1989 s.4A (1) (a).

⁴²⁸ *R v E and F (Female Parents: Known Father)* (n 368) [39] – [47].

significant was that the contact arrangements had proved satisfactory for a number of years after the child's birth. It was only following the dispute that the biological father came to view them as unsatisfactory. This could indicate a change of heart on his part especially considering that the judge found that 'the father's position was already recognised by the female parents who had not attempted to marginalise him after the dispute, and who had consulted and would continue to consult him as to significant decisions.'⁴²⁹

However, it could also be that the arrangement had been satisfactory only until there was a disagreement over discipline because up until that point, all the parents were on the same page in terms of parenting. Therefore, it is difficult to gauge whether this is a case where the biological father subsequently sought more involvement than he initially did or that he was prevented from asserting his point of view with regard to the upbringing of the child, which he thought he had the right to assert.⁴³⁰ Nevertheless, the circumstances leading to the conception are sufficiently dissimilar to those in *Re B*, the case I am treating for these purposes as the archetypal known donor case, to warrant different treatment.

In *Re B*, the female couple had decided to have a child together and it was only after several unsuccessful attempts at becoming pregnant using unknown donor sperm that they sought the help of a family member. In *R v E*, however, the female couple and male couple discussed the possibility of having a child over a long period of time and there was no suggestion that the female couple would have gone ahead regardless using unknown donor sperm. Therefore, there is not the same sense in *R v E*, as there is in *Re B*, that the biological father was simply

⁴²⁹ *Ibid.*

⁴³⁰ For a discussion of the case from the latter point of view see Thérèse Callus, 'A New Parenthood Paradigm for Twenty-First Century Family Law in England and Wales?' (2012) 32 Legal Studies 347, 352.

enabling the female couple to have a child. This fact alone could be sufficient to mean that *R v E* is not a true known donor case, properly so-called, as *Re B* was, because the biological father was not simply making a donation of sperm with no intention of being involved in the child's life, other than in his role as a family friend.

This version of family formation is born out not only by the recollection of the biological father and his partner but also that of the birth mother and her partner, even though the accounts of the men and women differ markedly. In the judgment, the biological father is described as recalling that for the female parents 'it was important for a child to have a father who wants to play an active role in the child's life. They wanted a good friend to be the father rather than a mere sperm donor'.⁴³¹ The biological father's partner is reported as recalling that the biological father 'wanted to be fully involved with the child as a father'.⁴³² The women do not explicitly refute this account but they were both clear that it was the two of them that were bringing up the child and 'they would want to make final decisions about the child, having consulted [the biological father]'.⁴³³ Nevertheless, the judgment reports that the birth mother's recollection is 'that the child to be born would have a positive and meaningful relationship with Richard as the child's biological father'.⁴³⁴ Therefore, although this does not necessarily imply a high degree of involvement, even the women's recollection of their pre-conception intentions does not sit easily with idea of the biological father as a mere (known) donor.

⁴³¹ *R v E and F (Female Parents: Known Father)* (n 368) [12].

⁴³² *Ibid.* [13].

⁴³³ *Ibid.*

⁴³⁴ *Ibid.* [15].

The court in *R v E* does not explicitly recognise any potential tension between this family's lived reality and the legal framework. There is little acknowledgment that the court struggles to accommodate this type of parenting arrangement within the existing legal framework. Therefore, the court seems to be shoehorning a parenting arrangement that doesn't easily fit with existing models without acknowledging the potential difficulties this creates. Callus argues similarly that *R v E* is an example of where the court appears:

to gloss over the legal reality of the situation in the hope of finding a solution which matches the practical reality. However, where the sperm donor father also has a relationship with the child, the reality is that a two-parent-nuclear family model is wholly inadequate.⁴³⁵

She also suggests that the judge's reasoning is open to question relying as it does on the notion of parental responsibility, which the father did not have:

the argument that the father could not lay claim to being a co-parent and taking decisions is actually because the law did not grant him automatic parental responsibility. When he disagreed with a decision of the mother, he had no legal standing to object. Consequently, he needed to apply for parental responsibility in order to exercise the co-parenting role, which the judge found to be lacking.⁴³⁶

This is a plausible account of the father's position and runs contrary to the idea of the father simply having changed his mind. Although, it is difficult, if not impossible, to determine what was agreed prior to conception without written evidence, this version of events does not seem to be contemplated by the court in *R v E* in its, understandable, attempt to protect the homonuclear family.

⁴³⁵ Callus, 'A new parenthood paradigm for twenty-first century family law in England and Wales?' (n 421) 351.

⁴³⁶ *Ibid* 352.

The case of *R v E* stands somewhat in contrast to that of *T v T*,⁴³⁷ which is also open to criticism but more for undervaluing the role of the mother's partner rather than being overprotective of it. *T v T* concerned the children's biological father (F), who, along with his male partner, advertised for someone to have children with, and a female couple, the biological mother (M) and her partner (L), who responded to the advert. In this case F and M already had parental responsibility and the court at first instance further granted parental responsibility to L. Although the children spent most of their time with M and L, they did have contact with F. In addition to granting parental responsibility to L, the court at first instance also granted a joint residence order in favour of M and F, which provided for a significant amount of staying contact for F. In doing this, the court denied M's application to restrict F's parental responsibility and L's application for a joint residence order in favour of M and L. The judgment at first instance seems to put F in a similar position to a post-separation father which the previously decided cases had been reluctant to do. M and L appealed against this decision asking the court to set aside the residence order in favour of M and F and preferably substituting it with a residence order in favour of M and L, failing which substituting it with a residence order in favour of all three parties, the latter of which F would agree to.

In substantially denying the appeal in relation to the appellants' first alternative, the court held that the order made at first instance was within the trial judge's discretion and was not contrary to the best interests of the child. The appeal court would, therefore, have upheld that order and denied the appeal entirely had F not

⁴³⁷ *T v T* (n 416).

offered to agree to a residence order in favour of all three adults, which order the court, therefore, made.

In *T v T*, it seems that the reasons for the known donor being involved in the children's lives were irrelevant. The salient fact was that F had been having regular and progressively increasing contact and parental responsibility for the entirety of the children's lives (i.e. 10 and 7 years respectively). Does this level of contact, however, imply that it should result in a residence order? If a similar contact regime had existed in relation to another family member (e.g. an aunt or an uncle) would the court have granted a residence order in their favour? Perhaps the court was heavily influenced by the fact that F already had parental responsibility. However, it seems essentially accidental that F in this case had parental responsibility but TJ in *Re B* did not and yet the outcomes in the cases are very different. In some ways this is an unfair comparison because there seemed to be considerably more hostility and relationship break down in *Re B* than in *T v T*. However, the court doesn't really address these difficult issues explicitly.

While in *R v E* the court was very concerned to protect the position of the birth mother's partner, the court in *T v T* did not seem to consider this a priority. Therefore, just as *R v E* was open for criticism on the basis that it failed to give proper consideration to the allegedly agreed role of the father, so too did *T v T* fail to give sufficient consideration to the role of the birth mother's partner.

Smith is similarly critical of Lady Justice Black's reasoning in the Court of Appeal decision in *T v T* because of the way it makes L's inclusion in the shared

residence order dependent on the wishes of F.⁴³⁸ Lady Justice Black's approval of the first instance judge's finding that it was not necessary for L to appear on the residence order because she already had parental responsibility and the children were secure in their relationship with her,⁴³⁹ is surprising in two key respects. Firstly, this is out of step with the recent case law on the symbolic use of shared residence orders in post-separation parenting to protect the psychological security of the parents, discussed above and also referred to in the judgment. Smith goes so far as to say that '[t]he decision in *T v T* thus sits uneasily with some of the other authorities on shared residence and adds to the claims of those who argue that there is now little clarity of purpose underpinning the making of shared residence orders'.⁴⁴⁰

Furthermore, it also seems to be inconsistent with the same judge's earlier comments in *Re D* that a co-mother in a position similar to L was 'the most vulnerable person in this situation, whom society will view to some extent as "the cuckoo in the nest"'.⁴⁴¹ Smith notes that Lady Justice Black's position in the subsequent case of *T v T* arguably 'serves to compound this vulnerability'.⁴⁴²

Not only is the birth mother's partner vulnerable in terms of her parental relationship with the child but potentially so also is the biological father's partner, of which there is very little mention in the case report. The case report notes that the biological father advertised that he wanted to become a father, the birth mother and her partner responded and discussions with the biological father and his partner followed this.⁴⁴³ Although Lady Justice Black makes little mention of

⁴³⁸ Leanne Smith, 'Case Comment: *T v T* (Shared Residence) [2010] EWCA Civ 1366' (2011) 33 *Journal of Social Welfare and Family Law* 175.

⁴³⁹ *T v T* (n 416).

⁴⁴⁰ Smith, 'Case Comment: *T v T* (Shared Residence) [2010] EWCA Civ 1366' (n 429) 178.

⁴⁴¹ *T v T* (n 416) [64].

⁴⁴² Smith, 'Case Comment: *T v T* (Shared Residence) [2010] EWCA Civ 1366' (n 429) 179.

⁴⁴³ *T v T* (n 416).

the biological father's partner's role in her summary of the children's parenting reality, she notes the recorder's finding that both children love the birth mother, the biological father and their partners and are 'enthusiastic about their lives in both household'.⁴⁴⁴

Therefore, similar to the case of *R v E* discussed above, it is unclear why F's partner was not included in any of the applications. It is difficult to know whether the biological father and his partner understood themselves to be having a child together with the female couple or whether the biological father's partner did not consider himself fully part of that arrangement. The fact that the judgment describes the initial advert as having been placed by the father without mentioning his partner may indicate that he did not conceive of himself as a parent to these children. However, it is also possible that the father's partner is not mentioned because men in his position lack visibility in the case law and are not contemplated by the legal framework. It may be the case that the couple felt that it would be difficult enough to have the biological father's parental claim recognised without complicating things by discussing his partner's position. They may have felt that the likelihood of success of the application would be reduced if he were involved. We do not have enough information in the case report to conclude one way or another about this.

Nevertheless, it seems that the role and legal position of the biological father's partner needs to be developed further in the case law. The position of the birth mother's partner has been extensively discussed in the reported cases and is now explicitly addressed in legislation. Although there are still concerns about the vulnerability of the birth mother's partner, the biological father's partner is in an

⁴⁴⁴ *Ibid.* [13].

arguably even more vulnerable position. The issue of the biological father's partner's position will be returned to in a subsequent chapter when discussing the empirical data.

Although his partner's position may not have been explicitly addressed, the court in *T v T* were clear that the biological father should certainly be included in the shared residence order and were even minded to omit the co-mother in the absence of the father's agreement. One conceptual difference that may have been influential is that in *T v T*, unlike the earlier cases, the biological father was the one who initiated things by placing an advert. This could arguably place the biological father in this case in a somewhat stronger position than those in earlier cases because it may evidence his intention to be a parent from the outset. However, this is not explicitly discussed in the case report.

While the case of *T v T* is commendable for recognising the legal position of both the birth mother's partner and the biological father in what is arguably a collaborative co-parenting arrangement, the outcome and the court's reasoning seems to have been somewhat at odds with previous cases with materially similar facts. In *Re D*, Mrs. Justice Black, as she then was, expressed particular concern that formally recognising the biological father would undermine the position of the co-mother. Therefore, she only ordered a version of parental responsibility in that case that was essentially stripped of practical effect. Furthermore, in both *Re B* and *R v E and F* the court refused the biological fathers' applications for parental responsibility. Hedley J commented in *Re B* that the child's family life with his female parents was 'wholly inconsistent with the exercise of parental responsibility'.⁴⁴⁵ This has led Smith to opine that 'it is hard to avoid concluding

⁴⁴⁵ *Re B* (n 405) [26].

that the exercise of discretion has led to inconsistency in the application of the law, irrespective of whether one prefers the approach taken in *T v T* or that taken in the earlier cases'.⁴⁴⁶ Therefore, it cannot really be said that a coherent approach to the legal recognition of poly-parenting families has yet been developed.

Overall, therefore, it would seem that a desirable outcome was reached in *T v T*, although the route through which this was achieved undervalued the intentions of the parties and the role that the mother's partner plays in the children's lives, not to mention that of the biological father's partner. All three adults that were parties to the case have parental responsibility and a residence order in their favour, which guarantees contact with the children. This reflects the post-birth reality that has developed, namely that the children view all three adults as their parents. This may or may not have been the intention of the adults prior to birth but it is the situation that they have allowed to develop.

It is arguable that the different outcomes in *R v E* and *T v T* are justified on the facts of the cases. However, in *T v T*, the way in which the court marginalises the birth mother's partner by making her inclusion in a joint residence order conditional on the father's consent is indefensible. This observation similarly applies to the Quebec case of *S.G. v L.C.*⁴⁴⁷ discussed more fully in the previous chapter. Although Quebec's civil code is supportive of female same-sex parenthood in a similar way to the HFEA 2008 in *E&W*, as discussed in the previous chapter, *S.G. v L.C.* indicate that the protection of the homonuclear

⁴⁴⁶ Smith, 'T v T Case Comment' (n 429) 178.

⁴⁴⁷ *S.G. v. L.C* [2004] Q.J. No. 6915 (S.C.).

family is not such a high judicial priority in Quebec as it has been in a number of the cases decided in E&W.

Although it is possible to contrast the generally affirmative position in relation to women-led families that is evident in the judicial reasoning from some of the E&W case law with the approach in cases like *S.G. v L.C.* in Quebec, it is important to recognise the substantive differences in the cases emanating from these two jurisdictions. While the cases in E&W concerned disputes around parental responsibility or contact, *S.G. v L.C.* was about who the child's legal parents were, which is an issue conclusively resolved in E&W by statute.

Furthermore, the case, *S.G v L.C.*, is somewhat problematic because it was decided solely on the basis of the biological father's affidavit evidence. Therefore, the court did not have the benefit of hearing arguments on behalf of the biological mother and her partner. In addition to this, due to a publication ban, it is difficult to ascertain the facts of the case in detail. However, based on the interim judgment,⁴⁴⁸ it seems that the lesbian couple, who were registered as the parents on the birth certificate, had a allowed contact between the child and biological father under the father sought to establish filiation with the child. This would essentially recognise the biological father as the child's second legal parent instead of the birth mother's partner.

As the previous chapter highlighted, under Quebec's civil code, a sperm donor does not have an automatic bond of filiation with any child born, although he may establish filiation in the year following birth if conception occurred through sexual intercourse.⁴⁴⁹ Under Quebec law, the parents of a child born using assisted

⁴⁴⁸ *S.G. v L.C.*, [2005] J.Q. No 7407.

⁴⁴⁹ Quebec Civil Code 1991, art. 538.2.

reproduction are those who were party to the 'parental project' and this is presumed to be the birth mother and her spouse, whether male or female.⁴⁵⁰ The biological father argued that the parental project existed between the birth mother and himself rather than her partner. This was based on the assertion that, although the birth mother's partner went on to co-parent the child, she had never intended to enter into the parental project. The court relied heavily on this to conclude that the biological father and not the mother's partner was party to the parental project and, therefore, granted him access rights.

As other commentators have acknowledged,⁴⁵¹ this decision was understandable given that the court only had the biological father's version of events to base its decision on. However, it is problematic in the sense that it disrupts the security of female-led families. In a similar way to the court in *T v T*, the Quebec court in *S.G. v L.C.* seem to have unwarrantedly prioritised the interests of the biological father over those of the birth mother's partner despite this outcome not being supported by the child's parenting reality.

One thing that seems striking about *S.G. v. L.G.* is that there appears to be an unjustified level of judicial certainty and conviction about the outcome. The judge is critical of the women who are, in the judge's view, trying to deny the child's right to a father. There is no acknowledgment that this type of situation is not directly analogous to the typical heterosexual reproductive scenario. This is a further indication that the Quebec court is unquestioningly prioritising heteronormative conceptions of the family without having any regard to the vulnerability of the homonuclear family in this situation.

⁴⁵⁰ *Ibid.* art. 538.3.

⁴⁵¹ Kelly, *Transforming law's family the legal recognition of planned lesbian motherhood* (n 384).

Understandably, much of the commentary on this case has been scathing about the judge's failure to prioritise the intentions of the women-led family. This is unsurprising given that the judgment fails to engage with or recognise the differences, complexities and vulnerabilities of female same-sex parenting as compared to different-sex parenting. However, the judgment could also be criticised from the point of view that it does not even consider the possibility of all three adults being recognised in some parental capacity.

Therefore, while the judgment fails to recognise the differences between the homonuclear same-sex family and different-sex parenting, it also fails to acknowledge that the parenting situation in the case is not directly analogous to an unknown donor situation either. I would argue that quasi-donor situations where the biological father is known is *sui generis* and needs to be treated as such in legal discourse rather than try to shoehorn it into existing concepts. This is something that the courts of E&W seem to have recognised, although they do not necessarily follow through on this when applying the legal rules. To some extent this outcome was precipitated by the legislative framework in place and the nature of the arrangement. It is not self-evident that a man whose sperm has been used to conceive a child with a single woman or female couple has necessarily 'donated' the sperm. This is different from an unknown donor situation where the nature of the situation indicates that it is a donation more along the lines of blood donation.

The Ontario courts by contrast have experience of engaging with a more flexible legislative framework in resolving these disputes. A prominent example of this is the case of *C (MA) v K (M)*⁴⁵² where the court reached a similar outcome, in terms

⁴⁵² *C (MA) v K (M)* [2009] ONCJ 18.

of recognising more than two adults as parental figures, as the England and Wales case of *T v T*. The judge in *C (MA) v K (M)* was considerably influenced by the earlier Ontario case of *A (A) v B (B)* discussed in the previous chapter, which concerned a situation where the court was being asked to afford legal recognition to a parenting arrangement that had been reached consensually, involving three legal parents. Unlike that earlier case, *C (MA) v K (M)* involved a dispute between a female couple and biological father about legal parenthood. Although, this case is more akin to the disputes that arise before the courts in E&W, it differs in the crucial respect that it concerned legal parenthood rather than parental responsibility. The applicants were a female couple who had approach the respondent, a gay man, to help them have a child. The intention of all three adults was that the respondent would be more than a sperm donor. He would, in fact, be recognised as the father and would be able to spend a generous amount of time with the child on a regular basis. Following birth, the parties signed an agreement with respect to custody, access, child support and adoption. Amongst other things, the agreement stipulated that the respondent would consent to the termination of his parental rights in the event that the applicants sought to adopt the child.

For a number of years, things went smoothly and the biological father and child spent time together as agreed. However, as the relationship between the respondent and applicants deteriorated, the applicants sought to rely on the agreement in order to adopt the child without the respondent's consent. Despite the agreement, the court found that an order dispensing with the respondent's consent would not be in the child's best interests. It reiterated that it is the child's best interests that determine the outcome of the case and, consequently, the court is not bound by any agreement reached by the parties.

In deciding the case, the court was influenced by the fact that both the applicants were secure in their position as the child's parents as they both had custody of the child pursuant to the agreement, which could be incorporated into a custody order. The court also found that the child had a positive and beneficial relationship with the respondent and his family, which might be jeopardised if consent was dispensed with. Given that the respondent had been a caring and loving influence in the child's life, the court was keen to protect this relationship.

Interestingly, in *C (MA) v K (M)*, the issue was presented by the court not as one involving competing interests but as involving mutually reconcilable interests. In particular, the court highlighted the fact that a declaration could be made recognising all three as legal parents. In the court's judgment, this was a more appropriate way of recognising the legal position of each of the parties than adoption. The significance of this approach is that it demonstrates the potential for reconciling different interests that a more flexible legal stance on the number of legal parents can present. This is typified by Justice Cohen's comments that:

[I]n determining B's best interests, the issue for the court is not the protection of a specific family structure *ab initio*. This court sees all kinds of family structures and, absent specific statutory provisions otherwise, the nuclear family of two parents and a child enjoys no special preference when the court is assessing the best interests of a child. Indeed, a child can have more, or less, than two parents for the purposes of family law.⁴⁵³

This is similar to Lord Justice Thorpe's comments in *A v B* to the effect that there is no *a priori* reason for not recognising more than two parents.⁴⁵⁴

While this degree of flexibility around legal parenthood is a welcome development, the court would need to be careful when applying it not to impose

⁴⁵³ *Ibid.* [36].

⁴⁵⁴ Discussed further at p 211.

a legal parenthood regime that is inappropriate for the family before it. The court in *C (MA) v K (M)* adopt quite a strict approach to the consequences of the female couple's decision to involve a known donor, implying that the legal recognition of multiple parents might necessarily flow from such a decision. As Justice Cohen goes on to say:

When they decided to have a child, they fully understood that, although engaging a sperm donor was a biological necessity, engaging a known sperm donor was not. Thus, when they decided ... that they wanted their child to have a known and involved father, they knew that, if they chose well, their child would develop a relationship with a parent who was not part of their immediate family. They knew that a parent-and-child *19 relationship gives rise to rights and responsibilities. They anticipated that a third parent would be involved with their family and had to have anticipated that this parent might disagree with, or challenge, their parenting choices, just as they must do with one another...Now they want to turn back the clock and make a different choice.⁴⁵⁵

This is also reminiscent of Lord Justice Thorpe's comments to the effect that the female couple possessed the decision-making power in relation to the child and they chose to involve a known donor, from which certain consequences may flow.

Fiona Kelly raises a note of caution in relation to such an approach where multiple parents are recognised because it may be used as a means of imposing men on lesbian families, particularly in light of the currency of the fathers' rights movement. She notes that:

[W]idening the category of "parent" so that three or more people can be included might result in men being given additional tools with which to control women within the family, despite women remaining the primary caregivers of children in both the heterosexual and homosexual context.⁴⁵⁶

⁴⁵⁵ *Ibid.* [74].

⁴⁵⁶ Fiona Kelly, 'Nuclear Norms or Fluid Families? Incorporating Lesbian and Gay Parents and Their Children into Canadian Family Law' (2004) 21 Canadian Journal of Family Law 133, 163

Kelly presents women-led families as being particularly vulnerable in terms of being prevented from exercising their autonomy to create the families they desire. It may well be the case that the courts' approach in *C (MA) v K (M)* was justified on the basis of the facts of the case. As Kelly notes, 'there was little evidence that the mothers in *M.A.C.* had in fact parented as a nuclear family unit. The donor had played a significant role in the child's life and had been a party to both caregiving arrangements and decision making'.⁴⁵⁷ However, that does not mean that the decision to involve a known donor to help conceive a child would necessarily imply that the biological father should be afforded legal recognition as the court in *C (MA) v K (M)* seem to suggest.

It is worth noting at this stage that these known donor disputes not only raise issues related to the vulnerability of the female partners involved but also the vulnerable position the biological father finds himself in. This is particularly true of gay men, who are in a vulnerable position not only as donors but also when they seek to create autonomous families. This is an issue that will be explored further in Chapter Seven.

The earlier discussion of *T v T* and *R v E* illustrate that disputes concerning collaborative co-parenting families can be analysed from a number of different perspectives. The perspective the courts in E&W have taken in the cases that have come before them has been to start from a consideration of how the legal rules might impact the women-led homonuclear family. This is understandable given that female same-sex parenting has been increasingly visible in society for a number of years. In addition to this, the protection of female same-sex parenting

⁴⁵⁷ Kelly, *Transforming law's family the legal recognition of planned lesbian motherhood* (n 384) 65 – 66.

has been prioritised in the previous cases and legislative reform as discussed above.

However, in situations where gay men and lesbians collaborate to have children this is not invariably done in order to facilitate the creation of women-led homonuclear families. In other words, same-sex parenting is broader than lesbian parenting. The cases that have come before the courts in England and Wales demonstrate a range of practices around initiating these collaborative co-parenting arrangements that may evidence various intentions in terms of parental involvement. *Re B* could be seen as closely approximating a donor situation where the donor is known; *Re D* was a situation where the female couple advertised for a man to help them start a family. In each of these cases, the impression is that the female couple were looking to start a family one way or another and sought the involvement of a man to help them do that. This does not necessarily imply that the man intended to be a donor because that would depend on his own reasons for getting involved in the arrangement. However, this has to be assessed in light of whether the female couple would have likely been willing to accept an involved father or would have looked for another donor.

The way the arrangement was initiated, however, may indicate different intentions in terms of parental involvement. *R v E* resulted from informal discussion between four friends (a male couple and a female couple). Therefore, arguably, this wasn't a case of a female couple wanting to start a family one way or another but of four adults deciding to start a family together. In *T v T*, it was the male couple who placed the advert and the female couple that responded, which suggests even more strongly that the father intended to be involved rather than be a donor.

In the absence of written agreements, these observations are merely inferences from the facts surrounding intentions. This highlights the importance of written agreements as a record of pre-conception intentions even though they are not legally binding. In addition to this, the way the parenting arrangement was initiated can be an important indicator of intentions, which also needs to be considered alongside post-birth parenting.

While the female partners in these cases have sought to demonstrate how fragile the legal protection of the lesbian mononuclear family is, the legal position of male same-sex parents is even more precarious, not to mention the lack of legal recognition of collaborative co-parenting arrangements. The difference in legal position of female and male same-sex parents is evident from the Human Fertilisation and Embryology Act 2008. Under that act, the birth mother of a child born following assisted reproduction is automatically one of the two legal parents and has parental responsibility on the birth of the child. As outlined above, her female partner would also be recognised as the second legal parent if they were married/in a civil partnership at the time of conception or conception occurs in a clinic. It is less than ideal that similar protection is not open to unmarried female couples who conceive informally at home, which accounts for a significant number of cases. However, at least those female couples covered by the 2008 Act can be certain at the time of conception that they will be the child's legal parents.

By contrast, this option is not open to male same-sex parents. As the birth mother is automatically one of two legal parents on birth (along with her partner if married), she/they would have to first consent for the male couple to be the legal parents in order for the court to be able to make a parental order to this effect.

While it is a positive development that this 'expedited adoption' procedure is available to male couples, the parental order mechanism presents a number of difficulties in relation to male same-sex parenting. This raises questions about the role of intentionality in relation to surrogacy, which is beyond the scope of this thesis.⁴⁵⁸

This difference in the legal treatment of female and male same-sex parenting can partly be explained by the fact that different considerations are involved when legally separating a birth mother and child compared with a biological father and child. There is a greater reluctance to separate a birth mother and child because of the bonding that may take place during gestation and childbirth, which is not a factor in relation to biological fathers. However, it is also the case that law and society generally has more longstanding engagement with female same-sex parenting than male same-sex parenting, which has only recently become increasing visible. As Naomi, a family law solicitor in E&W, comments:

I think that gay male couples are a newer phenomenon. So they're less visible and I think the fact that people like Elton John are having children is very helpful because it puts it, kind of, very firmly and prominently in the public mind. But I think lesbian couples have been conceiving children for longer. You know, I think it's more unusual for men to be raising children without women than for women to be raising children without men.

The legal recognition of male same-sex parenting *per se* is beyond the scope of this thesis. However, a future study might fruitfully consider the complexities of legally recognising gay male parenthood following surrogacy.

Some commentators construct these disputes as between homonuclear and heteronormative conceptions of the family, whereby biological fathers are being

⁴⁵⁸ For more on this see Kirsty Horsey, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements' (2010) 22 Child and Family Law Quarterly 449.

imposed on women-led families in a heteronormative way. This may be how judges and others are conceiving of this. However, another dimension to these disputes is that the interests of both male and female same-sex parents are engaged. Therefore, the tension between these interests should not be obscured by focusing on fathers' rights discourse. The interests of gay fathers may coincide to an extent with, but are separate from, fathers' rights generally in separating different-sex couples. As Wallbank and Dietz argue:

It is unfortunate for [gay fathers] to be cast as agents of heteronormative patriarchy when empirical evidence suggests that there is a sense amongst lesbian and gay prospective parents that the PTP family is a re-imagining and reshaping of family life with a shared aim of decentring the traditional two parent family.⁴⁵⁹

Therefore, while commentators have criticised the cases for being heteronormative in the sense of imposing biological fathers on women-led families it is also important to recognise that the imposition of dyadic parenting is also a manifestation of heteronormativity. The decision to recognise the parental involvement of the biological father could be seen as both promoting heteronormativity by undermining the homonuclear family and subverting it by recognising potential collaborative co-parenting arrangements. Similarly denying the biological father any parental involvement may be seen as clear subversion of heteronormativity in that it promotes the female homonuclear family but at the same time promotes heteronormativity in that it furthers the two-parent model.

The reasoning behind the decisions that courts reach is important because they may indicate whether heteronormative assumptions played a determinative role or whether there was a genuine attempt to value difference in same-sex parenting

⁴⁵⁹ Julie Wallbank and Chris Dietz, 'Lesbian mothers, fathers and other animals: is the political personal in multiple parent families?' [2013] *Child and Family Law Quarterly* 451, 461.

and grapple with the unique factual context before the court. The courts are constrained by a legislative framework that promotes the heteronormative two-parent model while also protecting homonuclear families from claims based on biology. The way the courts have used parental responsibility to afford status to the biological father could be seen as a way of circumventing the legislative reforms and ‘reinscribing heteronormativity’.⁴⁶⁰ However, the judicial rhetoric and reasoning discussed above in relation to the protection of the homonuclear family indicates this is not self-evidently the case. An alternative interpretation is that the courts are trying to mitigate the harshness of the two-parent model by affording some recognition to the adults involved in these situations through the imperfect tool of parental responsibility and, what used to be, residence orders.

Troubling Terminology

In addition to the way in which parental responsibility is used, these cases also raise issues about the use of vocabulary. This is an issue that Mrs Justice Black particularly highlighted in *Re D*:

the debate about parental responsibility is particularly finely tuned. Ms A and Ms C are entirely happy for Mr B to be recognised as D's “father” and for her to see him for regular contact. They do not agree to an order that, as they see it, recognises him as D's “parent”. They see themselves and their two children as a family. They argue that they are D's parents and that if she were to have a third parent, it would compromise the family, affecting not only their relations with Mr B but also the way in which they, and D, are seen by others. For Mr B, to be D's father is simply not enough; he wishes to be recognised as a father and a parent and he perceives that a parental responsibility order would bring this recognition.⁴⁶¹

⁴⁶⁰ Harding, ‘(Re)inscribing the Heteronormative Family’ (n 380).

⁴⁶¹ *Re D* [2006] EWHC 2 (Fam) [22].

It would seem that the use of the terms 'father', 'parent', and 'family' in this dictum need to be unpacked a lot more before we can understand what is meant by them and the type of legal weight that should be given to these labels. It may be that in terms of biology these terms have particular meanings. However, despite the biological interpretation of these terms, our everyday understanding of them might be somewhat different. A mother and father could, for example, be any woman or man, respectively, that raises a child as her or his own. These terms are commonly used to denote social parents. It is unclear, however, how this would differ from being a parent in the sense that the courts use the term. The term parent could be understood as the gender-neutral equivalent of the gendered terms 'mother' and 'father'. The dictum, however, seems to suggest that being a parent is somehow more than merely being a mother or father.⁴⁶²

It seems that the judge's use of father is in recognition of the biological position whereas parent is someone, above and beyond that, who is raising the child. As will be discussed below in relation to later cases, the court seems to struggle with finding the terminology for men in Mr B's position. The court's solution has been to grant a form, albeit a restricted one, of parental responsibility. As illustrated by the judge's comments, the award of parental responsibility is important for men in Mr B's position because of the recognition that it brings. This would seem to indicate an issue that a number of participants in this study have commented on, namely that the courts, and perhaps society more broadly, are struggling to find the vocabulary to describe co-parenting arrangements and how to label the adults who are involved in them.

⁴⁶² These difficulties surrounding terminology and how to refer to the biological father have been discussed at length in the context of how the Australian family law courts approach this issue. See Dempsey, 'Donor, Father or Parent - Conceiving Paternity in the Australian Family Court' (n 404).

The issue of the courts and society struggling to find the terminology to describe these arrangements was a common theme that ran through a number of the interviews with legal practitioners in E&W. Lizzie, a solicitor in England with considerable experience dealing with same-sex parenting disputes, highlighted that the courts are not used to such fine-tuned and in-depth consideration of the terminology surrounding parenthood, often taking it for granted in the majority of disputes they are asked to resolve. Lizzie notes that:

...there [is] still quite a struggle amongst the judiciary in this country as to what terminology to use and what language to use and what status that should bring because concepts of parenthood is not something historically that mainstream family lawyers and judges have had to deal with. That's been a given and suddenly that's no longer there and they're being asked to adjudicate and determine this and it can be a very difficult thing to do...⁴⁶³

This comment could apply not only to the judiciary but also society at large, which equally struggles to find the terminology to describe the relationships that exist between the adults and children in these parenting arrangements. As Dr Sturge, an eminent child psychologist, notes in *Re D*, there is 'a range of difficulties that the present terminology does not cover', which in her mind illustrates '...just how deep rooted concepts and language are in relation to families and that the law, in a sense, pre-empts ways of understanding new family structures'.⁴⁶⁴

The discussion around terminology in *Re D* is echoed in some ways by the discussion that takes place in the later case of *Re G; Re Z*. In *Re D*, Mrs Justice Black explicitly acknowledges the fact that the biological father feels that being referred to as a father but not a parent is inadequate. In *Re G; Re Z*, however,

⁴⁶³ UKPB9LG.

⁴⁶⁴ *Re D* (n 451) [57].

the judge does not make a similar acknowledgment in relation to the female partners. Harding notes that:

by not referring to D or Y, the civil partners of the women who had carried the children, as 'parents' but merging them into a category of 'mothers', [the judge] is concurrently erasing their legal status in this judicial discourse'.⁴⁶⁵

This observation derives from the fact that the terms 'mother' and 'father' are significantly more normatively loaded than the more neutral, but perhaps legally significant, term 'parent'. Diduck, commenting on the *Re G* case discussed above, notes that '[t]he importance of father(ing) and mother(ing) to a child's welfare, if not always clear for the law, is at least meaningful. The role, on the other hand, of a de-gendered 'parent' is opaque and, as yet, imaginary'.⁴⁶⁶

Brown reinforces this idea and is similarly critical of the more recent case of *Re G*; *Re Z* for its lack of consideration of what the term parent actually implies as distinct from mother or father. He notes that:

the role of the 'parent' in lesbian-led families lacks the fall back, 'common-sense' social construction possessed by the traditional gendered parenting roles (of 'mother' and 'father'); and that this role of 'parent' has not been fully explored or developed in judicial discourse and hence is not being given the same weight or consideration as those gendered roles.⁴⁶⁷

These issues relating to terminology are particularly pronounced in relation to collaborative co-parenting situations. Caroline Jones argues that "[t]he gendered, heteronormative framing of parenting in social and legal discourses clearly can have powerful normalising effects".⁴⁶⁸ The effect of this use of language can be

⁴⁶⁵ Harding, '(Re)inscribing the Heteronormative Family' (n 380) 195.

⁴⁶⁶ Alison Diduck, "'If Only We Can Find the Appropriate Terms to Use the Issue Will Solved': Law, Identity and Parenthood' (2007) 19 Child and Family Law Quarterly 458, 462.

⁴⁶⁷ Brown (n 393) 237.

⁴⁶⁸ Jones, 'Parents in Law: Subjective Impacts and Status Implications around the Use of Licensed Donor Insemination' (n 364) 86.

the sense that there is a parenting hierarchy with the birth mother at the top with her partner and the biological father competing for their place within the hierarchy.

To an extent this is a tension created by a lack of flexibility in the legal concepts and language used to recognise the adults in these parenting arrangements. Given that collaborative co-parenting arrangements are not homogenous, the most appropriate language to be used may vary from family to family. It is nevertheless important for judges to more explicitly explore their understandings of the terms being used to describe the adults in these parenting arrangements. By unpacking the range of meanings the terms mother, father and parent can bare, a more apt description of the family before the courts might be reached based on the factual circumstances and parenting arrangement in that particular case. In doing this, it is important not only to recognise the equivalence in terms of parenting between the birth mother and her partner but also to afford an appropriate level of recognition for the biological fathers in these situations without disempowering the birth mother's partner.

In contrast to E&W, these discussions around language and terminology do not seem to be as present in the Canadian case law as they are in the E&W case law. Part of the reason for this may be that the Canadian cases have often involved a written agreement in preparation for which discussions around terminology may have taken place. This is reflected in the emphasis that a number of the Canadian legal professionals interviewed in this study placed on discussing the language used to describe each of the adults when establishing the parenting arrangement. Mary, an attorney in Ontario with a broad family law practice including same-sex parenting disputes, stresses that:

kids just look up and see adults; they don't necessarily slot them, they're their adults...So, I think what's really important is to make

sure that there's language in place that allows the original group to plan as a group how that relationship will roll out... not formalising language around those ongoing relationships, I think is unfair to the children.⁴⁶⁹

Therefore, while a number of legal professionals in E&W were struck by the struggles courts were having deciding the appropriate terminology, as mentioned above, some of the Canadian legal professionals were more focused on the need to have these discussions when creating the parenting arrangement, perhaps in order to avoid disputes later.

Furthermore, when asked about whether differences in terminology created difficulties, legally or otherwise, in Canada as they do in E&W, none of Canadian legal professionals interviewed identified language or legal terminology as a significant issue. Lance, an attorney in BC with a significant practice in relation to parenthood following assisted reproduction, felt that the way terminology was used to identify each of the parties and their relationships with the children did not present any obstacles at the stage of negotiating a written agreement. Reflecting on the parenting arrangements and written agreements he has been involved in, he comments that 'I have discussed it. But I don't think I've ever described it as a difficulty'.⁴⁷⁰

Not only does the use of terminology not seem to present significant obstacles at the stage of creating these parenting arrangements in Canada but it also does not seem to complicate the legal resolution of disputes in relation to parenthood. David, an attorney in BC who specialises in the law relating to same-sex relationships and parenting, suggested that how the parties identify themselves does not necessarily have a legal impact in terms of the legislation. In response

⁴⁶⁹ CAPB1.

⁴⁷⁰ CAPB7.

to being asked whether he had come across any struggle with terminology in the cases he had dealt with the comments that:

No, I haven't felt that at all... The parties can self-define in their agreements using words like 'sperm donor' or 'biological father' or any other term they want... But everybody, sort of, knows what you are talking to. So I think that's a false argument about terminology. It's often just the discomfort of the people who are dealing with the situation to not know what to call people... So I don't think the terminology is actually that big of a deal.⁴⁷¹

This position stands in contrast to the point of view expressed above by a number of legal and other professionals in E&W that stresses the importance of language in these situations. Dr Sturge, a well-recognised child psychiatrist in E&W, even went so far as to opine in *Re D* that, 'I believe if the Court can find appropriate terms to refer to the parties in this case, the issue will be solved.'⁴⁷²

The way in which the relationships between the adults and children in these parenting arrangements are signified and referred to may at least be of significance to the parties themselves, at least in some cases, as both Harding and Brown's discussion of *Re G*; *Re Z*. Nevertheless, it seems overly optimistic to suggest that the use of language has the power to resolve the legal difficulties that the adults in these arrangements have in have their relationship with the children recognised. A clearer and more established way of referring to the adults and the relationships is required both legally and socially speaking.

However, it is the status that the adults have in relation to the children that is more important legally speaking. Belinda, an attorney in BC with considerable experience negotiating same-sex parenting agreements and dealing with same-

⁴⁷¹ CAPB4.

⁴⁷² *Re D* (n 451) [57].

sex parenting disputes, for example, highlights the significance of the change in status afforded by the BC's Family Law Act. She comments that:

as a matter of legal practice, I never, ever refer to a donor as a father ever, in any circumstances, ever. Because I never wanted anybody to think of them that way... However, now the parties have an opportunity to confer status at the moment of the child's birth on that person as a parent. And then the question is, what's the content of that? What's the content? What does it mean to have a dad and two mums on your birth certificate, especially if the dad doesn't live with the two parents?... we don't have social models. The legislation is ahead of social conversation about this, way ahead.⁴⁷³

Therefore, for Belinda, the way in which parental status had been opened up to more than two parents was a more complicated a potentially challenging issue that how terminology is used. Having said that, in terms of how these families are recognised by society, terminology and language will play a significant role as a signifier of this legal status. Consequently it may be that status and terminology are inextricably linked and it is this issue that the courts in E&W are struggling with when resolving known donor disputes.

Conclusion

The focus of this chapter has been on the judicial resolution of collaborative co-parenting disputes in E&W, drawing on examples from other jurisdictions where appropriate. It has raised the issue of how these disputes are characterised by the parties as either known donor type situations or poly-parenting situations depending on what supports the vision they have of their family. Despite a lack of evidence about what was initially agreed by the parties, the courts have often sought to characterise these families with reference to heteronormative standards without necessarily fully considering the interests of the parties

⁴⁷³ CAPB5.

involved. At times, this has meant that the homonuclear family has been supported with little consideration to any potential collaborative co-parenting arrangement. At other times, although to a lesser extent, biogenetic discourses have been drawn on in a way that undermines the homonuclear family. On balance, this has had a more detrimental impact on the biological fathers involved in these arrangements where the courts have paid little attention to their motivation for getting involved in these arrangements. The focus has instead primarily been on the female couple's desire to start a family.

Furthermore, the courts in E&W have largely failed to engage with collaborative co-parenting as a valid family form that deserves legal protection in its own right. This is illustrated by the lack of a settled judicial understanding of the vocabulary that might best reflect the relationships involved in these collaborative co-parenting arrangements. Interviews with legal professionals who work with collaborative co-parenting families suggest, however, that terminological confusion is not limited to the judiciary but can also be a factor for them in their work and also for the families themselves. Therefore, it seems that courts, and society more generally, are still getting to grips with the relationships involved in collaborative co-parenting arrangements. Consequently, it is important to approach the issue of legal regulation with an open mind and question whether the importation of legal principles and terminology from other contexts most accurately reflects the issues at stake in relation to collaborative co-parenting.

Chapter Five: Valuing Autonomy – Indeterminate Intentions and Collaborative Parenthood

Introduction

This chapter discusses a number of different reform options and how these might improve the legal recognition of these families as well as ameliorate the difficulties the courts face. In particular, the chapter considers the way the parties' intentions are currently dealt with by the courts and how pre-conception intentions might be drawn on in resolving disputes in the future. The chapter examines how the courts in E&W take intentions into account when resolving disputes about parental responsibility and contact but ultimately give greater weight to the post-birth parenting reality. In doing this, the courts position themselves in relation to the case law concerning post-separation different sex couples, which has, to an extent, resulted in the uncritical acceptance of an approach to resolving collaborative co-parenting disputes that is not specifically tailored to the needs of that family arrangement. The chapter concludes by arguing that pre-conception intentions are a good starting point in resolving disputes concerning these intentionally created families but that they still need to be balanced against the interests of the parties involved.

Parenthood and Parental Responsibility: Section 8 Orders as Badges of Status

The court's approach to the use of section 8 orders in resolving these disputes is succinctly summarised in the following sentence from the Court of Appeal's judgement in *T v T*:

Whatever the initial intentions of the parties when the children were conceived, things had moved on with time and the Recorder's orders had to accommodate the position as it actually was rather than the position that the adults wanted or had originally planned.⁴⁷⁴

This dictum is instructive because it echoes the approach taken in subsequent cases. In the appellants' submission, however, the recorder failed to adequately reflect the reality of the situation in the order made because they felt that they were the child's parents, not F, and this could be reflected in a joint residence order in their favour.

The Court of Appeal took a different view of this, however, which is illustrated by the following section from their judgment:

One might, perhaps, be forgiven for thinking that someone who has been granted parental responsibility has truly been recognised as a parent of the child. In this case, three people have parental responsibility, M, F and L, and have thereby been recognised as parents; it seems to me that that probably accords with how things look at the moment from the children's point of view.⁴⁷⁵

Here the court seems to be saying that the post-birth parenting reality is that all three adults have been involved to some extent as parents of the child, albeit with M and L as the primary carers, and, therefore, each deserve to be recognised as such. In saying this, the court is implicitly approving the fact that all three adults

⁴⁷⁴ *T v T* [2010] EWCA Civ 1366 [13].

⁴⁷⁵ *Ibid* [23].

currently have parental responsibility. This is noteworthy because in each of the cases discussed in the previous chapter (*Re D*, *Re B* and *R v E*), the facts of which are broadly similar to *T v T*, the court refused to grant either a parental responsibility or a residence order in favour of the biological father.

In considering the issue of a residence order, the court in *T v T* referred to previous case law outlining the function of such an order. In particular they relied on the following statement of the then president of the Court of Appeal:

It is now recognised by the court that a shared residence order may be regarded as appropriate where it provides legal confirmation of the factual reality of a child's life or where, in a case where one party has the primary care of a child, it may be psychologically beneficial to the parents in emphasising the equality of their position and responsibilities.⁴⁷⁶

The use of a residence order to reflect the factual reality of a child's life seems to have been particularly important in this case because the court felt that the children did view F as one of their parents. Therefore, it would appear justified to include him in a residence order. However, it is more difficult to justify omitting L on any residence order, which the court would have done in the absence of F's agreement. If a residence order is supposed to reflect the parenting reality for these children then surely L is as much a parent as F is and, therefore, deserves to be recognised as such. To deny this would be to give too much weight to biological and heteronormative understandings of parenting.

The use of residence and parental responsibility orders in collaborative co-parenting disputes stems from the 2006 case of *Re D*,⁴⁷⁷ (formerly known as *Re M (Sperm Donor Father)*⁴⁷⁸ which is one of the earliest cases involving a known

⁴⁷⁶ *Re A (a Child)(Joint Residence: Parental Responsibility)* [2008] EWCA Civ 867 [66].

⁴⁷⁷ *Re D* [2006] EWHC 2 (Fam).

⁴⁷⁸ *Re M (Sperm Donor Father)* [2001] Fam Law 94.

sperm donor decided in E&W. The case concerned a lesbian couple (Ms. A and Ms. C) who advertised for a man to father a child with them. The case report indicates they were happy for the man to act as a father figure provided there was an understanding that they were the primary carers. Mr. B, a married man, responded and a child (D) was subsequently conceived through sexual intercourse between Mr. B and Ms. A. Shortly after the child's birth conflict arose when Mr. B attempted to have a more involved relationship with D than Ms. A and Ms. C had envisaged. Therefore, they only allowed the biological father to see the child on two occasions following birth and then ended contact. Mr. B saw himself as being in a similar position to a separated father whereas Ms. A and Ms. C preferred relatively infrequent contact and 'benign interest' on his part perhaps along the lines of an uncle.

In terms of the legal position of each of the adults, as Ms. A gave birth to D, she had automatic parental responsibility. Ms. C acquired parental responsibility in relation to D as a result of being granted a joint residence order by the High Court in 2001. Although Mr. B also received a contact order in his favour in 2001, his application for parental responsibility was adjourned at that time until there had been a period of contact. The 2006 case concerned his renewed application for parental responsibility, which Ms. A and Ms. C opposed on the grounds that it would be disruptive for their family. This was the main ground of contention in the case because the adults had managed to reach a mutually acceptable agreement in relation to contact in the period between the two cases.

In making a defined contact order for indefinite, monthly, limited contact and adjourning the parental responsibility application in 2001, Mrs Justice Black held that the family the female couple had formed with the child was potentially fragile

and deserved protection. Consequently, the court held that a joint residence order, and the parental responsibility that went with it, in favour of the couple would provide the family with some security. Despite this, the judge did not feel able to rule on the issue of parental responsibility for the father until after there had been a period of contact. Furthermore, contact with the biological father was desirable in order that the father could answer any questions the child may have at a later stage. Therefore, Mrs Justice Black reasoned that the early establishment of contact with the biological father was important for the child's self-esteem.

On the face of it, this does not seem to be a case concerning collaborative co-parenting but a case where a female couple have advertised for a sperm donor who was not intended to parent the child with them. This can be inferred from the fact that the intention was for the female couple to be the primary carers and decision-makers in the child's life. Nevertheless, the female couple's decision to involve a known donor and specifically refer to him as a father figure raises different considerations than those that are present in the context of unknown sperm donation.⁴⁷⁹ As Douglas notes in her comment on this case, '[t]his rather unusual case provides an example of the difficulties that may arise when a single sex couple have a child other than by anonymous gamete donation'.⁴⁸⁰ While choosing to conceive with a known donor may not imply a high degree of involvement on the donor's part, such a decision may, nevertheless, carry certain implications. This is something the courts need to discuss more explicitly when resolving these disputes than they have been willing to do so far. The implications

⁴⁷⁹ By unknown donation, I mean where conception occurs at a clinic with sperm from a donor who has previously made the sperm donation to the clinic and is, therefore, not known to the birth mother.

⁴⁸⁰ [2001] Fam Law 94.

of involving a known donor need to be clarified in the interests of legal certainty even though this is not always explicitly addressed in the cases.

It is important to set the judgment in context. This case was initially decided in 2001 at a time where there had not yet been the legislative and policy shifts described above recognising the sufficiency of same-sex parenting. Furthermore, although the courts had previously held that being in a lesbian relationship was no basis for discriminating against an applicant,⁴⁸¹ cases where the mother being in a lesbian relationship was relevant to the welfare assessment when determining the child's residence were not yet in the distant past.⁴⁸² Given this, and the novelty of the courts having to deal with known donor arrangements, it is commendable that Mrs Justice Black recognises the fragility of same-sex families and expresses the desire to protect them.

The initial judgement seems to indicate, however, that the fact that the biological father is present and desires contact means that such contact is likely to be in the best interests of the child. This reasoning and the outcome of awarding contact on this basis almost seems to suggest that female same-sex parenting is not sufficient in itself when the biological father is present, which is *per se* beneficial. It is unlikely that Black J intended to imply this in anyway and her decision may be understandable from the point of view of the courts encouraging fathers to be involved following separation in the heterosexual context. Nevertheless, the court's decision does not sufficiently justify the assumption that a present and willing biological father should be allowed contact in the, at the time, novel context

⁴⁸¹ *G v F (Contact and Shared Residence: Applications for Leave)* [1998] 2 FLR 799.

⁴⁸² See for example *C v C (A Minor) (Custody: Appeal)* [1991] 1 FLR 223, 233.

of female same-sex parenting involving a known donor. The court simply imports this assumption from the case law on post-separation different-sex couples.

The issue of contact was resolved by mutual agreement between the parties following the 2001 decision, and no doubt against the background of that decision, with the result that the 2006 case solely concerned the issue of parental responsibility for the biological father. As the case concerns an application for parental responsibility under the Children Act 1989, it is instructive to recall the purpose this was designed for and how this has changed over time. Parental responsibility as contained in the Children Act 1989 was originally conceived of as a means of making practical decisions in relation to children.⁴⁸³ Initially this was reflected in the decisions of the family law courts.⁴⁸⁴ However, since then the courts have used parental responsibility as a badge of status.⁴⁸⁵ This use of parental responsibility, evident in relation to post-separation parenting, can also be seen in the present case of *Re D*.

In *Re D*, the High Court awarded Mr. B parental responsibility but was considerably influenced by his voluntary undertaking to limit the practical consequences of the order. As Mrs. Justice Black states in her judgement, 'the grant of parental responsibility to Mr B alongside the sort of undertaking that he offers would amount to a grant of a status, stripped of practical effect'.⁴⁸⁶ This use

⁴⁸³ For more on this see Peter G Harris and Robert H George, 'Parental Responsibility and Shared Residence Orders: Parliamentary Intentions and Judicial Interpretations' (2010) 22 Child and Family Law Quarterly 151. See also Craig Lind and Tom Hewitt, 'Law and the Complexities of Parenting: Parental Status and Parental Function' (2009) 31 Journal of Social Welfare and Family Law 391.

⁴⁸⁴ For example *Re H (Minors) (Local Authority: Parental Rights) (No 3)* (1991) 1 FLR 214.

⁴⁸⁵ See for example *Re S (Parental Responsibility)* 2 FLR 648 (CA). For more on this see Helen Reece, 'The Degradation of Parental Responsibility' in Rebecca Probert, Stephen Gilmore and Jonathan Herring (eds), *Responsible parents and parental responsibility* (Hart 2009); Craig Lind and Tom Hewitt, 'Law and the Complexities of Parenting: Parental Status and Function' (2009) 31 Journal of Social Welfare and Family Law 391..

⁴⁸⁶ *Re D* (n 467) [21].

of parental responsibility would appear to be quite far from its original purpose but is consistent with how the courts have deployed the concept in relation to post-separation different-sex parenting.

This is confirmed by Lady Justice Butler Sloss, as she then was, in the case of *Re H (Parental Responsibility)*, who comments that '[p]arental responsibility is a question of status...The grant of the application declares the status of the applicant as the father of that child'.⁴⁸⁷ Mrs. Justice Black refers to these comments with approval in her judgment in *Re D*. The symbolic importance of a shared residence order (as a vehicle for conferring parental responsibility) was highlighted in *Re A (A Child) (Joint Residence: Parental Responsibility)*⁴⁸⁸ where Sir Mark Potter confirmed that:

[i]t is now recognised by the court that a shared residence order may be regarded as appropriate where it provides legal confirmation of the factual reality of a child's life or where, in a case where one party has primary care of a child, it may be psychologically beneficial to the parents in emphasising the equality of their position and responsibilities.⁴⁸⁹

Despite this, Reece has criticised this decision as being 'fundamentally inconsistent with granting parental responsibility'.⁴⁹⁰ These remarks indicate that in the post-separation different-sex parenting context, issues to do with legal status were inappropriately being dealt with through the use of parental responsibility

This criticism of the use of parental responsibility in this way has also been extended to the same-sex parenting context. Although parental responsibility

⁴⁸⁷ *Re H (Parental Responsibility)* [1998] 1 FLR 855.

⁴⁸⁸ *Re A (a Child) (Joint Residence: Parental Responsibility)* [2008] EWCA Civ 867.

⁴⁸⁹ *Ibid.* [66].

⁴⁹⁰ Helen Reece, 'The degradation of parental responsibility' in Rebecca Probert and others (eds), *Responsible parents and parental responsibility* (Hart 2009) 90.

seems to have been the main tool available to the court in *Re D* for granting some recognition to the adults involved in this *quasi* collaborative parenting arrangement, it is questionable whether this is an appropriate response to these types of families. As McCandless notes '[t]he "creative" use of parental responsibility in *Re D* further reflects the current inadequacy of legal terminology in a society where parenthood increasingly occurs outside the confines of the traditional nuclear family'.⁴⁹¹ Therefore, rather than relying on traditional tools to afford recognition to collaborative co-parenting families as the court did in *Re D*, it may be necessary to develop novel ways of accommodating alternative parenting arrangements not predicated on the post-separation different-sex parenting model. This is discussed further in the following section.

In *R v E*, the real issue seemed to be that there was a disagreement between the two couples about upbringing and in particular discipline. The biological father wanted to be able to discipline the child in certain ways (e.g. through smacking) because he felt the child was being spoiled, which the mother would not allow. Therefore, this case does actually seem to have been about parental responsibility to a large degree, which contrasts with *Re D* which was really only about status. As a separate point, the father also made an application for contact, which seemed necessary because of the diminished contact between him and the child which had resulted from the breakdown of relations between the adults. Although the issue of contact seemed to resolve itself with the child initiating overnight staying contact, there was, however, some disagreement about how

⁴⁹¹ Julie McCandless, 'Status and anomaly: *Re D* (contact and parental responsibility: lesbian mothers and known father)' [2006] EWHC 2 (Fam), [2006] 1 FCR 556 (2008) 30 Journal of Social Welfare and Family Law 63, 63

contact should develop in the future. The male couple wanted it to increase whereas the female couple would have liked it to remain the same.

In relation to parental responsibility, the judge accepted that it was nearly impossible, in the absence of written evidence, to ascertain which party's recollection of the pre-conception agreement was more accurate. Instead he looked to what happened following birth to ascertain what the agreed arrangement was. In his judgement, Mr Justice Bennett found that the biological father was not acting as a parent towards Daniel (i.e. caring for him and taking decision about his life). He referred to the Law Commission's intention for parental responsibility as reflecting actual parenting and as a result denied the father's application. This decision would seem to stand in contrast with that of *Re D* where parental responsibility was used to recognise status rather than actual involvement and decision-making. It does seem somewhat ironic that in one case parental responsibility was granted where it was accepted that it wouldn't be used but in the other parental responsibility was denied despite, and perhaps because of, the fact that the dispute was about actual parenting rather than status.

Post-Separation Different-Sex Parenting: Uncritically Adopting Similar Approaches

Wallbank and Dietz have noted that the gay fathers in these cases have sought to equate their position with post-separation heterosexual fathers.⁴⁹² In *Re D*, for example, the judge notes, referring to the biological father Mr B:

Mr B was expecting something of the role of the absent parent after divorce who might share the child's leisure time equally with the child's mother and participate in decisions about the child whereas

⁴⁹² Julie Wallbank and Chris Dietz, 'Lesbian mothers, fathers and other animals: is the political personal in multiple parent families?' [2013] Child and Family Law Quarterly 451, 464.

Ms A and Ms C intended that he should complement their primary care of the child by being a real father but by doing so through no more than relatively infrequent visits and benign and loving interest.⁴⁹³

Here the idea of being a 'real father' is invoked as something the female couple find desirable. This is contrasted with the role of the 'absent parent' after divorce, which is seen as something that is not desirable. The terminology used in these cases is discussed in more detail in the final section. Nevertheless, it is worth noting that the term 'absent parent' may have certain negative connotations and a more neutral description (such a post-separation parent) would be desirable. Furthermore, the usefulness of the notion of 'real father' is questionable.

The judge in that case goes on to comment that 'I know that Mr B now recognises that he is not working towards the sort of role in [the child's] life that an absent father may have after divorce'.⁴⁹⁴ In the case of *Re D*, where a female couple had advertised for a man to help them start a family, it may well be inappropriate for the biological father to conceive of himself as being in a similar position to a post-separation heterosexual father. Therefore, the approach adopted in resolving disputes in the different-sex post-separation parenting context cannot be uncritically imported into the context of collaborative co-parenting. There have been a number of judicial dicta to this effect. Perhaps the most recent of these are contained in Lord Justice Thorpe's judgment in the Court of Appeal decision of *A v B*.⁴⁹⁵

The facts of this case are that A (a gay man) offered to help B and C (two lesbians in a long-term relationship) have a child M (now 2 1/2 years old). In order to give

⁴⁹³ *A v B and C* [2012] EWCA Civ 285 [5].

⁴⁹⁴ *Ibid.* [95].

⁴⁹⁵ *Ibid.*

the appearance of a conventional family A and B married but the intention was always that B and C would be the primary care givers with A being recognised as the father but with a secondary relationship with the child. During the period leading up to the birth the parties disagreed about A having staying contact with the child. After birth A applied for a contact order and B and C responded by applying for a residence order and also a specific issue order relating to A's parental responsibility (which he had acquired by being married to the mother). At first instance the judge granted the joint residence order in favour of B and C, thereby granting C parental responsibility. The judge held that although the child should have contact with A so that he would know his father it should not be so much as to fracture the nuclear family.

It seems in this case that the trial judge took a different approach compared to the trial judge in *T v T*. While the trial judge in *T v T* made little to no findings in fact about the preconception intentions of the parties, the trial judge in this case held that both parties had articulated their views about A's involvement prior to conception and both parties felt that there was agreement but that in fact there was no agreement. It is noteworthy in this case that, unlike the case of *T v T*, the biological father was only applying for a defined contact order and not a full residence order. By contrast, the female couple in *A v B* were making a very similar application as the female couple in *T v T*, namely a joint residence order in their favour and limiting A's parental responsibility. The unique feature of this case is that A had parental responsibility by virtue of the fact that he was married to B at the time of conception. The reason for this was that B's family were very religious and therefore A and B married in order to appease B's parents. C, however, did not have parental responsibility and, therefore, required the joint residence order in order to gain that.

The trial judge granted the joint residence order in favour of B and C and made a defined contact order in favour of A. Therefore A's appeal was not so much directed at the contact order itself but at the way the judge characterised his role in the child's life. The judge essentially provided for some additional contact to that which the female couple proposed. However, in characterising A as a secondary parent, the judge suggested that contact between A and the child was unlikely to increase and thereby, in effect, precluded any further application on A's part. Therefore it is this characterisation as a secondary parent that A appeals against.

In emphasising the difference between biological fathers in these parenting arrangements and post-separation fathers, Jenkins J, as quoted by Thorpe LJ in *A v B*, notes that:

The situation that is referred to is not in any way analogous to a situation which has been referred to as the "divorce model". The father himself used the phrase at an early stage, seeing himself in the role of the separated parent but, in broad terms, in most cases where there is a separation between married or previously cohabiting parents a relationship has been established between the parent with whom the child is not living.⁴⁹⁶

Jenkin J's statement was made in the factual context of *Re D*, which may not have been analogous in any way to the 'divorce model'. However, this does not mean that the biological father in a collaborative co-parenting situation will never be in a sufficiently analogous situation to a post-separation father to justify a similar level of involvement with the child.

Jenkin J's comments were also echoed in the case of *ML and AR v RWB and SWB*,⁴⁹⁷ which was later revisited as *P & L (Minors)*. The facts of this case are

⁴⁹⁶ *Ibid.* [12] citing *DN v MD and AR* [2011] EWHC 2290 (Fam) [37].

⁴⁹⁷ *ML, AR v RW, SW* [2011] EWHC 3431 (Fam).

broadly similar to previous cases in that the respondents, a female couple, advertised for a gay man or couple to start a family with, to which the applicants, a male couple, responded. All four adults decided to have a child together but, as so often happens in these cases, there may have been a mismatch in the parties' expectations. In terms of the legal position of each party, the biological father had parental responsibility over the children by virtue of a court order and the mother's partner also had parental responsibility by virtue of an agreement with the mother, with whom she is in a civil partnership. One of the key disputes in this case is over the meaning of key terminology. The mismatch in expectations between the parties relates to the meaning and role of a 'father' in this context. In struggling with these issues, the trial judge felt that traditional concepts such as mother and father proved quite problematic in this context and, therefore, he preferred the notion of primary and secondary parents. He felt that this accorded with the idea that the female couple were the principal parents and the biological father engaged in 'a parenting role, albeit in a secondary capacity'.⁴⁹⁸

Mr Justice Hedley makes the point that parenting arrangements such as the one in question (which might be termed poly-parenting arrangements) are different from post-separation parenting. This would seem to be quite an unproblematic claim because it seems evident that agreeing to parent in this way from the outset is very different from making the best of the situation that presents itself upon divorce. However, the trial judge indicates that the reason why these parenting arrangements are different from post-separation parenting is because the adults in this case were not equivalent to separated parents in that 'there was a clear agreement that the respondents would do the principal parenting and that they

⁴⁹⁸ *Ibid.* [17].

would provide the two-parent care to these children'.⁴⁹⁹ This, however, does not appear to be very different from the type of arrangements that often exists within post-separation parenting arrangements.

The trial judge was particularly concerned with protecting the female co-mother's position in light of the fact that she feels her position is threatened by the biological father's presence. This is commendable, especially considering the courts seeming dismissiveness of the co-mothers position in *T v T*. However it is open to debate how much her concerns should be prioritised, as the trial judge had done, over the concerns of the biological father. After all, the biological father's position in the child's life is also threatened by characterising him as a secondary parent and the female couple as the principal parents. In fact, it could be argued that the father is in an even more precarious position because he does not live with and care for the children. The trial judge seems to fail to appreciate the father's position and confines him to quite a limited role in the child's life. In the context of post-separation parenting, a similar arrangement whereby the mother (and her partner) were the child's primary caregivers following separation would not lead to an inference that the father is a secondary parent with a specific and limited role to play. Indeed, the courts place greater emphasis nowadays on equality between parents following separation.⁵⁰⁰ Therefore, the justification for treating fathers in this position less favourably than post-separation fathers is not necessarily self-evident.

One position advanced by the trial judge in defence of this difference in treatment is the initial agreement between the parties that the respondents would be the principal parents and be responsible for child care. This, in and of itself, would

⁴⁹⁹ *Ibid.* [16].

⁵⁰⁰ See for example 'Re A (a Child)(Joint Residence: Parental Responsibility)' (n 483).

not appear to be enough to characterise the father as a secondary parent any more than a father in a heterosexual relationship who was not significantly involved in the child care would be. Perhaps this issue relates to the gendered nature of parental responsibilities and the basis on which the law allocates these. However, it would seem reasonable to suggest that what would prevent a post-separation father as being characterised as a secondary parent is the fact that the child was born during the relationship and is a child of that relationship. In a collaborative co-parenting situation, although there is no intimate relationship between the biological mother and father, there is a parenting arrangement between them. The trial judge acknowledges this when he accepts that the original agreement was that all four adults would have a parenting role in the child's life. He seems to be mistaken, however, when he characterises this as a secondary role.

The judge goes on to clarify what he means by a parenting role, namely:

That parenting role was to fulfil at least three purposes. The first was indeed to give a clear sense of identity to the child or children in due course. The second was to provide the male component of parenting which all must be taken to have acknowledged. Thirdly, there was a more general role of benign involvement which would have, but would certainly not be confined to, an avuncular aspect.⁵⁰¹

Here the judge seems to be conflating the different aspects of parenthood. When he refers to part of the parenting role as being 'to provide the male component of parenting', it is unclear whether he means providing the genetic material necessary for conception or being some sort of male role model. Each of these, however, is arguably separate from the father having any kind of parenting role in relation to the child. Furthermore, giving the child a clear sense of identity does

⁵⁰¹ *Ibid.* 17.

not immediately relate to parenting as can be seen in relation to anonymous donors, whom children can identify once they reach 18 even though they are not considered to be parents.

The way different aspects of parenthood are being separated out with different adults involved with different components has led Nordqvist and Smart to conclude that:

This case, and others like it, raises the question of whether parenthood can be envisaged as a kind of 'parenthood pie chart' which is no longer comprised of two equal parts taken by two genetic parents, but of several different adults who each have a different-sized slice of the pie or a different role to play.⁵⁰²

This atomization and separating out the different components of parenthood has been remarked on by a number of commentators⁵⁰³ and was discussed more fully in Chapter Four.

The third aspect of parenting that the judge mentions, namely involvement with the child, is highly relevant. However, the fact that the judge refers to this as 'benign involvement' with an 'avuncular aspect' suggests that the envisaged involvement is not the type of involvement one would expect from someone exercising a parenting role. The implication of this discussion would seem to be that either the agreement was that the father would exercise a parenting role, properly understood, in which case he is in a closer position to a separated father than the judge would care to admit, or the initial agreement was for some sort of uncle figure in which case the biological father cannot be said to be exercising a parental role. Each of these options has certain implications and while the former

⁵⁰² Petra Nordqvist and Carol Smart, *Relative strangers : family life, genes and donor conception* (Palgrave Macmillan 2014) 14.

⁵⁰³ See for example Sally Sheldon, 'Fragmenting Fatherhood: The Regulation of Reproductive Technologies' (2005) 68 *Modern Law Review* 523.

would certainly strengthen the father's position, the latter wouldn't necessarily preclude his arguments.

There seems to be an element of contradiction in the judge's comments about the biological father's role. On the one hand the judge holds that:

What matters is that there was a degree of regularity to the contact, that the children were clear about the contact, they were clear that the first applicant was daddy and that the second applicant was known as Addy. There were birthdays and Christmases and Father's Day cards, and all the things that you would expect to see where there is a relationship of parenting.⁵⁰⁴

This seems uncontroversial and not inconsistent with a post-separation father's role. However, the judge goes on to say that '[a]ll that the picture of contact does is to establish a parenting role for all four, and to establish in the concepts that I have tried to develop in my own thinking of the role of the women as principal parenters and the role of the men as secondary parenters.'⁵⁰⁵ Here the judge seems to be coming close to saying that the females are the primary caregivers but this does not mean that the men are secondary parents, as such, even though they may only be caring for the child in a secondary capacity.

In his judgement, the judge continues to discuss evidence which might be used to support the father's claim. However, the judge interprets this evidence to support the idea that the father merely had a secondary parenting role. One compelling endorsement of the situation that existed after the birth of the first child is the fact that the four adults decided to have a second child. The conclusion that the judge draws from this is that 'everybody went into that second arrangement with their eyes wide open about the issues that would be involved. Secondly, it

⁵⁰⁴ *ML, AR v RW, SW* (n 467) [21] per Hedley J.

⁵⁰⁵ *Ibid.*

must be the case that at least in 2004 all the parties were sufficiently content with the arrangements that were then on foot that they were prepared to go through it all again'. In ascertaining what the arrangements were, the judge considers the fact that the men had developed a significant role in the first child's life and it was likely that everyone wanted this to continue in relation to the second child. In addition to this the judge finds it significant that staying contact had developed prior to the birth of the second child. It might be reasonable to suppose that this pattern of contact suggests a highly involved role for the father. This is strengthened by the fact that the applicants moved house to be closer to the respondents and the judge's finding that all four adults agreed with that decision. However, the judge draws on this evidence to bolster the notion of primary and secondary parents in a way that does not necessarily accord with the pattern of contact that existed between the father and child stating that 'all these events, in my judgment, are consistent with the general picture that is firmly established of the respondents as the principal parents with the applicants playing a secondary role which never lost its parental nature'.⁵⁰⁶

The case was revisited several months later in order to assess how suitable the arrangements were. In giving this judgment, the judge accepted that 'there are really no restraints on what parties can choose to agree should be their respective roles' and that 'in exercising a welfare jurisdiction the court will be bound to give careful consideration and weight to any such agreement'.⁵⁰⁷ In saying this, the judge is acknowledging the validity of poly-parenting arrangements, which was not something that came across in his previous judgment in the case. In the judge's eyes, therefore, the primary purpose of the judgment is 'to provide a level

⁵⁰⁶ *Ibid.* [29].

⁵⁰⁷ *P&L Minors* [2011] EWHC 3431 (Fam) [6].

of contact whose primary purpose is to reflect the role that either has been agreed or has been discerned from the conduct of the parties'. Against this background, what the judge seems to be saying is that, in cases like this, a full co-parenting arrangement may well have been agreed prior to birth and persisted following birth but the evidence in this case suggests that this did not occur. On the face of it, this seems quite a balanced approach and one that is echoed in subsequent cases.

Therefore, there seems to be judicial acceptance that collaborative co-parenting arrangements can present unique legal challenges, which existing models may not easily accommodate. This approach is reflected in Hedley J's warning in *P v L* 'against the use of stereotypes from traditional family models and in particular to resist the temptation to squeeze a given set of facts to fit such a model'.⁵⁰⁸ However, this does not imply that collaborative co-parenting is not in any way analogous to post-separation parenting, as Mr Justice Jenkin's comments above might indicate,⁵⁰⁹ merely that we cannot uncritically import assumptions from post-separation parenting without first reflecting on the type of parenting arrangement that is being considered.

This is supported by Mr Justice Hedley's comments in *ML v AR*, which suggest that the type of agreed parenting arrangement may have a marked impact on how disputes are resolved. He notes that:

It is all too easy in these cases for biological fathers to see themselves in the same position as in separated parent cases in heterosexual arrangements, whereas this arrangement is, and was always intended to be, quite different.⁵¹⁰

⁵⁰⁸ *Ibid.* [8].

⁵⁰⁹ See page 212.

⁵¹⁰ *ML, AR v RW, SW* (n 467) [9]

The corollary of this is that if the intention is for the biological father to be involved as a parent, this should be reflected in law. This relates to the importance of reaching an agreement about the type of parenting arrangement that is being created and evidencing this in writing, which will be discussed later in this chapter in relation to the empirical data.⁵¹¹

Wallbank and Dietz argue that the way the courts characterise the biological father in these cases unjustifiably undermines his position in relation to the children. They note that:

In 'protecting' the lesbian family by looking at pre-conception intent and the father's role post-birth, the courts see a lesbian nuclear family residing together and exclusive of the non-resident father. His role as exercised outside the residential unit is sometimes trivialised and not treated as a parental one even when there has been a fairly high level of input on his and his partner's part. Questions are therefore raised about when a father becomes a parent and what kind of conduct or contribution transmutes him into such.⁵¹²

This argument picks up on what Mr Justice Jenkins, quoted above, felt was an integral part of post-separation parenting, namely prior cohabitation. However, it is not clear why cohabitation should be a *sine qua non* for being recognised as a parent. This could apply to a broader range of parents than collaborative co-parents, for example couples that 'live apart together'.⁵¹³

One of the factors that may have encouraged the court to import principles from the post-separation, different-sex case law is the fact that conception did not occur through assisted reproduction but sexual intercourse. It is unclear what relevance this should have. The significance of the fact that conception occurred

⁵¹¹ See page 240.

⁵¹² Wallbank and Dietz, 'Lesbian mothers, fathers and other animals: is the political personal in multiple parent families?' (n 482) 466.

⁵¹³ Sasha Roseneil and Shelley Budgeon, 'Cultures of Intimacy and Care Beyond "the Family": Personal Life and Social Change in the Early 21st Century' (2004) 52 *Current Sociology* 135.

through sexual intercourse was not discussed in *Re D*. However, it could lend weight to the suggestion that an exclusive two-parent arrangement was not necessarily envisaged and agreed upon prior to conception. Mr Justice Hedley in *Re B*, where the manner of conception was disputed as discussed more fully below, took a different view, however. He held in that case that whether conception occurred through sexual intercourse or artificial insemination 'is irrelevant to the future of BA. It would not affect my view either way (given my other findings about them) of CV or TJ in terms of the part they may play in BA's future'.⁵¹⁴

Despite this, while the manner of conception may be irrelevant in terms of assessing whether the biological father's involvement is in the best interests of the child, it is relevant to the question of legal parenthood. In order for the legal parenthood provisions of the HFEA 2008 recognising a second female parent to apply, conception must have occurred as a result of 'artificial insemination'.⁵¹⁵ If this is not the case, the common-law rules apply and the biological father would also be the legal father.

In the seminal House of Lords case of *Re G*, which concerned a dispute over the residence of children between separated female parents, Baroness Hale commented that 'I am driven to the conclusion that the courts below have allowed the unusual context of this case to distract them from principles which are of universal application'.⁵¹⁶ By contrast Diduck notes, in her fictitious concurring opinion in *Re G* as part of the feminist judgment project, that:

⁵¹⁴ *Re B (Role of Biological Father)* [2007] EWHC 1952 (Fam) [22].

⁵¹⁵ Human Fertilisation and Embryology Act 2008, s. 34.

⁵¹⁶ *Re G (Children) (Residence : Same-sex Partner)* (2006) UKHL 43 [44].

I regard the “unusual” context of this case to be of crucial importance to it. It means that this family cannot be compared directly with those in more “usual” contexts and compels this House to attempt to achieve a form of equality among different family and parenting arrangements without requiring assimilation of all to a standard that was not set with all in mind.⁵¹⁷

This emphasis on valuing difference rather than formal equality with different-sex parents applies not only to lesbian parenting but to same-sex parenting generally.

Although *Re G* concerned a post-separation parenting dispute between female parents of a child conceived through anonymous donor sperm, the above comments could serve as a useful warning against simply treating collaborative co-parenting arrangements the same not only as post-separation heterosexual parenting arrangements but also as two-parent families based on the heteronormative model. To do either of these things would, as Diduck argues in the context of post-separation lesbian parenting, ‘obscure what is different about same-sex parents themselves’.⁵¹⁸ Therefore a more responsive form of legal recognition that privileges neither the homonuclear family form nor claims based on biology is required. Monk, in his commentary on Diduck’s feminist judgment, argues for ‘a flexible framework that creates space for and recognises, the social, cultural and individual contingencies of both children’s and parents’ lived experiences’.⁵¹⁹

⁵¹⁷ Alison Diduck, ‘Re G (Children) (Residence: Same-Sex Partner)’ in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing 2010) 102.

⁵¹⁸ *Ibid* 104.

⁵¹⁹ Daniel Monk, ‘Commentary on Re G (Children) (Residence: Same-Sex Partner)’ in Rosemary Hunter, Clare McGlynn and Erica Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing 2010) 101.

Making Intentions Clear

In these situations, it is important to be clear about what the intentions of the adults were in this respect when they agreed to have a child. There is a spectrum of possibilities ranging from, on the one hand, a sperm donor who has no additional involvement with the child other than what he would have already had given his relationship with the couple to, on the other hand, the three adults each sharing care-giving responsibility.⁵²⁰ However, as the judge acknowledged in *R v E*, It can be difficult to ascertain what the pre-conception intentions of each of the parties were, let alone whether there was agreement on the issue.⁵²¹ In order to clarify the agreed/expected role of the biological father, the post-birth parenting reality becomes an important means of gaining insight into what was agreed prior to birth, alongside the way the parenting arrangement was initiated.

One of the striking features of *T v T* relates to the role of pre-conception intentions, which was discussed above in relation to the previous cases. Seemingly unusually in this line of cases, the Court of Appeal in *T v T* found that the parties' pre-conception intentions were not relevant. The Court of Appeal were satisfied with the recorder's finding that 'neither parents wanted "simply to be involved in the means of procreation"'⁵²² and felt no need to take account of the appellants submission that 'M and L had made clear to F and his partner from the outset their intention that they would be the children's primary parents, albeit with F having some involvement by means of contact, and that F acquired parental responsibility only because they felt unable to resist his bullying and

⁵²⁰ See Dempsey, 'Conceiving and Neogtiating Reproductive Relationships: Lesbians and Gay Men Forming Families with Children (2010) 44 Sociology 1145, 1151

⁵²¹ *R v E and F (Female Parents: Known Father)* [2010] EWHC 417 (Fam) [41].

⁵²² *T v T* (n 464).

domination'.⁵²³ Once again, this raises the question of how important pre-conception intentions are and how they can be proven in the absence of a written agreement.

In each of the previous cases it would be fair to say that there was a dispute between what was agreed prior to birth resulting in the finding that there was no clear agreement and that each of the parties had different expectations all along. As a matter of evidence and proof, in the absence of a written agreement, it would be nearly impossible to show that this was the case rather than one of the parties subsequently changing their mind as has been alleged in some of the cases. Therefore, it is understandable why a judge at first instance would be reluctant to make a finding of fact in this regard. This, however, does not mean that pre-conception intentions are irrelevant in deciding issues of residence and parental responsibility, as suggested in *T v T*.

It may be necessary to acknowledge the limitations of relying on pre-conception intentions. As Lizzie, a solicitor in *E&W*, notes:

if [the biological father] is being referred to as dad or a significant adult in that child's life, that can be sufficient in practice to set up a practical precedent which then of course the donor could use to try to elevate his legal status notwithstanding what was set up at the time of conception and if there is a proven track record of contact, of status, of involvement, of language that can set up a very strong platform which can then enable that donor and, of course, what one can't legislate for with these arrangements is how people are going to feel in two years, three years, five years down the line.⁵²⁴

This comment is in line with Lord Justice Thorpe's dicta in *A v B*, which very much stressed the importance of post-birth involvement and the potential for this to mean that it would not be appropriate to follow any pre-birth agreement.

⁵²³ *Ibid.* [10].

⁵²⁴ UKPB9.

Nevertheless, there may be some merit in the argument that pre-conception intentions should be used as a baseline to determine the outcome of a case. As discussed above in relation to *R v E*, a combination of pre-conception intentions and post-conception parenting reality can be instrumental in determining what is in the best interests of the child. The court in *Re B* gave considerable weight to the post-conception parenting reality but almost no consideration to the pre-birth intentions. This may be commendable from the point of view that it values caregiving and a 'principle of care', which some commentators have argued should underpin decisions in post-separation parenting disputes.⁵²⁵ However, uncritically importing this critique of the resolution of different-sex post-separation parenting disputes into the novel context of same-sex collaborative co-parenting means that intentions are not given the weight that the conception and parenting arrangement warrants.⁵²⁶

A number of commentators have advanced the idea that intentions should be a determinative factor in deciding legal parenthood. Horsey, for example, argues that:

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.⁵²⁷

This leads Horsey to the conclusion that 'the recognition of the intention to parent should be used as a stable and consistent foundation for all parenthood status

⁵²⁵ Carol Smart and Bren Neale, *Family fragments?* (Polity Press 1999) 193 – 5.

⁵²⁶ See for example Aleardo Zanghellini, 'Who is Entitled to Parental Responsibility - Biology, Caregiving, Intention and the Family Law Act 1975 (CTH): A Jurisprudential Feminist Analysis' (2009) 35 Monash University Law Review 147–182.

⁵²⁷ Kirsty Horsey, 'Challenging presumptions: legal parenthood and surrogacy arrangements' (2010) 22 Child and Family Law Quarterly 449, 459.

provisions in legislation governing assisted reproduction, in turn leading to a greater and easier recognition of 'alternative' family forms'.⁵²⁸

Callus takes this idea further and suggests that intention as the basis for determining parenthood should not be restricted to assisted reproduction but should apply regardless of the mode of conception. She advances a law reform model based on a 'principled framework which would place formally recognised intention at the heart of parental status in order to reconnect legal duty with social reality for as many children and parents as possible'.⁵²⁹ It is beyond the scope of this thesis to discuss the general application of such a model, although Callus ably addresses a number of potential criticisms in her article. However, such an approach has considerable value in relation to collaborative co-parenting.

As has been highlighted above, the courts have engaged to varying degrees with the pre-conception intentions of the parties. Some cases, such as *T v T*, suggested that pre-conception intentions were irrelevant. There is also judicial dicta, such as Lord Justice Thorpe's judgment in *A v B* that indicate that pre-conception intention may be overridden by the post-birth parenting reality. However, a number of judgments have also placed considerable weight on what was agreed prior to birth when deciding the outcome of the case. In *R v E*, Mr Justice Bennet holds that:

One important issue is what agreement was arrived at between Richard and John on the one hand and Emily and Frances on the other as to how the child would be parented after its birth... conclude that the arrangement arrived in 1999/2000, or in any event before Daniel's conception, was that Emily and Frances were to be his parents. His family was to be Emily and Frances and himself. Richard would have a role to play, and an important one, beyond

⁵²⁸ *Ibid.* 449.

⁵²⁹ Thérèse Callus, 'A new parenthood paradigm for twenty-first century family law in England and Wales?' (2012) 32 *Legal Studies* 347, 347.

merely identifying him as Daniel's father in the life of Daniel. I reject the evidence of Richard, supported by John, that he was to be not just Daniel's father, but also one of his parents.⁵³⁰

In reaching this conclusion the judge was heavily influenced by the post-birth parenting reality as a guide to pre-conception intentions. The judge acknowledged that:

It would be close to impossible in a case such as this, absent relevant contemporary documentation, to conclude whose perceptions of what was agreed are likely to be the more accurate, based only on an evaluation of the evidence of each of the adults' state of mind in 1999/2000.⁵³¹

On that basis, this is not truly a case where pre-conception intentions and post-birth parenting reality are being weighed as separate factors. The two factors are being made to align with the latter providing evidence of the former.

The relevance of agreements and pre-conceptions intentions has come to the fore in E&W in the recently decided case of *H v S*.⁵³² The case concerned a dispute between a male couple, H and B, and a single woman, S, over the residence of a child, M, conceived as a result of a collaboration between the three adults. According to the male couple, the child, conceived with H's sperm and carried to term by S, was to live with H and B and S was to have a subsidiary parenting role. S, however, disputed this, claiming that although she and H were to co-parent M, B had not been involved and M was to live with S. Upon birth, S registered the child under her surname with her as the sole parent. H successfully applied for parental responsibility as the biological father but B was not successful in this regard as he was neither a step-parent nor a parent in terms of the HFEA 2008. However, both men were given unsupervised contact with M. H and B were

⁵³⁰ *R v E and F (Female Parents: Known Father)* (n 510) [39] – [48].

⁵³¹ *Ibid.* [41].

⁵³² *H v S (Disputed Surrogacy Arrangements)* [2015] EWFC 36.

also successful in obtaining a prohibited steps order to prevent S from baptising M, which S proceeded to do and initially lied to the court about.

At the time of the hearing before Russell J, S continued to disrupt contact between M and the male couple but, despite that, overnight contact had been occurring and a relationship had developed between the men and M. Russell J found that the case did not concern a surrogacy arrangement and as such fell to be decided by the ordinary principles contained in the Children Act 1989 and, in particular, was governed by the paramountcy of the welfare of the child. The conclusion the court reached in this regard was that the welfare of the child was best served if she lived with H and B, if B had parental responsibility and if S was given supervised contact, each of which the court ordered.

This case is particularly noteworthy because of the emphasis placed on the importance of the agreement that existed between S and the two men prior to conception in deciding what is in the best interests of the child. Russell J notes:

The circumstances of M's conception and birth are relevant because M will, in time, need to understand the background to her birth and, secondly, because it will inform and assist the court in reaching its decisions to conclude what agreements were made prior to M's conception and birth.⁵³³

This suggests willingness on the part of the judiciary in E&W to recognise, and to some extent enforce, pre-conception intentions in the context of collaborative co-parenting. This is, however, subject to the best interests test and in this case what was in the best interests of the child from the point of view of the mother's conduct in terms of frustrating contact and breaching a court order, happened to coincide with what was agreed prior to birth. Therefore, it is not self-evidently the case that

⁵³³ *Ibid.* [8].

such an agreement would be enforced where the mother's conduct was not also brought into question.

Mary Welstead is critical of what she describes as an 'unusual, and Draconian, order to remove a 15 month old baby girl from her mother'.⁵³⁴ She argues that the judge placed a surprising amount of emphasis on the pre-conception agreement given that the best interests of the child are the court's paramount consideration. Nevertheless, Welstead accepts that given the judicial approach on the matter it would be preferable 'if all agreements to procreate, whether by way of surrogacy, sperm donation, or co-parenting, were to be regulated by law. Agreements could then be entered into with the secure knowledge that they would normally be enforced'.⁵³⁵ This echoes Russell J's remarks in *H v S* that 'The lack of a properly supported and regulated framework for arrangements of this kind has, inevitably, led to an increase in these cases before the Family Court'.⁵³⁶

Despite this, it is important to acknowledge that what was intended prior to conception may no longer reflect how the adults feel following the birth of the child. As Lord Justice Thorpe starkly comments in *A v B*, '[w]hat the adults look forward to before undertaking the hazards of conception, birth and the first experience of parenting may prove to be illusion or fantasy'.⁵³⁷ This is also a concern for legal professionals working with prospective collaborative co-parenting families who advise their clients to think through the implications of

⁵³⁴ Mary Welstead, 'The Battleground of Gay Parenthood and the Role of Agreements' (2015) 45 (7) Family Law.

⁵³⁵ *Ibid.*

⁵³⁶ *H v S* (n 521) [2].

⁵³⁷ *A v B and C* (n 483) [27].

what happens when someone changes their minds. As Gail, a family law solicitor in E&W, comments:

What I say to people when they come in, particularly to women is “well look you say the man doesn’t want any involvement, well that is fine but you have got to realise that we are all human and we can all change our minds and you really do need to think that he may fall in love with the baby so I mean, just think about what you would do.”⁵³⁸

Therefore, the courts in E&W would have to assure themselves that what was agreed prior to birth remains in the best interests of the child despite any change in circumstances.

Nevertheless, given this judicial willingness to recognize changing intentions following birth, it would be interesting to see how the courts resolved a dispute where there was a clear record of the pre-conception intentions, which may or may not accord with the post-birth parenting reality. This is a situation the courts in E&W have not had to face, given that none of the reported cases have yet concerned a written agreement, but has been addressed in other jurisdictions.

This lack of written agreements in the E&W cases contrasts with the cases in Quebec, which invariably concern a written agreement. This may be partly due to the different role legal agreements in family law tend to play in common-law and civil-law legal systems. The priority afforded to written agreements in Quebec even in relation to parenthood was demonstrated in *A v. B, C and X*.⁵³⁹ The case was similar to *L.O. v S.J.* in that a lesbian couple conceived with a known donor who had signed a written agreement relinquishing any rights in relation to the child. Nevertheless, the donor sought to block the non-biological mother’s

⁵³⁸ UKPB5.

⁵³⁹ *A v. B, C and X*, [2007] Q.J. No. 1895.

second-parent adoption of the child and brought an action for filiation. However, the Quebec Court of Appeal concluded that despite the fact the father had been having occasional contact with the child the written agreement took precedence.

Some commentators have viewed this outcome as progressive in terms of recognising women-led families.⁵⁴⁰ By prioritising the intentions of the adults over biology, the court is recognising women's procreative autonomy to conceive children without involving the biological father in raising the child. Various commentators have long argued for the prioritisation of intentions in the context of assisted reproduction.⁵⁴¹ While this does seem a positive in that case, it raises issues which need to be considered more fully.

One of the most positive aspects of this case is that there is no sense in which the validity of women-led families is being questioned. Undoubtedly the court is guided by child welfare. It would be inconceivable for a court in that position not to be mindful of child welfare. However, there is no indication that the court questioned that the child's needs would be met within the women-led family. Therefore, the court could not have been further from imposing father-figures on same-sex families, which has been highlighted as a problematic bias within the legal regulation of same-sex parenting. This is commendable from the point of view of not automatically prioritising biological and heteronormative discourses suggesting that children need to be raised by a mother and a father.

⁵⁴⁰ Fiona Kelly, 'Equal Parents, Equal Children: Reforming Canada's Parentage Laws To Recognize The Completeness Of Women-Led Families' (2013) 64 *University of New Brunswick Law Journal* 253.

⁵⁴¹ John Lawrence 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; Marjorie Maguire Shultz, 'Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality' [1990] *Wisconsin Law Review* 297–398.

However, in some respects there is a concern that this line of thinking may go too far the other way and lead to an automatic prioritisation of intentions and the autonomy of women-led families over other interests. Although the fact that biology was not determinative was laudable, it is important not to overlook the legitimate interests that the biological father has. Often these can result from a post-birth relationship that develops with the child and the court was mindful of this but decided this was insufficient to override the intentions. However, the biological father also has a weaker interest, which stems from the biological connection itself. John, a solicitor in E&W who was interviewed in this study, echoes this sentiment when he notes that:

as a very general statement of principle it is better for children to have a relationship with their parents and while I do not believe that biology is in anyway conclusive of a relationship if there is a biological connection I think that is a legitimate reason to say that if that is a relationship that is desired to be pursued either by adult or by child that is a reason to know and understand and appreciate.⁵⁴²

Viewed from a contractual perspective, intentions would take precedence and be determinative. However, unlike in a purely contractual situation, each of the parties has a degree of emotional investment in the child, which should not be ignored.

The case for allowing the biological father to play a role in the child's life is stronger where post-birth contact has taken place and some sort of relationship has been allowed to develop. In that situation, not only are the child's and father's interests engaged in maintaining the relationship but the relationship itself has developed partly as a result of parenting decisions the women have made. However, even in the absence of such a relationship, if the biological father

⁵⁴² UKPB8.

asserts a genuine interest or need for connection with the child it may be justifiable to explore how that can be accommodated. This is not meant to suggest that a biological father should automatically be able to assert his rights over the interests of the women-led family nor that he should be able to ignore any pre-conception agreement on an emotional whim. It is, nevertheless, argued here that the courts need to engage in a genuine balancing exercise between the interests of all involved when deciding these disputes rather than promoting a particular family form.

I would suggest that it is the decision to involve or a known donor (or put slightly differently, the fact that a female couple have conceived with a man who is now aware of the child's existence) that justifies the court to weigh the father's interests against those of the women-led family. One implication of this decision may be that the man might develop feelings for the child and feel a need to have a connection with that child, which may be strongly related to their biological connection. In the literature, this tends to be argued from the female/feminist perspective, as an illustration of the problematic way the legal system approaches known donation by imposing fathers on these families. However, once one moves beyond suggestions of bias and heteronormativity, in a similar way to the Quebec court, one is confronted with a biological father whose legitimate interests are engaged.

Nevertheless, the judge's task in resolving disputes surrounding parenthood and parenting is made more difficult in the absence of any evidence of the type of parenting arrangement that was envisaged prior to conception. This speaks to the need, from an evidentiary point of view, for parties to make a prior written agreement about the parenting arrangement even though such an agreement

may not be legally binding. Furthermore, not only does the existence of a written agreement provide evidence of pre-conception intentions, which can assist in the resolution of disputes, but the process of negotiating an agreement means that there is an opportunity to clarify the respective roles of the adults. This may have the beneficial effect of reducing the likelihood of disputes arising.

Negotiating a written agreement as a means of facilitating discussion was seen as crucial by many of the legal practitioners interviewed in this study both in the UK and Canada. Gail, a family law solicitor in E&W with considerable experience dealing with same-sex parenting disputes stresses that, '[w]hat I have always thought the benefit of written agreements are is that it concentrates people's minds on what it is that they are getting involved with. It helps people to think about how they will deal with uncertainties'. The idea that a pre-conception written agreement puts these families in a better position to deal with future uncertainties is one that is echoed by a number of the legal professional participants. Mary, for instance, an attorney in Ontario introduced above, comments that:

I think that it's very important that couples be educated and understand that what you're planning against is bad management in the future. And what we are planning for is an agreement that goes in the drawer and you'll never look at it again. Think down the road now, you know, be intentional and then see how things go. But at least you've got something to come.⁵⁴³

The way that Mary phrases the purpose of a written agreement is noteworthy because she does not approach the issue from a purely legal perspective as a court might but she frames it in terms of the ability of written agreements to provide peace of mind for these families that they have though through the relevant issues should future difficulties arise. This way of communicating the

⁵⁴³ CAPB1.

significance of written agreements is important in terms of educating parents, as Mary puts it, because the desire for peace of mind in the face of future uncertainty is likely to be a more attractive feature of written agreements than their more legalistic uses, which may seem more abstract to these families.

These experienced views, therefore, paint the picture of written agreements not as legally binding contracts that determine the outcomes of future disputes but as a means of facilitating discussion and also as evidence of pre-conception intentions. Kerry, an attorney in Ontario with a considerable same-sex family law practice, summarises the dual purpose and importance of written agreements quite forcefully:

It's critical. Critically important. And not because the contract is enforceable. Because, at least in Ontario and probably most places, it's not enforceable. It's important for two reasons: One, it is evidence of what everyone intended in the event that the relationship breaks down, so it will provide some guidance for a decision maker in the future, a judge or arbitrator, about what the parties intended...And secondly, maybe even more importantly, erm, it helps clarify everyone's intentions.

It is noteworthy that in both E&W and jurisdictions such as Ontario in Canada, written agreements about parenthood and parenting are unenforceable and yet legal professionals in both jurisdictions strongly recommend entering into them.

Understandably the legal framework in the jurisdiction they are in influences how legal professionals view the role of written agreements. John, a solicitor in E&W, where the courts have a large degree of discretion when exercising their child welfare jurisdiction notes that:

While a certain amount of analysis would need to be paid to what the agreement was, what the agreement was is not determinative of what the answer should be. What the answer should be is, what is in the best interests of this child, and so if the agreement was

Dad has no role whatsoever and he is not going to be recognised as Dad fine that is relevant and needs to be taken into account but the reality is whether that child is best served by having a relationship with the Dad and if the child is best served by having a relationship with the Dad then that is determinative of the outcome irrespective of what the agreement was.⁵⁴⁴

This contrasts with Belinda, an attorney in BC, who stresses that following the Family Law Act reforms in 2013, as a result of the written agreement '[t]he donor is never a parent, period, full stop. Very simple. And that reflects the biological reality that donors don't, you know, they're only involved at the beginning; they don't deliver the child, or anything like that'.

Despite this seemingly clear distinction in the legal position between E&W and BC a number of legal professionals in BC mooted the idea that the courts could arguably retain a degree of discretion in deciding the involvement of the biological father, any written agreement notwithstanding. David, an attorney in BC, commenting on the binding nature of written agreements denying the donor any legal status in BC, notes that 'there will eventually be cases that will try to challenge that, but it's clear that that's the intention of the law and that's the way it's written'. Lance, an attorney in BC specialising in fertility law, goes further to say that:

my sense is that, regardless of how the Statute's written, there will be a case and therefore a precedent at some point which is going to establish rights for that donor or that surrogate if the actions of the parties are such that they are contrary to whatever their agreement may read. And if their actions are consistent with the agreement when they say they are going to have contact, I think the court will make an order...And given the rights to the facts, I'd like to argue the case.⁵⁴⁵

⁵⁴⁴ UKPB8.

⁵⁴⁵ CAPB7.

This is reminiscent of Lord Justice Thorpe's comments above to the effect that the post-birth parenting reality might indicate that the pre-conception intentions were unrealistic. However, these judicial dicta were made in respect of a legal framework that does not recognise the binding nature of written agreements unlike the revised framework that now exists in BC.

Despite this, there does appear to be a difference in the cases coming before the Canadian courts, whether that's in Ontario, Quebec or Alberta, on the one hand and those in E&W in terms of the existence of written agreements. None of the cases in E&W have involved families with written agreements, whereas a number of the Canadian cases have. The cases that reach the courts are not necessarily representative of families parenting in this way many of which may resolve disputes without going to court. It is also unlikely that there would be a significant difference in terms of the existence of a written agreement between families in Canada and E&W who sought the advice of a legal professional when creating their family given that legal professionals in both jurisdictions emphasise the importance of written agreements, as discussed above.

As Chapter Seven will discuss more fully, the Canadian parents in the current study's sample all had written agreements and had sought legal advice, whereas there was a mixture of families with and without written agreements in the E&W sample. There could be a number of explanations for this. As Chapter Two discusses in more detail, the sample size is too small to generalise. However, the engagement of legal professionals in education initiatives within the (prospective) LGBTQ parenting community can play a significant role in this. This varies greatly depending on geographical location but some cities in Canada, for example Toronto, have very well developed (legal) education programmes, which likely

result in more legally aware prospective LGBTQ parents. Such initiatives do exist to a certain extent in the UK, for example in London, but one of the hopes for this research is that it can feed into legal education programmes for (prospective) LGBTQ parents in the UK.

Despite tentative indications in the present study's sample and in the case law that LGBTQ collaborative co-parents in Canada may be more legally aware than their counterparts in E&W, this is by no means universally the case as the Canadian legal professionals interviewed attest to. Zabrina, a family law attorney in BC, notes that 'the one's I've seen have had formal agreements. But that's probably proportionate because of the work that I do'. Therefore, legal professionals, like Zabrina, who are involved not only at the stage of disputes but also in drafting written agreements at the stage of family creation are more likely to encounter written agreements in their practice. By contrast, Mary, an attorney in Ontario mentioned above, who mainly has experience dealing with same-sex families that are at the point of separation has more experience of families that do not have written agreements. She describes a particularly emotionally fraught case she was involved with where the female couple in a collaborative co-parenting situation were separating:

it was very unpleasant all around, and I could not get a discussion happening to get the parties to the point where they wanted to discuss how all of this was going to play out over time... there was no agreement in place, nor could I convince anybody that it would be a good time to put an agreement in place, to at least state intention about the relationship between those children and those dads.

The reasons why families may or may not wish to put written agreements in place will be explored in more detail in Chapter Seven where the views of participants in the current study will be considered.

While legal professionals in both Canada and E&W are keen to stress the importance and utility of written agreements, there is also a sense of acknowledgment that from the families' point of view, it is not the written agreement *per se* that is important but the discussions that it encourages. Dan, a family law solicitor in E&W, comments that 'I don't see it necessarily needing to be a legal contract because you can't contract on this stuff, but I do think at least some note or memorandum of what is agreed is going to be useful but the most important thing is clearly to talk about it'.⁵⁴⁶ Therefore creating a written agreement is not essential for people to think about 'how they will deal with uncertainties', as Gail put it, but it can be a useful means of addressing these in the future to have something down in writing.

As will be discussed more extensively in Chapter Seven, a number of the participants in this study had wide-ranging discussions prior to conception about what the future might hold but did not write any of this down. Fortunately, these families had not been in dispute about the roles of the various adults, perhaps because they had not encountered the difficulties that some of the other families have or perhaps because they pre-empted any disputes in the discussions that they had. Nevertheless, the process of creating the written agreement can be a good focal point for these discussions and can provide evidence of what was agreed should dispute occur in the future where memories of what was agreed might be understandably sketchy.

While there may be some resistance to thinking about the possibility of disputes further down the line, there is a clear sense that confronting these issues at the stage of family creation can avoid or at least ameliorate more intractable

⁵⁴⁶ UKPB7.

difficulties further down the line. In response to being asked whether families embarking on collaborative co-parenting can reasonably expect to consider potential worst case scenarios at that stage, Gail, a solicitor in E&W introduced above, comments that:

Well I think you can. I do, then they think about what would we do, and that's what I was saying, heterosexual couples don't tend to sit down and think what happens if we divorce. If they did then we would have a lot less disputes if people actually looked at it like that.

It seems unrealistic to expect that a pre-conception written agreement is the silver bullet that avoids dispute further down the line. As mentioned above, intentions and feelings can change following the birth of the child and prior planning may not be able to avoid this. However, as Gail implies, the fact that collaborative co-parenting families are, by necessity, intentionally created could be seen as a good opportunity to address any potential issues that might arise, which can only be a positive thing even it is not a full-proof means of avoiding future conflict.

Contracting Contact

Despite the inconsistency in the use of parental responsibility in previous cases, the courts have taken a more consistent approach to contact as demonstrated in two recent cases (*ML v RW*⁵⁴⁷ and *A v B*⁵⁴⁸). It would seem that the women's attempt to drastically curtail contact in *ML v RW* is somewhat unwarranted given the role for the men, which the evidence suggests they agreed to and which the men have been performing. By contrast, one might argue that the women's desire in *Re B* to limit the biological father's contact with the child would seem warranted because that was never what was agreed and is not the situation that existed

⁵⁴⁷ *ML, AR v RW*, SW [2011] EWHC 2455 (Fam).

⁵⁴⁸ *A v B and C* (n 483).

after birth. In that sense *Re B* deals with a situation that is more akin to a charitable donation than an attempt to start a family together.

Despite this, the case can be seen as an illustration of how female-parented families create through the involvement of a known donor might feel vulnerable in the face of claims by the biological father. Nordqvist and Smart argue that the case contains echoes of a situation where ‘the looming donor can make claims to a child, even though the child is happy with the family they already have’.⁵⁴⁹ This is a particular concern given that female couples that create a family in this way may feel insecure that the family they have created is going to be recognised as a ‘proper’ family.⁵⁵⁰ In making this point, Nordqvist and Smart recognise the countervailing consideration that some female couples actively seek an involved father figure rather than just resorting to known donation as a means of conception. As they put it, ‘[s]ome parents are therefore trying to reshape parenthood away from the familiar twosome model towards a different combination of adults, while insisting that this too is a proper family’.⁵⁵¹

Nordqvist and Smart’s critique of *ML v RW* focuses very much on the female couple’s vulnerability and perspective in trying to create a family. This is unsurprising given their study’s focus on lesbian parenting. However, the men in this case and others like it are also embarking on the process of family formation alongside the female couple. Therefore, it is important to consider the vulnerability and needs not only of the female couple but also the biological father

⁵⁴⁹ *Ibid.* 16.

⁵⁵⁰ See for example Petra Nordqvist, ‘Origins and originators : lesbian couples negotiating parental identities and sperm donor conception’ (2012) 14 *Culture, Health & Sexuality: An International Journal for Research, Intervention and Care* 297–311.

⁵⁵¹ Nordqvist and Smart, *Relative strangers : family life, genes and donor conception* (n 492) 17.

(and his partner if he has one) in these types of collaborative co-parenting situations. This issue will be considered in greater depth in Chapter Seven.

Building on this, although the female couple did not manage to restrict the contact in the way they sought, the male couple in *ML and AR v RWB and SWB* will be similarly disappointed because they had hoped for shared residence. Again, without a written document, it is difficult to ascertain what was agreed prior to birth. However, in this case, the post-birth parenting situation does seem to suggest that shared residence was not what was agreed. Therefore, the men's expectation may be equally unrealistic in this respect. Despite this, it is regrettable that the courts are unable to insist on greater contact between the children and the male couple, largely because of the female couple's hostility (justified or not) towards the male couple.

Incidentally, it is worth exploring a little further at this stage A's choice of application for a contact order rather than a residence order, unlike the respondent in *T v T*. Perhaps in this case the level of contact that had developed with the child was less; perhaps because the child was younger such a strong relationship hadn't developed between A and the child; or perhaps A felt that contact was as much as he could hope for. These are important issues to consider because they can affect how just the outcome of the case is. A comparison of the cases *T v T* and *A v B* begs the question why the former case resulted in a joint residence order in favour of all three but the latter case resulted in a joint residence order in favour of the female couple. The simple answer to that is that no such joint residence order in favour of all three adults was sought in *A v B*. As indicated above, perhaps the facts of the case warrant such a distinction and perhaps the reason no such application was made is because that

has a lower likelihood of success. Regardless, it is interesting to note that the trial judge in *T v T* was willing to grant a residence order in favour of the biological father and mother, whereas the trial judge in *A v B* was reluctant to even allow increasing contact between the biological father and child. Can this be explained simply by the differing approaches of different judges or was there a crucial distinction in the facts of these cases?

It is possible to infer from the facts of the case that the father might have considered applying for a joint residence order had he felt able to do so. This is implicit in the trial judge's finding that 'there has never been an acceptance of the basics of the father's position, even if he made it plain, that there should be three parents and two homes.'⁵⁵² However, the trial judge goes on to say:

Any benefit that might accrue from developing the relationship with the father to regular contact, shared holidays and a situation where in normal terms in these days a Shared Residence Order might be appropriate is not [present in] this case. The father has done well with the child. That is his evidence and I accept it, but to try and develop the relationship to a full divorced parent type of relationship, in my judgment any benefit that accrues is likely to be outweighed by what I consider is likely to be confusion and disruption and the potential disruption of the relationship between the mothers and the child, and it is that relationship which provides the nurture, stability and security for M.⁵⁵³

The trial judge emphasises the fact that the child has never lived with the father. However in *T v T* the Court of Appeal referred to case law that confirmed that this is not a prerequisite of granting a residence order. It seems to be the case that, *mutates mutandis*, the father in this case is in more or less a similar position to the father in *T v T* but just at an earlier stage in his relationship with the child because the child is younger. This suggests that it would not be inappropriate, as

⁵⁵² *A v B and C* (n 483) [37]

⁵⁵³ *Ibid.*

the trial judge indicates, to grant a shared residence order if one were applied for. There does seem to be an element of different judges reaching different decisions as a matter of discretion rather than on the basis of a principled distinction. As noted above, this is a concern Smith expressed in relation to earlier case law. However, the age of the child may have been a significant factor in this case. It may well be disruptive to the life of a 2 1/2-year-old to have to share time between his parents whereas it wouldn't be so disruptive to a 7-year-old or a 10-year-old. Nevertheless, there is no suggestion in the court of first instance's judgement of this sort of distinction and very limited recognition of the role the biological father can play as the child grows up.

Fortunately, the Court of Appeal takes a slightly different approach, which is evident in the following, telling section of the judgment:

A's involvement in the creation of M and his commitment to M from birth suggest that he may be seeking to offer a relationship of considerable value. It is generally accepted that a child gains by having two parents. It does not follow from that that the addition of a third is necessarily disadvantageous'.⁵⁵⁴

The Court of Appeal recognises that there may have been a mismatch in expectations. However, in their judgement expectations are not determinative and what is subsequently in the child's best interest may not accord with pre-conception intentions. In light of this, Lord Justice Thorpe, in delivering the judgement of the Court of Appeal allowing the appeal, held that:

in my judgment the conclusion that Judge Jenkins should have reached was that the issue of whether the relationship between M and A should be encouraged to thrive and develop had to be decided by stages in the light of accumulating evidence. There were

⁵⁵⁴ *Ibid.* [24]

too many unforeseeable factors to allow this judge to declare the future as definitively as he did.⁵⁵⁵

In some ways this is a more satisfactory outcome which accords with the court's reasoning in *T v T*. However, it once again raises the issue of the security of the female couple's homonuclear family, which needs to be explored in greater depth. The case, and in particular Lady Justice Black's concurring judgment, also raises a number of ancillary issues that deserve to be considered in greater detail such as the use of language and labelling in these situations as well as the role of written agreements in documenting the expectations of the parties.

Lady Justice Black, who has considerable experience with these types of cases dating back to 2001, felt it necessary to expand on some of the issues she felt were particularly problematic. She reviewed some of the key cases on the issue, which have been discussed in more detail above. She highlighted that pre-conception intentions can never be determinative of the outcome of the case but forms part of the consideration of factors involved in assessing what is in the best interests of the child. In addition to this, Lady Justice Black highlighted the difficulties around terminology for these families, particularly in relation to the biological father, which was discussed in more detail above. Zanghellini is particularly critical of Lady Justice Black's use of the term father, arguing that:

'father', like 'mother', is a normatively loaded term which immediately naturalises the role of all male progenitors in lesbian and gay families as something more than their genetic contribution, inviting us to think of them in terms of 'fathers' no matter what – regardless, for example, of shared intentions about whether or not they should act as fathers in the child's life.⁵⁵⁶

⁵⁵⁵ *Ibid.* [32]

⁵⁵⁶ Aleardo Zanghellini, 'A v B and C [2012] EWCA Civ 285' (2012) 24 Child and Family Law Quarterly 475, 477.

This is a powerful critique because it is impossible to ‘unload’ this normative content from our everyday use of these terms. However, it does not follow that the use of the term father implies an uncritical acceptance of these normative assumptions.

Zanghellini’s critique compellingly demonstrates the ease with which courts can, perhaps unwittingly, rely on heteronormative assumptions when dealing with these families. However, it also reveals a tendency to criticize court decisions on this basis without necessarily making any attempt to interpret judicial reasoning in its best light or give credit for attempting to engage with these complex issues. Zanghellini’s critique stems from his characterization of the case as one where the biological father subsequently changed his mind about the involvement he was comfortable with rather than one where there was no clear agreement about his role.

The trial judge in *A v B* found that ‘the father never managed to establish an agreement to his satisfaction’.⁵⁵⁷ In Zanghellini’s interpretation:

this is quite different from saying that the father may have been under the impression that his role would be different. What Judge Jenkins seems to be saying here is, rather, that the father entered the agreement with mental reservations – that is, despite failing to be happy with its terms. Characterising the situation any differently – in particular, as one in which the sperm donor was not clear about what had been agreed – gives an undue rhetorical advantage to the sperm donor, setting the stage for deciding the appeal in his favour.⁵⁵⁸

It is, however, questionable whether such a definitive inference is warranted from the facts of the case, especially in the absence of a written agreement. The trial judge’s position, which the Court of Appeal accepted, that there was a lack of

⁵⁵⁷ *A v B and C* (n 483) [12].

⁵⁵⁸ *Ibid.* 479.

agreement over the biological father's role is at least arguable on the facts of the case and does not necessarily imply any inherent bias in favour of the biological father.

Given Zanghellini's interpretation of the facts, which is arguable and valid although difficult to be definitive about, it is understandable why he characterises the case as one suggesting that 'biological connection, in and of itself, should be constitutive of a relationship of belonging between genetic progenitors and 'their' children.' In support of this Zanghellini highlights Lord Justice Thorpe's comment that 'the issue of whether the relationship between M and A should be encouraged to thrive and develop had to be decided by stages in the light of accumulating evidence'.⁵⁵⁹ He suggests that '[t]he language here betrays what Thorpe LJ assumes to be the best case scenario in lesbian and gay families – a thriving relationship between children and their biological fathers'. However, generalizing from a case of same-sex parenting involving a known biological father where his role may or may not have been agreed, to the best case scenario in lesbian and gay families more broadly would seem to be a surprising leap to make.

Overall, Zanghellini's critique of *A v B* is an important one because it unearths hidden assumptions that may be implicitly operating in the judicial reasoning of a case that, on the face of it, may be seen as a step in the right direction towards recognizing same-sex collaborative co-parenting. While the possibility of recognizing collaborative co-parenting may be a positive step, it should not come at the expense of acknowledging the sufficiency of same-sex parenting. As Zanghellini notes:

⁵⁵⁹ *Ibid.* [32].

it is one thing to facilitate poly-parenting on the ground and to the extent that the participants to a parenting project desire it, and another thing entirely to promote it, let alone enforce it, because of the supposed (and unsubstantiated) benefits of dual-gender, biological and genetic parenting.⁵⁶⁰

Zanghellini goes further to suggest that:

When poly-parenting is court-imposed, or when a court implicitly pictures it as the desirable outcome in circumstances such as those of the present case, then poly-parenting (as actually practiced or as regulatory ideal) risks losing any transformative potential.⁵⁶¹

However, I would argue that these poly-parenting or collaborative co-parenting arrangements also risk losing their transformative potential when we fail to recognise genuine attempts to engage with the complex issues of legal recognition that arise in these cases and the way they advance the debate around these issues, as well as warning of the dangers of potential heteronormative bias.

As the court highlighted in the more recent case of *Re G; Re Z*,⁵⁶² decisions in these cases are highly fact-specific. Therefore, it is worth considering the factual circumstances of that case in some detail. It is also worth examining the arguments advanced by counsel in some depth to see which are most compelling. One aspect of the case that makes detailed analysis problematic is the considerable disagreement that exists over various facts in the case such as the duration and quality of contact with the children. This is something that would hopefully have been resolved during a fact-finding hearing had the substantive applications been brought. However, the parties settled the case out of court.

⁵⁶⁰ Aleardo Zanghellini, 'Lesbian and Gay Parents and Reproductive Technologies: The 2008 Australian and UK Reforms' (2010) 18 *Feminist Legal Studies* 227–251, 250.

⁵⁶¹ Zanghellini, 'A v B and C [2012] EWCA Civ 285' (n 545) 485.

⁵⁶² *Re G (A Minor); Re Z (A Minor)* [2013] EWHC 134 (Fam).

Therefore, as this was merely an application for leave to apply to the court, no findings in fact were made.

In relation to F and G, one of a number of disputed issues in the case concerns what was agreed prior to birth. D and E contended that they made it quite clear to S that he was to have no parental title, no parental responsibility and no financial contribution. In E's words, 'we wanted a known donor to make it possible for the child to find out more about its background. We were not looking for a father, we didn't want involvement, we, that is D and I were to be the parents'.⁵⁶³ S, however, argued that these were not the terms of the agreement but that D and E would care for the children and S would be involved in their upbringing and have contact as their father. Just as in *A v B* and other previous cases, in the absence of a written agreement as evidence of their pre-conception intentions it seems impossible to resolve the issue. This would appear to be a recurrent theme throughout the case law in this area and highlights the importance of reaching an agreement about the expectations and roles of the respective adults and to evidence this in writing.

Pre-conception intentions, although not determinative, can be an important factor in cases like these, if they can be ascertained. Often judges have tried to infer what roles were agreed for each of the adults prior to birth by examining their post-birth involvement with the children. In this case, however, even that was disputed to an extent. In relation to F, it seems clear that contact took place somewhere between once a fortnight and once a week, either at S and T's home or at D and E's home, and that F was introduced to various members of S and T's families. There was, however, considerable dispute about the quality of the

⁵⁶³ *Re G (A Minor)*; *Re Z (A Minor)* [2013] EWHC 134 (Fam) [5].

contact. D and E argued that S mainly came round to socialise with them, paying little attention to F and rarely seeing G as he would be asleep. S, on the other hand, felt that he and the children had a very close relationship, claiming that ‘the children were clearly very pleased to see us both and particular wanted to be very close to me and kiss me’.⁵⁶⁴ Again, the dispute about the quality of contact will be a difficult one to resolve during the fact-finding hearing. However, the trial judge felt that, given the regularity of contact that existed between S and the children, he would be able to at least make a *prima facie* case for a contact order in relation to both children.

In relation to Z, the disagreement about pre-conception intentions seems even more pronounced. X and Y argued along similar lines to D and E that they wanted a known donor with no other responsibilities in relation to the child other than perhaps being a role model. Furthermore, they argued that T didn’t express wanting anything more than this at the time. However, T argued that the arrangement was that X and Y would be Z’s parents and care for Z but that he would still be Z’s father and be involved in Z’s life. T went even further and argued that he thought he would still be one of Z’s legal parents and would be recorded on the birth certificate as such. In any event, regardless of what had been agreed, approximately fortnightly contact occurred between Z and T. Once again, however, the quality of this contact was disputed. T argued that he had a bond with Z who was pleased to see him and was very relaxed around him. X and Y claimed that T and Z did not interact much at all and X even described T’s assertions to the contrary as a ‘bare-faced lie’.⁵⁶⁵

⁵⁶⁴ *Ibid.* [20].

⁵⁶⁵ *Ibid.* [34].

The central contention of the applicants' argument in relation to Z is similar to that of the applicants in relation to G and is succinctly summarised in the statement that T 'is not challenging the respondents' place in Z's life, merely seeking the continuation of one for himself'.⁵⁶⁶ According to the applicants this accords with the idea advanced by X and Y of T as a role model for the child. The respondent's arguments in this case again are similar to those in relation to G, in terms of the autonomy of the family unit. The respondents in this case also go further to argue that pre-conception intentions cannot be enforced by the court and that options other than being a known donor would have been open to the applicants had they wanted to be involved fathers. The enforceability of pre-conception intentions and the implications of involving/being a known donor are issues that deserve grater consideration in their own right and would, no doubt, have been considered in greater detail during the substantive hearing.

One of the underlying concerns that runs throughout cases like this is the worry that the validity and suitability of same-sex parenting arrangements in general are being brought into question. After all, it was not all that long ago that the law didn't fully recognise same-sex parenting and may have even considered being in a same-sex relationship prejudicial to custody applications in relation to children. In some quarters this issue may still be debated. However, such debate is beyond the scope of this thesis. Recent amendments to the law⁵⁶⁷ have made it clear that the law fully recognises same-sex parenting. Therefore, it is important in deciding these cases that there is no suggestion that same-sex parenting is in any way inadequate and that is why the biological father needs to be involved. Although none of the judgments contain any explicit reference to this, it is a valid concern

⁵⁶⁶ *Ibid.* [75].

⁵⁶⁷ Such as the Human and Fertilisation Act 2008 and the Adoption and Children Act 2002.

especially when some judgments (such as *Re B* discussed above) have come close to imposing contact merely because the donor/biological father is known.

In *Re G*; *Re Z*, however, the judge explicitly acknowledges that ‘the policy underpinning [the 2008 Act] reforms is an acknowledgement that alternative family forms without fathers are sufficient to meet a child's need.’ In the judge’s view, this is bolstered by the fact that ‘it is now established beyond doubt that the relationship between a same-sex couple constitutes ‘family life’ for the purposes of article 8: see *Schalk and Kopf v Austria* [2010] ECHR 995.’⁵⁶⁸ This acknowledgment is of crucial importance to the decision because it belies any suggestion that the suitability of same-sex parenting is being brought into question. The judge explicitly states that in relation to applications for section 8 orders, ‘the position of a lesbian couple who have been granted the status of legal parents by the 2008 Act is exactly the same as any other legal parent.’ The converse of this, however, is that the biological father is not precluded by the 2008 Act from making an application to the court and therefore his status is the same as any other applicant who needs the leave of the court to make an application for a section 8 order.⁵⁶⁹ I have argued elsewhere that:

[t]he court’s reasoning in this regard is commendable to the extent that it allows the biological fathers to argue their case at a substantive hearing: not granting these biological fathers leave to apply would have meant putting them at a disadvantage (based on their biological relationship) as compared to other adults with a similar connection to the child to whom the courts may well have granted leave to apply.⁵⁷⁰

⁵⁶⁸ *Re G (A Minor)*; *Re Z (A Minor)* (n 551) [113].

⁵⁶⁹ *Ibid.* [115].

⁵⁷⁰ Philip Bremner, ‘CASES: Lesbian Parents and Biological Fathers – Leave to Apply for Contact’ (2014) 36 *Journal of Social Welfare and Family Law* 83, 80.

By contrast, some commentators have been critical of the case because of the emphasis it places on biological fathers⁵⁷¹ and its potential to undermine the policy of the Human Fertilisation and Embryology Act 2008 by allowing disputes to continue between lesbian parents and known biological fathers.⁵⁷²

Despite this, the judge's approach to determining the application for leave to apply for section 8 orders proceeds from a well-balanced and solid analysis of the law and the policy underlying it. From this, he goes on to make the determination that both T and S should be able to apply to the court for contact orders based on the particular facts of the case. Rather than on considerations of family form or the importance of biological parenthood *per se*, the judgment is based on the decisions made by the child's legal parents. In relation to G, the judge holds:

As a result of choices made by the respondents, both S and T had regular and frequent contact with G and Z respectively. D and E chose S, an old friend of D's, who lived 100 yards or so away, to provide sperm to enable them to conceive a child. They involved him in preparations before the birth. They invited him to see the new baby, F, immediately after birth and thereafter on a regular basis. When they decided to try for another child, they asked him to provide sperm again. They wanted their second child to have the identical genetic background to their first. Again, they involved S in the preparations before the birth and allowed him regular and frequent contact thereafter.⁵⁷³

In his judgment, the judge is taking the position that none of the resulting involvement and contact were a necessary consequence of involving a known donor but, for whatever reason, this took place and, therefore, whether the parties

⁵⁷¹ For an interesting discussion of how the language used in the case favour biological father see Alan Brown, 'Re G; Re Z (Children: Sperm Donors: Leave to Apply for Children Act Orders): Essential "Biological Fathers" and Invisible "Legal Parents"' (2014) 26 Child and Family Law Quarterly 237, 240.

⁵⁷² Natalie Gamble, 'Lesbian Parents and Sperm Donors : Re G and Re Z' (2013) November Family Law 1426, 1429.

⁵⁷³ *Re G (A Minor); Re Z (A Minor)* (n 551) [115].

like it or not, the biological father does play a role in the child's life. He reaches a similar conclusion in relation to Z, highlighting that X and Y could have chosen anyone to be a role model for their child but they decided to involve the biological father. In relation to both families, the judge takes the view that a fact-finding hearing is required to determine the disputed facts but that it is at least arguable that the relationships that were allowed to develop were in some way linked to the fact that these men were the children's biological fathers.

Although this case concerned an application for leave to apply for a section 8 order, the likelihood of success of the main application is a factor to be taken into account alongside others listed in s.10(9). In considering the merits of the substantive application, the judge made the following instructive remarks:

All parties have much to reflect on as a result of this hearing. Both D and E, and X and Y, may care to reflect on the fact that they chose S and T respectively to enable them to conceive children. In the case of D and E, they repeated that choice when they decided to have a second child. In the case of X and Y, they specifically wanted T to be a role model for their son. It was always part of the plans in both cases that there should be some contact between the children and their biological fathers. Equally, both S and T should reflect on the fact that the primary family unit for these children is with their mothers and this court will, when considering their substantive applications, look very carefully to ensure that any risk of harm to the children is avoided.⁵⁷⁴

As one of the most recent judicial comments on known donor/poly-parenting arrangements, this provides a succinct and balanced summary of the competing interests involved but does not necessarily give any insight into how the substantive application will be decided. The judge goes on, however to say:

These mothers understandably feel very vulnerable by the challenge to their family units. Notwithstanding the great social changes that have facilitated the creation of these new types of family, mothers in the position of D and E, and X and Y,

⁵⁷⁴ *Re G (A Minor); Re Z (A Minor)* (n 551) [136].

understandably continue to feel vulnerable, and this court will take that vulnerability into account when considering the applications for contact.⁵⁷⁵

This, perhaps, gives some indication of where the court's sympathies lie in relation to the substantive application. On the one hand, it is commendable that the court is sensitive to these issues and does not seek to impose contact with biological fathers on same-sex families. On the other hand, it also seems to indicate that the courts pay little attention to the vulnerability of the poly-parenting arrangement itself which arguably could be said to constitute a different sort of family unit. Both in this case and others, the courts have opined that adults in these situations could have chosen to enter into a full co-parenting poly-parenting arrangement but on the facts of these cases this hasn't been out. It is questionable, however, whether this is truly the case or whether the courts have simply failed to recognise where a co-parenting arrangement exists. It would be interesting to see how the courts handled a case where all parties acknowledge the initial intention was full co-parenting between all three or four adults but that this subsequently did not work out.

In each of the cases discussed above, the female couple have sought to argue that they envisaged, and that everyone agreed upon, a lesser role and a lesser degree of involvement for the father in the child's life than he now seeks. By contrast, the father invariably argues that the agreement was for greater involvement than the female couple are now allowing. Given that none of the cases involve written agreements, it is very difficult to ascertain precisely what the preconception intentions were, especially when many of the facts are disputed between the parties. Therefore, the courts have had to infer what was

⁵⁷⁵ *Re G (A Minor)*; *Re Z (A Minor)* (n 551) [136].

agreed from the post-birth parenting reality (which would be a factor for consideration in and of itself aside from any consideration of pre-birth agreements).

On this basis, it is difficult to assess the relevance of this body of case law to the type of full co-parenting, poly-parenting arrangements that is the primary focus of this thesis. It would be interesting to see how the courts would resolve disputes similar to those in the cases discussed above where there was a written agreement evidencing the intention to engage in full co-parenting, poly-parenting. Although such a case has not yet come before the courts, certain judicial dicta (such as in the case of *A v B*) and the creative use of court orders (such as in *T v T*) suggest that the courts would be willing to recognise such arrangements as being of considerable value to and in the best interests of the children involved. Furthermore, the court in *H v S* indicated its approval (and incredulity) that the male couple still wished to involve the birth mother in the child's life, despite her attempts to minimise the male couple's role.

Conclusion

This chapter has sought to demonstrate that in resolving collaborative co-parenting disputes the courts have insufficiently valued the autonomy of the parties involved, preferring instead to adopt a default position that insulates the homonuclear family from potential threats. It is commendable that the courts protect the homonuclear family from unwarranted threats. However, when the adults' initial intention is to create a collaborative co-parenting family, this default approach is unjustified. The way in which the courts position themselves in relation to the approach used in post-separation, different-sex parenting,

whether that is distancing or approximating, does not sufficiently recognise collaborative co-parenting arrangements as valid families in their own right. In order to do this, the courts need to adopt an approach that takes pre-conception intentions seriously in a way that values the autonomy of the adults involved but also reflects a genuine assessment of the best interests of the child. As a number of participants in this study commented, this would be greatly assisted if the adults involved in these parenting arrangements recorded their intentions prior to birth in the form of a written agreement, however unemotional that may seem. The implications of this for future law reform will be discussed further in the concluding chapter of this thesis.

Part Three: The Viewpoint of Law's

Families

The chapters in Part Three explore the legal regulation of collaborative co-parenting from the perspective of the families that participated in this study. The doctrinal analysis in Part Two revealed the potentially problematic nature of the dyadic model of parenthood based on an intimate couple relationship, which I explored empirically with participants through the use of vignettes of various collaborative co-parenting scenarios. The following chapters explore the themes that emerged from the analysis of these data and situate them alongside other studies that have explored these issues.

The key finding that is presented here is that the interests of collaborative co-parents are not homogenous and that the legal framework in E&W is overlooking the emerging procreative consciousness of gay men in this respect. This finding results from the typology of collaborative co-parenting that has emerged from the data and is discussed in '**Chapter Six: Family Portraits and Parenting Journeys**'. By presenting the data in this way, the problematic nature of the heteronormative, dyadic approach to parenthood in terms of collaborative co-parenting becomes apparent. The idea that a more flexible approach to parenthood is required is, consequently, corroborated through a triangulation of the doctrinal analysis, empirical data and the findings of previous studies.

'**Chapter Seven: Women-Led Families, Male-Led Families and Poly-Parenting**' builds on this by considering the complementary and competing

interests of gay men and lesbians in relation to collaborative co-parenting through the lens of the theoretical framework of procreative consciousness.⁵⁷⁶ This combination of the theoretical and empirical explorations surrounding the pathways to parenthood, which prospective collaborative co-parents (and gay and lesbian parents more generally) take allow issues of reproductive autonomy and procreative consciousness that arise in the empirical data, reflecting the lived experiences of the participants, and in the theoretical literature, to be related back to the legal framework in order to explore whether and how such concepts can be accommodated.

‘Chapter Eight: Conclusion - Collaborative Co-Parenting as a Call to Reform Law’s Families’ links together the doctrinal, empirical and theoretical insights of the previous chapters as each challenges from a different perspective the rigidity and implicit heteronormativity of existing legal frameworks around parenthood and parenting. Drawing on theoretical perspectives from recent works on family sociology and anthropological kinship,⁵⁷⁷ this chapter questions the notions that traditionally underpin our conception of the family and suggests how law might be reformed to be more inclusive of a wider range of families. The argument this chapter (and the thesis as a whole) pursues is that an in-depth examination of the legal regulation of gay and lesbian collaborative co-parenting commends a

⁵⁷⁶ W Marsiglio, “Male Procreative Consciousness and Responsibility: A Conceptual Analysis and Research Agenda” (1991) 12 *Journal of Family Issues* 268.

⁵⁷⁷ For example, Elizabeth B Silva and Carol Smart, *The New Family?* (Sage 1999); John Eekelaar, *Family law and personal life* (Oxford University Press 2006) Charlotte Faircloth, Diane M. Hoffman, and Linda L. Layne, *Parenting in Global Perspective: Negotiating Ideologies of Kinship, Self and Politics* (Routledge 2013); P. Nordqvist, ‘Bringing Kinship into Being: Connectedness, Donor Conception and Lesbian Parenthood’ [2013] *Sociology* 1; Naomi Cahn, ‘New Kinship, The’ (2012) 100 *Georgetown Law Journal* 367–430; Daniela Cutas and Sarah Chan, *Families - Beyond the Nuclear Ideal*, vol. 53 (Bloomsbury Academic 2012); Robert Leckey, *After Legal Equality: Family, Sex, Kinship* (Routledge 2014); Petra Nordqvist and Carol Smart, *Relative strangers : family life, genes and donor conception* (Palgrave Macmillan 2014).

model of family law and policy predicated on valuing difference within family life⁵⁷⁸ rather than the promotion of the homogeneous ideal family form against which other families are measured.

⁵⁷⁸ Linda McClain, 'A Diversity Approach to Parenthood in Family Life and Family Law' in Linda McClain and Daniel Cere (eds), *What is Parenthood? Contemporary Debates About the Family* (New York University Press 2013); Susan B Boyd, 'Equality: An Uncomfortable Fit in Parenting Law' in Robert Leckey (ed), *After legal equality: family, sex, kinship* (Routledge 2014).

Chapter Six: Family Portraits and Parenting Journeys

Introduction

The reported case law almost exclusively concerns disputes between female couples and biological fathers who are being characterised as known donors. However, this study attracted and selected a range of different types of collaborative co-parenting families to participate in this study. Represented within it are a spectrum of arrangements ranging from some where the biological father was primarily a donor that was known to the family to full poly-parenting situations where the parenting was shared between the biological father (and sometimes his partner) and the birth mother (and often her partner). Despite this, it was surprising that more families involving a male couple and a single or partnered lesbian were not identified. It is unclear whether this is because women-led collaborative co-parenting arrangements are more prevalent or that other types of family are simply more difficult to recruit. Nevertheless, a range of families is represented in the data, which provides important insights into the different motivations and expectations of men and women in these parenting arrangements.

In order to identify the potentially varying needs of these different families (in response to this study's second research question) this chapter first presents mini-biographies of the seven families (four from E&W and three from BC) that

have been involved in this study as a series of case studies.⁵⁷⁹ These are then drawn on in order to suggest a typology of collaborative co-parenting families, which modifies those advanced in previous studies carried out in other jurisdictions, such as Australia.⁵⁸⁰ In addition to this the pathways to parenthood that these families have pursued are considered, in order to reveal that a range of motivations and interests are implicated in the decision to engage in collaborative co-parenting, and of which, it is argued, the courts need to demonstrate a more sensitive appreciation. It is worth noting that only the first of these families involved planned conception at a clinic whereas for the rest the children were conceived at home, which could potentially make a difference in who is considered a parent under the current legislative framework.

Poly-Parenting Family Portraits

*Betty, Eliza and Lenny*⁵⁸¹

Each of the three members of this British prospective poly-parenting family was interviewed in turn. It was fortunate to be able to interview the entire family because it provided an opportunity to gauge the level of agreement that existed between the adults, which turned out to be very high. These three adults were still trying to conceive at the time of interview, which was not the case with other participants all of whom had children. Therefore, these interviews provide an insight into how these arrangements are perceived prior to birth. As such, it is interesting to compare their views with those families who had been co-parenting

⁵⁷⁹ See Chapter Two for a more detailed discussion of participant recruitment and research methods used.

⁵⁸⁰ Deborah Dempsey, 'Beyond Choice Family and Kinship in the Australian lesbian and gay 'baby boom'' (La Trobe University 2006).

⁵⁸¹ Each of the names used are pseudonyms in order to protect participant confidentiality and anonymity.

for a while. None of the families interviewed were currently in dispute about the roles of the respective adults. However, comparisons can also be drawn with the reported experiences of disputing families from the case law.

Betty and Eliza had been together for six years and were in a civil partnership, whereas Lenny was a single gay man. Although Betty and Lenny would be the biological parents, Betty and Eliza would be the legal parents as a result of them being in a civil partnership. There was a written agreement, which all three of them acknowledge was very protective of the women's role in terms of responsibility and the ability to make decisions in relation to the child. There was an understanding, however, that Lenny would seek to obtain parental responsibility following the child's birth.

There was a strong sense from all three interviews that each of them understood this arrangement as an attempt to create a family that included all three of them. The women already thought of Lenny as part of the family and vice versa. Despite this, the written agreement, pre-birth intentions and legal recognition played an interesting role in the family dynamic. Although both the women and Lenny professed the ideal of creating a family, for the women this was very much predicated on the idea of firm pre-conception intentions. Lenny, however, seemed more willing to take things on faith and see how things developed, trusting that they would be able to navigate the future together in a mutually acceptable way. This tension between prior 'family planning' and organic development as a family can be seen as a theme that emerges in a number of the case studies.

Chris, Callum and Camilla (four-year old Gabriella and two-year old Hayden)

Unfortunately it was not possible to interview each member of this British poly-parenting family and in the end, only Chris was interviewed. Whereas Betty and Eliza had posted an advert on a co-parenting website to which Lenny had responded, this co-parenting arrangement grew organically from the relationship that already existed between Chris, Callum and Camilla. Chris had been aware of wanting a child for a long time and he and his partner Callum had discussed it at length. There had been some tongue-in-cheek discussion between the three of them that if Camilla hadn't met someone by a certain age that they would have a child together. As time went by and they all got older, they started talking about it more seriously. It seems as though no one had necessarily gone into these discussions with a strong conviction that they wanted to co-parent. It was just a logical progression of the relationship they already had, in light of their mutual desire to have a child.

Camilla and Chris are the biological parents and they are on the birth certificate. Initially having a biological child seemed more important for Chris but as he has come to see how his partner Callum interacts with their children he has come to realise that biology actually has very little impact for him. Camilla and Chris are, therefore, the legal parents with Callum having no legal relationship with the children. They intended to remedy this to some extent when Chris and Callum got married, (which they have subsequently done) but at the time of the interview they had not remedied Callum's legal position in relation to the children.

Just as with Betty, Eliza and Lenny, Chris, Callum and Camilla, along with their children, consider themselves a family. An interesting point of contrast between these two families, however, is the importance of the written agreement in the

first one and the complete lack of written agreement in the second. That is not to say that the second family did not discuss a wide range of issues that might potentially affect their family, because they did. However, they did not feel the need to have a written agreement, partly because it would not be legally binding. Therefore, this family would fall more into the organic family development category, whereas the first are a more pre-planned family. One dimension of this that will be explored subsequently in relation to the data is whether having the women as the primary driving force for creating the family has any impact on this. In the case of Betty, Eliza and Lenny, the women very much sought to make this happen with whomever they could. Whereas, in relation to Chris, Callum and Camilla, co-parenting was not seen as a goal to be achieved but as an opportune solution to their situation.

Colin, Joel, Lisa and Rosalind (sixteen year old Geoff)

This is the third of the British poly-parenting families. Unfortunately, only Colin was willing to be interviewed. In contrast to other co-parenting families in this study, who had relatively young children, this family had been co-parenting for the past sixteen years. Colin and Joel, who are in a civil partnership, had already been together for over ten years when their single, lesbian friend Lisa suggested having a child together. The inception of this family differs slightly from that of the other two. Unlike Chris and Callum, Colin and Joel had more or less accepted they were not going to have children until Lisa suggested it. From this point of view, the family creation was more at Lisa's instigation than that of the men. However, unlike Betty, Eliza and Lenny's family, the creation of the family flowed from the relationship that existed between the adults rather than on the basis of relationships forged in order to co-parent. The difference between creating co-

parenting relationships and allowing existing relationships to develop into co-parenting ones and the implications of this on the types of families formed will be discussed later in the chapter.

In this family Joel and Lisa are the biological parents, because being biologically related to the child was more important to Joel than it was to Colin. Therefore, Joel and Lisa are Geoff's legal parents on Geoff's birth certificate. However, Colin and Joel both view themselves as equal fathers of Geoff. Despite this, they never sought to alter the legal position because they didn't feel that legal recognition was available for the type of family they were trying to create. The type of family the three adults had envisaged involved two mums and two dads, rather than a single mum and two dads.

A few years after Geoff was born, Lisa met Rosalind, who is now also considered to be Geoff's mum. Despite this Colin feels that Geoff is different with Rosalind as compared to Lisa in a way that is not evident with the men:

[Joel] and my relationship with [Geoff]...certainly I don't think we feel that it's shaped fundamentally differently by the fact that he's genetically linked to [Joel] in a way that he isn't to me. Whereas George definitely has a very different relationship with [Lisa] than he does with [Rosalind] and I don't know whether it's the nature of what being a biological mum is in terms of pregnancy and child birth.⁵⁸²

While the biological connection between the birth mother and child may certainly play a role here, it may also be to do with the almost 'step-parent' nature of Geoff's relationship with Rosalind relationship. What is more, this family did have a written agreement, although in Colin's recollection they had not referred to it since

⁵⁸² UKPB12.

it was written. The agreement did not include Rosalind as she was not in their life at the time. Therefore, she has had to adjust to this pre-existing arrangement.

Sally, Rachel, Casey and Rich (eight year old Jason and ten year old Steven)

This is the last of the families that is currently poly-parenting and the only poly-parenting family that was recruited in Canada. Rachel had always wanted a child and wanted to experience pregnancy, whereas Sally did not necessarily have the same desire to become pregnant. They decided to ask a gay friend from high school, Tim, if he would help them to have children. Tim and his partner at the time, Casey, felt it would better if Casey were the biological father because it would mean more to him. Tim was already involved with another friend's child. Tim and Casey broke up very early on in the arrangement. So Tim does not really feature in the children's lives. Casey re-partnered fairly quickly and the women think of both Casey and his partner Rich as the children's dads, occasionally referring to Rich as a stepdad. The children refer to Casey as their dad and they refer to Rich by name.

Given Rachel's desire to become pregnant, it made sense to the couple for Rachel to be the children's biological mother. Rachel's family also did not have any descendants in the way Sally's family did. Therefore, biological connection took on a different significance for Rachel. Connection to family was very important for Rachel, which is why the couple chose to have an involved biological father. As Rachel shared during the interview:

My father left my mum when I was very, very young. And so I have a bit of that feeling, that I don't have any connection to that side of my family, and the feeling that I have regarding my family being so tiny and having my brother die, my mother, my father, and feeling

like family, biological family is very important. I wanted it to be a father that they knew...⁵⁸³

This is reflected in the fact that Casey and Rich often have the children for overnight stays and take them on camping holidays without the women. They have a fairly flexible arrangement about contact. Casey's mother also visits quite often and was heavily involved in supporting the women to care for the children when they were young.

Despite this level of involvement, Casey and Rich have no formal, legal relationship to the children. Sally and Rachel stressed the fact that they were named on the birth certificate but not the men. In addition to this there is a written agreement, which confers the responsibility and decision making power on the women rather than the men. The way in which the women attempted to retain all responsibility for the child from the outset, reflects the concerns the women had prior to deciding to start a family about the potential for the biological father to disrupt their family unit. Fortunately this has not been their experience of post-birth parenting reality, unlike some of the families in the reported case law.

Delilah (eight year old Oscar)

Delilah is a single mother raising her eight-year old son in the UK. Although she did not conceive with a donor of any sort, she is included in this study because of her exploration of the idea of collaborative co-parenting before she became pregnant with her son. After Delilah and her husband were told by a fertility specialist that the husband's sperm would not result in a viable pregnancy, they considered conceiving through donor conception. However, her husband was uncomfortable with this idea. Therefore, Delilah began exploring the idea of co-

⁵⁸³ CAPB11.

parenting with two gay partners who were friends of hers. In her mind this would be a four-way co-parenting arrangement between the gay couple, her husband and herself. As it turned out though, she became pregnant naturally with her husband and shortly after her son Oscar was born. Following the birth, however, the couple divorced and Oscar and his biological father have no contact. Although Delilah was not a single mother by choice, she did briefly consider having a second child through co-parenting having previously explored this option but decided against this in the end.

Delilah is, therefore, different from the other participants in the sense that she is neither a current/prospective co-parent nor did she conceive through donor conception. However, her experience exploring both these options, although subsequently precluded by her individual circumstances, makes her well placed to comment on the issues these parenting options raise. In particular, Delilah was keener on the idea of co-parenting/known donation than unknown donation because of the awareness that the child would have of his or her biological origins. She also favoured the idea of co-parenting because, in the family that she had conceived of for her future child, there would be four parents each of whom love the child and have his or her best interests at heart.

Reflecting on her parenting aspirations back when she thought this was a viable option, she identifies a tension between utopian ideals and parenting reality:

I don't know what's utopia or not but in my head the idea would be co-parenting I suppose. Ideally, ultimately, the child would live 50% with one parent and 50% with the other...having now had a child I think that in babyhood it's very important for a child to be with its mother. I think it would be quite hard for a baby to be separated from mum for half the time. That said, I think they would adjust.⁵⁸⁴

⁵⁸⁴ UKPB11.

Given this, in order for any compromise solution to work effectively it would have been vital from Delilah's perspective to agree on parenting values before embarking on a co-parenting arrangement. For example, she would have only been willing to be separated from her very young child if the men were also going to be full-time carers and not rely on full-time child care. This is the type of issue Delilah foresaw as potentially causing friction in the adults' relationship and would, therefore, need to be addressed in advance.

Known Donor Family Portraits

Angela, Ruth and Rob (four year old Matthew)

This Canadian family, each member of which was interviewed, had what seemed to be a very successful (largely) uninvolved, known donor arrangement. Angela and Ruth had been together for five years before they decided to have children. They debated whether to go down the unknown donor route but in the end opted for a known donor. Their main concern in doing this was ensuring that the children did not feel as though a part of their identity was missing. In choosing a known donor, Angela and Ruth did not want to approach a close friend but rather a friend of a friend. That way too close a relationship between the biological father and children wouldn't develop but at the same time, the women could be sure they were meeting someone trustworthy. In the end, Rob, one of Ruth's colleagues offered to be a known donor and they conceived at home. Although they had initially decided not to accept if anyone offered, they felt the right connection with Rob and were constrained by the limited degree of choice available when going through a sperm bank for an unknown donor.

Rob did not have any biological children at the time and did not have any plans to have any. At the time of interview, however, he and his female partner, Lulu, were parenting Lulu's child from a previous relationship. Therefore, Rob's primary motivation in helping Angela and Ruth to have a child was not in order to be involved in parenting because he was already experiencing that. Rob's main motivation was to help his colleague/friend have a child. He was also motivated by biological curiosity, which has characterized his subsequent involvement with Matthew. The women made clear their expectation that Rob was not to be present at the birth, which Rob was happy to go along with. He has, however, met four-year old Matthew and they spend time together roughly once a year, which each of the adults seems happy with.

A clear written agreement exists between the three adults, which states that Angela and Ruth are the intended parents and that Rob has no intention to parent or exercise decision-making power. It also makes clear that Rob would not, under any circumstances, become Matthew's legal guardian. Similarly, Rob would have no legal support obligations towards Matthew. For Rob this was an opportunity to support his friends in having a child and have a biological child himself without having any responsibility for that child. Having said that, in the minds of each of the adults, there is considerable scope for a relationship to develop in the future should that be what Matthew desires.

Frieda and Calvin (and nine year old Mary)

Frieda is a single lesbian who was raising her daughter Mary in Canada at the time of the interview. Frieda had wanted to be a parent since her mid-twenties and had assumed that this would be with a partner. However, by her early thirties she considered becoming a single mother by choice. At this time in her life, the

material conditions for her having a child seemed to be right. Therefore, she approached an acquaintance about being a known donor. After a couple of years getting to know each other they conceived at home and shortly afterwards, Mary was born.

Frieda was clear that she would not want to co-parent with anyone other than a partner, especially as she did not have a close male friend with whom she would feel comfortable co-parenting:

I didn't want to share parenting with someone who wasn't my partner, primarily because...not because I don't think that kind of arrangement can work - very well in fact, but certainly at that point in my life I would have wanted years of planning that.⁵⁸⁵

Therefore, the written agreement between Frieda and Calvin makes it clear that Calvin has agreed to facilitate Frieda's desire to have a child. Consequently, Frieda is Mary's sole parent and any access to or contact with Mary that Calvin might have is at Frieda's discretion. Despite this, Frieda's decision to involve a known donor was at least partly motivated by her desire to have a somewhat involved donor rather than someone who was not going to be involved in Mary's life at all.

Fortunately, Frieda's and Calvin's expectations did not conflict and the process of reaching agreement and the subsequent experience of parenting has been relatively smooth. The initial agreement provided for monthly contact between Calvin and Frieda, although the reality has been closer to every five or six weeks. Although it was not possible to interview Calvin, Frieda had the impression that Calvin was comfortable with the level of contact he currently has and does not have the desire to become a more involved parent. In the future, Frieda would

⁵⁸⁵ CAPB3.

seemingly be happy for the contact to evolve further towards spending time alone together etc. However, she wants Mary to be the driving force behind this rather than the adults.

Everyone seemed to be quite loose about the terminology used to describe Calvin. Frieda initially referred to him as Mary's donor and is increasingly using the term donor dad, which indicates a somewhat more familial relationship. Mary calls Calvin by his name but acknowledges him as her dad. In contrast to Rob and Matthew, discussed previously, Calvin seems to have relatively more involvement in Mary's life. This supports the idea, discussed in the literature and considered in greater detail below, that these 'plus two' parenting arrangements exist on a continuum of relatedness between everyone concerned.⁵⁸⁶

Parenting Journeys

Why Do People Engage in Collaborative Co-Parenting?

One of the questions participants were asked is why they chose to engage in collaborative co-parenting. There was a range of different answers. One of the participants, Lenny, a single gay male in the UK aged 25 – 33, felt that co-parenting allowed him to have children, without being a single parent, despite the fact he wasn't in a relationship:

I really want to be a dad...but I'm not entirely sure if I can do this on my own...Why should I wait until I'm with someone or have a relationship? I don't have to be in a relationship with a man to have a child.⁵⁸⁷

⁵⁸⁶ For more on this see Deborah Dempsey, 'More like a Donor or More like a Father? Gay Men's Concepts of Relatedness to Children' (2012) 15 *Sexualities* 156.

⁵⁸⁷ UKPB3.

This is an idea that will resonate not only within the LGBTQ community but also with many other single men and women. People are increasingly planning their private lives and the timing of having children. Something that cannot always be factored into this planning process is meeting a partner with whom you can have an intimate relationship and raise children. For Lenny, collaborative co-parenting was a way of meeting his need to have children despite the uncertainty of finding a partner.

The centrality, for many, of a desire to have children regardless of whether we have a partner is reflected in the sociological literature. Whether as a result of natural inclinations or socialisation, the desire to have children has been 'imprinted on our minds and hearts and imaginations'⁵⁸⁸ from an early age. A particularly salient observation to the current study is that 'the struggle to have children, to create a family in whatever form, is constituted as central to an aliveness and humanity'.⁵⁸⁹ This innate desire was something that Lenny seemed to feel particularly strongly as did his female co-parents.

Often, however, the focus is on women when discussing the desire to have children. Reproductive technologies, which facilitate greater choice around having children, are sometimes construed as a response to women's demand for this technology, which 'has in essence increased the cultural value of having one's own child, thus reaffirming the reproductive function of women'.⁵⁹⁰ Therefore, 'the desire for the child is located as both issuing absolutely from the

⁵⁸⁸ Jill Bialosky and Helen Schulman, *Wanting a Child* (Farrar, Straus and Giroux 1998), 7 - 8.

⁵⁸⁹ Karin Lesnik-Oberstein, *On Having an Own Child : Reproductive Technologies and the Cultural Construction of Childhood* (Karnac Books 2008), 9.

⁵⁹⁰ Mary M Lay and others, *Body Talk : Rhetoric, Technology, Reproduction* (University of Wisconsin Press 2000), 16.

woman as an innate wish and demand and as an imposed, externally controlled and mediated story'.⁵⁹¹

Furthermore, traditionally, 'the concepts of heterosexuality and parenthood [have been] so inextricably intertwined in our culture'⁵⁹² that gay men becoming parents outside the context of a prior heterosexual relationship has not been thought a likely or particularly feasible option. This is reflected by the comments made by Colin, a gay man in the UK aged 34 – 49, who is in a relationship and raising a child with a female friend and her partner:

I think for us probably initially the sense that we wouldn't be parents, that neither of us would be dads, was probably quite a big part of, I suppose, the role that we thought we'd have as gay men.⁵⁹³

This sentiment is echoed by Lenny who states that:

I didn't think that I could have kids. I didn't think that it was an option. I just thought by being gay you are choosing to accept that you wouldn't have a family, you wouldn't have kids because you just couldn't.⁵⁹⁴

This is a deeply held feeling that these gay men have internalised. Interestingly, this seems to apply irrespective of age, which is surprising because one might have expected Lenny, being over a decade younger than Colin, to approach the issue differently. Therefore, despite the increasing acceptance of same-sex relationships, there may not necessarily be a corresponding shift in the internalised views that gay men have about becoming parents.

Nevertheless, nowadays gay men having children seems a much more realistic and achievable goal. According to a recent US study which interviewed 14 gay

⁵⁹¹ Karín Lesnik-Oberstein, *On Having an Own Child : Reproductive Technologies and the Cultural Construction of Childhood* (Karnac Books 2008), 34.

⁵⁹² Gerald P Mallon, *Gay Men Choosing Parenthood* (Columbia University Press 2004) 1.

⁵⁹³ UKPB12.

⁵⁹⁴ UKPB3.

men aged between 18 and 25, and reviewed previously gathered statistical data 'recent historical changes have opened doors such that gay men are now more likely to pursue fatherhood and to pursue it outside of heterosexual marriage'.⁵⁹⁵

As Lenny comments:

Things have changed a lot. I think because things have changed, my eyes have opened. It is more common place. I have read more and more about gay parenting...I think because I saw that more and more people were parenting and quite successfully, it inspired me...⁵⁹⁶

Here Lenny mentions the benefit of having positive gay male parenting role models in terms of his own thinking about the feasibility of becoming a parent. This highlights the symbolic importance of legislation that recognises these parenting arrangements and sends the message that they are a viable route to parenthood.

It is important, therefore, when thinking about the legal regulation of collaborative co-parenting to recognise that the desire to have and raise a child can be felt quite keenly by both men and women. Furthermore, the most viable way of becoming a parent may not necessarily be to try to emulate the heteronormative ideal. Viewed in this light, it is questionable how appropriate it is for courts to have a particular family form in mind as their starting point in resolving collaborative co-parenting disputes, whether that is the homonuclear family or the post-separation different-sex family. It is necessary to consider each of the adults' reasons for engaging in collaborative co-parenting, as reflected in their pre-conception intentions.

⁵⁹⁵ Carl Rabun and Ramona Faith Oswald, "Upholding and Expanding the Normal Family : Future Fatherhood through the Eyes of Gay Male Emerging Adults" (2009) 7 *Fathering* 269, 269.

⁵⁹⁶ UKPB3.

Amongst those gay men who desire children, many would wish to raise their children in the context of a dyadic relationship with their romantic partner. As Rabun and Oswald in their previously mentioned US study comment:

We entered this research project assuming that contemporary young gay men belong to a cohort for which family models are inclusive of diversity but also shaped by an ideal of middle-class heteronormative procreation. However, given the legacy of gay identity being defined in opposition to family (Weston, 1991), we did not expect all of our participants to envision their future lives in terms of parenting within the ideal normative family. Contrary to our expectations, all 14 participants intended to become fathers and the majority described their future family goals in ways that uphold the normative family: a committed couple who delay their parenthood until after establishing themselves in a middle-class career and then acquire 2 children and organize daily life around meeting the child's needs.⁵⁹⁷

This heteronormative model, however, is not appropriate for every gay man who wishes to start a family. Some, like Lenny, may have initially wished to raise a child with a partner but as that became a less-likely prospect turned to co-parenting as a way of facilitating having a child and not raising a child alone. Others such as Chris, a gay man in the UK aged 34 – 49 who is raising two children with his partner and their female friend, did not feel any particular desire to co-parent; 'It just felt like something that suited us as a family'⁵⁹⁸

Based on the case law, differences can emerge between the birth mother (and potentially her partner) and the biological father (and potentially his partner) about each of the adults' respective roles.⁵⁹⁹ These differences are also evident in the different family configurations that could broadly be termed collaborative co-parenting (at least in terms of conception). Dempsey identifies a 'continuum of

⁵⁹⁷ Rabun and Oswald (n 583).

⁵⁹⁸ UKPB6.

⁵⁹⁹ For further discussion of this see the case law discussed in Part Two.

kinship intentions⁶⁰⁰ in relation to gay and lesbian families. These range from standard known donor arrangements to full co-parenting. According to Dempsey, standard known donor arrangements 'appear to be modelled very strongly on the conventions of donor insemination characteristic of contemporary clinical practice, where 'identity-release' provisions exist'.⁶⁰¹ Co-parenting arrangements, on the other hand, tend to be based on a 'mutual desire to fully co-parent in the context of [the] friendship'.⁶⁰² This spectrum of kinship intentions was reflected to some extent amongst the present study's participants.

Betty (aged 25 – 33) and Eliza (aged 34 – 49), who are lesbian civil partners in the UK, along with Lenny, who has been mentioned previously, are a good example of a family whose intention is to fully co-parent. As Betty comments, she and her partner were looking for someone who was very much behind 'the idea of co-parenting which means all of us being equal, all of us being equally involved, all of us being a family as well and [Lenny] is very much part of our family now'.⁶⁰³ Betty, Eliza and Lenny were at the stage of trying to conceive a child through home insemination when the interviews for this study were being conducted. Therefore, it is possible that these feelings and intentions might change once the baby is born. In some senses it is Lenny who would be in the more vulnerable position if this were to happen because only Betty and Eliza would be the legal parents of the child and only they would appear on the birth certificate. Lenny, however, seems content to operate on the basis of trust that things will work out, especially given his view that 'we are trying to create a family, really, and to be a

⁶⁰⁰ Deborah Dempsey, "Conceiving and Negotiating Reproductive Relationships: Lesbians and Gay Men Forming Families with Children" (2010) 44 *Sociology* 1145, 1151.

⁶⁰¹ *Ibid.* 1154.

⁶⁰² *Ibid.* 1153.

⁶⁰³ UKPB1.

bit flexible about it'.⁶⁰⁴ He also seems reassured that the three of them will seek to have him named on a shared residence order following the child's birth, commenting that 'that was kind of the compromise that if I'm not going to be the legal parent, I am taking that court order which sort of gives me that parental status'.⁶⁰⁵

Continuum of Relatedness: A Typology of Collaborative Co-Parenting

Having introduced the four British and three Canadian families in the first section of this chapter, this section will attempt to conceptualise their position in a broader spectrum of collaborative co-parenting relationships. In particular, this section will consider the degree of fit between the empirical data in this study and previously postulated theorisations of how collaborative co-parenting families might be categorized.

One thing that has emerged across the data is that these parenting projects have mostly been women-driven initiatives. In relation to the two known donation families (i.e. Angel, Ruth, Rob and Matthew; and Frieda, Calvin and Mary), the families were created almost entirely as a result of the women's desire to have children. The men in these arrangements were facilitating the women's wish to become parents rather than their own. Although both these arrangements might be classed as known donor rather than co-parenting situations, they differ in terms of the level of donor involvement. Furthermore, neither of these donor

⁶⁰⁴ UKPB3.

⁶⁰⁵ *Ibid.*

arrangements conforms to what Dempsey refers to as 'standard donor arrangements'.⁶⁰⁶

According to Dempsey, a standard donor agreement 'attempts to replicate the goal [of] donor anonymity achieved in the clinical setting'.⁶⁰⁷ Unsurprisingly as the goal was to examine co-parenting, none of the participants in the present study were in this position. Each of the parents was open about the identity of the biological father and envisaged a greater or lesser degree of involvement. Dempsey represents standard donor arrangements as being at the opposite end of the spectrum of parenting arrangements from poly-parenting.

The next increment in her analysis is social solidarity arrangements, which she characterises as 'less impersonal than the first, and couched in language emphasizing ongoing friendship and mutual support'. Here the biological father and his partner are 'embraced, not as resident parents or legal custodians, but nonetheless as fathers who are part of the child's social family'.⁶⁰⁸ This could accurately describe the arrangement Sally, Rachel, Casey and Rich have, even though they are referred to more as poly-parenting families here.

However families such as Frieda, Calvin and Mary; and Angela, Ruth and Rob seem to fall somewhere between what Dempsey refers to as 'standard donor' situations and 'social solidarity' situations, which suggests that even within these categories a range of parenting arrangements exists. None of the participants in the current study sought to imitate an unknown/anonymous donor situation in its entirety. Although Angela and Ruth sought very limited involvement from their donor, they did not seek to hide his identity as the biological father. A strong

⁶⁰⁶ Dempsey (n 600).

⁶⁰⁷ *Ibid.* 1153.

⁶⁰⁸ *Ibid.*

motivation in involving a known donor in the first place was to avoid any secrecy around the identity of the biological father.

In terms of Frieda's family, Calvin has more involvement than Rob does with Angela and Ruth and is also acknowledged as the biological father. Therefore, like Rob, Calvin is not involved in a standard donor arrangement. However, it would seem to be stretching the relationship that exists between Calvin, Frieda and Mary to say that there was a social solidarity agreement between them. For Dempsey, this requires the biological father to be recognised as a father and, thereby form part of the child's social family.

It is an interesting question whether Rob and Calvin are respectively recognised as fathers and also as part of the children's social families. Frieda initial use of the term donor and subsequent use of the term donor dad to refer to Calvin does imply a degree of familialisation. There does seem to be some recognition that through his post-birth involvement Calvin has become more than a mere donor to Frieda and Mary. However, it is questionable whether he is recognised as a father. It is true that he is acknowledged as the biological father, which would not be the case in a standard donor arrangement. Therefore, If Dempsey's reference to being recognised as the father simply refers to biological fatherhood then both Rob and Calvin may be involved in social solidarity arrangements. However, what constitutes a father has been extensively discussed in academic literature and this is not always coextensive with biological fatherhood.⁶⁰⁹

⁶⁰⁹ For more on this see Richard Collier and Sally Sheldon, *Fragmenting Fatherhood: A Socio-Legal Study* (Hart Publishing 2008); Rosanna Hertz, 'The Father as an Idea: A Challenge to Kinship Boundaries by Single Mothers' (2002) 25 *Symbolic Interaction* 1–31.

The final category Dempsey refers to is co-parenting,⁶¹⁰ which she views as ‘an affirmation of mutual desire to fully co-parent in the context of [a] friendship’.⁶¹¹ This would typically involve shared residence with the child. In Dempsey’s study a non-cohabiting single gay man and a single lesbian, who decided to have a child together, typified this type of arrangement. According to Dempsey, ‘[i]n the co-parenting agreement, the conventional assumption is that biological motherhood and fatherhood are grounds for parental rights and responsibilities’.⁶¹²

Dempsey’s category of co-parenting is a narrow one, which has the potential to exclude some families, such as one or two in this study, which consider themselves to be engaged in co-parenting but do not necessarily fit Dempsey’s notion of this. Betty, Eliza and Lenny could be an example of this. Although each of these adults sees themselves as creating a family by having a child together, this is not done on the basis of a co-parenting agreement like the one Dempsey describes. The written agreement this family has protects the legal rights and responsibilities of the female couple while leaving the biological father legally vulnerable. The intention is to remedy this following the birth of the child through a court order but the power very much remains in the hands of the female couple. Despite the skewed nature of the agreement in terms of legal rights and responsibilities, which seems more like a social solidarity agreement, the actual parenting envisaged in the agreement would fit more with an understanding of co-parenting.

⁶¹⁰ In this study collaborative co-parenting has been used to describe the entire spectrum of these parenting arrangements and poly-parenting has been used to describe what Dempsey refers to as ‘full co-parenting’.

⁶¹¹ Dempsey (n 588) 1154.

⁶¹² *Ibid.*

An important point that has emerged from this study is that there can be a complicated dynamic in some agreements between legal protection and the type of parenting envisaged which makes it difficult to fit the agreements into the categories Dempsey has suggested. Therefore, this thesis suggests an alternative way of categorising these families based not only on the types of parenting arrangement they engage in but also how their family was formed.

One significant element of this that has emerged from the empirical data is the way in which family members enact what might be termed an organic method of family creation as compared to a planned one. Betty and Eliza, for example, were very keen on having a written agreement in place, which spelt out a range of issues and contingencies. Lenny placed greater emphasis on paying attention to how relationships and feelings evolve and develop over time without feeling the need to completely plan out his role in the child's life in advance. This relates to an important finding this study has made, which will be discussed in more detail in the next chapter, namely that the relative power dynamics between lesbians and gay men in terms of the reproductive relationships they form can have a marked impact on their perceived ability to assert their needs and interests at the stage of family planning. Therefore, Betty and Eliza came across as being more invested in the need for planning than did Lenny, who did not necessarily see a more organic development of family relationships as problematic.

Chris, Callum and Camilla, along with their two children, are a good example of organic co-parenting. There is no written agreement between the adults as to the specific role each is going to play in the child's life. As a result childcare arrangements are quite flexible, which suits the busy lifestyles of these three working adults. One stipulation they all made at the outset was that they would

stay in the same country and preferably live close together while the children are at school. This was seen as important in providing stability for the children. Beyond that, however, they felt it was important to be able to respond to the various occurrences of everyday life in a flexible and adaptable way. As Chris emphasises, 'you never know what is going to happen you need to be open minded and flexible'.⁶¹³

In addition to having a more organically developing setup, this family could also be referred to as engaging in 'happenstance co-parenting'. This phrase suggests that co-parenting was not necessarily a goal in and of itself for these adults. Instead, co-parenting presented itself as an opportune way of expressing each of their desires to have children. As Chris puts it:

it was very much something that came out of the three of us talking rather than me thinking oh I'd like to co-parent and then looking for someone to do that with. The situation arose from the relationship anyway, if that's clear. I wasn't looking to co-parent and this situation presented itself and we all thought that was the right thing for us.⁶¹⁴

While each of the adults had been aware of separate desires to have children, co-parenting as an idea might not have been foremost in their mind as a way of achieving this. Chris, for example, would have considered exploring adoption as a way of becoming a parent had this opportunity not presented itself.

Happenstance co-parenting can be contrasted with deliberate or goal-oriented co-parenting, where co-parenting is the desired outcome and steps are then taken to try to achieve this. Becky, Eliza and Lenny are a good example of deliberate co-parenting. Becky seems committed to the idea of co-parenting for

⁶¹³ UKPB6.

⁶¹⁴ *Ibid.*

a number of reasons. She refers to the strong relationship she had with her father and the benefits she feels that brings. She also refers to her conviction that the child should know his genetic origins. Her commitment to co-parenting seems to be both a personal one, in terms of building the type of family she wants, and also a political one, whereby she realises she is challenging what she perceives as exclusionary family law norms.

Both Becky, Eliza and Lenny's family and Chris, Callum and Camilla's family could be described as co-parenting arrangements. However, the former could be conceived of as being at one end of the spectrum in terms of being a deliberate and planned-out co-parenting arrangement, whereas the latter lies at the other end of the spectrum as an organically-developing, happenstance co-parenting arrangement. The differences between these two types of co-parenting arrangements are, however, not necessarily as pronounced as this dichotomous positioning makes it seem. For example, although Chris, Callum and Camilla did not have a written agreement in place, they did discuss various scenarios and contingencies extensively prior to conception. As Chris notes:

we talked about every eventuality as you do in these situations; you always look at worse case scenarios and what happens if somebody moves away and if we disagree on things. We talked through so much to begin with until we were blue in the face and we decided the best way was to just go ahead, I think you can talk yourselves out of things sometimes but we talked about all the worst case situations but one thing that comes up time and time again is that it doesn't seem to be any different co-parenting with someone than where a couple has broken up, you get on.⁶¹⁵

Therefore, despite a desire to get it right, there was a recognition that it is not possible to plan for every eventuality beforehand and that the best approach might be revealed along the way while engaging in parenting. This is an

⁶¹⁵ *Ibid.*

interesting insight into co-parenting because many of the cases, which have come before the courts have not involved a written agreement. This makes them appear to be organically developing co-parenting arrangements. One question this raises is whether these types of co-parenting arrangements are more susceptible to leading to intractable disputes.

At the same time families that appear to be engaged in planned co-parenting seem to deviate from the script at times and organically develop in ways which were not necessarily envisaged in the written agreement. Colin, Joel, Lisa and Rosalind's family are an example of this. Although the family did have a written agreement in place, they have not referred to it since the birth of their son. As Colin comments, 'I think if you looked at it and compare what's actually happened, I'm not sure we've followed what we agreed at all. I mean I think we probably followed the spirit of what we agreed but we've never sort of checked it'.⁶¹⁶ Therefore, despite an initial sense that having a written agreement was an important way of providing security for the family, it has had little influence on parenting practice.

Conclusion

This chapter has presented the families that were interviewed as part of this study as a series of case studies. Through analysing the parenting journeys these families have been engaged in, this chapter has also advanced a typology of collaborative co-parenting based on family formation rather than purely the parenting arrangement that is in place as previous studies in other jurisdictions have done. The suggested typology categorises families in terms of

⁶¹⁶ UKPB12.

the level of planning involved in the co-parenting arrangement and whether such an arrangement was a goal in and of itself or whether it simply evolved. This analysis has revealed that there is considerable emotional investment in these collaborative co-parenting arrangements both on the part of the gay men and lesbians involved. This will be built on in the next chapter to argue that any future law reform needs to adopt a more nuanced understanding of collaborative co-parenting families in order to adequately reflect their needs and interests.

Chapter Seven: Women-Led Families, Male-Led Families and Poly-Parenting

Introduction

Despite a number of recent high-profile cases, the body of case law on collaborative co-parenting in both E&W and Canada is still not very well developed. Furthermore, of the relatively few collaborative co-parenting cases that exist in these jurisdictions, only one or two have been recognised to involve actual poly-parenting. Given that the law on poly-parenting/collaborative co-parenting in E&W is still in its infancy, it is important to consider how these parenting arrangements between gay men and lesbians sit alongside their ability to form autonomous women-led and male-led families.

This chapter begins by considering the implications of the possibility for female couples to conceive a child using gametes from an unknown donor and the basis on which unknown sperm donation is regulated. The socio-legal context surrounding same-sex parenting is then outlined before considering in turn the ability of lesbians and gay men to create autonomous families. This involves not only a discussion of female couples' motivations for involving known donors but also a consideration of how gay men are positioned in relation to parenthood and reproduction generally.

Assisting Reproduction

It is perhaps obvious to observe that biological human reproduction is implicitly present in any discussion of parenting. That is to say that whenever a concrete parenting situation is being considered there is a child, a woman who gave birth to that child and a man who is the male progenitor of that child. The intention in making this initial observation is not to accord primacy to biological or natural discourses of parenting but it is to suggest an intuitive starting point for a discussion around parenting. Nevertheless, our understanding of personhood and human nature would seem to indicate that we all have, to some degree, a vested personal interest or stake in our biological offspring and progenitors. This has been recognised within the sociological literature⁶¹⁷ and also in the context of the ECHR's Article 8 right to private and family life.⁶¹⁸

In the early days of regulating artificial donor insemination, the Warnock Committee was able to mitigate the tension between this innate interest we have in our biological offspring and the purpose of gamete donation by insisting on the complete lack of relationship between donor and recipient and the 'absolute anonymity of the donor'.⁶¹⁹ In this way the Warnock Committee attempted to address the concerns of earlier reports⁶²⁰ about the involvement of a third party in the reproductive relationship not only with respect to the emotional needs of

⁶¹⁷ Karín Lesnik-Oberstein, *On Having an Own Child : Reproductive Technologies and the Cultural Construction of Childhood* (Karnac Books 2008).

⁶¹⁸ See for example *S.H. and Others v Austria* (Application No. 57813/00, November 15 2007); Marleen Eijkholt, 'The Right to Found a Family as a Stillborn Right to Procreate?' (2010) 18 Medical Law Review 127; Caroline Forder, 'Article 8 ECHR: The Utter Limits of "Family Life" and the Law of Parenthood' (1997) 4 Maastricht Journal of European and Comparative Law 125.

⁶¹⁹ Great Britain. Committee of Inquiry into Human Fertilisation and Embryology., *A question of life : the Warnock report on human fertilisation and embryology* (Mary Warnock (ed), Blackwell 1984) 25

⁶²⁰ Church of England (1948). Artificial Human Insemination. The Report of a Commission Appointed by His Grace the Archbishop of Canterbury. London. SPCK (Wand Report); Feversham, Earl of (1960). Report of the Departmental Committee on Human Artificial Insemination. Cmnd. 1105. London: HMSO.

the intended parents but also those of the child and donor too. Requiring a complete separation of donor and intended parents not only reduces any threat to the family unit, it also protects the donor from any associated emotional and legal complications. As Richards *et al.* have put it 'there was a reduction of the person from a sperm donor to a sperm. Sperm was the drug that would cure infertility. The sperm donor, as a person, was erased and separated from the recipient family.'⁶²¹

Since the Family Law Reform Act 1987 and the Human Fertilisation and Embryology Act 1990, which enshrined donor anonymity and transferred all parental rights and responsibilities from the donor to the intended parents when using a licensed clinic, there has been a slow gravitational pull in the opposite direction towards increased emphasis on a child's right to know his or her genetic origins.⁶²² This has resulted in a child being able to identify the donor after the age of eighteen.⁶²³ This establishes and reinforces the idea that the connection between biological progenitors and offspring is significant for the child. It stands to reason, therefore, that this connection is also significant for the biological progenitor. The suggestion that this biological connection is not so easy to dismiss as inconsequential is supported by the parallel rise in open adoptions in many jurisdictions.⁶²⁴

Therefore, the system of anonymous gamete donation seems to be underpinned by an acknowledgment that connections resulting from biological reproduction

⁶²¹ Martin Richards, Guido Pennings, and John B. Appleby, *Reproductive Donation Practice, Policy and Bioethics* (Cambridge University Press 2012) 11.

⁶²² See for example Julie A Wallbank, 'The Role of Rights and Utility in Instituting a Child's Right to Know Her Genetic History' (2004) 13 *Social and Legal Studies* 245; Eric Blyth, Marilyn Crawshaw, Lucy Frith, and Caroline Jones, 'Donor-conceived people's views and experiences of their genetic origins: A critical analysis of the research evidence' [2012] 769–789.

⁶²³ Disclosure of Donor Information Regulations 2004, SI 2004/1511.

⁶²⁴ See for example D. H. Siegel, 'Open Adoption: Adoptive Parents' Reactions Two Decades Later' (2012) 58 *Social Work* 43–52.

are important but it is legitimate to sever these connections provided that no relationship is allowed to develop between the donor and the recipient or child. Central to this is the idea that a donor donates gametes not knowing how these have been used and whether a child even exists. Nevertheless, this separation between donor and child has begun to be eroded through the rise of genetic origins discourse and the removal of complete donor anonymity.⁶²⁵

This only comes into play, however, once the child has reached eighteen. Therefore, in terms of the implications for parenting, it is a very different scenario to be aware that you are the biological progenitor of a child who can only become known to you as an independent 'adult offspring' as compared to being a known donor who has knowingly fathered a still dependent child. One could draw an analogy with blood donation. Although the biological processes involved in reproduction are more fundamental and arguably significant, the clinical setting of gamete donation and lack of connection with the recipient, as with blood donation, can mitigate the emotional and psychological impact. It is also worthy of note that in the licensed clinic context, the act of donation is fully explained as just that, albeit with consequences far in the future. It is legally established as an essentially altruistic yet fundamentally impersonal act (even where the donor is known) undertaken in a formal medical setting. This, it is argued, sets unknown clinical donation apart from known donation.

While some concerns exist about the potential ramifications of no longer providing completely anonymous donation, these concerns are amplified in known donor situations. As Richards *et al.* have put it recently:

By lifting the veil of secrecy, the parents accept the existence of a person whose actions have led to the conception of their child. By

⁶²⁵ See n 623.

allowing the identification of donors and known donation, the donor can even be contacted either by the recipients or the child...Will we be able to construct a coherent framework that includes these new requests while respecting people's views on how social and genetic parenthood should balance?⁶²⁶

The implication seems to be that the very involvement of known donors reignites concerns, which existed prior to the enactment of donor anonymity,⁶²⁷ such as the intrusion of the donor into the reproductive relationship, and which the Warnock Committee sought to address through the separation of donor and recipient/child. It seems logical to suggest that the involvement of a known donor *per se* requires recognition and negotiation of the potential significance of the biological connection in a way that is not necessary in relation to anonymous donation. One might go so far as to say that, in the absence of countervailing considerations, the biological connection and knowledge of that child's existence might be so significant as to mean that a 'known donor' *prima facie* ought to form part of that child's family.

On the face of it, this line of reasoning seems at odds with much of the literature on known donation and same-sex parenting, which argues that the imposition of donors on women-led families curtails their autonomy in creating a family.⁶²⁸ However, as one commentator has acknowledged 'while reproductive autonomy is an extremely important interest...reproductive autonomy may have to give way to other interests'.⁶²⁹ In the case of known donation, there is a tension between

⁶²⁶ Richards, Pennings, and Appleby, *Reproductive Donation Practice, Policy and Bioethics* (n 609) 11.

⁶²⁷ Church of England (1948). *Artificial Human Insemination. The Report of a Commission Appointed by His Grace the Archbishop of Canterbury*. London. SPCK (Wand Report).

⁶²⁸ See for example Angela Cameron, "A chip off the old (ice) block?: Women-led families, sperm donors and family law" in Jennifer Kilty (ed), *Women and the Law* (Canadian Scholar's Press 2013); Fiona Kelly, 'Equal Parents, Equal Children: Reforming Canada's Parentage Laws To Recognize The Completeness Of Women-Led Families' (2013) 64 *University of New Brunswick Law Journal* 253.

⁶²⁹ Erin Nelson, *Law, policy, and reproductive autonomy* (Hart Publishing 2013) 308 – 309.

the autonomy of women-led families and the interest a biological father has in the having a connection with his offspring, which he knows exists (and vice versa). This tension is largely avoided in situations involving unknown donors because of the wall of anonymity that exists between donor and intended parent/child. As some commentators have acknowledged, some families 'have often consciously and politically chosen an anonymous sperm donor to avoid the legal and parenting complexities that come with using a known donor.'⁶³⁰

Legally speaking known donation in a clinic is treated in the same way as anonymous donation in a clinic. However, it is questionable whether this should always be the case. It is understandable that a known donor who is merely donating in order to enable a female couple to have a child with no further involvement with that child should be treated in the same way as an anonymous donor. However, it is not so clear cut where the biological father is providing sperm to facilitate the creation of some type of collaborative co-parenting family but they have decided to go through a clinic for medical reasons. Therefore, it seems a more nuanced approach to the legal effects of conceiving at a clinic, that takes into account the range of intentions that the parties might have in relation to their family, is required.

What is more, the literature on same-sex parenting does not appear to be objecting to any sort of discussion about recognising the contribution of known donors. The main objection is against the legal bias that seems to operate to a large extent in favour of the interests of the donor and against the interests of autonomous women-led families at least where conception occurs at home and

⁶³⁰ Angela Cameron, Vanessa Gruben, and Fiona Kelly, 'De-Anonymising Sperm Donors in Canada: Some Doubts and Directions Rethinking Assisted Conception' (2010) 26 Canadian Journal of Family Law 95, 118.

the female coupled are not civil partners/spouses. This perceived bias provides a complicated background for a discussion of the various interests, which are engaged in a known donation situation. It makes it more difficult to be conceptually clear about when a genuine contribution and interest is being valued and when pre-conceived notions about the family are entering the discussion.

Reaffirming Same-Sex Parenting

In legal terms in the UK, there has been legislative and judicial affirmation of the equivalence of same-sex and different-sex parents as regards their suitability as parents. Since 2005 legislation has provided that same-sex couples have been able to foster and adopt,⁶³¹ and since 2009 same-sex couples have been on an equal footing as different-sex couples in terms of assisted reproduction.⁶³² This was recently emphasised by a High Court judge who endorsed the idea that ‘the policy underpinning [the 2009] reforms is an acknowledgement that alternative family forms without fathers are sufficient to meet a child's need.’⁶³³

These recent legislative and judicial signals contrast with those of the recent past. Although opposition to same-sex parenting in the UK may not have been as vehement as it continues to be in some countries such as the USA, there has traditionally been considerable resistance to the idea of same-sex parents as suitable parents in the British press, Parliament and courts. As recently as 1998, child welfare concerns in relation to same-sex parenting were raised within the then Labour government with one minister remarking, ‘I am not in favour of gay

⁶³¹ Adoption and Children Act 2002, s. 50(1) and s.144 (4), which came into force in 2005.

⁶³² Human Fertilisation and Embryology Act 2008, ss.42-44 and 54, which came into force in 2009.

⁶³³ *Re G (A Minor)*; *Re Z (A Minor)* [2013] EWHC 134 (Fam) [113] per Mr Justice Baker.

couples seeking to adopt children because I question whether that is the right start in life. We should not see children as trophies.’⁶³⁴ These concerns are reflected in early post-separation custody cases where the mother has subsequently identified herself as a lesbian. The courts in these cases highlighted the risks presented to the child of being raised by a lesbian couple, risks which were supposedly exacerbated if the couple were ‘militant lesbians’.⁶³⁵

Fortunately, legal attitudes have moved on considerably in the past twenty years with more recent cases concerned with protecting the integrity of same-sex families.⁶³⁶ Consequently the earlier concerns that being raised in same-sex families is detrimental for the child are no longer readily visible within the legal framework. However a degree of hesitancy remains in terms of legal and policy discourses, as well as social attitudes, when it comes to suggesting that same-sex parenting might be ‘as good as’ different-sex parenting. In 1991, Glidewell LJ, sitting in the Court of Appeal, held that it was ‘axiomatic that the ideal environment for the upbringing of a child is the home of loving, caring and sensible parents, her father and her mother.’⁶³⁷ Since then, there has been over two decades of same-sex, in particular lesbian, parenting, despite which this statement still has considerable traction within the legal and social imagination.

These ideas that the two-parent, heterosexual family is both natural and better than other family forms (i.e. ideal) for raising children lies at the heart of the hegemony of heteronormativity within family law and policy. There is, however, a growing body of empirical evidence that disputes the claim that (in particular)

⁶³⁴ Comments of the then Home Secretary, Jack Straw, on Radio 4’s Today Programme in November 1998. This is quoted in Leanne Smith, ‘The Problem of Parenting in Lesbian Families and Family Law’ (PhD Thesis, Queen’s University Belfast 2007) 72.

⁶³⁵ *B v B (minors) (custody: care and control)* [1991] 1 FLR 402, 410.

⁶³⁶ See for example *Re D* [2006] EWHC 2 (Fam).

⁶³⁷ *C v C (a minor) (custody: appeal)* [1991] FLR 223 (CA) 229.

lesbian parenting is somehow less than ideal. The courts have drawn extensively on the expertise of child psychiatrists in disputes about same-sex parenting to confirm that child welfare is not put at risk through being raised by same-sex parents.⁶³⁸

In a recent overview of research into planned lesbian parenting, a researcher in child development cited numerous studies to support the assertion that ‘growing evidence suggests that there are no differences between young children raised in lesbian-parent families and those raised in two-parent heterosexual families with regard to problem behaviour and well-being.’⁶³⁹ It is difficult to be conclusive about this finding because this type of research has a number of limitations. Sample sizes are often small, for example, and studies sometimes rely on parental reports of wellbeing, which can introduce bias into the results.⁶⁴⁰

However, there have been a number of studies, which have drawn on large data sets, used more objective measures of psychological wellbeing and have often been conducted longitudinally. Golombok *et al*, for example, used the UK Avon Longitudinal Study of Parents and Children to compare the psychological wellbeing of young children in families led by two women with two-parent heterosexual households. Their results suggested that:

...even with a general population sample it remains the case that children reared by lesbian mothers appear to be functioning well

⁶³⁸ See for example, C Sturge, ‘Gay and Lesbian Parenting in the UK: Biological, Societal and Psychological Issues Relevant to Children’ [2008] *International Family Law* 32; Chris Barton, ‘Lesbian Couples and Their Families: Harmony for the Child, the Women and the Man’ [2014] *Family Law* 851.

⁶³⁹ Henny M W Bos, ‘Lesbian Mother Families Formed Through Donor-Insemination’ in Abbie E. Goldberg and Katherine R. Allen (eds), *LGBTQ-Parent Families: Innovations in Research and Implications for Practice* (Springer 2013) 25.

⁶⁴⁰ For more detail on this see Fiona Tasker, ‘Same-Sex Parenting and Child Development: Reviewing the Contribution of Parental Gender’ (2010) 72 *Journal of Marriage and Family* 35–40.

and do not experience negative psychological consequences arising from the nature of their family environment.⁶⁴¹

In addition to the more representative sample size, another strength of this study is that a range of measures were used to assess psychological wellbeing such as parental reports, teacher reports and psychological indicator measures in relation to the children themselves.

More recently, researchers have used similar strategies to assess the psychological wellbeing of adolescents in lesbian-led families. In the US, for example, Wainwright and colleagues used the National Longitudinal Study of Adolescent Health to reveal no difference in substance use, peer relationships and academic progress between children raised in two-women-led families and two-parent heterosexual families.⁶⁴² Other similar studies have gone further than this to indicate more positive results for adolescents from lesbian-led families compared to children from two-parent heterosexual families. Data from the US National Longitudinal Lesbian Family Study indicates that children from lesbian-led families are no more likely to engage in heavy substance abuse and, in fact, demonstrate greater academic competence and social skills.⁶⁴³ This is supported by a recent study in the UK, which found that adolescents in lesbian-led families

⁶⁴¹ Susan Golombok, Beth Perry, Amanda Burston, Clare Murray, Julie Mooney-Somers, Madeleine Stevens, and Jean Golding, 'Children With Lesbian Parents: A Community Study' (2003) 39 *Developmental Psychology* 20, 30

⁶⁴² J.L. Wainwright, S.T. Russell, and Charlotte J Patterson, 'Psychosocial adjustment, school outcomes, and romantic relationships of adolescents with same-sex parents' (2004) 75 *Child Development* 1886 – 1898; J.L. Wainwright and Charlotte J Patterson, 'Delinquency, victimization, and substance use among adolescents with female same-sex parents.' (2006) 20 *Journal of Family Psychology* 526 – 530; J.L. Wainwright and Charlotte J Patterson, 'Peer relations among adolescents with female same-sex parents.' (2008) 44 *Developmental Psychology* 117 – 126.

⁶⁴³ Nanette Gartrell and Henny Bos, 'US National Longitudinal Lesbian Family Study: psychological adjustment of 17-year-old adolescents.' (2010) 126 *Pediatrics* 28–36; Abbie E. Goldberg, Henny Bos, and Nanette Gartrell, 'Substance use by adolescents of the US National Longitudinal Lesbian Family Study' [2011] *Journal of Health Psychology*.

had higher self-esteem and lower levels of depression, anxiety, hostility and alcohol abuse compared to adolescents in heterosexual two-parent families.⁶⁴⁴

Therefore, although more research is needed on a diverse range of planned same-sex families, the best evidence we have, based on sound psychological research, indicates that it is not 'axiomatic' that a same-sex family is *per se* a less favourable environment for raising children than a heterosexual family. On the contrary, the research indicates that the absence of parents of both genders in planned lesbian families has little impact on the psychological wellbeing of children.

Despite this, even this tentative formulation of the point is not universally accepted in terms of social attitudes.⁶⁴⁵ This lack of acceptance provides the background for much of the scholarship on same-sex parenting, which in different ways challenges the hegemony of heteronormativity within family law and policy. While this is a laudable aim, there isn't always a clear delineation between arguments deployed against a specific rule/decision because it embodies this heteronormative bias and arguments that decry a prejudicial outcome, which may have resulted more from the existence of that rule/decision within a heteronormatively-biased system rather than that rule being biased in itself. However, this is not always an easy distinction to make because the motivation for making a given rule/decision may be relevant even where the rule itself is not inherently biased. Therefore, this is an important consideration when examining the legislation and case law.

⁶⁴⁴ Susan Golombok and S Badger, 'Children raised in mother-headed families from infancy: A follow-up of children of lesbian and heterosexual mothers, at early adulthood' (2010) 25 Human Reproduction 150 – 157.

⁶⁴⁵ See A Park, C Bryson, E Clery, J Curtice, and M Phillips, 'British Social Attitudes : the 30th Report', (NatCen Social Research 2013) ix.

The Role of Men in Women-Led Families

As discussed in the previous section, the psychological wellbeing of children seems to be unaffected by whether they are raised by a female couple or a heterosexual couple but, despite this, heteronormative bias continues to exert a pervasive influence on legal and social discourses. These two linked observations have a considerable impact on the discussion of the role of men in women-led families:

...in becoming parents, lesbian mothers open themselves to many of the values that govern heterosexual families, such as the assumed need for both male and female role models. These values may contradict their own lived experience, such as the desire, implicit or explicit, to become parents without men.⁶⁴⁶

Although the authors here refer to a lesbian mother's desire to become a parent without men, there is, self-evidently, a biological impediment to this, namely that a man at least needs to make a biological contribution for conception to occur. Although perhaps the authors were referring to more than mere biological contribution, it is worth dwelling on this point a little.

The biological reality of the situation is that men and women cannot create children independently of one and other. Therefore a same-sex couple cannot conceive a child without involving someone of a different sex, whereas a fertile heterosexual couple can. However, as discussed above in relation to the Warnock Report, it has long been possible for infertile heterosexual couples to side step the involvement of a third party in the reproductive relationship through anonymous gamete donation. This option is now also open to female same-sex

⁶⁴⁶ Abbie E. Goldberg and Katherine R. Allen, 'Imagining Men: Lesbian Mothers' Perceptions of Male Involvement During the Transition to Parenthood' (2007) 69 *Journal of Marriage and Family* 352, 352.

couples. Therefore while 'anonymous'/unknown sperm donation does not quite allow lesbians to become parents without men it does in the sense that it is not necessary to identify a specific man, which in practical terms is a close approximation.

The relatively recent inclusion of female couples and single women in the institution of 'anonymous' gamete donation has arguably made them reproductive insiders in this respect along with infertile heterosexual couples, where previously these groups may have been excluded from reproduction. This is largely due to the possibility of separating the donated gamete and the donor and, therefore, not having to deal with the donor as a person. This possibility does not, however, exist for women, or couples involving women (lesbian or heterosexual), who cannot bear children nor for gay men (as individuals or couples) because these groups require a gestational surrogate as well as donated gametes in most cases.⁶⁴⁷

Despite this, the decision to conceive with a known donor, which may occur for a number of reasons, raises different and more complex issues compared to unknown donation. Lord Justice Thorpe commented in a recent case involving a known donor/collaborative co-parenting arrangement that:

...the desire to create a two parent lesbian nuclear family completely intact and free from fracture resulting from contact with the third parent...may be essentially selfish and may later insufficiently weigh the welfare and developing rights of the child.⁶⁴⁸

Some commentators are highly critical of this statement. One author argues that:

Thorpe LJ seems to assume that a supervening and unilateral desire for full parenthood on the donor's part will generally be natural and to the child's advantage and that it should thereby bring

⁶⁴⁷ This is discussed further at page 312 onwards.

⁶⁴⁸ *A v B and C* [2012] EWCA Civ 285 [27].

about an adjustment in parenting arrangements...This assessment is predicated on [the] highly problematic understanding that biology or human nature makes it almost inevitable that, sooner or later, a donor will want his contribution to escalate to full parenthood...⁶⁴⁹

This reaction seems understandable given the persistence of heteronormative hegemony in family law and policy as discussed above. Nevertheless, the author's point does not acknowledge, as Lord Justice Thorpe seems to, the potential impact on both the donor and child of being able to identify the biological father who may have some ongoing social relationship with the child.

It seems unlikely that the author views an acknowledgment that the biological father's interests in relation to the biological connection may well be engaged as a 'highly problematic understanding' of human nature and biology. It seems more likely that the author was taking issue with any suggestion that this is inevitable, which is not necessarily the case. As one of the 'known donors' in the current empirical study commented:

I was very surprised at how detached I am. I was detached in the process and after he was born I was still detached. I don't feel any... pull, not right now anyway and I mean he's, what, four years old now. I don't feel like he's my child.⁶⁵⁰

This is quite a telling observation because it demonstrates that a biological connection does not necessarily hold any significance for the donor. However, the increasing number of known donor cases coming before the courts recently suggests this is not always the case. Studies on surrogate motherhood suggest

⁶⁴⁹ Aleardo Zanghellini, 'A v B and C [2012] EWCA Civ 285' (2012) 24 Child and Family Law Quarterly 475, 481.

⁶⁵⁰ CAPB9.

a similar outcome with some surrogate mothers experiencing very little emotional difficulty when relinquishing the child compared to others.⁶⁵¹

Importantly, the law does not ignore the psychological security of the parents⁶⁵² but the child's welfare as a whole, of which the parents' psychological security may form a part, is clearly the law's central concern. As Diduck and Kaganas note:

The welfare of children has increasingly claimed the attention of policy makers and law reformers alike in recent decades. Children are portrayed as victims of divorce and of child abuse...These concerns have led to the elevation of the welfare principle to a central and seemingly unassailable position in the law relation to children.⁶⁵³

Despite this, some commentators question the overriding nature of specific interpretations of child welfare in resolving disputes concerning parents and children.⁶⁵⁴

As Zanghellini argues, it may well be the case that 'it is likely that the child's welfare is equally compatible with, or promoted by, a variety of different arrangements'.⁶⁵⁵ Arguably, Thorpe LJ is suggesting that it is in the best interests of the child for the biological father to be involved in his or her life, which brings to mind heteronormative influences and fathers' rights discourse. However, suggesting that a biological father has an interest in having a relationship with his offspring and that the child may well benefit from his presence does not necessarily imply any heteronormative bias in favour of fathers' rights.

⁶⁵¹ See for example Eric Blyth, "' i wanted to be interesting . i wanted to be able to say ' i ' ve done something interesting with my life '": Interviews with surrogate mothers in Britain' (2007) 12 *Journal of Reproductive and Infant Psychology* 189–198. See also *H v S* [2015] EWFC 36.

⁶⁵² See for example *Re H (Shared Residence: Parental Responsibility)* 2 FLR 883.

⁶⁵³ Alison Diduck and Felicity Kaganas, *Family Law, Gender and the State* (Hart 2012) 373.

⁶⁵⁴ See for example Reece, 'The Paramountcy Principle: Consensus or Construct?'

⁶⁵⁵ Zanghellini, 'A v B and C [2012] EWCA Civ 285' (n 637) 483.

Despite this, it is important to acknowledge that there is a perception that ‘fathers are essential to the healthy psychological, moral, social, and gender development of children,’⁶⁵⁶ which is likely to have an impact on how Lord Justice Thorpe’s comments are interpreted. However, Lord Justice Thorpe’s comments do not necessarily ‘assume that a supervening and unilateral desire for full parenthood on the donor’s part will generally be natural and to the child’s advantage’ as Zanghellini suggested above. The judge’s comments recognise this as being a distinct possibility and one that ultimately must be weighed against the intended parents’ desire to create an autonomous family free from the interference of a third party.

Unfortunately, ‘[t]here are few data on what it means for offspring to have known or unknown donors’.⁶⁵⁷ One of the few studies to have looked into this, the US National Longitudinal Lesbian Family Study, indicated that ‘donor type has no bearing on the development of the psychological well-being of the offspring of lesbian mothers over a 7-year period from childhood through adolescence’.⁶⁵⁸ This area of research is still in its infancy and much more work needs to be done here. Nevertheless, the research seems to indicate that a female couple’s decision to use anonymous donor sperm to form an autonomous family without the involvement of a third party has little effect on child welfare.

Indeed, research suggests that the conscious and deliberate way many of these families manage male influences in the child’s life mean that they compensate for

⁶⁵⁶ L. B. Silverstein and Carl F Auerbach, ‘Deconstructing the essential father’ (1999) 54 *American Psychologist* 397 – 407 cited in Goldberg and Allen, ‘Imagining Men: Lesbian Mothers’ Perceptions of Male Involvement During the Transition to Parenthood’ (n 634) 353.

⁶⁵⁷ Bos, ‘Lesbian Mother Families Formed Through Donor-Insemination’ (n 627) 30.

⁶⁵⁸ H M W Bos and N K Gartrell, ‘Adolescents of the US National Longitudinal Lesbian Family Study: the impact of having a known or an unknown donor on the stability of psychological adjustment’ (2011) 26 *Human Reproduction* 630, 636

the lack of an immediate role model, which may be present in families consisting of a mother and a father. Goldberg contends that '[m]en do not need to be central in a family to be valued as socialization sources'.⁶⁵⁹ In her study of lesbian mothers' perceptions of male involvement, Goldberg found that a majority of the women (i.e. 41 women) 'were highly conscious of the fact that their child will not grow up with a male parent and expressed concern about the absence of a male figure. Their concern fuelled their intention to find potential male role models'.⁶⁶⁰ Therefore, these couples engaged in a number of creative strategies to ensure that the child was exposed to a range of influences, including from both genders, with around half of the lesbians interviewed with a known donor opting to involve him in the child's life.

Motivations for Involving a Known Biological Father

Conceiving with a known donor is an option that a considerable number of prospective lesbian parents have considered for a variety of reasons. In Kelly's Canadian study, she found that:

Twenty-four of the thirty-six families interviewed had conceived their children using anonymous-donor sperm. However, about half of this group stated that they had initially wanted to use a known donor, and only after careful deliberation had they decided it was not the right choice.⁶⁶¹

According to Kelly, the motivation of those who initially wanted a known donor but eventually chose an anonymous donor was that 'they wanted a father in name only – a symbolic father – who served little more than a semiotic function'.⁶⁶²

⁶⁵⁹ Goldberg and Allen 'Imagining Men: Lesbian Mothers' Perceptions of Male Involvement During the Transition to Parenthood' (n 634) 354.

⁶⁶⁰ *Ibid.* 358.

⁶⁶¹ Fiona J Kelly, *Transforming law's family the legal recognition of planned lesbian motherhood* (UBC Press 2011) 97.

⁶⁶² *Ibid.* 98

However the participants in that study were largely unable to find men who were willing to fulfil this role because most wanted more active involvement. Therefore, many of the women who initially wanted a known donor felt this was too risky and settled for an anonymous donor.

Furthermore, the idea of wanting the known donor to be a 'symbolic father' but having no role in the child's life is a problematic one. In commenting on the Australian case of *Re Patrick*, Dempsey makes the point that:

...it is clear that the mother assumes having lesbian parents automatically excludes a child from the right to have contact with his biological father. This line of reasoning by the biological mother is both philosophically and empirically problematic.⁶⁶³

As Dempsey highlights, such a presumption is almost as problematic as the assumption that children should have fathers. Some of the participants in previous studies use this as an oppositional discourse and in so doing adopt a scathing view of the potential role of fathers. One of the participants in Kelly's study responded to the suggestion that a father might have rights by saying 'What because he donated sperm? I don't think so.' This led Kelly to suggest that 'the known donor emerged from these conversations as a slightly sinister figure with the law on his side'.⁶⁶⁴

These reactions are understandable as a response to the dominance of perceived heteronormative biases within the legal system. However, it is important to try to fairly represent the interests of both women-led families and known donors when discussing questions of legal recognition. What is more, there was not the same sense of known donors as slightly sinister figures in the

⁶⁶³ Deborah Dempsey, 'Donor, Father or Parent - Conceiving Paternity in the Australian Family Court' (2004) 18 *International Journal of Law, Policy and the Family* 76, 95.

⁶⁶⁴ Kelly, *Transforming law's family the legal recognition of planned lesbian motherhood* (n 649) 101.

current study, which suggests that opinion among lesbian parents on the role of the known donor is somewhat divided with a number of lesbians advocating a more involved role.

Angela, Ruth and Rob's story emerging from the current study is an encouraging one for women-led families who wish to involve a known donor without entering into a co-parenting arrangement. Angela comments that:

I think because it was so clear to him and to us right from the get-go, I've never felt uncomfortable with it or unsafe in terms of him asserting any kind of rights to that child, probably just because that's him and because we were able to be so clear. Whereas I could see it towards the end of our relationship with our first potential donor, that that was becoming fuzzy.⁶⁶⁵

Angela's remarks highlight that the process of finding a suitable known donor is an important one, just as it is in relation to selecting a co-parenting, which involves gauging the level of involvement everyone is comfortable with. Four years down the line all parties are still on the same page and the donor has not felt compelled in any way to assert any kind of relationship with the child. As Rob (who is heterosexual and is currently raising his partner's child) remarks:

I'm ok with the way things are. I'd be ok if they lived in town and I'd spend more time but I'm...so involved in my own family life and work that there isn't much time to really think about much else...but ye it's kind of out of sight out of mind.⁶⁶⁶

This arrangement, therefore, although involving a written agreement, is also based on a considerable degree of trust that has developed during the process of finding the right match and being explicit about the envisaged level of involvement.

⁶⁶⁵ CAPB6.

⁶⁶⁶ CAPB9.

Moreover, although a number of the participants in the present study acknowledged the unknown donor approach based on their awareness of how other lesbians have become parents, this did not necessarily chime with their own views and experience. As Betty (from the UK) comments:

Obviously as a lesbian couple we are very fortunate in that we have the options of going either with an unknown donor or even a known donor who is not involved...I didn't want to go to the sperm bank and just pick out a profile with information about the father...50% of my child's genes. Not that there is anything wrong with that...it is really horses for courses.⁶⁶⁷

Therefore, while Kelly's study found that a number of lesbians were rejecting known donation as inherently risky, both the UK and Canadian participants in this study conversely rejected unknown donation for a variety of reasons. Betty and Eliza, for example were quite concerned about genetic identity, as the allusions to genes in the view expressed above highlights. Related to this, Angela and Ruth (a Canadian couple) were concerned with the child's identity more generally and not feeling a sense of absence or loss. Angela notes:

I know that he'll never have to go out looking for his other parent, his other family, which is exactly what Robin and I were uncomfortable with in an unknown donor, in an anonymous donor, is that his feeling like there's a part of him that's missing or that's mysterious or that maybe they would know themselves if they found that.⁶⁶⁸

This suggests that female couples seeking to involve a known biological father are not uniform in their desires for doing so but that motivations for seeking to involve a known donor can vary, which may be significant when deciding the legal effect such decisions should have.

⁶⁶⁷ UKPB1.

⁶⁶⁸ CAPB6.

This is evident not only from the findings of the current study but also from previous studies. One concern that a US study on lesbian parenting identified relates to the importance of medical history. As one of the participants in that study commented:

The only reason we wanted a known donor was because we thought at some point in this child's life there would probably be reasons why they would want to be able to trace their medical history in order to make certain decisions or to figure out certain medical stuff... It wasn't because we wanted a known donor.⁶⁶⁹

With increasingly sophisticated medical screening procedures and the possibility of obtaining medical information about 'anonymous' donors, this may be less of a motivating factor to involve a known donor nowadays. However, medical concerns were evident in the current study, for example in Betty and Eliza's decision to conceive at a licensed fertility clinic rather than at home.

As mentioned previously, the idea of the known donor as a male role model also emerged from the current study. Sally from Canada stressed that she 'wanted [the children] to have other people that would be role models for them, that wouldn't be fleeting...when you are family, there is this connection'. This supports what was found in the US study where one of the participants commented, 'I thought of the possibilities that, you know, there would be, maybe if I found the right person, a male influence, you know, in the child's life'.⁶⁷⁰ To some extent this type of thinking is influenced by the societal norm that having both an involved mother and an involved father is beneficial for a child. This relates to Goldberg's suggestion discussed earlier that women-led families may feel social pressure to include specific male role models in a child's life. However, as Goldberg's study

⁶⁶⁹ Jacquelyne Luce, *Beyond Expectation Lesbian/Bi/ Queer Women and Assisted Conception* (University of Toronto Press 2010) 30.

⁶⁷⁰ *Ibid* 33.

revealed, this can be achieved in a number of ways without having to involve the biological father. Therefore, women-led families who feel that it is important for a child to have male and female influence need not feel compelled down the route of known donation.

While knowledge of medical history and having male influences in the child's life may be important for many women-led families, some feel these can adequately be achieved in the context of having two female parents. One of the participants in a recent UK study, which represented quite a typical response, emphasised the importance of joint parenting independently of the biological father:

I didn't want to have to consider there being a third parent in the family really, which would kind of maybe be the case with using a known donor. Yeah, I don't feel the need to share [our child] with another parent. So we decided, yeah, the two of us were enough so, yeah, we would use an anonymous donor; and that was that.⁶⁷¹

Therefore, this couple were not interested in involving a third parent and for that reason avoided involving a known donor in favour of anonymous donation.

From the present empirical study, the importance of genetics/medical history emerged, adding a further and new dimension to the knowledge developing around these issues. One of the UK participants, Eliza, who was in the process of conceiving with her female partner and male co-parent commented that:

I wanted to know where the sperm comes from. I wanted to know...I mean, perhaps this is slightly sort of genetically fascist. [Laughter]. I wanted to know that you are getting some good genes, really. When you go to a clinic you only get so much information, and that, you know, made me a bit more reticent to consider that route as a first option.⁶⁷²

⁶⁷¹ Petra Nordqvist, 'Origins and originators : lesbian couples negotiating parental identities and sperm donor conception' (2012) 14 *Culture, Health & Sexuality: An International Journal for Research, Intervention and Care* 297, 301.

⁶⁷² UKPB2.

Another factor, related to genetics and biology, which surfaced as an important consideration is the importance of the child not feeling anything is lacking in terms of his or her genetic identity. Angela stresses that:

What we both felt was really important is that our kid would have the... that none of his identity would be a secret, he wouldn't feel like it was mysterious and that there was some part of him that he needed to track down and find or that there was some missing father figure or something like that, which I think is sometimes... we knew some people who had done the anonymous donor route and their kids then got to be teenagers and wanted to find their father.⁶⁷³

This resonates with some of the responses found in Goldberg's study discussed above where the female couple were concerned with being 'fair to the child' and compensating for any perceived lacking as a result of the absence of a biological father.

For a number of families in the current study, however, it was about more than mere genetics. Ruth, a Canadian participant, who is the non-biological parent of a child conceived with the help of a known donor, links genetics with the idea of attraction:

I think it's really important to reproduce with somebody that you find appealing. Like, even if you are not...you wouldn't have a sexual relationship with them, I think that there's a lot to do with attraction and good genetics. So that was a huge part of, like, not wanting to do an unknown donor. Because everyone looks good on paper.⁶⁷⁴

This goes beyond genetics for its own sake or medical history. It recognises that reproduction is an important process and it brings in our inbuilt intuition about interpersonal, rather than romantic, attraction. This idea is reinforced by Eliza's

⁶⁷³ CAPB6.

⁶⁷⁴ CAPB8.

partner Betty who makes the point that it was as if they were 'dating this guy' when they were selecting a male co-parent.⁶⁷⁵

Therefore, alongside considerations to do with the importance of genetics, which participants in other studies on known donation highlighted as discussed above, a number of the participants in the current study stressed the importance of the relationship with the male co-parent. As Eliza comments, '[i]t felt like you had to, kind of, I don't know, not fancy them but kind of feel sort of connected to them somehow, or attracted to them somehow'.⁶⁷⁶ While this would be an important consideration in relation to someone who will share parenting duties, it may not be so relevant in the case of a known donor who will not have any kind of relationship with the child.

Nevertheless, participants in the current study indicated that the choice of known donor was an important consideration, albeit perhaps one that involves different considerations compared to the choice of a co-parent. Angela, the biological mother of children born through known donation in Canada, comments that:

We spent quite a long time finding somebody who would be suitable. We were looking for somebody who was in our life in a kind of periphery, not involved on a daily basis, not one of our close friends, not somebody we were going to see all the time, but not somebody who was really distant. Not a stranger, because we wanted to know them and trust them a little bit.⁶⁷⁷

Therefore similar importance is being placed on the search for a known donor as it is for a co-parent, although perhaps the emphasis in what is important in each of these situations is slightly different. Both Betty and Eliza, who are in the process of conceiving with a co-parent in the UK, and Ruth and Angela, who have

⁶⁷⁵ UKPB1.

⁶⁷⁶ UKPB2.

⁶⁷⁷ CAPB6.

conceived with a known donor in Canada, seem to emphasise that it is important to find the right person. However, Betty and Eliza focus more on the idea of 'attraction,' whereas Ruth and Angela seem more concerned with suitability in terms of the right level of relational proximity when looking for a man to conceive with.

Gay Men and Parenthood

The previous sections have considered female same-sex parenting generally as well as the intended role of, and motivations for involving, known biological fathers. The remaining sections of this chapter will focus more on how gay men are positioned in terms of collaborative co-parenting. They will look at the general context of gay male parenting as well as the nature of gay men's involvement in collaborative co-parenting before turning to the issue of accommodating the experiences of gay men in terms of reproduction and parenting within the legal framework.

Gay male parenting and lesbian parenting, sometimes referred to collectively as same-sex parenting, are often discussed together, particularly in contrast to different-sex parenting. These discussions often focus on sexuality-based differences between same-sex and different-sex parenting, without necessarily considering the different experiences that gay men, on the one hand, and lesbians, on the other, have in relation to parenting. Neither gay men nor lesbians are homogenous groups in terms of their experiences of parenting, as with other areas of their lives. Therefore, it is important to consider the different parenting accounts given by individual families. However, one might also intuitively expect there to be gender-based differences between the parenting experiences of gay

men and those of lesbians. This intuition is likely to be predicated on our appreciation of the different experiences that men and women have in relation to different-sex parenting. This section considers gay male routes to parenthood and the various challenges that gay men face. The section contrasts the experiences of gay men in becoming parents with those of lesbian women in an attempt to disentangle the different interests involved when gay men and lesbians reproduce collaboratively.

The discussions in the previous sections of this chapter suggest that single women, female couples and infertile heterosexual couples have been made reproductive insiders as a result of anonymous gamete donation, which comes very close to being able to conceive children without involving an identified third party. However, unlike fertile women, female couples and heterosexual couples, gay men remain reproductive outsiders to some extent regardless of their fertility status. The reason for this is that in order to conceive a child, they need an identified woman to be involved and give birth to the child. It is a biological reality that unlike gamete donation, the act of child-birth cannot be separated from the gestational carrier.

As discussed above, there may be a tension in women-led families between the desire to become parents without the involvement of men and the pressure these parents might feel based on the heteronormative ideal of involvement of the mother and the father. Similarly, it seems plausible that men, particularly gay men and gay male couples, may also have a desire to become parents without the involvement of women. The idea that the biological connection between a progenitor and offspring may be significant seems to accord with our understanding of human nature and biology without necessarily implying a

biological imperative in this regard. Furthermore, given that the ECHR is a living instrument that can respond to social change,⁶⁷⁸ this potentially engages tensions in relation to article 8 ECHR right to private and family life and also issues relating to equality between male and female couple. This begs the question of what extent autonomous male-led parenting should be reflected in law in a similar way as women-led parenting.

Unlike women, men are not traditionally thought of in terms of having or lacking the desire to have children.⁶⁷⁹ This would appear to stem from the fact that 'gender norms locate reproductive planning as a woman's issue'.⁶⁸⁰ As a result of this, there is a considerable amount of, mainly feminist, literature around motherhood and reproductive autonomy⁶⁸¹ but little on men's involvement in reproductive decision making.⁶⁸² This has led to the recent suggestion that:

greater attention needs to be shown to how men emerge and express themselves as procreative beings. In ways that feminist theory has made explicit in women's lives, reproductive issues do not simply become personally relevant for men at the birth or adoption of their children. Reproductive concerns can come to the fore much earlier as men, often in conjunction with their partners, strive to promote or restrict reproduction.⁶⁸³

Building on this, the present study was particularly interested in eliciting experiences from the gay men who participated about how they position

⁶⁷⁸ See for example *Schalk v Austria* (30141/04) 3 June 2010 2010 (ECHR); *Oliari and others v. Italy* (8766/11 and 36030/11), 21 July 2015 (ECHR). See also Shazia Choudhry and Jonathan Herring, *European Human Rights and Family Law* (Hart Publishing 2010) 171 – 173.

⁶⁷⁹ D T Meyers, 'The rush to motherhood: Pronatalist discourse and women's autonomy' (2001) 26 *Signs: Journal of Women in Culture and Society* 735-773.

⁶⁸⁰ William Marsiglio, Maria Lohan and Lorraine Culley (2013), Framing Men's Experience in the Procreative Realm, *Journal of Family Issues* 34, 1011, 1020.

⁶⁸¹ For an overview see Meyers (n 667).

⁶⁸² T Morison, 'Heterosexual men and parenthood decision-making in South Africa: Attending to the invisible norm' (2013) 34(8) *Journal of Family Issues* 1125-1144, 1128. See also A J Rijken and T Knijn 'Couples' decisions to have a first child: Comparing pathways to early and late parenthood' (2009) 21 *Demographic Research* 765-802. <www.demographic-research.org/Volumes/Vol21/26/> accessed 20 September 2015.

⁶⁸³ William Marsiglio *et al.* (n 668) 1029.

themselves in relation to having children and how the collaborative co-parenting arrangement they were engaging in fitted into that. Therefore, the current study adds to the empirical knowledge available on gay men's reproductive choices, especially in the context of collaborative co-parenting arrangements.

Reproductive decisions in heterosexual partnerships are made as a couple, which may obscure any gender differences in the reproductive decision-making. In relation to gay and lesbian parenting, however, gender-based differences may be more apparent when comparing gay male and lesbian parents' reproductive decision making processes. Both lesbian and gay parents face a common sexuality-based challenge as compared to heterosexual parents, namely that 'heterosexual norms construe childbearing among heterosexual couples as a taken-for-granted aspect of life that does not require deliberation,'⁶⁸⁴ whereas the opposite is true in relation to both gay and lesbian parenting. However, it is likely that gay men experience the intersection of gender-based and sexuality-based challenges in relation to parenting, in a qualitatively different way from lesbians. This needs to be taken into account when considering gay men's and lesbian's respective motivations for engaging in collaborative co-parenting in order to ensure that the potentially distinctive needs and interests of both groups are being adequately reflected. This stands in contrast to the existing approach where these concerns are conflated in the interests of protecting the (largely women-led) homonuclear family.

Parenting by lesbians has become increasingly accepted and more commonplace since the 1980s.⁶⁸⁵ Lesbians becoming parents today do not face

⁶⁸⁴ *Ibid.* 1020.

⁶⁸⁵ G A Dunne, 'Opting into Motherhood: Lesbians Blurring the Boundaries and Transforming the Meaning of Parenthood and Kinship' (2000) 14 *Gender & Society* 11.

the same opposition or obstacles as those 'pioneer[s] of planned lesbian motherhood'⁶⁸⁶ did. Part of the reason for this is that lesbians parenting children is seen as consistent with the gendered notion in society that women are suitable primary carers. In this way, lesbian parenting has become 'normalised' through them being seen as fulfilling a supposedly 'natural' desire for women to become mothers. In legal terms, this process of normalisation has only really come to fruition fairly recently as a result of the Human Fertilisation and Embryology Act 2008 reforms. Nevertheless, there is not the same sense in relation to lesbians who become parents that they are acting inconsistently with gender norms in doing so as there is with gay men who become parents.

Therefore, the perception persists that gay men as parents challenge fundamental norms of family life in a way that lesbian parents do not. According to Biblarz and Stacey, 'gay male parents challenge dominant practices of masculinity, fatherhood, and motherhood more than lesbian co-mothers depart from normative femininity or maternal practice'.⁶⁸⁷ This is reinforced by the prejudicial way that the courts have treated gay fathers in the past as demonstrated by *Re D (An Infant) Adoption: Parent's Consent*⁶⁸⁸ In this case, the House of Lords dispensed with the consent of a father, who had subsequently come out as gay, to the adoption of his child by the mother and her new partner, on the ground that any reasonable father would consent. According to Lord Wilberforce the father's refusal to consent ran the risk of the child being exposed to experiences which 'may lead to severance from normal society, to

⁶⁸⁶ Kelly, *Transforming Law's Family the Legal Recognition of Planned Lesbian Motherhood* (n 649) 2.

⁶⁸⁷ Timothy Biblarz and Judith Stacey 'How Does the Gender of Parents Matter?' (2010) 72 *Journal of Marriage & Family* 3-22.

⁶⁸⁸ [1977] AC 602 HL.

psychological stresses and unhappiness and possibly even to physical experiences which may scar them for life'.⁶⁸⁹ Although this case was decided a number of decades ago now, this scathing indictment of gay fatherhood continues to detrimentally impact upon how male same-sex parenting is conceived of, not least in the minds of potential gay fathers themselves.

Furthermore, gay men lack a framework and set of well-established conventions in relation to becoming a parent because parenthood for gay men has not gained such cultural traction as lesbian parenting. There remains considerable hostility towards gay male parenting in some jurisdictions, particularly the United States, because of the combined challenge it presents to the link between heterosexuality and parenting and normative masculinity, which is perceived as a bigger threat than that posed by lesbian parenting.⁶⁹⁰ Mallon notes that a number of the participants in his US study who were hostile to the idea of gay parenthood commented on 'the threat to their patriarchal privileges from the presence of gay men who were blatantly taking on traditionally female responsibilities in the home'.⁶⁹¹ Therefore, choosing to raise a child in the absence of a woman as the primary care giver challenges dominant social norms around parenting and caregiving, adding to the hurdles faced by gay men who are prospective parents.⁶⁹²

⁶⁸⁹ *Ibid.* 629. For an insightful discussion of this case see D Bradley, 'Homosexuality and Child Custody in English Law' (1987) 1(2) *International Journal of Law, Policy and the Family* 155 – 205. I am grateful to Daniel Monk and Liz Trinder for their suggestions on this.

⁶⁹⁰ E Lewin 'Family values: gay men and adoption in America' In K. Wegar (Ed.), *Adoptive families in a diverse society* (Rutgers University Press 2006).

⁶⁹¹ Gerald P Mallon, *Gay Men Choosing Parenthood* (Columbia University Press 2004) 115. See also Stephen Hicks, 'Maternal Men – Perverts and Deviants? Making Sense of Gay Men as Foster Carers and Adopters' (2006) 2 *Journal of GLBT Family Studies* 93 114.

⁶⁹² G P Mallon 'Gay men and lesbians as adoptive parents' (2000) 11(4) *Journal of Gay and Lesbian Social Services* 1 – 14.

As discussed in the previous chapter, a number of the gay male participants in the present study had discounted the idea of having children until they came to view collaborative co-parenting as a way of achieving this.⁶⁹³ This finding is supported by other recent studies that have revealed how many gay men have internalised this hostility, which prevents them from envisaging options for becoming a parent. In a recent qualitative study of civil partnerships in the UK, Heaphy et al. found that of the twenty five lesbian couples interviewed only four did not envisage having children, with the rest already having children or had plans to have children in the near future. By contrast, none of the twenty five male couples had children:

Among these young men there were those who very much did want to have children but who felt that the process of becoming parents was rather alien and outside their possible scope of action...However, the majority of the male couples did not include parenthood in their plans for the future. Some thought it might be wrong for gay male couples to have children.⁶⁹⁴

These results are surprising because you might expect that, as a group, civilly partnered gay men would be more likely to want children than other gay men. However, unlike with the lesbian couples, becoming parents did not appear to be a priority for many of the male couples.

The absence of narratives of gay male parenthood within the gay community is highlighted by another recent study in the UK by Cooper on gay male identity.⁶⁹⁵ This study of contemporary gay male identity contains very little discussion of parenthood, which is telling in itself even though the focus of the study was not on parenting. Similar to Heaphy et al.'s study discussed above, of the twenty one

⁶⁹³ See page 273.

⁶⁹⁴ Brian Heaphy, Carol Smart and Anna Einarsdottir, *Same Sex Marriages: New Generations, New Relationships* (Palgrave Macmillan 2013) 162.

⁶⁹⁵ Andrew Cooper, *Changing Gay Male Identities* (Routledge 2013).

gay men Cooper interviewed, (who were a mixed sample of single men and those in a relationship), none were currently raising children in a male-led family, either because they were not interested or had tried unsuccessfully:

Several of the men talked about having children. Some were against the idea, while others hoped to have a baby at some point...Although two of the men that I interviewed had children from previous relationships with women, none were currently bringing up children with a male partner. However, some stated that they would like to have children. Others had already tried to have a baby but had been unsuccessful.⁶⁹⁶

These qualitative studies relied on relatively small sample sizes and cannot claim to be representative in any statistical sense. However, they do capture a range of views and provide a snapshot of contemporary gay men's thoughts about family, which, for whatever reason, rarely seems to include planned gay male parenthood.

A potential explanation for this could be that gay men are less interested in becoming parents than heterosexual couples and lesbians. However, this was certainly not the case for the gay men interviewed in the current study. What is more, the findings from the current study, when combined with the range of views captured in the two studies discussed above, indicate that this could only be a partial explanation because structural, institutional and social influences have a marked impact on the parenting aspirations of gay men. It is, therefore, important to be cognisant of the fact that gay men may desire to become parents but feel excluded from this for a variety of reasons.

There has been relatively little research on men's desires to become parents generally. A key study in this regard is Marsiglio and Hutchinson's 2002

⁶⁹⁶ *Ibid.* 127.

qualitative project where they interviewed fifty-four young men (some single, some in a relationship, some with children, most without) about their thoughts in relation to procreation and fatherhood.⁶⁹⁷ The authors of the study did not explicitly address the sexual orientation of the participants. However, the focus of the study was on attitudes about becoming fathers through sexual intercourse. Therefore, it is likely that the majority of the participants were heterosexual. The picture that emerged from this study is a group of ethnically diverse men aged sixteen to thirty, the majority of whom were actively thinking about and making plans in relation to becoming parents, as the authors explain:

A few of the men seemed particularly eager to get on with their lives and make the transition to fatherhood. One 21-year-old, Terry, excitedly speaks of how...[he] “would rather start a family early, so I’m kind of young so I can relate more with the kids, rather than starting like later in life, that’s kind of, I guess, why I wanna find a girl, settle down fairly soon, start a family.” Although only a few of our participants share Terry’s need to search immediately for a wife and the future mother of their children, most state that this type of family arrangement is something that they want eventually for themselves.⁶⁹⁸

Here the culturally taken-for-granted nature of having children in the context of heterosexual relationships is evident. These men were not struggling over the question of whether or not they wanted to have children, because the vast majority were clear they did. They also didn’t feel the need to deliberate over how they should go about having children because that appeared to be obvious. The consideration foremost on many of these men’s minds was what type of father they wanted to be.

⁶⁹⁷ William Marsiglio and Sally Hutchinson, *Sex, Men and Babies* (New York University Press 2002).

⁶⁹⁸ *Ibid* 181.

This contrasts markedly with the context in which gay men who might be thinking about having children operate. Berkowitz and Marsiglio, writing from the perspective of society in the USA, comment that 'heterosexuality and parenthood are so inextricably intertwined in the United States, the mere suggestion of gay fatherhood appears strange, abnormal, and even impossible'.⁶⁹⁹ Therefore, rather than taking the possibility of parenthood for granted and assuming that they will become parents, as the men in Marsiglio and Hutchinson's study did, many gay men (at least in the USA where much of the research has been conducted but likely also elsewhere too) 'automatically assume that fatherhood is not an option'.⁷⁰⁰

Neither of the UK studies mentioned earlier (Heaphy *et al* and Cooper) were focused on parenthood specifically. However, narratives about wanting to become parents and experiences of having children were conspicuously absent from the accounts of the gay men interviewed. This could lead to a suggestion that gay men are less likely than women and heterosexual men to want to have children. However, given the research in the USA that many gay men feel automatically disqualified from becoming parents, it is necessary to consider whether the sociological data indicate a genuine lack of desire to have children or whether more complicated factors feed into procreative decision making for gay men.⁷⁰¹

⁶⁹⁹ Berkowitz, Dana, and William Marsiglio, Gay men: Negotiating procreative, father, and family identities? (2007) 69 *Journal of Marriage and Family*, 366, 367.

⁷⁰⁰ *Ibid.*

⁷⁰¹ For a discussion of the views of the gay men in this study in relation to becoming fathers see page 273.

Many of the men in Berkowitz and Marsiglio's study, 'viewed the coming out process as synonymous with the realization that they will never be fathers'.⁷⁰² However, while participants in the current study echoed this sentiment, it also identified a slow awakening to the possibility that this is not necessarily the case by some. As discussed in the previous chapter,⁷⁰³ both Lenny and Colin initially felt that being gay precluded them from becoming fathers until collaborative co-parenting became a feasible way of realising that deep seated desire. Therefore, this assumption that being a gay man means being childless seems to be an influential force that impacts upon procreative decision making for these men, in a way that is not present in relation to heterosexual or even lesbian parenting.

However, there are a number of stumbling blocks for gay men before they get to the stage of feeling able to have children. One of the obstacles is how difficult it is for gay men to have genetically related children of their own, which contrasts with the more available option for lesbian women of conceiving children through sperm donation. As Heaphy *et al* comments about the male participants in their study:

The male couples were in a different position, however, because those who wanted a genetically related child could only go down the surrogacy route which for most seemed rather remote. Options to adopt or foster were mentioned by eight of the 25 male couples, but these were always rather tentative plans for action in five or ten years' time.⁷⁰⁴

For many, surrogacy might seem like an unrealistic option. There is an increasing presence in the media and academic studies of gay men engaging in commercial

⁷⁰² Berkowitz and Marsiglio (n 685) 372.

⁷⁰³ See page 273 above.

⁷⁰⁴ Heaphy *et al*. (n 680) 162.

surrogacy abroad. However, the expense associated with this means that only a small portion of gay men would be able to afford this.

In addition to the financial implications a number of gay men are ambivalent about surrogacy as a practice. As Chris, a participant in the current study who is co-parenting two children with his male partner and female friend, stresses:

I have always had certain issues with surrogacy, there are a number of reasons, I don't think it would have been right for me to do...I wouldn't be comfortable with paying someone to have a child for me and then hand it over. It doesn't...there are too many questions I am unable to answer about how I feel about it, I like to be clear on how I feel about a situation and I am not clear on...there's too many things that don't sit right with me so it wouldn't be right for me.⁷⁰⁵

This reflects a more general disquiet about commercial surrogacy in society, which is highlighted by the approaches different jurisdictions take to the issue. There has been considerable literature arguing in favour of lesbians being able to have children autonomously without the involvement of men.⁷⁰⁶ Commercial surrogacy is the closest to having children without the ongoing involvement of a woman that gay men come to. However, there are considerable financial and ideological barriers to this.

An additional hurdle gay men face is the perception that having children is incongruous with their identity as gay men. Firstly, there is a perception that gay men having children without a woman as the primary caregiver is seen as deviant by some in society. As Berkowitz and Marsiglio highlight:

[F]or some of these men, being socialized into a world that stereotypes gay men as pedophiles constrained their ability to envision themselves as future fathers. Even worse, as both Luke and Aiden express, it is not uncommon for gay men to incorporate

⁷⁰⁵ UKPB6.

⁷⁰⁶ See for example Catherine Donovan, 'Who Needs a Father? Negotiating Biological Fatherhood in British Lesbian Families Using Self-Insemination' (2000) 3 *Sexualities* 149–164.

these heterosexist myths and irrational stereotypes into their own self-concept.⁷⁰⁷

Although this particular stereotype did not appear in Heaphy *et al.*'s study, they did find that a number of the male couples they interviewed felt it was wrong for gay men to become parents. Berkowitz and Marsiglio note that 'many young childless gay men are apprehensive about becoming fathers because they are overly concerned with how outsiders would perceive them' and implicitly their family.⁷⁰⁸ One manifestation of this present in both studies is a concern about how their children would be treated at school, which would put them off having children in the first place.

Another pernicious obstacle to gay men having children is the perception, rightly or wrongly, of the gay male community as being 'sexually voracious' and characterised by 'the freedom to have many sexual partners'.⁷⁰⁹ This enhances the perception of those outside the gay community that gay men are unsuitable primary carers and also affects those within the gay community. Some of the participants in Heaphy *et al.*'s study, for example, felt that 'children would not fit in with their lifestyle, particularly with holidays and "hedonism"'.⁷¹⁰ For some of the participants in Dempsey's 2006 Australian study, this type of attitude, which they felt typifies the gay community is particularly problematic in terms of their aspirations to become parents:

Distinguishing between the values of men as parents, and the sexually voracious gay majority also featured in other interviews with gay male primary carers. Russell and Anthony Sorenson professed to have few other gay men in their close social networks. The values Russell, in particular, saw exemplified in the gay male

⁷⁰⁷ Berkowitz and Marsiglio (n 685) 374 - 375.

⁷⁰⁸ *Ibid.* 375.

⁷⁰⁹ Deborah Dempsey, 'Beyond Choice Family and Kinship in the Australian lesbian and gay "baby boom"' (La Trobe University 2006) 242.

⁷¹⁰ Heaphy *et al.* (n 680) 163.

communities, notably the freedom to have many sexual partners, were not those he aspired to. Far more keenly than in interviews with lesbian mothers, resident parenting by gay men entailed a greater sense of isolation—whether self-imposed or reluctant—from gay male sociality.⁷¹¹

At this point in time, it appears that gay male parenthood has not become part of the culture of gay male communities in the same way as it has in lesbian communities. Traditional stereotypes about how inconsistent parenting is with the gay male lifestyle abound and may have a detrimental effect of those gay men who do want to be parents or would wish to feel they had the choice. It seems likely that this environment, which is hostile to gay men having children, could have an impact on gay men's desires to have children.

It is also important to recognise that to ask whether as a gay man you would want to be involved in caring for and raising a child is a different question to the question of whether as a gay man you would want to have a child. The former question does not entail considering the complexities that gay men face in having a child of their own, whereas the latter does. Despite what might be classed as a hostile culture to gay male parenting, increasing numbers of gay men do want to become parents. As Berkowitz and Marsiglio note:

Despite standing outside the traditional family building path, gay men appear to develop a procreative consciousness somewhat similar to their heterosexual counterparts. But because gay men cannot biologically reproduce with one another, their procreative consciousness and father identities are constructed, negotiated, and expressed in unique ways.⁷¹²

For a number of gay men the feeling that they might be unable to become a parent brings with it a considerable sense of loss. In the present study, for Collin's

⁷¹¹ Dempsey 'Beyond Choice Family and Kinship in the Australian lesbian and gay 'baby boom' (n 709).

⁷¹² Berkowitz and Marsiglio (n 699) 379.

partner Joel, 'there had been a sense that that was something being gay would mean...you know was a bit of a loss'.⁷¹³ Therefore, in considering gay men's involvement in collaborative reproductive arrangements with lesbian women, it is important to bear in mind the constraints that these men face when thinking about parenting 'autonomously', in comparison to prospective lesbian parents.

Gay Men and Collaborative Reproduction

Having discussed the general context surrounding planned parenthood in relation to gay men in the previous section, this section will consider more specifically the nature of gay men's involvement in reproductive collaborations with lesbian women. The section will begin by discussing the motivations of gay men who enter into such arrangements and will go on to discuss the different types of families that are formed as a result. This will provide a good point of comparison with the initial sections of this chapter, which mainly focused on the experiences of lesbian parents.

There is some evidence to suggest that gay known sperm donors at the time of the Gay Liberation movement in the 1980s donated mainly for altruistic and political reasons. As gay men who experienced a sense of exclusion from heteronormative institutions, such as the patriarchal family, they felt a sense of solidarity with lesbian women in the struggle to resist the restrictions placed on them by society. As van Reyk explains in the Australian context, 'Becoming donors was not only about supporting the right of women to control their reproduction, but also a challenge to the construction of patriarchal relations

⁷¹³ UKPB12.

through the heterosexual nuclear family'.⁷¹⁴ This was very much at a time where women were asserting control over their bodies and reproduction and the involvement of gay men facilitated this in relation to lesbians who wanted to become parents. Since then gay men have been actively developing a 'procreative consciousness'⁷¹⁵ and are seeking to exercise their reproductive autonomy in a similar way as lesbians sought to do in the 1980s.

While feminist critiques of patriarchy may have been a dominant influence on gay men's decisions about facilitating lesbians to have children, a fathers' rights discourse has developed greater prominence recently.⁷¹⁶ Although the focus of the fathers' rights movement is on heterosexual fathers particularly following separation from the mother, it is suggested here that gay men may ultimately be influenced by the rhetoric as awareness of their own reproductive needs develops. This may even be reflected in the fact that today, more gay men are seeking involvement with the children they conceive with lesbians. Riggs has argued that this is an indication that gay men are drawing on fathers' rights discourse to support their own position in relation to children.⁷¹⁷ Developing this line of thinking, some lesbians may come to view gay men as aligning themselves with heterosexual men in terms of asserting their parenthood and challenging women-led families. By contrast, gay men and lesbians previously were perceived as being part of a 'reproductive coalition' because their interests in

⁷¹⁴ Paul van Reyk, 'Donor dads: The sperm givers' view' in L. Wakeling and M. Bradstock (eds) *Beyond blood: Writings on the lesbian and gay family*. (Black Wattle Press 1995) 82.

⁷¹⁵ Marsiglio and Hutchinson (n 683).

⁷¹⁶ See for example Richard Collier, 'Fathers' Rights, Gender and Welfare: Some Questions for Family Law' (2009) 31 *Journal of Social Welfare and Family Law* 357.

⁷¹⁷ Damien W Riggs, 'Lesbian mothers, gay sperm donors, and community: Ensuring the well-being of children and families' (2008) 17 *Health Sociology Review* 226–234; Damien W Riggs, 'Using Multinomial Logistic Regression Analysis to Develop a Model of Australian Gay and Heterosexual Sperm Donors' Motivations and Beliefs' (2008) 6 *International Journal of Emerging Technologies and Society* 106–123

terms of parenting aligned more closely with each other than they did with heterosexual parents.⁷¹⁸

Partly as a result of this uncertainty about how gay men might assert their relationship with the child further down the line, lesbians have, as discussed in a previous section, varying views about the involvement they envisage from the biological father. This in turn is prompting a greater variety of non-traditional parenting arrangements within the gay and lesbian communities as they grapple with the possible roles which can be played by known donors and surrogates within their child's life without threatening the relationship with their partner. Dempsey has recently drawn on a series of case studies based on her previous qualitative research conducted in Australia to illustrate the range of family configurations that exist and the challenges gay parents face. Dempsey identifies a 'continuum of kinship intentions' within which these families operate, ranging from a 'standard donor' arrangement to full 'co-parenting'.⁷¹⁹ It is helpful to explore and further consider this spectrum using examples from Dempsey's own study combined with data from the current study.

Standard donor arrangements attempt to approximate a situation similar to anonymous donation with the possibility of future identity release. As Dempsey explains 'this renders a social father invisible and allows the lesbian parents to ensure their family is established as a social entity'.⁷²⁰ This type of arrangement allows the biological father to be on hand for when (and if) the child becomes

⁷¹⁸ See Jenni Millbank, 'Reproductive Outsiders - the Perils and Disruptive Potential of Reproductive Coalitions' in Robert Leckey and Kim Brooks (eds), *Queer Theory: Law, Culture, Empire* (Routledge 2010)..

⁷¹⁹ Deborah Dempsey, "Conceiving and Neogtiating Reproductive Relationships: Lesbians and Gay Men Forming Families with Children" (2010) 44 *Sociology* 1145, 1151.

⁷²⁰ *Ibid* 1153.

curious or wants to develop some sort of relationship. This type of arrangement is essentially what existed between Angela, Ruth and Rob in the current study.⁷²¹ Although the focus of the present study was primarily on situations where parenting was shared between the biological mother and father (and potentially their partners), this family represents a case study of a known donor situation where a poly-parenting arrangement was expressly rejected.

One important feature here is that Rob is currently also raising a child in the context of a heterosexual relationship, which impacts on his view of the situation. As discussed in the previous chapter, Rob reports being happy with the known donor arrangement whereby he is on hand should the child wish to develop a relationship with him, but otherwise has little involvement in his life:

I'm so involved in my own family life and work that there isn't much time to really think about much else...I'm open to if he wants, you know, to get to know me and potentially I can be a, you know, a mentor for him or you know...I don't know if I'll be a parent. I think it'll be more of a role model or mentor for him, potentially.⁷²²

A recurring theme in Rob's responses is that he is focused on his own family life, although he does admit that 'if I didn't have [my stepson] in my life it would probably be a different situation for me'. Therefore, in Rob's mind, he already had a family and was not looking to raise any more children, which made him particularly suitable as a largely uninvolved known donor.

However, as discussed in the previous section, collaborative co-parenting is likely to be a way for gay men to realise their own parenting desires, which may well conflict with some female couples' desire to parent autonomously. Although such situations have arisen in the case law discussed in part two of the thesis, none of

⁷²¹ For Angela, Ruth and Rob's family portrait see page 270.

⁷²² CAPB9.

the families interviewed in the current study reported conflicting expectations. It is noteworthy, therefore, that the case study from recent research on the involvement of gay men in lesbian families conducted by Dempsey in Australia that most closely resembles the standard donor type of arrangement also happened to be one of the most challenging in terms of conflicting expectations between the donor and his partner, on the one hand, and the lesbian mothers, on the other.⁷²³

Dempsey describes a couple, Greg and Martin who are 43 and 42 respectively. Greg is the biological father of a one-month and a four-month old child, both of whom live with their biological mother and her female partner. A striking feature of this case study is the very young age of the children compared to a wider range of ages amongst the other families. This may well have an impact on the expectations of the parties as even in co-parenting arrangements the mother is sometimes reported as being primarily responsible for very young children.

Nevertheless, the arrangement as it then was, of Greg and Martin's contact about once a month with the children, was less than desired by the male couple and a source of ongoing disappointment for them. Indeed, Greg and Martin's experiences of this type of collaborative reproduction seem to be characterised by disappointment and insecurity about their relationship with the children. Their concerns seems to centre on not being given the freedom to develop the relationship with the children they would like, not being able to assume the caregiving responsibilities they desire and not being able to find their place in the women's 'nuclear family'.

⁷²³ See Deborah Dempsey, 'Gay Male Couples ' Paternal Involvement in Lesbian-Parented Families' (2012) 18 *Journal of Family Studies* 155, 160.

These concerns that are being raised by Greg and Martin contrast markedly with Rob's approach to a very similar sort of arrangement, as discussed above. This might in part be due to the young age of the children. It is possible that the arrangement will develop into a more mutually satisfactory one, as the children get older. Alternatively, it may be that the mismatch in expectations widens given that the way relationship develops is principally in the hands of the lesbian mothers. It is, however, worth noting that Dempsey's study did not include any 'standard donor' arrangements between gay men and lesbians where the adults' expectations were aligned as in the case of Angela, Ruth and Rob in the current study. It is, therefore, fortunate that the current study was able to capture a successful example of this type of parenting arrangement despite the hard-to-access nature of the sample.

Traditionally, since the Gay Liberation movement, gay men and lesbian women have been thought of as well-matched allies in the struggle to have families. A number of factors could have facilitated this. As noted, gay sperm donors were politically and altruistically motivated. Also, the templates of lesbian families and the frameworks in which they operate did not exist then as they do to a greater extent now. Therefore, historically, the fact that lesbian families were different from the nuclear family ideal may have been taken for granted. More recently, however, we can observe more of an assimilationist attitude among lesbian couples. Rather than tolerate or accept that lesbian families are going to be different, many now aspire to a heteronormative ideal of the lesbian family. This in turn has the potential effect of dividing the same-sex community in terms of their attitude to parenting.

As discussed in part two of this these there has been considerable criticism levelled at the way legal frameworks promote and encourage this heteronormative ideal of lesbian parenting by limiting the number of recognised parents to two to the detriment of those families who do not conform to that.⁷²⁴ That criticism has been a central focus of this thesis because of the way heteronormative assumptions present in the legal framework delegitimises co-parenting families. However, that is not to say that aspiring to a heteronormative ideal, or in other words desiring to create a homonuclear family, is not a legitimate aim. This is what lesbians create when they conceive with anonymous donor sperm. As Angela, Ruth and Rob, discussed above, illustrate, at least some successfully do so with known donors where the donor is acting purely altruistically in the process and remains content with this. Whether or not being a childless gay man lends itself to this type of wholly altruistic arrangement deserves more detailed consideration. However based on the available empirical studies and case law, the birth mother and biological donor father may have inherently conflicting needs in that situation.

Based on empirical studies from both the UK⁷²⁵ and Canada,⁷²⁶ it appears to be the case that the majority of lesbians raising children are doing so without the involvement of their biological father. That is to say that the same-sex 'nuclear' family is more widespread than multi-parenting families.⁷²⁷ However, by and

⁷²⁴ See discussion at page 96.

⁷²⁵ Leanne Smith, 'Is Three a Crowd: Lesbian Mothers' Perspectives on Parental Status in Law' (2006) 18 *Child and Family Law Quarterly* 231.

⁷²⁶ Kelly, *Transforming Law's Family the Legal Recognition of Planned Lesbian Motherhood* (n 649).

⁷²⁷ J Power, A Perlesz, R Brown, M Schofield, M Pitts, R McNair and A Bickerdike 'Diversity, tradition and family: Australian same-sex attracted parents and their families' (2010) 6(2) *Gay and Lesbian Issues and Psychology Review* 66–81; Riggs, 'Lesbian mothers, gay sperm donors, and community: Ensuring the well-being of children and families' (n 703).

large, where the biological donor father is involved in caring for the child to some extent this is not as a primary carer but a non-resident occasional carer.

Dempsey uses the term 'social solidarity agreements' to describe parenting situations where the biological father is acknowledged as the father and is given the opportunity to develop a non-resident but caring relationship with the child. These arrangements could potentially work for a number of reasons. The primary focus of this type arrangement, like the standard donor arrangement, would have to be facilitating the birth mother to have a family, rather than facilitating the birth mother and biological father to have a family. This latter goal could only really be achieved through a co-parenting arrangement. Although the focus of the arrangement would be on facilitating the creation of the women-led family, the father would have a certain stake on the periphery of that family, as, has often been suggested, an uncle-like figure.

From the biological mother's point of view, this arrangement might work well if she feels a need to incorporate a male role model into the child's life, if she feels the biogenetic relationship has some importance or even if she just wants to pave the way for a future relationship between the father and child. All of these are reasons lesbians have given for opting for a known donor, as discussed above.⁷²⁸

Therefore, from the women's point of view this arrangement could work quite well.

There could be a number of motivations on the part of the biological father. It may be that, for whatever reason, perhaps to do with his identity as a gay man, the biological father does not wish to have children. However, just because the man does not wish to have the responsibility of raising a child of his own, does not automatically mean that he does not wish any peripheral involvement in the lives

⁷²⁸ See page 305.

of children, perhaps as part of an extended family relationship. Some might wrongly equate this formulation with fathers who are unwilling to take responsibility for their child but may still assert their right to have a relationship with that child.

From a feminist perspective, gay men who enter these types of arrangement might be accused of wanting all the fun parts about being a parent without having to take any responsibility, which lays itself open to being seen as a typical male perspective. However, it is important to distinguish conception which occurs in the heterosexual context with planned gay and lesbian conception. In the heterosexual context, calls for fathers to take responsibility for their children and not cherry pick the relationship they have with them are much weightier because the biological father is as responsible for that child's birth as the biological mother. Therefore, the relationship of responsibility that exists between him and the child is no more optional than that which exists between the birth mother and the child.

This contrasts with the biological father's position in a social solidarity arrangement because, from an ethical point of view, the birth mother is more responsible for the child than the biological father, due to her insistence that any rights and responsibilities in relation to the child lie with her and not the father. In this situation it is disingenuous to suggest that the biological father is being irresponsible if he wishes to limit the amount of time and caregiving he devotes to the child. Nevertheless, it may still be the case that a biological father in that position may feel a sense of personal obligation towards the child and consequently wish to assume a greater share of the rights and responsibilities in relation to the child if this were required. Therefore, there is a fine line between biological fathers who want the joys of having a child without any of the

responsibilities and those who wish to honour the parenting arrangement with the female couple but at the same time also feel responsible for the child's wellbeing and development.

The closest of Dempsey's case studies to the social solidarity arrangement is Carl and Roman, who are 44 and 41 respectively.⁷²⁹ Carl is the biological father of a two-year old who lives with his biological mother and her partner. Carl and Roman care for Harry at their home on average every 2-3 weeks sometimes for two full days over the weekend. Therefore, Harry was having overnight stays with the couple, in addition to other social occasions where everyone was together, which is more frequently than Greg and Martin's case study. Although Dempsey does not expand on this, it would be interesting to know what the arrangements were when the children were younger. It may have been the case that when the children were very young that the situation resembled more a standard donor arrangement more akin to that which exists with Greg and Martin. To some extent this may depend on how this family is positioned in relation to the typology advanced in this thesis. If the family is enacting a more pre-planned form of parenting arrangement than it may be less likely for the parenting to evolve in the way it might in relation to an organically developing parenting arrangement. Further longitudinal research in relation to these families would be required to test this out.

Ironically, while Greg and Martin may well envy Carl and Roman's position, the latter couple feel 'exhausted and overwhelmed'⁷³⁰ by the level of contact and the demands they feel the female couple are placing on them. Interestingly a theme

⁷²⁹ Dempsey, 'Gay male couples ' paternal involvement in lesbian-parented families' (n 709) 159.

⁷³⁰ *Ibid* 160.

that occurs in relation to both families is that they feel the contact encouraged by the female couple is not what was originally agreed. For Greg and Martin the contact is less than agreed, whereas for Carl and Roman the contact and responsibility is more than the original agreement. A comparison of these two case studies raises a number of questions. As a starting point, it is worth considering whether the two couples are expressing different expectations or whether they may have similar expectations but, in different ways, neither of the arrangements is quite meeting those expectations.

It would be tempting to conclude that Greg and Martin would be happy with more involvement than Carl and Roman are comfortable with. This inference might be made from the fact that Greg and Martin have expressed concerns that the children do not know who they are and that they regret that they don't see the relationship developing into one of care taking. Despite this, they may feel equally uneasy, as Carl and Roman do, with a burdensome level of caretaking responsibility. It is impossible to know for sure without following up these case studies longitudinally. It may just be the case that Greg and Martin would want to be involved more than Carl and Roman do, although this seems unlikely given Carl's strong desire to become a father.

Dempsey comments that:

It was apparent that this discourse of paternal choice was in play for men like Carl, who seemed able to simultaneously position themselves as 'distant' and 'active' in their child's life when it suited them... [T]here was a sense in Carl's story that a 'father' relationship is about having all the joys and emotional rewards of involvement when these are wanted, but not the responsibility or obligation to care when it does not suit.⁷³¹

⁷³¹ *Ibid.* 162.

This raises the interesting question of whether 'having all the joys and emotional rewards of involvement when these are wanted, but not the responsibility or obligation to care when it does not suit' is what Carl envisaged when he felt the desire to become a father in his 20s. Indeed, a related question is whether or not the legal framework should facilitate the desire on the part of some gay men to seek the emotional rewards of involvement in a child's life, without also shouldering a share of the care taking responsibility, bearing in mind that this may also be the arrangement that suits the birth mother and her partner.

The Legal Regulation of Gay Male Parenting

Riggs has emphasised the necessity of drawing 'attention to gay men's location as men in a legal and social context that often privileges the needs of men over those of women and children'⁷³² when discussing their involvement in reproductive collaborations with lesbians. Riggs goes further than this asserting that in the current social and legal context 'men more broadly not only benefit from the fact that the law is centred upon a (hetero)patriarchal understanding of parenting and families, but also where men as fathers are increasingly having their calls for rights affirmed'.⁷³³

The idea of locating gay men as men would appear to be an important one, as will be discussed in more detail later. However, the suggestion that it is important to locate these men as operating within 'a legal and social context that often privileges the needs of men over those of women and children' could be seen as a provocative one. It is important to acknowledge the long-standing feminist

⁷³² Riggs, 'Lesbian mothers, gay sperm donors, and community: Ensuring the well-being of children and families' (n 703) 228

⁷³³ *Ibid* 229.

critiques of the patriarchal nature of norms surrounding the family.⁷³⁴ Despite the 'formal commitment to gender neutrality and equality' which characterizes modern legal framework, feminist writers have criticised the way formal gender equality has 'reinforced gendered norms by effacing still extant questions of gender difference... [and how it] fails to redress the material basis of dominance, side-stepping issues of social power'.⁷³⁵ However, I would suggest that a more nuanced understanding of the situation is required when discussing gay men's involvement in reproduction.

In response to the assertion that men benefit from law's '(hetero)patriarchal understanding of parenting and families',⁷³⁶ it is important to ask how accurate this is particularly in the context of gay men's reproductive collaborations. Saying that law is premised on a (hetero)patriarchal understanding of parenting and families suggests a system controlled by (heterosexual) men. However, there is a rapidly developing counter-narrative to men's exercise of power in relation to parenting, namely that of men as law's 'victims':

The idea of men as victims highlights the broader disadvantages seen to befall men in general, and certain groups of men in particular. It focuses on the costs and 'crises' of contemporary masculinity, including the displacement of men from the workplace, and, in particular, from the family.⁷³⁷

Collier and Sheldon highlight that 'There exists a common assumption in law and society that reproduction is a time of specifically female responsibility, one in which a woman's role as mother is natural, instinctive and inevitable, an "umbilical

⁷³⁴ See for example, Martha Albertson Fineman, *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies* (Routledge 1995).

⁷³⁵ Richard Collier and Sally Sheldon, *Fragmenting Fatherhood: A Socio-Legal Study* (Hart Publishing 2008) 14.

⁷³⁶ Damien W Riggs, *What About the Children! Masculinities, Sexualities and Hegemony* (Cambridge Scholars Publishing 2010) 31.

⁷³⁷ *Ibid.* 217.

attachment”'.⁷³⁸ Much of the feminist scholarship on this has focused on the expectations this creates for women and on men's attempts to exercise control over women's reproduction.⁷³⁹ Little attention has been paid to men's experiences of reproduction, which, 'in contrast, have tended to be seen in law as somewhat distant and vicarious, mediated by and through the agency of the woman, who stands as a 'gate-keeper' to their involvement.'⁷⁴⁰

Therefore, it is not self-evident that men inherently benefit from law's understanding of parenting and families. It seems more to be the case that men and women engage in reproduction and parenting in the context of a number of gendered expectations, which interact in quite complex ways. As Collier and Sheldon stress:

We have argued throughout against the idea that power can be usefully conceptualised in ('zero-sum' terms, whereby as men (or fathers) 'lose' power, women (or mothers) somehow 'gain' it, and vice versa. While a 'zero-sum' understanding might resonate with certain strands of both feminist and fathers' rights thinking, each curiously mirroring the other in terms of seeing legal reform as having 'winners' and 'losers', law's relation to social change is far more complex.⁷⁴¹

Although Collier and Sheldon were primarily concerned with heterosexual parenting a number of their insights are highly relevant to parenting by gay men.

While Riggs's starting point was to explicitly recognise the way the law's understanding of parenting may privilege men, another, important dimension that

⁷³⁸ *Ibid.* 8.

⁷³⁹ For more on this see Nelson, *Law, policy, and reproductive autonomy* (n 617); See also Emily Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Hart Publishing 2001) 174.

⁷⁴⁰ Collier and Sheldon, *Fragmenting Fatherhood: A Socio-Legal Study* (n 721) 8.

⁷⁴¹ *Ibid.* 228.

needs to be acknowledged is the way in which men are marginalized in terms of reproduction. As Marsiglio puts it:

Every day, all over the world, men think about having babies, imagine themselves as parents, struggle with infertility, donate gametes, hear of unintended pregnancies, receive news of fetal abnormalities, make decisions about abortions, and become parents. Although feminist scholarship has centered these experiences in women's lives, it has inadequately explored their meanings in men's lives. Granted, research on women and reproduction does acknowledge that men influence women's reproduction in a number of ways but "men need to be considered reproductive in their own right."⁷⁴²

When discussing gay men's involvement in parenting, it is, therefore, important to acknowledge men's interests tend to be seen as subordinate to those of women/mothers in terms of reproduction.

Much of the focus in the literature on same-sex parenting is on women's reproductive autonomy and the rights of lesbian parents to create autonomous families. This is understandable because lesbian parenting, and women's assertion of reproductive autonomy more generally, has been becoming more present in society for at least the past few decades. Reproduction is also seen as more of a women's issue and one where men's agency does not come to the fore.⁷⁴³ This has led to considerable discussion of the interests that lesbians have at stake in relation to same-sex parenting and much less discussion of gay men's interests.

The importance of biogenetic connection could be seen as a site of contestation between lesbians and gay men when engaging in reproductive collaboration.

⁷⁴² William Marsiglio, Maria Lohan, and Lorraine Culley, 'Framing Men's Experience in the Procreative Realm' (2013) 34 *Journal of Family Issues* 1011, 1013 citing Marcia Claire Inhorn, Tine Tjornhoj-Thomsen, Helene Goldberg and Mauska la Cour Mosegaard, *Reconceiving the Second Sex: Men, Masculinity and Reproduction* (Berghahn 2009) 3.

⁷⁴³ See for example T Morison, 'Hetrosexual Men and Parenthood Decision-Making in South Africa: Attending to the Invisible Norm' (2013) 34 *Journal of Family Issues* 1125.

Before discussing how biogenetic relatedness plays out in relation to lesbians and gay men, it is important to acknowledge the socio-legal context which surrounds this biogenetic discourse. As Collier and Sheldon comment:

While on its own a genetic link might not be either necessary or sufficient to claim the rights associated with fatherhood, it is now legally accepted as forming an important basis on which a father may claim the right to develop a relationship with his child...even where such recognition might be seen as posing a risk to the stability of a social family unit.⁷⁴⁴

This presents the real concern for women-led families that a renewed emphasis on the importance of 'the genetic link' might permit biological fathers to disrupt their nuclear family.

Kelly has identified what she refers to as 'the recent valorization of biological fatherhood'.⁷⁴⁵ This is based on the fact that, in her assessment, 'the "best interests of the child" test, which governs both custody and access law in Canada, has been so influenced by the fathers' rights agenda that there now appears to be a de facto presumption that father access is in a child's best interests'.⁷⁴⁶ Millbank's comparative research looking at lesbian parenting cases in a number of other jurisdictions, including various states and territories in Australia, USA, UK and New Zealand, supports the idea that biological fatherhood is often prioritized by the courts over recognition of the non-biological mother. As Millbank stresses:

A functional family model should protect the autonomy of the mothers in these circumstances, because it is they who are the functioning family unit. But while the co-mother has to meet a very high standard to prove herself a functional parent, the donor through a friendly or recreational contact relationship with the child,

⁷⁴⁴ Collier and Sheldon, *Fragmenting Fatherhood: A Socio-Legal Study* (n 721) 226

⁷⁴⁵ Kelly, *Transforming law's family the legal recognition of planned lesbian motherhood* (n 649) 43.

⁷⁴⁶ *Ibid.* 30.

or even the sincere wish to have such relationship which has not in fact occurred to date, is seen as a real and immutable father.⁷⁴⁷

This highlights a genuine concern that in a number of jurisdictions the position of the non-biological mother is not being adequately recognised. As Millbank acknowledges, this is evident not only in disputes involving a lesbian couple and a biological father, but also those between the birth mother and non-biological mother.

Although the priority given to genetics and biology plays a role in this it seems to do so in favour of a particular family form. As Donovan highlights:

Genetic relationships are the least important when the structural and ideological features are not contentious. In other words, when the resulting family 'looks right' ... the genetic links are not an issue and can be ignored. It is only when the structural or ideological features of the resulting family raise concern - for example in the case of lesbian parents - that the genetic relationships become important and questions are raised about the child's need for a (genetic) father.⁷⁴⁸

These systemic biases in the legal system relate to the interrelation between the prioritization of biological/genetic connection as well as the privileging of a heteronormative conception of the family.

It is important to acknowledge that an unquestioning prioritization of biogenetic connection over other forms of relatedness and the privileging of the heteronormative family is neither in the best interests of lesbians who wish to become parents nor in the interests of gay men who want to be parents. While this bias may operate in a gendered manner it is a matter of concern for both lesbians and gay men who wish to become parents. As a result, both groups have

⁷⁴⁷ Jenni Millbank, 'The limits of functional family : lesbian mother litigation in the era of the eternal biological family' [2008] *International Journal of Law , Policy and the Family* 149, 160.

⁷⁴⁸ C. Donovan, 'Genetics, Fathers and Families: Exploring the Implications of Changing the Law in Favour of Identifying Sperm Donors' (2006) 15 *Social & Legal Studies* 494, 494.

an investment in combating such systemic bias within the legal system both at the legislative and case law level.

Despite this, it is necessary to recognise the distinction between individual gay men expressing a desire to be involved with children who have been conceived in a collaborative reproductive arrangement with lesbians, even if this is largely based on the biogenetic connection, and a systematic preference in favour of recognising biological fathers in the promotion of a heteronormative family ideal.

As Collier and Sheldon highlight:

we have argued in this context against seeing the evolving law as a 'zero sum game' where recognising genetic links necessarily detracts from valuing other kinds of connections. Rather, we have argued that a greater emphasis on genetics has been accepted, at least in part, because of a growing belief that knowledge of and contact with a genetic father is unlikely to disrupt unduly a child's social family.⁷⁴⁹

Furthermore, as the current study and the various other empirical studies discussed show, there are a number of women-led families, which actively seek to include the biological father for various reasons discussed in an earlier section.⁷⁵⁰ As Kelly acknowledges, 'the challenge for lesbian mothers is to secure legal recognition in a manner that does not exclude those lesbian families that parent outside traditional norms'.⁷⁵¹ I would also add to this that it is important not to undervalue the contribution gay men may make to the lives of these families. This is a complex issue given the desire to accommodate families that parent outside the norm and the interests of gay men, while resisting heteronormative

⁷⁴⁹ Collier and Sheldon, *Fragmenting Fatherhood: A Socio-Legal Study* (n 721) 99.

⁷⁵⁰ See page 305.

⁷⁵¹ Kelly, *Transforming law's family the legal recognition of planned lesbian motherhood* (n 649)

influences based on essentialised notions of biology that pervade the legal system and a fine balance, therefore, needs to be struck.

Riggs argues that gay men are considerably influenced by the fathers' rights discourse in the way they think about their role in reproductive collaborations with lesbians. He comments that 'gay men are not outside of discourses of fathers' rights, and may thus be influenced by the demand for men's rights'.⁷⁵² An example that Riggs draws on is a data from one of his participants, Chris, who has previously been a donor and was considering doing so again but had a bad experience at a community parenting event where a number of lesbians were sharing negative experiences with donors. Chris comments that:

I think women are wonderful people and to have children is wonderful and that is fine. But a man is also part of the conception and it can be a truly shared thing. Perhaps in the past men have been awful to women, I am not one of them.⁷⁵³

Riggs characterizes this as a conflict between the rights of lesbians to 'seek donors who will only be involved on the basis of the child's directions and Chris's rights as a man. While this could be a valid interpretation of what Chris is saying, it is also possible to examine it from the perspective of gay men's evolving procreative consciousness which might imply an alternative interpretation.

By saying that 'a man is also part of the conception,' Chris is not necessarily making a rights-based claim on the basis of essentialised notions of biology, which fathers' rights discourse is criticised for doing. Chris may just be recognising the fact that when a lesbian, for whatever reason, chooses to involve a known man in having a child, he is necessarily part of that conception in a way

⁷⁵² Riggs, 'Lesbian mothers, gay sperm donors, and community: Ensuring the well-being of children and families' (n 703) 228.

⁷⁵³ *Ibid.* 230.

that an unknown donor is not. In some ways, what Chris has said indicates a desire for his contribution to be valued and not simply taken for granted. This seems to be a major part in how satisfied other participants in the same study were with their arrangements. Rick comments:

I know to them I am not a means to an end. Of course those thoughts come up: you think 'do they only see me that way?' But then when they want you to be involved in their child's life you realise no, I am not just a sperm donor or sperm maker, I am something more.⁷⁵⁴

This is lauded by the Riggs as reflecting 'something other than a possessive investment in paternity or access'.⁷⁵⁵ Therefore, it seems likely that at least some of the concerns gay men might express in relation to collaborative reproduction with lesbians, which may have some resonance with fathers' rights discourse, are likely to stem from a concern for their contribution to be appropriately valued rather than asserting some patriarchal notion of rights.

As Dempsey cautions, 'it is important not to completely conflate an interest in genetic relatedness with a desire for power and control over parenting relationships, as some previous research on this topic insinuates'.⁷⁵⁶ This is reinforced by Wallbank and Dietz's argument that:

[t]he notion of third-party threat apparently draws upon an idea of dominant paternal authority historically associated with heterosexual fatherhood. It is at least doubtful whether this notion of paternal authority is appropriate for gay fathers...the gay father's position is rather more ambiguous.⁷⁵⁷

⁷⁵⁴ *Ibid.* 232.

⁷⁵⁵ *Ibid.* 233.

⁷⁵⁶ Deborah Dempsey, 'More like a donor or more like a father? Gay men's concepts of relatedness to children' (2012) 15 *Sexualities* 156, 170.

⁷⁵⁷ Chris Dietz and Julie A Wallbank, "'Square Peg, Round Hole?': The Legal Regulation of Plus Two Parent Families' in Nicola Barker and Daniel Monk (eds), *From Civil Partnerships to Same-Sex Marriage: Interdisciplinary Reflections* (Routledge 2015) 180.

Therefore, the fact that gay men are not immediately associated with this idea of paternal authority has meant that they are viewed as a safer option for creating women-led families because they are less likely to attempt to assert paternal rights.⁷⁵⁸

Furthermore, in past decades, gay men seem to have been strongly motivated by political and personal desires to help lesbians become pregnant.⁷⁵⁹ This may have partially stemmed from the perception that parenting was a feasible reality for lesbians in a way that it just wasn't for gay men. Therefore, it is understandable that gay men might want to help lesbians as an act of solidarity even though they could not have children themselves. According to Robinson, the feeling that it is feasible to have children as a gay man may be restricted to relatively few, advantaged individuals in the west:

While alternative parenting practices might be common knowledge in some districts of Manhattan, some parts of north London, as well as in some pockets of some suburbs in Auckland, Los Angeles, Manchester or Melbourne, it is likely that only small cliques of privileged gay men share a similar awareness of fatherhood choices and possibilities in the major cities of the developing world – in Hong Kong or Mumbai, for example. The strong impression I have from analysing these data in light of other published research is that alternative fatherhood is a practice only available to certain groups of gay men in some parts of the First World.⁷⁶⁰

Robinson does, however, acknowledge a considerable shift in terms of gay parenthood which is likely to increase in the future:

It is reasonable to assume, however, that the incidence of non-heterosexual fatherhood will increase, representing as it does everyday experiments on which young gay and lesbian people are

⁷⁵⁸ *Ibid.*

⁷⁵⁹ Van Reyk (n 714).

⁷⁶⁰ Peter Robinson, *Gay Men's Relationships Across the Life Course* (Palgrave Macmillan 2013) 88.

increasingly prepared to embark in advanced, western democracies like Australia, Britain, and the USA.⁷⁶¹

Therefore, it is important to acknowledge the changing social landscape where gay men increasingly feel the desire and are able to have children of their own, which wasn't the case in the earlier days of lesbian parenting.

Given this shift in gay men's 'procreative consciousness',⁷⁶² it cannot be taken for granted that gay men are mainly motivated to engage in collaborative co-parenting arrangements for altruistic reasons. Riggs notes that:

As more gay men 'discover' a desire to become parents, and as the law seeks not necessarily to recognise gay men's rights, but certainly to recognise fathers' rights, it is likely to be the case that gay men are not automatically the 'safe option' they may once have been for lesbians wishing to become pregnant.⁷⁶³

To some extent, this has been borne out by the empirical studies discussed in this chapter and the current study, where Angela, Ruth and their heterosexual known donor Rob were the primary example of a stable known donor arrangement. Therefore it is important for the law, as well as those engaging in collaborative co-parenting, to recognise that these parenting arrangements be viewed by the gay men involved as a means of realising their own parenting desires rather than facilitating the creation of women-led families.

Struggle for Coherence

A number of commentators have argued that the autonomy of women-led families is being threatened by giving weight to the biology-based claims of the biological

⁷⁶¹ *Ibid.* 99.

⁷⁶² Marsiglio and Hutchinson, *Sex, Men and Babies* (n 683).

⁷⁶³ Riggs, 'Lesbian mothers, gay sperm donors, and community: Ensuring the well-being of children and families' (n 703) 229.

father.⁷⁶⁴ This position is understandable because of the way heteronormativity and biology are often privileged in judicial and broader social discourses. Many argue in favour of actively displacing the hold these pervasive concepts have on the legal imagination. However, in doing this, it is important not to lose sight of legitimate claims that might exist on the basis of biology, for example.

In some respects, it is the limitation to two parents that exacerbates some of these problems. In an unknown donor situation, there is a legally and socially sanctioned separation of the donated sperm and the person donating. Legal firewalls are erected, based on that man's written consent, which prevent him from accessing data about, let alone bringing claims in relation to, any children that may have been born. Such an approach seems intuitively less appropriate in a situation where the biological father is necessarily aware of the children that are born.

In addition to this, there is even greater reluctance to sever parental ties between a birth mother and child unless the mother agrees following birth. This is largely predicated on the idea that the act of giving birth can affect the birth mother in an unanticipated way as a result of the bond that develops between the birth mother and child during pregnancy. On this analysis, there may be a compelling case for not enforcing a surrogacy agreement to the extent that it would extinguish the birth mother's parental connection with the child. It does not, however, follow from this that the 'intended parents' should be deemed never to have had any parental connection with the child. A serious attempt to engage with the interests of the

⁷⁶⁴ See for example Fiona Kelly, 'Autonomous from the start : single mothers by choice in the Canadian legal system' (2012) 24 (3) *Child and Family Law Quarterly* 257–283; Angela Cameron, "A chip off the old (ice) block?: Women-led families, sperm donors and family law" (n 616).

birth mother and the intended parents would, therefore, necessarily recognise that each have valid parenthood claims that deserve respect and legal recognition.⁷⁶⁵

It is argued here that a similar line of reasoning applies in collaborative co-parenting situation involving a female couple and biological father. Admittedly, the donation of gametes by the biological father is a lot less physically involved than the process of giving birth which the birth mother experiences. However, it need not necessarily be the case that the emotional impact resulting from this is necessarily dramatically different for all men and women. It seems uncontroversial to suggest that carrying and giving birth to a child might have a profound emotional effect on the woman giving birth. However, what seems to be largely ignored in law and policy nowadays is that being the biological father of a child whose existence he is aware of might also have a profound effect on the biological father. Making this point is in no way an attempt to diminish the significant physical and emotional investment a woman makes in terms of childbirth and post-natal caregiving, nor is it an attempt to accord primacy to biological connection. The purpose of making this argument is to illustrate the point that there are a number of interests engaged in the conception, birth and raising of a child, which need to be appropriately recognised and respected.

The 'best interests of the child' test governs court decisions relating to contact and parental responsibility. This test in itself is not unproblematic, as has been discussed in part two.⁷⁶⁶ However, who is considered to be a legal parent is not normally subject to a best interests analysis. Therefore, it is important to separate out the concept of legal parenthood from any rights or decision-making powers in

⁷⁶⁵ On this point, see the case of *H v S* [2015] EWFC 36.

⁷⁶⁶ See page 150.

relation to the child. From a pragmatic perspective, it may seem that the only important issue is who has decision-making powers and contact rights in respect of the child. However, who is considered the child's parent can also be significant in terms of recognising and respecting the various interests of the parties involved.

A further consideration is the potential for prevailing social and legal norms, influenced by their historical development, to polarise the discussion over the respective weight given to intention and biology. Historically, the (presumed) biological father of a child made decisions in relation to that child not the mother. Upon divorce, the mother was in a very weak position often having very limited contact with the children.⁷⁶⁷ This could be seen as prioritising abstract biological connection with the father over day-to-day caregiving and psychological attachment with the mother. As a reaction to this, courts began to recognise the claims of mothers and the perception grew that the interests of (particularly unmarried) fathers were being overlooked.⁷⁶⁸

This historical perspective continues to bear on present day disputes between female couples and 'known donors'. It is important to recognise that mothers who had children in the context of a heterosexual relationship and subsequently came out as lesbian faced additional obstacles. Traditionally courts viewed it as being in the best interests of children not to award custody to lesbian mothers. Therefore, from a female couple's perspective a 'known donor' dispute occurs against a legal backdrop whereby heteronormative bias in the courts has traditionally meant that the claims of female couples have been ignored in favour of the biological father. This is compounded by the fact that biological fathers

⁷⁶⁷ Joan B Kelly, 'The Determination of Child Custody' (1994) 4 Children and Divorce 121.

⁷⁶⁸ For more on this see Collier (n 702).

have recently been asserting their legal claims over children through the fathers' rights movement. These factors combined with the ambivalent social acceptance of women-led/lesbian families means that it is understandable for female couples to feel vulnerable in terms of the legal relationships they have with their children and their legal/social acceptance as a family.

The vulnerabilities of women-led families have been ably discussed in feminist legal scholarship.⁷⁶⁹ In contrast to the growing discussion of the vulnerability of women-led families, there is relatively little scholarship on the vulnerability of men in terms of having children outside the context of a heterosexual relationship.⁷⁷⁰ Therefore, while the female couple in a known donor arrangement experiences a sense of vulnerability, so too does the biological father. Just as it might be psychologically unsettling and upsetting for a birth mother to be denied access to her child, this is also a concern for the biological father and potentially his partner. One of the functions of family law is to protect vulnerable parties and in a known donor situation each of the parties, not least of which the child, is vulnerable to some extent. As a result, courts and policy makers need to give careful consideration to resolving the various tensions in a way that is as fair as possible to those involved.

Conclusion

This chapter has considered collaborative co-parenting from the perspective of both the lesbians and gay men who may be involved in such parenting

⁷⁶⁹ Boyd, 'Susan B Boyd, 'Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility' (2007) 25 Windsor Yearbook of Access to Justice 63–94; Kelly, 'Autonomous from the Start : Single Mothers by Choice in the Canadian Legal System' (750).

⁷⁷⁰ Mallon; Abbie E Goldberg, Jordan B Downing and April M Moyer, 'Why Parenthood, and Why Now? Gay Men's Motivations for Pursuing Parenthood' (2012) 61 Family Relations 157.

arrangements. It has attempted to highlight that the legitimate interests of both the birth mother/female couple and biological father/male couple are engaged in these parenting collaborations. The chapter has considered the importance of the general context surrounding assisted reproduction and women's ability to conceive children largely autonomously from men through a fertility clinic as well as the potential threat that involved donors may present to autonomous women-led parenting. However, this chapter has also asserted that the motivations, desires and experiences of gay men in terms of parenting need to be considered in more depth alongside the already detailed consideration of these elements in relation to lesbians.

This chapter recognises that it is understandable that prospective lesbian parents might feel uncomfortable about the suggestion of greater involvement from the gay men with whom they have reproduced collaboratively given the law's dyadic approach to parenting. At the same time, however, it is important to acknowledge that the involvement of gay men, predicated on their biogenetic connection, with children is not the same as attempting to assert patriarchal rights over women-led families and control women's reproductive autonomy. Therefore, the legal framework should strive to accommodate the fact that gay men's agency and experiences of reproduction can often be marginalised, leading them to feel excluded from having and raising children, while also protecting women-led families from unwarranted intrusions.

Chapter Eight: Conclusion -

Collaborative Co-Parenting as a Call to Reform Law's Families

This thesis has sought to discuss the legal recognition in E&W of gay and lesbian collaborative co-parenting families, taking into account developments in various Canadian jurisdictions. The overall aim was to explore, within this comparative context, how well the law regulating parenthood and parenting following assisted reproduction in E&W balances the interests of those involved in these co-parenting arrangements, as well as to consider whether there were any wider implications for family law. It has done this by looking theoretically, empirically and doctrinally at the issues across the selected jurisdictions, focusing on its three stated research questions.⁷⁷¹

Dealing with the first two of these, which are closely related, about how the law does and should respond to collaborative co-parenting, the combined comparative analysis of the legislation, case law and interview data has identified both a lacuna and tunnel vision approach in the law of England and Wales in its lack of recognition of the phenomenon of collaborative co-parenting born out of its unchallenged and accepted dyadic focus. The study has revealed criticisms by both practitioners and particularly male-led families around the limitations of the heteronormative assumptions which underpin this and which have been

⁷⁷¹ See page 25.

critiqued here and in the wider scholarly literature. Indeed one of the key issues to emerge from the analysis of the legislative framework in E&W was how problematic it can be when legislation promotes an ideal(ised) version of the family.

In this way, family law in E&W for all its recent reform can be seen as still promoting an archetypal concept of the family. Nigel Simmonds explains that:

The essential hallmark of an archetypal concept is the fact that instantiations of the concept count as such by resemblance or approximation to the archetype, such resemblance or approximation being a property that can be exhibited to varying degrees.⁷⁷²

While Simmonds is discussing this idea in relation to the rule of law as a whole, we have seen here that this is an equally valid interpretation of the way that family law constructs a heteronormative model of the family based on dyadic conjugality, against which different family forms are measured when it comes to deciding whether or not to afford legal recognition.

Yet in considering how to address this, having looked empirically at the needs of collaborative parents in this study and drawing on others, this thesis has identified that collaborative co-parents are not a homogenous group, but fall within a typology with differential approaches to collaborative co-parenting. Unsurprisingly, therefore, they have different needs and perspectives around the complex legal issues, which surround such families. I would suggest that the most important finding of this study, even though potentially controversial, is that the interests of women-led and male-led families are different and that the power dynamic in these arrangements is often very significant. While the women

⁷⁷² NE Simmonds, *Law as a Moral Idea* (Oxford University Press 2007) 54.

involved in these arrangements may seek to legally protect the homonuclear family form, the interests of the gay men involved may be better served through recognising a multiple parent family. Consequently, different vested interests call for legislative intervention which recognises the emergence of collaborative co-parenting arrangements as a legitimate choice which requires the law to respond beyond the assumptions which surround the discourses on women-led families and (stigmatised) surrogacy arrangements for gay men.

From the doctrinal analysis of the case law conducted in this study it is clear that the courts' attempt to mirror Parliament's equality discourse has resulted in considerable protection for the women-led homonuclear family, at the expense of the range of interests involved in collaborative co-parenting, not least of which is those of the gay men involved in these arrangements. Although the homonuclear family deviates from the heterosexual parenting ideal in that it does not include gendered parenthood in the same way, the homonuclear family also conforms to the heteronormative model in that it is still based on the intimate couple relationship. Therefore, while the law in E&W is not, either legislatively or judicially, privileging heterosexual parenting *per se*, the legal framework is still recognising family forms that closely approximate the archetype of dyadic heterosexual parenting.

Given this finding that the interests of lesbians and gay men in collaborative co-parenting arrangements are different and potentially in competition with one another, one inference from this study is that lesbians who wish to create homonuclear families may not support the recognition of collaborative co-parenting families, but may prefer the homonuclear family. This is supported by Smith's research, which demonstrates the strong desire on the part of lesbian

parents 'to see unequivocal endorsement of their parenting arrangements, most notably via recognition of co-parents as parents'.

This thesis has, however, advanced the argument that in collaborative co-parenting situations insufficient attention is paid to the more precarious nature of gay men's ability to start a family as compared to lesbians. As a result of the gendered nature of reproduction it is more problematic for gay men to create autonomous male-led families than it is for lesbians to create autonomous women-led families. As a number of the gay men interviewed in this study stressed, collaborative co-parenting may appear the only viable means of having a family, if surrogacy and adoption are thought to be too complicated and costly. By contrast, lesbians have the less complicated avenue of unknown donor insemination open to them as an alternative to co-parenting. This leads to the situation where, in this procreative realm, the women are in a more powerful position than the men. While this power dynamic ought not to determine the outcome of any co-parenting dispute, it should be borne in mind as a potentially salient factor and the background social context against which these parenting arrangements are created.

A number of the studies discussed in this thesis have commented on perceived threats to the women-led homonuclear family. However, few have identified the vulnerability of the biological father (and his male partner if he is not single) in relation to these arrangements, which came across strongly in this study. Kelly's study in Canada highlighted that any model of law reform could not 'simply map the existing legal framework onto lesbian families' because this is 'unlikely to capture the diversity of needs and the complexity of the family relationships that

exist'.⁷⁷³ This study has added to that understanding by demonstrating that the source of this complexity is not only lesbian families but also gay men's desire to become parents. Similarly Dempsey's study stressed the interaction between the influence of biological discourses and female reproductive autonomy and choice in deciding whether to involve a known biological father. Therefore, combining these previous studies, which focused on lesbian parenting, with the current study, which included gay men, has provided a more holistic picture of collaborative co-parenting. The law needs to respond to this.

What is more, the female participants in this and other studies felt able to clearly articulate and protect their own needs in these parenting collaborations. However, the gay men were much more focused on the friendship that existed between the adults and the desire to create a family. As a result, the gay men interviewed in this study were more likely to discuss their needs as a family rather than identify their own needs within the co-parenting arrangement as distinct from those of the female parents. Therefore, it is important that the interests of gay men in these parenting situations are not being side-lined in an effort to guard against the perceived vulnerability of the female homonuclear family.

Furthermore, the analysis of the empirical data from the legal professionals and parents/prospective parents in this study, along with previous empirical studies, suggest that there may be more that unites these different types of gay and lesbian families than divides them. Many of the gay men and lesbians interviewed in this and other studies are very much committed to a diversity model of parenting that recognises all sorts of different families that individuals create. This idea was also echoed by the legal professionals that were interviewed. Therefore,

⁷⁷³ Fiona J Kelly, *Transforming Law's Family the Legal Recognition of Planned Lesbian Motherhood* (UBC Press 2011) 160 - 161.

there was a clear sense among parents/prospective parents and legal professionals that the current system of legal recognition was not adequately meeting the needs of the range of gay and lesbian families but there was also a sense of caution about how this could be achieved without compromising the progress that has already been made.

The empirical insights gained from this study add valuable knowledge to the limited amount of research that currently exists on this topic. Other researchers in this area have acknowledged the difficulties they faced in terms of sample recruitment and sample size and this study is no exception.⁷⁷⁴ The aim of this study was not to recruit a large statistically representative sample but rather to canvas the experiences of a number of different case studies as heuristic devices for reflecting upon the legal framework. With more time and resources, it would have been ideal to recruit a greater number of each family configuration in order to explore potential differences within, as well as across, family types. Nevertheless, a robust sample was achieved within the context of a case study approach, which represented each of the different family types that were of interest. The rigour of the data that emerged was further bolstered by triangulating this with data from a sample of legal professionals, which have been involved with a wide range of families, in order to provide invaluable insights into the experiences of collaborative co-parenting families.

So, given the above discussion, how should the legal framework respond to mediate the differential needs, interests and power of those involved in collaborative co-parenting? The comparative doctrinal analysis revealed a number of different legislative and judicial approaches to the legal regulation of

⁷⁷⁴ For more on the difficulties encountered and the strategies for dealing with this see p. 74.

collaborative co-parenting, which endorsed the critique of shortcomings in E&W in meeting the needs of the collaborative co-parenting community. A prominent feature in the case law of a number of Canadian jurisdictions (such as Ontario and Quebec) was the important role that pre-conception intentions can play in guiding who is to be recognised as a legal parent. This thesis has also considered the legislative approach in BC, which is predicated on the legal enforceability of pre-conception intentions and which challenges the limitation of the number of parents to two.

Importantly, the legislative approach in BC chimed with the responses of participants in both Canada and E&W to vignettes about hypothetical families. Both groups of participants indicated that the adults in this situation should honour their intentions. Unsurprisingly, Canadian legal professionals interviewed in this study were more strongly in favour of pre-conception intentions being determinative of legal parenthood than the legal professionals in E&W were. However, all the legal professionals interviewed agreed that written agreements were an important means of evidencing pre-conception intentions, regardless of whether or not they are enforceable.

However, while BC's legal framework is progressive in terms of its recognition of pre-conception agreements it is problematic in terms of its limitation to three legal parents and also the lack of discretion available to courts in deciding issues of legal parenthood. As regards the first of these, there need not be an arbitrary limit on the number of legal parents that could be recognised under this framework. In the majority of cases there would not be more than four parents because these arrangements tend to involve single individuals, a couple and a single person or two couples collaborating. However, there may be circumstances where

recognising more than four parents would be appropriate and this possibility should not necessarily be excluded. It would, however, be important to ensure that there was a genuine intention to be involved in the child's life as a legal parent and not merely an adult figure without any sort of parental involvement.

Furthermore, the typology of families that has been advanced in Chapter Six, based on participant responses, suggests a degree of variance and ambivalence about the use of written agreements, and consequently the role of pre-conception intentions, in the lives of their own families. Therefore, rigidly enforceable pre-conception agreements, along the lines of the BC approach, is not necessarily the outcome that all of these families are seeking to achieve. Consequently, from this thesis I recommend a more nuanced approach that lies somewhere between the pre-determined legislative outcome approach in BC and the highly discretionary approach in E&W.

A key distinction identified in this typology is between organically formed and pre-planned families. Although, in relation to both families extensive pre-conception discussions took place, written agreements featured more prominently in the pre-planned families. Previous studies have suggested a continuum of relatedness in collaborative co-parenting arrangements depending on the type of agreement the parents have.⁷⁷⁵ However, the present study adds to our understanding of these families by noting that organically formed families, where collaborative co-parenting was never a goal in itself but grew out of the relationship that existed between the adults, may resist the idea of having a written agreement. These co-

⁷⁷⁵ Dempsey, 'Conceiving and Neogitating Reproductive Relationships: Lesbians and Gay Men Forming Families with Children (2010) 44 Sociology 1145.

parents had an optimistic outlook and were confident that any difficulties that arose could be resolved within the context of the relationship.

In addition to the different approaches of different collaborative co-parenting families, this study has also revealed that gay men and lesbians might approach pre-conception agreements differently. It was often the case with participants in this study that the men involved in these arrangements would downplay the significance of the written agreements, whereas the women found them very important. This was reflected in the content of a number of the agreements themselves, which tended to protect the position of the female parents more so than the male. Even in poly-parenting situations where the agreement stated that the intention was that all the adults would be parents, the agreement nevertheless often stipulated that the male co-parent would not attempt to assert his rights at the expense of the female co-parents. Therefore, the threat that poly-parenting may present to women-led families, which has been referred to in other studies,⁷⁷⁶ was at play for the participants in this study when it came to negotiating written agreements.

One potential explanation for this that has emerged from this study is the power dynamics that exist in collaborative co-parenting arrangements and the relative vulnerability of gay male parents. It became clear in a number of agreements that the biological fathers were in a manifestly weaker position than the female couple in terms of the rights the agreement purported to confer on them. This was the case not only in more 'known donor' type arrangements but also where the intention was to fully poly-parent. As previous studies have noted, a big part of why the female couples were so keen to assert their rights in relation to the

⁷⁷⁶ See Kelly, *Transforming law's family the legal recognition of planned lesbian motherhood* (n 759).

biological father is the seeming power that biological fathers are perceived to have in legal discourse to threaten their family security. However, while it is important to recognise the concerns that single lesbians and female couples have in that regard, this study suggests that the law should ensure that the interests of the gay men in this situation are being protected, and distinctions drawn from the situation of more reproductively powerful heterosexual men.

The position of male couples in relation to reproductive collaborations with a birth mother came to the fore during the recently decided case of *H v S*, discussed in more detail in Chapter Five, which concerned a collaborative co-parenting arrangement between a male couple and the birth mother.⁷⁷⁷ The fact that the judge in that case was willing to order that the residence of a young child be transferred from the birth mother to the male couple, which is very uncommon, suggests that the courts in E&W are open to affording appropriate recognition to the reproductive relationships that gay men form with children in the context of collaborative co-parenting arrangements. The judge made it clear that she was not enforcing the pre-conception agreement *per se* but that nevertheless this was a factor in determining which living arrangement was in the best interests of the child.

Therefore, this timely case has highlighted the need, which was identified in this study, for a more responsive legal framework surrounding parenthood in E&W, which foregrounds the role of pre-conception intentions rather than promotes a particular version of the family. In doing this, the law would be recognising the negotiated nature of parenting relationships within collaborative co-parenting families rather than promoting the taken-for-granted assumptions that currently

⁷⁷⁷ See page 227.

underpin parenthood law in E&W. It is necessary to acknowledge the potential for the interests of the adults involved to be in conflict with the welfare of the child. However, a more nuanced approach to the interpretation of the best interests of the child would allow these interests to be balanced rather than automatically privileging a particular family form under the guise of the best interests of the child.⁷⁷⁸ Furthermore, it is important to recognise that these pre-conception agreements would not be enforced in a contract law sense but would form (perhaps quite an influential) part of the overall welfare assessment.

Given the range of collaborative co-parenting families identified in this study and the highly negotiated nature of parenthood relationships, it is suggested that some sort of 'parenting solidarity agreement' could be a happy medium solution between BC's legislative approach based on the enforceability of pre-conception agreements and the more discretionary approach in E&W relying on parental responsibility rather than legal parenthood. Currently in E&W, there is no recognition that legal parenthood may have a negotiated element to it, which contrasts with the approach in relation to parental responsibility.

Therefore, parenting solidarity agreements might be conceived along the lines of parental responsibility agreements, which are currently legislatively provided for but which the courts have the discretion to deviate from. This has the advantage of being a familiar type of agreement in family law, stemming from post-separation parenting, and would not necessarily imply any sort of commodification of children as a purely contractual arrangement might. In this way, it would be desirable for the legislative framework in E&W to facilitate the creation of private agreements around parenthood, which would result in the

⁷⁷⁸ For more on the need to balance the interests of those involved see John Eekelaar, 'Beyond the Welfare Principle' (2002) 14(3) Child and Family Law Quarterly 237 – 249.

conferral of legal parenthood, while also maintaining the courts' discretion to modify these legal relationships by way of court order.

Such an approach, where legal agreements are facilitated through the legislative framework, might encourage their use. Although some families in this study did not have a written agreement, they invariably spent a considerable amount of time discussing how the parenting arrangement was going to work and trying to pre-empt any issues that might arise. Detailed discussions prior to engaging in co-parenting was something that the legal professionals in both Canada and the UK advocated but this did not, in parents' eyes, remove the need for a written agreement.

The potential consequences of not having a written agreement emerged from the doctrinal analysis of the case law in E&W, where the disputes were highly acrimonious and did not, in any of the cases, involve a written agreement. The effect of this was that given the differing accounts of the parties and in the absence of any written evidence to the contrary, the judge had to determine the type of intended parenting arrangement from how the child was parented following birth, which may or may not be an accurate interpretation. By properly valuing intentions in the context of collaborative co-parenting the law would be facilitating gay and lesbian parents' procreative autonomy and consequently recognising the diversity of families that exist.

Wider Implications of Legally Recognising Collaborative Co-Parenting

This section now turns to the study's final research question: What are the potential implications, if any, for the wider legal regulation of gay and lesbian

parenting and family life of expanding a legal response to gay and lesbian collaborative co-parenting beyond the heteronormative model? To address this question, I drew on the theoretical constructs of gay men's procreative consciousness and the diversity model of parenting as a lens through which to discuss participants' parenting journeys and the factors they found important in terms of engaging in collaborative co-parenting. This was then used as a basis for considering the impact that legally recognising collaborative co-parenting might have on the autonomy of homonuclear same-sex families, and families more generally.

The discussion of the first two research questions provides a strong indication that, unlike BC, the law of E&W has a narrow approach to legal parenthood based on dyadic conjugality. This stands in contrast to the views of legal professionals and parents/prospective parents interviewed in this study who seem united in their view that the diversity of families that individuals create should be legally recognised even if this deviates from the heteronormative ideal. This is particularly important in the context of gay and lesbian parenting because collaborative co-parenting is seen as the main viable route to parenthood for many gay men and lesbians.

Furthermore, this insight has broader implications for the legal regulation of family life. Collaborative co-parenting, although primarily seen as a form of gay and lesbian parenting, is of potential significance for a range of people who wish to parent outside the heteronormative framework. A particularly salient example of this, seen in research on couples who 'live apart together',⁷⁷⁹ is single men and women who have reached the stage in their lives where they want to become

⁷⁷⁹ Sasha Roseneil, 'On Not Living with a Partner: Unpicking Coupledness and Cohabitation' (2006) 11 Sociological Research Online 1.

parents but have not met a partner. For these individuals, collaborative co-parenting might seem an attractive way of raising a child and realising their desire to become parents. In addition to this, in her study on couples who 'live apart together,' Roseneil found heterosexual partners who were romantically involved but chose to raise children across two households as well as people who chose to cohabit and raise children but were not romantically involved.⁷⁸⁰

Consequently, although the present study indicates that the legal regulation of collaborative co-parenting is of particular importance for gay and lesbian parents it is also relevant for heterosexual individuals who may, for whatever reason, chose to parent outside heteronormative standards. No longer can conjugality, cohabitation or coupledness be taken for granted in the context of parenting. The findings in this study, therefore, largely support and corroborate much of the theoretical framework outlined in the introductory chapter. Collaborative Co-parenting can be seen as an instantiation of what Weston called 'families of choice'⁷⁸¹ in that these families are centred on an intentionally created parenting arrangement that operates outside traditional frameworks. In this way, the research could also be seen as validating Giddens' suggestion that the very nature of same-sex relationships challenges the unquestioning acceptance of heteronormative assumptions within intimate relationships generally.⁷⁸²

Intentionally creating a family and parenting with someone you are not in an intimate relationship with is a new challenge that family law is only beginning to deal with. It has the potential to alter our understanding of the family. Therefore,

⁷⁸⁰ *Ibid.*

⁷⁸¹ Kath Weston, *Families We Choose: Lesbians, Gays, Kinship* (Columbia University Press 1991).

⁷⁸² Giddens, *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies* (Stanford University Press 1992) 15.

legislators and courts need to consider the issues involved more fully so as to be able to achieve the fairness and certainty that family Law strives for, while also meeting the needs of collaborative co-parenting families. In this regard, another major conclusion of this thesis is that it is important for the law to take into account gay men's emerging procreative consciousness as well as the need to protect the women-led homonuclear family. In order to do this, while I have suggested parenting solidarity agreements might be one way forward, more thought needs to be given to the purpose of, even the more taken-for-granted legal provisions, rather than accepting the underlying heteronormative assumptions about family form, which permeate this, and other, areas of family law. Only in this way can the interests of all those involved in collaborative co-parenting be adequately taken into account within a legal framework premised on a diversity model of parenthood.

Appendix 1: Interview Guide

(Parents)

Intro

- Thank you for agreeing to take part in this study and thank you for completing the online survey.
- I'd like to start by reminding you of some of the information about taking part that was at the beginning of the survey if that's ok. I wanted to emphasise the fact that you don't have to answer any questions that you are not comfortable with and that all your responses will be anonymised so you won't be identified at any stage. Are you happy with all of that?
- In this study we are exploring the legal recognition of families such as yours where lesbian and gay individuals and couples are having children and both biological parents (and potentially their partners) are involved to some extent in the child's life. We're particularly interested in discussing who the law recognises as parents in these situations and the way the law facilitates or creates barriers to these arrangements. So I'll start by asking you about social attitudes towards same-sex parenting generally, before moving on to talk a bit about your family. Finally I'll ask you about legal recognition and I'll ask you to comment on a hypothetical scenario as part of that.
- Do you have any questions for me before we start? If you do have any questions as we go along, please don't hesitate to ask them.
- The final thing I'd like to check is, are you happy for me to record this interview so that I can write up your responses afterwards?

Attitudes

I'd like to start by asking you a very general question about social attitudes, which is:

- To what extent, if at all, do you think society's attitudes towards same-sex parents raising children have changed in recent years?
 - Do you feel there remains any differences in the way people think about same-sex parents and different-sex parents? (prompt if necessary: For example in terms of a child having both a male and female influence in his/her life)
 - Do you feel there is any difference in the way people think about a male couple as parents and a female couple as parents? (prompt if necessary: For example are women seen as more natural caregivers than men?)
- How do you feel that being gay and social attitudes towards gay people having children impacted on your decisions about having children?

Your Family

I'd like to move on to talk a little bit about your own situation if that's alright.

- Could you just talk me through the process you went through to have a child and how you came to decide to have a child in this way?
 - Did you conceive at a clinic or at home?
 - Who raised the idea of having a child in this way?
 - **Why did you decide to have a child in this way rather than exploring other options such as surrogacy or adoption?**
 - How important was it that your child was biologically related to either you or your partner?
 - How would you have felt about you and your partner raising a child alone compared to with a female couple?
- Which factors did you feel were important that everyone needed to consider and agree upon before having a child in this way?
 - Did everyone else agree with this? How would it have influenced your decision to have a child if they did not agree?
 - Did you decide to have a written agreement and why/why not?
- What role does each of the adults play in relation to your child's life?
 - Where does the child live?
 - Who is responsible for caring for the child?
 - How often do you see the child?
 - What sort of complications have you faced/do you think you might face along the way in terms of managing the roles of each of the adults?
 - How have you dealt/will deal with these?
 - How would you resolve any conflict between the adults in relation to what is best for the child?

Legal Recognition

- How aware were you of the legal issues to do with having a child in this way when you decided to conceive and how aware of them are you now?
 - In what ways, if at all, did the law factor in to your decision about having a child in this way?
 - Did the fact that the law only recognises two legal parents discourage you from having a child in this way?
 - Do you happen to know who is recognised as your child's legal parents, who is on the birth certificate and who has parental responsibility?
- How important is it that you and your partner have a legally recognised relationship with your child and in what way would you want the law to recognise this?
 - Is it important to you that you and your partner are the child's legal parent and recognised as being able to make decisions about your child's healthcare and schooling etc and why?
 - What do you understand by the term 'legal parent'?

- In terms of what is best for your child, who should be recognised as legal parents?
- In your opinion, is there a sense that people who co-parent in this way are challenging the traditional family ideal for raising children and going beyond the limitation to two parents, which the law imposes?
- In what ways would you want the law to be reformed, if at all, and what significance do you feel this would have for you and your family?

I'd like to ask you now to comment on a hypothetical scenario which describes a particular type of parenting arrangement.

Samantha and Christina, lesbian partners in their early 30s who live together but are not in a civil partnership, want to have a child but need donor sperm in order to do this. They approach their gay friend Mike and his civil partner Steve who also want a child. The four of them come to an informal agreement that the child will live with Samantha (the birth mother) and Christina but that Mike (the biological father) and Steve will have significant involvement in the child's life (as, say, uncle-type figures). They arrange for insemination at home and 9 months later Paul is born.

- Who should be considered Paul's legal parents at birth?
- Who should be entitled to make decisions about Paul's schooling and health care?
- How do you think a court should resolve a situation where Samantha and Christina want to limit Mike and Steve's contact to once per month and Mike and Steve want to have weekly contact?
 - How important is what the adults agreed prior to the birth of the child?
 - How important is the relationship that develops between each adult and the child following birth?
 - What would be in the best interests of the child?

Final Question

If I could just ask you a very broad question to finish and that is:

- What does being a parent mean to you?

Thank you for answering all those questions. That was really helpful.

If you happen to know anyone else in a similar situation who might be interested in taking part in the study, please do pass on the details of the study to them or you can send me their contact details. I'm always looking for more participants. Can I just ask whether you'd like me to keep in touch about the results of this study?

Do you have any questions for me before we finish?

Thank you very much for taking part in the study. I really appreciate you giving up your time.

Appendix 2: Interview Guide

(Professionals)

Introduction and Confirmation of Consent

- Thank you for taking part in the project.
- Hopefully you managed to have a look at the information about the project which I sent to you. I just wanted to emphasise the fact that you don't have to answer any questions that you are not comfortable with and all your responses will be anonymised so you won't be identified at any stage. And if you do have any questions at any point, please don't hesitate to ask. Are you happy with all of that? Do you have any questions at this stage?
- The final thing I'd like to check is, are you happy for me to record the interview so that I can write up your responses afterwards?

I'll just start by very briefly outlining the project and the types of questions I'd like to ask you. As you know, this study is about co-parenting within the LGBT community particularly focusing on the situation where individuals or couples are co-parenting with someone else whom they are not in a relationship with. There are four areas in particular I'd like to ask you about: firstly, the impact social attitudes have on the decisions these families make, your experience of alternative parenting arrangements, your sense about how co-parents feel about having and raising children in general, and finally the impact legal recognition has. Does that sound ok?

Social Attitudes and Their Impact on LGBT Men and Women

- I'd like to start by asking quite a general question about society's attitudes towards same-sex parents raising children. Do you feel that social attitudes are changing in this respect? In what sort of ways do you feel this is occurring?
 - *Do you feel there is any discrimination between same-sex parents as compared to different-sex parents?*
 - *Do you feel there is any discrimination amongst same-sex parents i.e. between lesbians and gay men in relation to having children?*
- In your experience, would you say that social attitudes towards gay people having children impact on their decision whether or not to have children?

Your Experience of Alternative Parenting Arrangements

- **I'd like to talk now about your experience of alternative parenting arrangements.** Perhaps you could just talk me through the types of arrangements you have encountered and your involvement in them.
 - *What sort of considerations do you feel need to be taken into account when considering co-parenting with someone you're not in a relationship with?*
 - *What sort of complications do you think these families might face?*
 - *How do you think conflict between the three adults would be resolved in these families?*
 - *What role do you see written agreements playing in relation to these families?*
 - *Perhaps you could just describe how parenting operates in relation to families you are aware of that co-parent in this way?*
 - *What level of awareness do your clients tend to have about the law's involvement in the type of family they want to create?*

Feelings About Having and Raising Children

- **I'd like to move on now to discuss how people in this situation might feel about having and raising children and also about how your experience has informed your own views.** What is your sense about how these families feel about the desirability of having a child with a partner compared to having a child with two other co-parents and even with having a child as a single parent?
- Do you have any indication of how these families feel about the desirability of raising a child who is living with a given parent full-time compared with raising a child who lives elsewhere part of the time?
- Based on your experience, what factors tend to be important to these families when it comes to raising children?
 - *To what extent is there agreement amongst the adults in these types of arrangements in relation to this?*
 - *Do you think it is in anyway important that a child have both male and female influences in its life? Do you feel that a co-parenting arrangement is a better way to achieve this than other ways same-sex parents might try to include a role model of the opposite sex e.g. a relative or just relying on the child's experiences at school etc?*
- Given the range of parenting arrangements you have encountered, what does being a parent mean to you?
 - *Is it important for parents to be biologically related to their child?*
 - *Is it important for the adults in these arrangements to be legally recognised as the child's parents?*

Your Views on Legal Recognition

- **I'd now like to look at the impact law has on parenting.** Perhaps you could just start by outlining what sort of difficulties you feel the law presents to same-sex families who want to co-parent?

- Do you think the law in relation to surrogacy makes it more difficult for gay men to have children?
- How important do you feel the status of legal parent and the acquisition of parental responsibility is for these families?
 - *In your opinion, how does having parental responsibility compare to being a legal parent?*
 - *Do you think the law should respond differently to lesbian couples who are involving the biological father in the child's life compared to a gay couple who are involving the biological mother in the child's life?*
 - *Who should be considered the legal parents and who should have parental responsibility in an involved donor and involved surrogate situation?*
 - *Do you think the law should respond differently to these co-parenting arrangements, on the one hand, compared to how it deals with a situation where a couple splits up, on the other?*
 - *Do you think that biology/genetic relatedness should be relevant in determining legal parenthood?*
 - *Do you think that the intention to have and raise a child should be relevant in determining legal parenthood?*
- In your experience, do you find the fact that the law only recognises two legal parents discourages people from engaging in a co-parenting arrangement with three people?
- Would you say that people who co-parent in this way are challenging the traditional family ideal for raising children and going beyond the limitation to two parents, which the law imposes?
- In what ways would you want the law to be reformed, if at all?
 - *What significance do you feel reforming the law would have for these families?*

Those were the main questions I had for you. Do you have anything you'd like to add or ask me? Would you be happy for me to keep your contact details and perhaps contact you about future research? My final question is, do you know anyone else who might be interested in taking part and if so could you give me their contact details or pass on details of this study to them? Thank you very much for taking part in this study.

Appendix 3: Consent Form

Thank you for your interest in this study. The following page contains further details about what taking part in the study will involve and asks whether you are happy to continue. The main part of the study will be a telephone interview lasting approximately 45 minutes at a time that is convenient for you. If you wish to participate in the study, after having consented to the information on the following page, please complete the rest of this brief online survey which will ask some details about you and your family. Please also remember to leave your name and contact details (such as telephone number and e-mail address) so that we can arrange the telephone interview. We appreciate you taking the time to find out more information about our project. If you would like to proceed further, please click continue.

The Project

The overall aim of the research project is to explore the attitudes that gay men have towards raising children and the legal framework that surrounds this. In particular, the study focuses on how gay men might seek to involve a biological parent, with whom they are not in an intimate relationship (e.g. a surrogate), in the lives of their children. Of particular interests is the way in which the law and other social norms act as constraints on the types of arrangements that are possible and desirable.

The Researchers

This research is being conducted by Philip Bremner (pdb203@exeter.ac.uk), a PhD student in the School of Law at the University of Exeter. It is funded by an

Economic and Social Research Council Doctoral Award. The project is being supervised by Anne Barlow (A.E.Barlow@exeter.ac.uk), who is Professor of Family Law and Policy. Please feel free to contact either Philip or Anne if you have queries about the project.

The Participants

This study is targeted at two groups of participants:

- 1) Gay men who either do not currently have children or have children from a previous heterosexual relationship and;
- 2) Gay men who have children either as single fathers or in the context of a same-sex relationship (e.g. through surrogacy or adoption) and anyone who is involved in co-parenting such children (e.g. the surrogate).

If you fall into either of these two categories, please feel free to complete the following survey. If you do not fall into either of these categories but are still interested in contributing to the project in some way, please e-mail Philip at the e-mail address above.

The Interviews

After you have completed the following survey, a telephone interview will be arranged at a time that is convenient for you. During the interview you will be asked to expand upon your attitudes towards having children in general and in particular how you would feel about involving

If you decide to participate in this project, please sign and return the consent form that was sent along with this information sheet. Once we have received this form, we will contact you about participating in a telephone interview at a time which is

convenient for you. This will be followed up by a joint interview with you and the other co-parents in your family. If you prefer, however, you may opt-out of this follow-up interview.

The overall aim of the research project is to investigate how the law should respond to what the study terms 'platonic co-parenting'. This is where two or more adults, one of whom is a sperm or egg donor or surrogate mother of the other adult(s)'s child and where there is no intimate relationship with the donor/surrogate, choose to raise children together. The project will use the data collected to discuss the implications of how parents, children and health care professionals view the family unit and the legal recognition of such families.

How were the participants selected?

The participants in this project are parents who are engaged in a platonic co-parenting arrangement. This study was advertised through various support groups and agencies in order to recruit participants. You are receiving this information sheet because you expressed an interest in taking part in the project.

Arrangements for Withdrawal of Participants

Your participation in the project is entirely voluntary and you are entitled to withdraw from the project (either in writing or verbally) at any point, and are not required to give your reasons for so doing. Please be assured that you are completely free to decline to answer any question if you are not comfortable doing so.

Arrangements to Ensure Confidentiality

The interviews will be transcribed and the information contained in the transcripts is kept anonymous so that your true identity and answers will not be attributed to you personally in any publication. The transcripts will be saved on a PC that will be password protected and stored in a locked room.

Arrangements for Dissemination of Results

Results will be written up in the form of a PhD thesis, parts of which may be published as articles within respected academic journals and presented in the form of conference papers. In all cases professional research ethics will be adhered to and appropriate confidentiality maintained; we will seek to provide a balanced and scholarly depiction of research findings.

Arrangements for Provision of Results to Participants

If you would like a summary of the outcome of the project please e-mail Philip and he will be happy to send this to you once the project is concluded.

Thank you for taking the time to read this. If you do have any questions please do not hesitate to e-mail Philip.

Appendix 4: Ethics Approval



**COLLEGE OF SOCIAL SCIENCES
AND INTERNATIONAL STUDIES**

Amory Building
Rennes Drive
Exeter UK EX4 4RJ
www.exeter.ac.uk/socialsciences

CERTIFICATE OF ETHICAL APPROVAL

Academic Unit: Law

Title of Project: Platonic Parents: A Comparative Study of the Legal Response to Co-Parenting in Canada and the UK

Name(s)/Title of Project Research Team Member(s): Philip Bremner

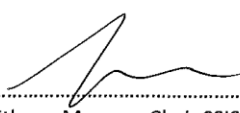
Project Contact Point: pdb203@exeter.ac.uk

This project has been approved for the period

From: 22.02.12

To: 31.10.15

College Ethics Committee approval reference: 11.07.11-xxii

Signature.......... Date approved: 16.03.12
(Jonathan Githens-Mazer – Chair SSIS College Ethics Committee)



The University of British Columbia
Office of Research Services

Behavioural Research

Ethics Board

Suite 102, 6190 Agronomy Road, Vancouver, B.C. V6T 1Z3

CERTIFICATE OF APPROVAL - MINIMAL RISK

| PRINCIPAL INVESTIGATOR: | INSTITUTION / DEPARTMENT: | UBC BREB | | | | |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------|-----------------------------|-------------|------|-----|-----------------------------------|
| Fiona Kelly | UBC/Law | NUMBER: H13-00073 | | | | |
| INSTITUTION(S) WHERE RESEARCH WILL BE CARRIED OUT: | | | | | | |
| <table border="1"> <thead> <tr> <th>Institution</th> <th>Site</th> </tr> </thead> <tbody> <tr> <td>UBC</td> <td>Vancouver (excludes UBC Hospital)</td> </tr> </tbody> </table> | | | Institution | Site | UBC | Vancouver (excludes UBC Hospital) |
| Institution | Site | | | | | |
| UBC | Vancouver (excludes UBC Hospital) | | | | | |
| Other locations where the research will be conducted: Although most of the interviews will be conducted via telephone with the research onsite at the UBC campus it may be appropriate to conduct face-to-face interviews at a mutually convenient location either on campus or off campus (e.g. coffee shop). | | | | | | |
| CO-INVESTIGATOR(S): | | | | | | |
| Susan B. Boyd | | | | | | |
| SPONSORING AGENCIES: | | | | | | |
| Economic and Social Research Council - "Platonic Parents: A Comparative Study of the Legal Response to Co-Parenting in Canada and the UK" | | | | | | |
| PROJECT TITLE: | | | | | | |
| Platonic Parents: A Comparative Study of the Legal Response to Co-Parenting in Canada and the UK | | | | | | |
| DOCUMENTS INCLUDED IN THIS APPROVAL: | DATE APPROVED: | | | | | |

| | | | |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|------------------|-------------|
| | | January 16, 2013 | |
| Document Name | | Version | Date |
| Protocol: | | | |
| Platonic Parents Research Proposal | | N/A | January |
| 10, 2013 | | | |
| Consent Forms: | | | |
| Consent Form | | 2 | January 16, |
| 2013 | | | |
| Advertisements: | | | |
| Platonic Parents Study Advert | | N/A | January |
| 10, 2013 | | | |
| Other: | | | |
| www.platonicparents.co.uk | | | |
| <p>The application for ethical review and the document(s) listed above have been reviewed and the procedures were found to be acceptable on ethical grounds for research involving human subjects.</p> | | | |
| <p><i>This study has been approved either by the full Behavioural REB or by an authorized delegated reviewer</i></p> | | | |
| <p>CERTIFICATE EXPIRY DATE: January 16, 2014</p> | | | |

Appendix 4: Data Naming

Convention

The interview transcripts are named using the following convention: jurisdiction, interviewer initials, number of interview. For ease of reference, the tables below link the interview transcript name with the pseudonym used to identify that participant.

UK Interviews

| | | |
|--------|---------|---------------------|
| UKPB1 | Betty | Prospective Parent |
| UKPB2 | Eliza | Prospective Parent |
| UKPB3 | Lenny | Prospective Parent |
| UKPB4 | Tammy | Health Professional |
| UKPB5 | Gail | Legal Professional |
| UKPB6 | Chris | Parent |
| UKPB7 | Dan | Legal Professional |
| UKPB8 | John | Legal Professional |
| UKPB9 | Lizzie | Legal Professional |
| UKPB10 | Naomi | Legal Professional |
| UKPB11 | Delilah | Parent |
| UKPB12 | Colin | Parent |

Canadian Interviews

| | | |
|--------|---------|--------------------|
| CAPB1 | Mary | Legal Professional |
| CAPB2 | Kerry | Legal Professional |
| CAPB3 | Frieda | Parent |
| CAPB4 | David | Legal Professional |
| CAPB5 | Belinda | Legal Professional |
| CAPB6 | Angela | Parent |
| CAPB7 | Lance | Parent |
| CAPB8 | Ruth | Parent |
| CAPB9 | Rob | Parent |
| CAPB10 | Sally | Parent |
| CAPB11 | Rachael | Parent |
| CAPB12 | Zabrina | Legal Professional |
| CAPB13 | Molly | Activist |

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