The Tensions Between Legal, Biological and Social Conceptions of Parenthood in English Law

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Eva Steiner *

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Introduction

1. As elsewhere, it is increasingly common for children in England to be born or to be brought up in families where they may be biologically unrelated to one or, even, both parents. This is due to a transforming series of developments through which the traditional family has passed since the seventies which has resulted in an increase in births where the parents are unmarried and increased family breakdown.  

Furthermore, since this period, there have also been technical advances in reproductive technology as well as a greater acceptance by society at large of the fact that alternative parent-child relationships can be successfully created and maintained through adoption and fostering.

2. However, despite these developments, specialists in child law have stressed the fact that embedded in the law is an essential ambivalence over what degree of importance to attach to the biological tie between a child and birth parents. It is this uncertainty about the nature of the biological tie between parent and child which has created tensions between different conceptions of parenthood, especially with regard to fathers since the new social and legal set up in family relationships has resulted in an increasing number of people being able now to be regarded as fathers of a child. In addition, the recognition and promotion of human rights in the context of family life, both at international and European level, has to a degree exacerbated the existing tensions in parent-child relationships.

* Dr Eva Steiner is Lecturer in Law at King’s College London.


3. What follows highlights, first, the existing legal aspects of the tensions between legal, biological and social conceptions of parenthood (I). The report will then focus on current trends in the law on the concept of parenthood with special attention being paid to the impact of human rights on the parent-child relationship (II).

I. Legal Aspects of the Tensions Between the Different Conceptions of Parenthood

A. Tensions between biological and legal conceptions of parenthood

Being a biological parent does not necessarily legally endow the rights usually associated with parenthood; and, conversely, one may not necessarily be biologically related to a child and still be considered in the law as the parent of this child. In dealing with this question we consider in turn the mother-child relationship and then the father-child relationship.

a) Mother and child

4. As with the majority of other legal systems, English law considers that the mother of a child is the woman who gives birth to the child. In most cases this woman will be biologically related to the child. However, in the case of assisted reproduction, this rule will apply even in the case where the woman who gives birth is not biologically related to the child. Thus, Section 27 (1) of the Human Fertilisation and Embryology Act (HFEA) 1990 states:

The woman who is carrying or has carried a child as a result of the placing in her of an embryo or sperm and eggs, and no other woman, is to be treated as the mother of the child.

5. In addition, the rule also applies in the case of surrogacy where the gestational mother is the legal mother whatever the form of surrogacy. However, the legal position of the woman who gives birth following a surrogacy arrangement is not as clear as it would first appear from the foregoing. This is due to the fact that English law’s response to surrogacy is itself quite ambiguous. Indeed, according to the Surrogacy Arrangements Act 1985, Section 2 (1), it is a criminal offence for a person to initiate or take part, on a commercial basis, in any negotiations with a view to the making of a surrogacy arrangement. Further, under Section 1A of the Act, no surrogacy arrangement is enforceable by or against any of the persons making it. However, this does not make surrogacy illegal per se. Indeed, as a first point, only third parties who make the arrangements (e.g. agencies…) can be held guilty of the above mentioned offence; this does not apply either to the surrogate mother or to the commissioning couple; secondly, if the arrangement between the parties comes to fruition and the baby is handed over to the commissioning couple then, although in these circumstances the latter would still have to apply for a court order (residence order or adoption order) to be both considered as legal parents, judges will very often have little alternative other than to allow the agreement to stand since, by the time the case reaches the court, the child may very well have already developed a relationship with the applicants.

Moreover, in certain circumstances, the law even permits a commissioning couple to apply within six months of the child’s birth for a parental order with a view to both being treated in law as the parents of the child. If the application is successful, then on the making of the order the child will be considered in law as the child of the applicants, which means that the surrogate mother will lose her parental status as
mother of this child. This procedure is nevertheless subject to a highly restrictive list of requirements. In particular, the applicants must be married, at least one of them must be the biological parent of the child, the treatment that resulted in the pregnancy must have been provided by a licensed clinic, the child must at the time of the order be living with the applicants, all parties involved must give their full and unconditional consent to the making of the order and no money, other than expenses, must have been paid in respect of the surrogacy arrangement. 4

b) Father and Child

As far as fathers are concerned their legal situation in respect of the child, compared with the child’s mother, is far less certain since it is more likely for children not to have a legal relationship with their biological father than it would be with their biological mother. This is due to a set of complex rules deriving from the law of marriage (1), the law relating to birth registration (2) and the law relating to the context of artificial reproduction (3).

6. (1) The legal presumption of paternity: according to the pater est presumption – also known as ‘presumption of legitimacy’ - if a married woman gives birth it is presumed that her husband is the father of the child even if the child has been conceived as a result of an adulterous relationship. Although this rule does not have a statutory basis in England, it is nevertheless a well established common law rule. 5 Although nowadays, owing to blood or DNA testing, it has become increasingly easier for a man claiming to be the father of a child whose mother is married to rebut the presumption of legitimacy by proving that he is the genetic father of a child, English courts are willing to make a direction for blood or DNA tests only in the course of dealing with an application for some other order regarding the child’s parentage. 6 Therefore, judges have no general power to deal with a free-standing application for blood tests. 7 Such an application would have to be combined with one for a contact order or parental responsibility order which in both cases would bear the risk of being strongly opposed by the child’s mother wishing to keep the applicant putative father out of the lives of herself and the child.

However, as we shall see later in Part II, current case law suggests that putative fathers now have less difficulty in obtaining directions for blood or DNA tests and that children will normally have the right to know their biological father, although achieving an appropriate balance between different sets of rights may not prove to be an easy task for the courts to decide.

7. (2) Birth registration: a further difficulty encountered by fathers not married to the child’s mother is related to whether or not their names appear on the child’s birth certificate. The law in England presumes that if a man’s name appears on the birth

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4 HFMA 1990 Sections 30 (1) to (7) and Parental Orders (Human Fertilisation and Embryology) Regulations 1994 (S.I. 1994 no 2767).
5 Banbury Peerage Case (1811) 1 Sim & St 153 HL. The presumption of legitimacy can further be inferred from Section 26 of the Family Law Reform Act 1969 which states the circumstances in which such a presumption can be rebutted. Thus, according to Section 26, ‘any presumption of law as to the legitimacy or illegitimacy of any person may in any civil proceedings be rebutted by evidence which shows that it is more probable than not that that person is legitimate or illegitimate, as the case may be, and it shall not be necessary to prove that fact beyond reasonable doubt in order to rebut the presumption’.
6 Relying on Section 20 (1) of the Family Law Reform Act 1969 which provides that the courts are only able to make a direction for blood tests in the course of ‘any civil proceedings in which the parentage of any person falls to be determined’.
certificate of a child he is the child’s father. In fact, in the case of a married couple, there is a statutory duty on both parties to register the birth within 42 days. However, if the mother is unmarried the obligation rests on her alone. The unmarried father does not have a right to have his name registered unless the mother consents to this or, in the event that she does not, provided that he can show through a court order that he is biologically related to the child. Moreover, until recently, even unmarried fathers whose names appear on the birth certificate did not enjoy automatic parental responsibility for their children. This has now changed but it is still the case that fathers who are not registered do not have the status of parents conferred upon them unless they avail themselves of the legal procedures whereby they could acquire parental responsibility. This can be achieved either by entering a parental responsibility agreement with the mother under Section 4 (1) (b) of the Children Act 1989 or, if the father is unable to obtain the mother’s consent, by applying for a parental responsibility order under Section 4 (1) (a) of the Act, provided that he can show he is the genetic father of the child. In deciding whether to grant parental responsibility the court will consider the best interest of the child which by virtue of Section 1 of the Children Act 1989 is a paramount consideration.

8. (3) Assisted reproduction: as already mentioned the rules governing assisted reproduction are found in the Human Fertilisation and Embryology Act 1990 (HFEA). The starting point in ascertaining fatherhood in cases of assisted reproduction is that the same rules that govern fatherhood in ordinary cases apply here; in other words the biological father or the man presumed to be the father by virtue of the presumption of legitimacy will be the legal father unless stated otherwise in the Act. Amongst the exceptions to the rule that the biological father is the legal father, are:

i) The rules relating to sperm donation to a licensed clinic, whereby the donor is not the father of any child born using that sperm.

ii) The rules relating to deceased fathers. A man who has died before his sperm is used in procedures leading to pregnancy is not the father of any child born using that sperm, unless he has given prior consent to its use.

In addition, a man not biologically related to a child is considered to be the legal father in two cases:

i) Under Section 28 (2) of the HFEA 1990 the husband of a woman who gives birth as a result of assisted reproduction is presumed to be the child’s father unless he shows that he did not consent and that he is not the child’s genetic father. However, this rule received an unexpected application in the recent case of Leeds Teaching Hospitals NHS Trust v A. In this case, a fundamental mistake occurred in the treatment provided to a childless couple in that the sperm of another man ‘B’ rather than the woman’s husband ‘A’ was used. To solve this legal conundrum as to who was the father of the child the court decided that because A did not consent to the treatment of his wife with the sperm of another man he could not be the father under

8 Births and Deaths Registration Act 1953, Section 34 (2)
9 Births and Deaths Registration Act 1953, Section 10 (1) (a).
10 Children Act 1989, Section 4 (1) (a), as amended by the Adoption and Children Act 2002, Sect. 111.
11 See below, in paragraph 11 (Part 2), the text of Section 1 of the Children Act.
12 Section 28 (6) (a) of the HFEA 1990.
13 Section 28 (6) (b) of the HFEA 1990.
14 [2003] 1 FCR 599.
Section 28 (2) of the HFEA 1990. On the other hand, since B did not give his consent to the use of his sperm he could not be considered as a ‘donor’ under Section 28 (6) of the same Act and, thus, be excluded from the basic rule that the biological father is the child’s father. Therefore, the biological father B, whether he was willing or not, was to be considered as the legal father of the child. Following this decision, it was questionable whether the courts, when confronted in the future with similar circumstances, would always choose as here to attach greater significance to the genetic link between the father and the child. It is more probable, however, that the decision was the result of a very narrow interpretation of the rules provided by the HFEA, Section 28 on sperm donation.

ii) Under Section 28 (3) of the HFEA 1990 a man will be treated as a father of a child even though he is not married to the mother of this child and has no genetic link with the child. This section applies in the particular event when both individuals making a couple have received medical, surgical or obstetric services together. It has been ruled in this context that the expression ‘receiving services together’ has to be understood not in the narrow meaning of both parties undergoing medical procedures but in a wider more flexible interpretation having due regard to the will of both parties to attend and seek fertility treatment as a couple. Thus, in terms of being the legal father to the exclusion of a biological tie, the requirements of the law would be satisfied if the woman alone would receive medical treatment so long as the man would attend treatment services with her and support her emotionally notwithstanding the fact that he himself would not play any physical role in such treatment.15

B. Tensions between biological and social conceptions of parenthood

The tension between biological and social parenthood can be observed from two standpoints.

First, in dealing with a child’s status the law may take the view that the bond existing between the child and the persons who provide constant care to that child and with whom the child is emotionally attached is to be considered as relevant as the link with the biological parents. This might happen in a number of situations although the answer to the question as to which of those who are caring for a child are to be treated by the law as parents may vary greatly (a)

Second, at the heart of paternal identity disputes has arisen the question as to whether or not biological parentage, if established, should carry with it a right to also enjoy a social relationship with the child (b).

a) Acknowledgement by the law of the day-to-day care a child receives

9. Several situations need to be distinguished here.

(1) Foster Parents: The Children Act 1989 makes a distinction between a privately fostered child and the child who is fostered by parents approved by a local authority. In the former case, a child under 16 years of age can, following a private arrangement between the biological parents and the foster carer, be cared for by someone who is neither a parent nor a relative and has accommodated the child for at least 28 days. Foster parents do not automatically acquire parental responsibility but can apply for an order to this effect. In addition, relying on Section 3 (5) of the Children Act 1989, they ‘may do what is reasonable in all the circumstances of the case for the purpose of safe-guarding or promoting the child’s welfare’.

Local authority foster parents are in a more precarious situation especially where the local authority wishes to remove the child from them against their wishes. They can resist such a demand only in restricted circumstances. Firstly, they could seek a judicial review of the local authority’s decision to remove the child. Secondly, they could apply to adopt the child. Moreover, local authority foster parents are barred by Section 9 (3) of the Children Act 1989 from applying for a contact or a residence order which would increase their parental authority over the child unless the local authority consents to this, or unless they are relatives to the child, or if the child has lived with them for at least three years preceding the application.

(2) Step-Parents: a step-parent is a person who marries the mother or the father of a child. The law related to step-parents does not therefore apply to a cohabitant of a parent. Step-parents do not automatically acquire parental responsibility on marrying the parent of a child. However, under the Children Act, Section 4 A, as amended by the Adoption and Children Act 2002, if the step-parent reaches an agreement with the child’s parents with parental responsibility, then he or she can gain parental responsibility. Alternatively, a step-parent can apply to the court for a parental order or can adopt the child (Section 51 (2) of the Adoption and Children Act 2002).

(3) Those who treat a child as a ‘child of the family’: the law gives further recognition to social parenthood in cases where a person who is not the child’s biological parent nevertheless treats that child as ‘a child of the family’. The concept of ‘child of a family’ is quite narrow. The Children Act 1989, Section 105 (1) defines it as any child of a married couple and any child treated by a married couple as a child of their family. It is clear from this definition that, not only are the spouses’ biologically related children covered by it, but also those that they have brought up and looked after as their children, such as step-children or grandchildren, for example. Moreover, there must be a family, which in the context of the Children Act means a husband and wife living together. However, children brought up by unmarried couples are excluded. In D v D (Child of the Family) the Court of Appeal has applied the following test in deciding whether a child is ‘a child of the family’: would the independent outside observer looking at the situation say ‘does the evidence show that the child was treated as a member of the family?’

A number of legal consequences - mostly financial - will follow from the fact that a child is treated as ‘a child of the family’. Thus, on divorce, a spouse is liable to provide financial support for any child he or she has treated as a ‘child of the family’. In addition, the child may be able to claim against the estate of a deceased adult who has treated him or her as a ‘child of the family’. Finally, under the Children Act 1989, Section 10 (5) (a) such a child can further apply as of right for a residence or contact order without the further need to apply to the court for leave.

(4) More generally, the Children Act 1989, Section 12 (2) enables any person who is not the parent or guardian of the child to acquire parental responsibility over him or her through obtaining a residence order.

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16 [1981] 2 FLR 93 at p. 97 (per Ormrod LJ).
18 Section 1(d) of the Inheritance (Provision for Family and Dependants) Act 1975.
19 Section 8 (1) of the Children Act 1989 defines a residence order as ‘an order settling the arrangements to be made as to the person which whom a child is to live’. In most cases a residence order is made in favour of one of the child’s parents; however, it can also be made, as in Section 12, in favour of somebody else, for example, a grandparent, an aunt, or anyone else.
b) Should the issue of biological parentage be linked to the issue of social relationship?

10. This question is generally addressed in the context of adoption and paternal identity disputes. Whereas in the context of adoption a child’s right to obtain information about the identity of his or her biological parents is normally kept separate from any issue of whether there should be a social relationship between them (1), in other contexts, such as paternal identity cases, the two issues seem to be entwined in the sense that the law will deny a putative father the opportunity to establish biological parentage because it will not be accompanied by social parentage (2).

(1) Adoptees’ contact with birth parents: when looking at the current law on adoption, as stated in the Adoption and Children Act 2002, one may notice that although the children’s need for information about their biological heritage is addressed 20, little provision is made for contact between adoptees and their birth parents. And, even though it is now within the court’s discretion to accompany an adoption order with a contact order in favour of birth parents (Section 46 (6) of the Adoption and Children Act 2002), it seems difficult to impose such an order on reluctant adopters, except in the most exceptional circumstances.21 Moreover, despite more openness in adoption, the law still protects adoptees and adopters from being traced by birth parents against their wishes with all the impeding consequences this might have on further contact between them.22

(2) Paternal identity disputes: in the context of paternal identity disputes, the English judiciary has always been very reluctant to consider the merits of an application for blood test by a putative father independently from the question of whether or not the child would benefit from having contact with him.23 Thus, if the court considers that the applicant’s wish for contact with the child would be against the child’s best interest, it will refuse to grant the direction for blood tests, whereas if held to be in the child’s interest the application will be granted.24 This approach to resolving paternal identity disputes has given rise to criticism on the part of child law specialists who take the view that the child’s right to identify his or her natural parents and the benefits attached to the creation of a relationship between them and the child are unrelated and should be kept separate.25 However, as will be seen next in the context of human rights, the senior judiciary has more recently shown a tendency to deal with these two issues separately.

20 Section 60 of the Act.
21 See, for example, Re T ( Adoption: Contact) [1995] 2 FLR 251.
23 See also what has already been said above at paragraph 6 about applications for paternity testing.
24 The leading case in favour of not ordering tests is Re F (A Minor) (Blood Tests: Parental Rights) [1993] 1 FLR 598 where a child was born as a result of an affair between the applicant and a married woman. The lover’s application for parental rights was rejected by the Court of Appeal which stressed that the welfare of the child depended upon the stability of the family unit formed by the mother and her then husband. Thus, according to the Court the advantages to the child of the blood tests necessitated by the application for parental rights were valued less when compared with the benefits of a secure family upbringing. Contra, see Re G (A Minor) (Blood Test) [1994] 1 FLR 495, where the court decided that the child’s long term interests were better served by her knowing the truth about her biological parentage.
25 For example, J. Fortin, op cit at no 3, p. 394.
II. Current Trends in the Concept of Parenthood

A. Presumption in favour of birth parents

11. Here we focus, firstly, on disputes between birth parents and private foster carers where the tensions between different approaches to parenthood seem to have been most openly brought to the surface leading to conflict. In theory these disputes should be governed by the best interests or welfare principle stated in the Children Act 1989, Section 1 which reads as follows:

(1) When a court determines any question with respect to
(a) the upbringing of a child; or
(b) the administration of a child’s property or the application of any income arising from it,
the child’s welfare shall be the court’s paramount consideration.

12. However, the interpretation of such a principle has proved in practice to be difficult with significant consequences on the relative weight to be attached to both the blood and the social tie. In a line of decisions stretching from the 1990s to the present day, English courts, when assessing the child’s best interests in disputes between birth parents and private carers, have often adopted an attitude which considerably favours birth parents. Indeed, instead of equally assessing and weighing all the evidence from each side with a view to determining what course would best promote the child’s welfare, the general assumption has been that the child has a ‘prima facie right’ to an upbringing by his or her birth parents, which survives any subsequent changes in the child’s care, and that it is therefore up to foster carers or potential adopters in charge of the child to show that the child’s best interest requires judges to override the right of the child to be brought up by his or her natural parents.26 This presumption in favour of birth parents has been applied in various contexts, sometimes, as we shall see, with very unfortunate consequences for the child.

a) Foster parents

13. Perhaps one of the most controversial decisions has been Re M (Child Upbringing), the case of a 10-year-old Zulu boy who had been entrusted by his birth parents to a white couple and raised in England for four years. Although the boy had settled in England and expressed the wish to stay with his foster parents and despite expert evidence showing that his return to South-Africa, where his natural family lived, would harm him emotionally, the Court of Appeal decided for him to be returned on the basis that there is a ‘strong supposition, other things being equal, that it is in the child’s best interests that he should be brought up with his natural parents’.27 As a matter of fact, following his ordered return to South-Africa, the child felt so unhappy that his birth parents had no choice but to send him back to his foster mother’s care in England.

b) Grand-parents

14. In Re D (Care: Natural Parents Presumption), the Court of Appeal had to decide whether a child should live with his father or maternal grandmother. Unlike the judge deciding in the first instance, the Court of Appeal preferred the father despite his poor financial situation, the fact that he had a history of drug abuse and had had

26 See, in particular, Re K (A Minor) (Ward: Care and Control) [1990] 3 All ER 795
very little contact with his son since his birth. Moreover, the fact that the child in question would suffer from being separated from his siblings was not considered as a compelling factor requiring the Court to override the ‘prima facie right’ of a child to an upbringing by its natural parents.

c) Adoption

15. Case law shows a similar approach in the context of adoption. In Re K (A Minor) (Wardship: Adoption) the birth parents had handed over a child to an older childless couple when the child was only six weeks old. Sometime later, a judge granted care and control of the child to the foster couple with a view to adoption and terminated access to the birth parents who, at that time, were seeking the return of the child. The birth parents appealed against the judge’s decision. Although the circumstances of the case showed that the foster parents were far more suitable to look after the child (the birth mother had a history of drug addiction together with an unstable marriage to a husband with a criminal record), the Court of Appeal, reversing the trial judge’s earlier decision, decided for the return of the baby to the natural parents. According to judge Butler-Sloss the birth parents ‘must be shown to be entirely unsuitable before another family can be considered, otherwise we are in grave danger of slipping into social engineering’.

This above case law clearly highlights and reflects the current held assumption in favour of biological parenthood in preference to social parenthood. However, despite an otherwise consistent line of decisions supporting this view, the courts, on occasion, will allow a child to remain with his or her foster carers to whom he or she is strongly attached, strangely without much legally defined justification for such a departure other than using the rather vague concept of ‘psychological parents’.


16. Current trends in the case law are also determined by the Human Rights Act 1998 which has incorporated into English Law the European Convention on Human Rights. Under the terms of the Human Rights Act, Section 3 (1), ‘so far as it is possible to do so’ judges must interpret domestic law in a way which is compatible with the Convention rights. More generally, Section 6 (1) of the Act makes it

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28 [1999] 1 FLR 134, especially at 141 and 145.
30 For illustrations of the application of the concept of ‘psychological parents’ see, Re K (Adoption and Wardship) [1997] 2 FLR 230, the case of an orphaned Bosnian child whose adoptive English parents had become her ‘primary psychological parents’; also, Re P (A Child) (Residence Order: Restriction Order) [2000] Fam 15, the case of a 8-year-old Down’s syndrome girl, where the Court of Appeal refused her birth parents to recover their rights to her care because she, the child, considered her foster carers to be her ‘real parents’. It should be noted that in both decisions there was an issue of loss of the child’s cultural ties through remaining with their present carers, an issue already raised in the 1991 adoption case of Re K (above, paragraph 15 and note 29) in which case the age and cultural differences between the foster couple and the natural parents were considered to be relevant in the decision to allow the return of the child to the birth parents. Despite the 1991 decision in Re K, the judges decided in both the Bosnian child’s case and the Down’s syndrome girl’s case that the fact that these children had been cared for by their foster parents almost from birth was more important than the natural parents’ rights. In the context of same-sex partners, see further the recent case of Re G (Children) (Residence: same sex partner),[2006] EWCA Civ 372, [2006] All ER (D) 71.
unlawful for a public authority to act in a way which is not compatible with a Convention right. Section 6 (3) further states that a public authority includes a court or a tribunal. Thus, a court will act unlawfully if it gives a decision that is inconsistent with the Convention. Furthermore, Section 2 (1) of the Act provides that in determining any question which has arisen in connection with a Convention right a court must take into account the full range of judgments, decisions and opinions of the relevant bodies connected with the European Convention. Therefore, Strasbourg case law must be taken into account when deciding any domestic case where the Convention is involved. This may lead English judges to ignore binding precedents which are inconsistent or incompatible with the Convention or with the Strasbourg jurisprudence.

17. When assessing the impact of the Human Rights Act on the concept of parenthood in English law three categories of right may be considered: the child’s right to know one’s parentage (a), the child’s mother and partner’s right to respect for their private and family life opposed to the putative father’s right to family life with his child (b), the right to be a parent (c).

a) The child’s right to know its parentage

This right is considered here in the context of blood / DNA tests (1), adoption (2) and artificial reproduction (3).

(1) Blood / DNA tests: in an early ruling, Re H (A Minor) (Blood Tests: Parental Rights), Ward LJ, referring to article 7 of the UN Convention on the Rights of the Child, emphasized every child’s right to know the truth of his or her parentage ‘unless his welfare clearly justifies the cover up’. More recently, in Re T (A Child) (DNA Tests: Paternity) Bodey J made it clear that the child in question had a right to respect for his private life under article 8 of the European Convention on Human Rights in the sense of having knowledge of his identity which also encompasses his true paternity. This latest case law has been further welcomed as a desirable move from past case law in which the judiciary was very reluctant to consider the merits of an application for blood tests independently from the possible outcome of the application for other orders such as a contact order. It has yet to be determined whether the issue of biological parentage in this context will, in future, be divorced from social or psychological factors.

(2) Adoption: following the Houghton Committee’s recommendations for greater openness in adoption, legislation was introduced enabling adoptees over the age of 18 access to their birth records with a view to discovering the identity of their birth family. The system for keeping and obtaining information about a person’s adoption is the object of a set of very detailed provisions now to be found in the Adoption and Children Act 2002, Sections 56-65.

Under these rules, adoption agencies are required to compile a case record for every child for whom adoption is being planned, thus allowing for adoptees to learn about the circumstances of their adoption in later life if they should so wish. However,

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33 See above at paragraph 10(2); for a general critical assessment of the case law in this area, see J. Fortin op cit at no 3, pp. 396-398. For a more general discussion about the right to know one’s parentage, see K. O’Donovan, ‘A Right to Know one’s Parentage’, International Journal of Law and the Family, 2, 1998, pp. 27-45.
34 Houghton W., ‘Report of the Departmental Committee on the Adoption of Children’ Cmd 5107, 1972, HMSO.
35 Adoption Act 1976, Section 51; now Section 60 of the Adoption and Children Act 2002.
adoption agencies have discretion as to whether to disclose to adoptees all the documents in their adoption files. In Gunn-Russo v Nugent Care Society and Secretary of State for Health the claimant, an adopted person, was seeking judicial review of the adoption agency’s refusal to allow her with access to her adoption record especially with regard to the identity of her natural parents. 36 In the judgment Scott Baker J recognised that one of the issues involved in this case was ‘how to resolve the tension between, on the one hand, maintaining the confidentiality under which the information was originally supplied [to the adoption agency] and, on the other, providing the information that the adopted person has a real desire, and often need, to have’. 37 Scott Baker J then found that the adoption agency should in such a case have conducted ‘the balancing exercise between the arguments in favour of disclosure on the one hand and the arguments in favour of maintaining confidentiality on the other’. 38 The judge concluded that the adoption agency did not in this case lawfully exercise the discretion given to it under the then Regulation 15 (3) of the Adoption Agencies Regulations 1983 to allow the applicant access to her birth record, especially in view of the particular circumstances of the claimant’s case where both her natural and adopted parents were dead. 39

(3) Assisted Reproduction: the question arose recently whether a similar system of disclosure should be made available for children conceived through sperm donation and other methods of assisted conception, following the case of Rose v Secretary of State for Health and Human Fertilisation and Embryology Authority. 40 New legislation was introduced following Scott Baker J’s statement in Rose saying that Strasbourg case law establishes a principle of respect for a person’s private and family life embodied in article 8 (1) of the European Convention which is sufficiently broad to entitle a person born through assisted conception to establish details of his or her identity. 41 Now, under this new legislation - the new Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004 - people conceived as a result of sperm, egg or embryo donation are able once they reach the age of 18 to request non-identifying information about their donor from the Human Fertilisation and Embryology Authority. This information can include a physical description, the ethnic group of the donor’s parents, his personal and family medical history, his religion, his occupation, interests and skills – although not the donor’s actual identity or any information that may identify him (Section 2 (2) of the Regulations). On this last point, although acknowledging the need for children - conceived using donated sperm, eggs or embryos- being able to find the identity of their donor, relevant authorities were also concerned about the possible effect of removal of anonymity on donor numbers and, thus, on the number of people able to receive infertility treatment.

37 Ibid at para 48 of the judgment.
38 Ibid at para 74 (iv) of the judgment.
39 Ibid at para 74 (vi) of the judgment.
40 [2002] 2 FLR 962
b) The child’s mother and partner’s right opposed to the putative father’s right to respect for their respective private and family life

18. The need to comply with the Human Rights Act 1998 has further highlighted the way in which parenting disputes can and do involve ‘a complex web of conflicting rights’, particularly paying regard to the right to respect for one’s private and family life enshrined in article 8 of the European Convention. These conflicts go to the heart of the issues discussed in the case of Re T. In this case, the putative father applied for blood tests, including DNA testing, as a preliminary to an application on his part for parental responsibility and contact orders, relying upon the European Convention on Human Rights. The court in its decision made an order for blood testing after having balanced the various conflicting rights involved in this case in light of the European Convention. Thus, following the court’s reasoning and, viewed from one perspective, the child in question in this case enjoyed a right to knowledge of the identity of his or her father as provided by article 8, a right which could only be established by paternity testing. But under article 8 there was also the child’s ‘competing’ right to security with his then current de facto family. Viewed from another perspective, the child’s mother and her new partner had a right to respect for their private and family life free from interference from the man claiming to be the child’s real father. Equally, the applicant had a right to respect for a family life encompassing a relationship with his child. The way this conundrum was solved by the court in Re T was that when finding a balance between these competing rights the court gave weight to be attached to the child’s rights under article 8 but with the greatest weight being given to his right to know his true identity. Consequently, any interference with the rights of the mother and her new husband was justified under article 8 (2) as being proportionate to the legitimate aim of furthering T’s right to certainty as to his true paternity.

c) The right to be a parent

19. Here we look generally at some of the parenting issues which have arisen from gay and lesbian relationships.

(1) First, some landmarks in the status of same-sex couples in Britain need to be recalled.

In 1999, the House of Lords in Fitzpatrick v Sterling Housing Association Ltd accepted that a ‘same-sex partner of a tenant was now to be recognised as capable of being a member of the tenant’s family’ for the purpose of the Rent Act 1977. More recently, the Civil registered Partnership Act 2004 has granted to same-sex couples similar rights as those granted to married heterosexual couples. Finally, - similarly to married couples, single persons and unmarried partners - same sex couples can now adopt a child under the Adoption and Children Act 2002, Sections 49 (1) and 144 (4).

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42 See, J. Fortin, op cit at no 3, p. 395.
43 Op cit at no 32.
44 Ibid, at 1198, per Bodey J.
45 [1999] 3 WLR 1113. More recently, in Ghaidan v Godin-Mendoza [2004] 2 AC 557, the House of Lords, upholding the decision of the Court of Appeal, further held that the existing rights - under articles 8 and 14 of the European Convention of Human Rights - of the survivor of a homosexual partnership, would be infringed if the rent legislation under scrutiny in this case and which provided for the case of ‘husband’ and ‘wife’ was not given effect in a way that was compatible with the Convention rights and, thus, extended to same-sex couples.
(2) Second, we focus on the few cases where English courts have had to consider whether the fact that one of the parents is in a gay or lesbian relationship should have any bearing on a dispute over the residence of the child.

In *C v C (A Minor) (Custody: Appeal)* the Court of Appeal had to decide between a mother who was in a lesbian relationship and a father who had remarried. Balcombe LJ, deciding in favour of the father, stated that ‘it is still the norm that children are brought up in a home with a father, mother and siblings (if any) and, other things being equal, such an upbringing is most likely to be conducive to their welfare’. In *B v B (Minors) (Custody: Care and Control)*, two particular factors were thought to be relevant in cases involving gay parents. The first was that a child brought up by a gay or lesbian parent might suffer from teasing at school and, secondly, that the child might suffer confusion over his or her sexual / gender identity. However, in this case custody was granted to the mother despite her sexual orientation. In deciding in her favour, Callman J noted that the mother was not a ‘militant lesbian’ and that she had several male friends who could provide male role models for the child.

In *G v F (Contact and Shared Residence: Application for Leave)*, it was further decided that the fact that the relationship between the applicant and the respondent was a lesbian relationship was to be seen as ‘background circumstances of the case’ and that there was ‘no basis for discriminating against the applicant in her wish to pursue these proceedings [application for contact and shared residence of the child] on the basis that she and the respondent lived together in a lesbian relationship’. More recently, in *Re M (Sperm Donor Father)*, Black J, although confirming that on issues concerning gay parents a court could not ignore that a child could be teased at school and be confused about his or her background when raised in a lesbian household, eventually made a joint residence order in favour of the lesbian couple giving them both parental responsibility for the child. This latest case law seems to conform to the European Convention on Human Rights, especially in view of *Da Silva Mouta v Portugal* where the European Court of Human Rights found that it was unlawful to deny residence or contact to a parent on the ground of sexual orientation, this amounting to discrimination in breach of article 14 of the European Convention on Human Rights.

20. **Conclusions:** Today, in England as elsewhere, the determination of legal parenthood has become one of the most contentious issues in family law. Tensions between different conceptions of parenthood have been triggered by a variety of social factors ranging from the greater instability in family relationships, the end of the stigma against illegitimacy and the fact that being a parent is no longer a matter of necessity but, rather, of choice. These tensions have been further intensified by a greater certainty in the determination of biological paternity.

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One way of relieving these tensions in the future would be for the law to work towards a closer relationship between biological and psychological parenthood with greater emphasis placed on adult acceptance of permanent parental duties and responsibilities toward their child. 52


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