Serving Best Interests in 'Known Biological Father Disputes' in the United Kingdom

LESLEY-ANNE BARNES MACFARLANE

A. 'Known Biological Father Disputes' and Best Interests

Introduction

In recent decades, the increased availability of assisted reproduction has conferred upon many groups, couples and individuals new procreative freedoms and choices. As a consequence, the paradigms of family life are rapidly evolving, but the essential questions remain the same: 'Who is my parent? Is this my child?'[1] When known individuals (rather than anonymous donors) provide eggs, sperm or embryos to those otherwise unable to conceive, several adults might assert their parenthood in respect of any child born – on biological[2] or psychological grounds.

During the last fifteen years or so, UK courts have decided a small but steadily growing number of cases brought by men who, having provided sperm to a female couple, are seeking recognition of their status in respect of the child, or children, subsequently conceived.[3] In such cases, sperm has typically been provided through an informal arrangement in which it has been agreed that all adults involved would assume a parental role of some sort. While the lesbian couple (one of whom is the gestational[4] mother) normally provide the child's primary care, the terms 'multiple-parenting' or 'co-parenting' have sometimes been used in reference to such arrangements.[5] The proceedings raised in the event that these arrangements break down have yet to acquire a homogenous label and nomenclature itself is a sensitive issue.[6] Although the phrase 'known donor dispute' persists in legal discourse, the judiciary has increasingly discouraged the use of the word 'donor', deeming it

[1] *A & Ors (Human Fertilisation and Embryology Act 2008)* [2015] EWHC 2602, para. 3, per Sir James Munby.
[2] The term 'biological parent' is used in this chapter as a generic term for: (i) men who have provided sperm to the child's biological mother, including those who have done so in a non-sexual arrangement (these men are also the genetic parent); (ii) the child's gestational mother who is often, although need not always be, the genetic mother.
[3] E.g., *X v Y*, 2002 SLT 161; *Re M (Sperm Donor Father)* [2003] Fam Law 94; *B v A, C, D (acting by her Guardian)* [2006] EWHC 2 (Fam); *B (Role of Biological Father)* [2007] EWHC 1952 (Fam); *T v T (Shared Residence)* [2010] EWCA Civ 1366; *MA v RS (Contact: Parenting Roles)* [2011] EWHC 2455 (Fam); *A v B & C (Lesbian Co-Parents: Role of Father)* [2012] EWCA Civ 285; *Re G (Children) (Children: Sperm Donors: Leave to Apply for Children Act Orders)* [2013] EWHC 134 (Fam); *DB v AB (Contact: Alternative Families)* [2014] EWHC 384 (Fam); *JB v KS* [2015] EWHC 180 (Fam).
[4] I.e., the woman who carries and gives birth to the child, whether or not the eggs used are hers.
[5] E.g., *Different Families: A Guide for Gay Dads*, Stonewall web-publication, 2010, pp. 19-24: www.stonewall.org.uk/educationforall; *A v B & C (Lesbian Co-Parents: Role of Father)* [2012] EWCA Civ 285; *X v Y*, 2002 SLT 161, paras. 11-37.
[6] See, e.g., 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(2) *CFLQ* 237-252.

'belittling and disrespectful to all concerned, most importantly the child'.[7] This chapter analyses the extent to which the child's best interests are the central focus in resolving these disputes. Accordingly, the term 'known biological father' is preferred[8] since it is submitted that it is an accurate and inclusive way of characterising such cases with reference to the child involved.

Article 3 and UK Law: Challenges

Article 3(1) of the United Nations Convention on the Rights of the Child ('the Convention') provides that in 'all actions concerning children' the 'best interests of the child shall be a primary consideration'.[9] The Article has been indirectly incorporated into UK law. In legislation regulating family proceedings, the 'welfare' (the synonym for 'best interests' found in UK legislation) of the child concerned is described as 'the paramount' rather than 'a primary' consideration.[10] This means that all other considerations are secondary to the overriding issue of what serves the child's best interests. Consequently, disputes between two – or more – adults about parental entitlements can only be decided with reference to whether endorsing any parental role will enhance or be detrimental to the child's welfare.

The United Nations Committee on the Rights of the Child ('the Committee') recently outlined the comprehensive nature of the Article 3 obligation as embodying 'a right, a principle and a rule of procedure based on an assessment of all elements of a child's… interests in a specific situation'.[11] The Committee also directed that State Parties include those family circumstances 'that make each child unique'[12] in best interest assessments. Recognition of diverse parenting paradigms is gradually becoming more common across a breadth of jurisdiction, some of which have already enacted legislation regulating multiple parenthood.[13] However, in each of the UK legal systems,

[7] *JB v KS* [2015] EWHC 180 (Fam), para. 40, per Hayden J. See, e.g., also *A v B & C (Lesbian Co-Parents: Role of Father)* [2012] EWCA Civ 285, para. 48, per Black LJ.
[8] See, e.g., Alan Inglis, 'Children and same sex parents' (2015) 11 *SLT* 53-56 at 53. Other terms, e.g. 'surrogate known father', have also been suggested: Andrew Bainham and Stephen Gilmore, *Children: The Modern Law'*, 4th ed., (Bristol: Jordans, 2013), p. 128.
[9] UN Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.
[10] Children Act 1989, s 1(1); Children (Scotland) Act 1995, s. 11(7)(a).
[11] General Comment No 14 On The Right of the Child to Have his or her Best Interests Taken as a Primary Consideration UN Doc CRC/C/GC/14, s I(A), V, para. 46.
[12] General Comment No 14, ibid, paras. 48-9.
[13] E.g. British Columbia's Family Law Act 2013, ss. 29-31, allows for 3 or more legal parents; California's Family Code, § 7612(c) provides that 'In an appropriate action, a court may find that more than two persons with a claim to parentage… are parents if the court finds that recognising only two parents would be detrimental to the child'.

the premise that children have two parents[14] underpins the statutory framework regulating family life and family disputes.

In the absence of explicit statutory provision for multiple-parented children, courts have determined known biological father disputes with reference to the 'one legal principle in play',[15] namely the paramountcy of the child's welfare. Yet such cases have proved challenging for the judiciary, principally for two reasons. The first of these concerns defining adult roles and responsibilities within the context of a distinct, and relatively novel, construct of parenthood and parenting. The second relates to the development of a consensus in judicial approach, particularly since the precedents regarding the best interests of children in more conventionally comprised families are of limited assistance.

In Section B below, it is observed that the legislation governing the taxonomy of the parent-child relationship has long been complex, fragmented and, at times, ambiguous. It is demonstrated that the restrictive provisions found in statute increasingly contrast with more inclusive contemporary judicial trends – particularly in known biological father disputes. Such disputes do not fit established two-parent norms, nor does the scheme governing the allocation of legal parenthood in the Human Fertilisation and Embryology Acts[16] provide adequately for them. A brief overview of evolving judicial rationale is provided in Section C where the underlying (and familiar) logic of decisions made regarding the child's best interests is discussed. However, certain inconsistencies in approach and terminology are also noted in known biological father precedent. It is argued that these inconsistencies are inevitable for jurisdictions, like the UK, in which the precise meaning and applicability of the term 'parent' is itself unclear and where there is a dearth of legal provision for multiple-parented children. Section D offers concluding observations and proposals for reform.

B. 'Who Is My Parent? Is This My Child?'[17]

Competing Conceptions of Parenthood

Questions about the precise meaning of 'parent' have long confounded legislators, politicians, judges and academics. The law concerning parenthood is the equivocal product of decades (and in some instances centuries) of piecemeal legislative policy. The word 'parent' frequently refers to a child's biological mother and father, both of whom are commonly named on the birth certificate.

[14] Traditionally, mother and father (Births and Deaths Registration Act 1953, s. 1; Registration of Births, Deaths and Marriages (Scotland) Act 1965, s. 14).
[15] *DB v AB (Contact: Alternative Families)* [2014] EWHC 384 (Fam), at para. 29, per Holman J.
[16] Human Fertilisation and Embryology Acts 1990 and 2008 (both extending throughout the UK), hereinafter referred to as the 1990 and 2008 Act(s)/legislation.
[17] *A & Ors (Human Fertilisation and Embryology Act 2008)* [2015] EWHC 2602, para. 3, per Sir James Munby.

Nonetheless, 'parent' is a term inconsistently used across a range of statutes,[18] many of which are directed towards ensuring a restrictive interpretation of the term for a particular purpose.[19] Courts, instead, consider questions of parenthood comprehensively, having regard to the welfare of the child concerned and to evolving social norms. In her oft-cited judgment in *Re G* in 2006, Lady Hale, currently Deputy President of the UK Supreme Court, approached the subject of contemporary parenthood in a most inclusive manner:

> There are at least three ways in which a person may be or may become a natural parent… The first is genetic parenthood… The second is gestational parenthood… The third is social and psychological parenthood.[20]

According to this definition, a child may have (or acquire) several parents. Yet 'natural parents' and 'natural parenthood' are neither precise medical nor legal categorisations. Such individuals need not be biologically related to the child, nor does statute necessarily empower natural parents to exercise any parental role. Thus, Lady Hale's pragmatic and child-focused definition of what it means to be a parent within the reality of twenty-first century family life is not borne out fully in wider law.

Within the uneven legal landscape, a longstanding distinction has been drawn between bearing the status of being a parent on one hand and, on the other hand, the possession of parental authority.[21] The former status, sometimes described as being a 'legal parent',[22] creates a lifelong relationship, while the latter – having parental authority[23] – invests in the individual concerned the legal responsibilities and rights necessary to parent a child throughout childhood. These categories, and the distinction between them, were perhaps more unambiguous historically when parental status was a simple matter of lineage.[24] However, in contemporary law, this is not always the case. Where a child is conceived with reproductive assistance, statutory provisions often override

[18] E.g., Education (Scotland) Act 1980, s. 135; Children (Scotland) Act 1995, s. 15(1); Adoption and Children Act 2002, ss. 52(6), 52(9), 52(10); Education Act 1996, s. 576.
[19] For different senses in which the term 'parent' is used, see, e.g., Adoption and Children Act 2002, s. 52; Education (Scotland) Act 1980, s. 135.
[20] *Re G (Children) (Residence: Same-sex Partner)* [2006] UKHL 43, per Baroness Hale of Richmond, paras. 33-35.
[21] See Elaine E Sutherland, *Child and Family Law*, 2nd ed. (Edinburgh: W Green, 2008), pp. 203-257, 357-403; Alexander B Wilkinson and Kenneth McK Norrie, *The Law Relating to Parent and Child in Scotland*, 3rd ed. (Edinburgh: W Green, 2013), pp. 71-97; Bainham and Gilmore, *Children: The Modern Law*, pp. 111-136,159-162.
[22] The term 'legal parent' has grown in use in the UK in recent years with reference to (often legally-created, as opposed to naturally evolving) family dynamics. Broadly speaking, 'legal parenthood gives a lifelong connection between a parent and a child, and affects things like nationality, inheritance and financial responsibility': Human Fertilisation and Embryology, A Code of Practice: Guidance Note 6, para. 6.3, Version 4.0: http://www.hfea.gov.uk/399.html#guidanceSection3937).
[23] 'Parental authority' is called 'parental responsibility' in s 3(1) of the (English) Children Act 1989 and 'parental responsibilities and rights' in the Children (Scotland) Act 1995, ss. 1-2.
[24] Whether proved of presumed: Family Law Reform Act 1969, s. 26; Law Reform (Parent and Child)(Scotland) Act 1986, s. 5. Where the child's mother and father were unmarried, establishing a legal parent-child relationship between father and child was (and to a lesser extent still can be) a more onerous process: Family Law Reform Act 1987; Children (Scotland) Act 1995, ss. 3-4. For further reading, see note 21 above.

biology by stipulating that neither of the child's legal parents need be genetically related to the child. In most cases, parental authority flows as a direct consequence of legal parenthood, but it might also be imposed by courts upon a wide range of individuals where to do so serves the welfare, or best interests, of the child concerned. Generally, those holding parental authority either live, or have contact, with the child concerned. Orders for parental authority are broadly analogous in English and Scottish law, [25] although some procedural differences exist.[26]

Thus, while a predominant two-parent legal tradition endures, UK law is capable of bestowing upon multiple adults, concurrently, the power to participate in raising a child. Also, many adults fulfil a parenting role – describing themselves, and being described by others, as a 'parent' – without possessing any formal legal entitlement. The UK government made a Declaration, upon ratifying the Convention in 1991, that it would recognise as parents 'only those persons who, as a matter of national law, are treated as parents'.[27] It is nonetheless worth observing the Committee's all-encompassing view on parenthood with reference to best interest considerations. In *General Comment No. 14* the value accorded to family ties, whether formalised or not, was emphasised. 'Parents' include 'biological, adoptive or foster parents… members of the extended family or community… and persons with whom the child has a strong personal relationship.'[28]

Yet, where a dispute arises in UK courts in which several adults assert parental entitlement on genetic, gestational, social and/or legal grounds, questions about the classification and labelling of 'parents' quickly become those of hierarchy. How should the title and/or authority of being a 'parent' in law be apportioned (if at all) among the various models of parenting and parenthood? The question for the court remains: what serves the child's best interests? Answering this question generates particular difficulties when it is addressed (as it is in known biological father disputes) in the context of the existing social and legal opacity of the term 'parent'.

Statutory Particulars versus Judicial Generalities

The Human Fertilisation and Embryology Acts of 1990 and 2008 regulate the provision of licensed fertility services throughout the UK. The welfare of any child who may be conceived is not the

[25] Children Act 1989, s. 8(1)(b); Children (Scotland) Act 1995, s. 11(2).
[26] In Scotland, anyone 'with an interest' (including a known biological father) may seek an order for parental authority (Children (Scotland) Act 1995, s. 11(3)(a)(i). In England those who do not possess the requisite standing must generally seek the court's permission to apply for an award of parental authority (Children Act 1989, ss. 4, 8-11).
[27] UN Treaty Collection, Chapter IV, Human Rights, Convention on the Rights of the Child, UNTS 1577: https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-11&chapter=4&lang=en.
[28] General Comment No 14, ibid, para. 59-60.

paramount/primary consideration.[29] Rather, the twin priorities of the legislative framework are reproductive choice and the acquisition of the status of 'legal parenthood'.[30] The legislation provides that the child's gestational mother is the central parental figure. By virtue of carrying the child and giving birth, she will always be recognised as the child's legal mother – irrespective of whether donor eggs or embryos were used.[31]

Where a man merely donates sperm through a licensed clinic, he will not be recognised as the legal father of any child conceived.[32] In those circumstances, if the gestational mother has no partner, any child she conceives will have only one legal parent (i.e. herself).[33] Alternatively, if she is in a relationship, then regardless of the child's genetic parentage, the legislation allows, by agreement, her spouse, civil partner, boyfriend or girlfriend to be treated as the other legal parent of the child.[34] A 'legal parent' in terms of the 1990 and 2008 Acts is placed in the same position as any other legally recognised 'parent' but, in some cases, may still require to obtain parental authority using other statutory provisions.[35] The provisions enabling two women, jointly, to become legal parents were introduced by the 2008 Act. Here, the terminology is gender-neutral: the legislation characterises the gestational mother's partner as the 'second woman… parent', rather than child's second mother.[36]

In the reported known biological father cases, however, the legal and factual matrices are often more complex, since reproductive assistance has normally been provided without the involvement (and without the statutory regulation relating to) a licensed clinic. Instead, a private transaction has taken place between biological father and gestational mother – and her female partner. Due to the dearth of statutory regulation of such 'Do It Yourself' (DIY) insemination arrangements, the allocation of legal parenthood is problematic. The 2008 Act allows the gestational mother's

[29] Clinics are required to take account generally of the welfare of any child conceived or affected by that child's birth and to provide counselling/general information etc: see 1990 Act, ss. 13(5), 13(6)-(6A); HFEA Code of Practice, 1 Apr 2015, chapter 8.3.
[30] See note 22 above for a definition of legal parenthood.
[31] 1990 Act, s. 27(1); 2008 Act, s. 33(1). The terminology used in respect of all adults is that they are 'to be treated as' the 'mother', 'father' or 'parent' of the child conceived (2008 Act, ss. 33(1); 35(1); 36; 42; 43(c)).
[32] 2008 Act, s. 41(1); 1990 Act, Sch 3, para. 5.
[33] The gestational mother and the known biological father could agree that, as the child's genetic father, he is also recognised as the child's legal father: see 1990 Act Sch 3, para. 5(3).
[34] 2008 Act, ss. 35-40; 42-47; s 48(1); 48(2). Unless it is shown that the gestational mother's husband, wife or civil partner does not consent to the licensed fertility treatment then he or she will become the second legal parent. Thus, presumed consent to a spouse's/civil partner's fertility treatment creates a(n artificial) legal parent-child relationship. If the gestational mother's partner is not her civil partner or spouse, then he/she will be treated as the second legal parent only by adhering to the 'agreed fatherhood' or 'agreed female parenthood' conditions.
[35] See, e.g. Children (Scotland) Act 1995, ss. 3(1)(d); 3A; 4A; Children Act 1989, s. 4ZA(1), both statutes providing for the acquisition of parental authority by legal parents who are unmarried/not civil partners through birth registration or formal agreement.
[36] Section 43(c); s. 45(1).

spouse/civil partner to become the child's other legal parent in non-clinic cases.[37] However, the Act provides no mechanism whereby the gestational mother's boyfriend or girlfriend might be recognised as the child's other legal parent if a licensed facility is not involved. In that eventuality, where the 1990 and 2008 legislation is silent, genetic truth can be expected to prevail: the known biological father might then expect to be viewed as the father. He will not, however, possess legal authority to parent unless (employing alternative statutory provisions) he marries the mother, is named on the birth certificate, has signed a parental agreement with the child's mother or is awarded parental authority by a court.[38]

Known biological fathers, therefore, generally raise legal proceedings to apply for an award of parental authority and/or contact in a climate of considerable ambivalence. In terms of biology, or genetics, these men are the fathers of the child(ren) concerned – they might have regular contact with their offspring and be referred to in the family as 'daddy'.[39] Yet, from the cases decided, it appears relatively rare for them to be the child's legal parent. Nor can they apply to be recognised as such if the mother's female partner is already the child's second legal parent[40] in terms of the 2008 Act. Regardless of the intricate statutory provisions focused on the acquisition of legal parenthood, all three adults (the gestational mother, her female partner and the child's biological father) might easily be encompassed by Lady Hale's definition of 'natural parenthood'. Her inclusive approach, characterising each adult involved using the vocabulary of parenthood, has gathered momentum among the judiciary. Thus, in *DB v AB (Contact: Alternative Families),*[41] in 2014, Holman J began his judgment simply by stating that the child concerned had:

> two mothers and one father… Mrs AB, who is his genetic mother and the person who carried and gave birth to him, and her civil partner, Mrs CB. His genetic father is Mr DB.[42]

An Emerging Picture of Parenthood in Known Biological Father Disputes

[37] 2008 Act, s.s 35; 42.
[38] Children Act 1989, s.s 4(1)(a); 4(1)(b); 4(1)(c); Children (Scotland) Act 1995, ss. 3, 4, 11. The case law is fact-specific, e.g., in *A v B & C (Lesbian Co-Parents: Role of Father)* [2012] EWCA Civ 285, the known biological father possessed parental authority because he had, for cultural/religious reasons, gone through a marriage ceremony with the gestational mother.
[39] See, e.g., *MA v RS (Contact: Parenting Roles)* [2011] EWHC 2455 (Fam), para. 21, per Hedley J. The father's partner, known to the children as 'Addy', was the second applicant in the case brought against the female couple (making a total of four adult litigants). The evidence, at para. 21, 'establish[ed] a parenting role for all four adults'.
[40] Section 45(1) also provides that 'Where a woman is treated by virtue of section 42 or 43 as a parent of the child, no man is to be treated as the father of the child.'
[41] [2014] EWHC 384 (Fam), ('*DB v AB'*).
[42] *DB v AB,* para. 3.

Despite undermining the general two-parent ethos of legal policy, this inclusive judicial approach seems entirely consistent with the Article 3(1) obligation to consider family disputes with reference to the individual child's perspective and his or her best interests in 'specific'[43] circumstances. In the closing paragraphs of his judgment in *DB v AB*, Holman J remarked that a father is 'another person in [the child's] life with other interests and experiences to offer', for, he opined, which child 'does not benefit from more love rather than less love'?[44] This judicial perspective is not new. In 2012, Lord Justice Thorpe, sitting in the Court of Appeal, observed in another known biological father case that:

> It is generally accepted that a child gains by having two parents… [i]t does not follow from that that the addition of a third is necessarily disadvantageous.[45]

Such comments deepen the chasm between restrictive statutory regulation of parenthood and the increasingly flexible approach of the judiciary. At one end of the spectrum, the 1990 and 2008 Acts empower both of the child's legal parents to circumvent 'the normal rules of genetic parentage automatically and with little consideration of the best interests, or welfare, of the child conceived.'[46] At the other, UK courts rely on the language of welfare when enabling the child's biological father to offer an alternative family construct – one involving more than two parents.[47] This embroils the judiciary in precisely what statute sought to prevent: private family disputes among a range of adults, each with an arguable factual or legal parental claim. In other words the judiciary has picked up a gauntlet that the UK Parliament never intended to throw down.

The emerging picture of parenthood – and of contemporary family life – from the case law is clearly one that includes known biological fathers. The willingness of courts to endorse fatherhood in such cases has been criticised as undermining 'fatherless families', particularly in the wake of the joint female parenthood provisions in the 2008 Act.[48] Yet, even when a child is settled in a 'two-parent lesbian nuclear family',[49] the judiciary routinely stress the 'real benefits' in the child

[43] General Comment No 14, ibid, para. 46.
[44] Ibid, para. 37.
[45] *A v B (Contact: Alternative Families)* [2012] 1 WLR 3456, para. 24, per Thorpe LJ.
[46] Brenda Hale, 'New families and the welfare of children' (2014) 36(1) *JSWL* 26-35 at 28.
[47] See, e.g. *Re G (Children) (Children: Sperm Donors: Leave to Apply for Children Act Orders)* [2013] EWHC 134 (Fam) in which the court took into consideration the underlying two-parent/lesbian parenting provisions in the 2008 Act but nonetheless granted both known biological father applicants leave to apply for contact orders. The orders would, in turn, be granted if in the best interest of the children concerned. For further discussion about welfare-based debate surrounding the provisions of the 1990 and 2008 Acts. See the chapter by Kenneth McK Norrie in this volume.
[48] Here it is worth noting that the 2008 Act amended s. 13(4) of the 1990 Act to remove the reference to the 'need… for a father', instead inserting reference to the 'need… for supportive parenting'. See also Leanne J Smith, 'Clashing symbols? Reconciling support for fathers and fatherless families after the Human Fertilisation and Embryology Act 2008' (2014) 22(1) *CFLQ* 46-70; Aleardo Zanghellini, '*Av B and C* [2012] EWCA Civ 285 – heteronormativity, poly-parenting, and the homo-nuclear family' (2012) 24(2) *CFLQ* 475-486 at 475.
[49] *A v B (Contact: Alternative Families),* [2012] EWCA Civ 285, para. 27, per Thorpe LJ.

having a 'proper knowledge of… and some relationship with'[50] his or her biological father. As in other family disputes, opposition from the primary carer(s) is generally insufficient to break established views about the advantages of a positive father-child relationship.[51] Nonetheless, every family (however comprised) is different and the decisions of family courts are fact-specific and welfare-driven. Developing a judicial consensus in determining the precise nature and scope of each parental role has thus proved particularly difficult. There are relatively few reported decisions to date and existing precedent about the best interests of children in more conventional families provides limited assistance.

C. Developing a Judicial Consensus

Broad Consensus on Broad Issues

The customary best interests considerations common to private family actions are, then, clearly evident in known biological father judgments. So, for example, the status quo[52] is a factor of importance, as is the conduct of the parties involved[53] and the ascertainable wishes of the child(ren).[54] Children able to express a view are, routinely, found capable of understanding 'entirely' the composition of their own family – and of being comfortable with the role each adult plays in their upbringing.[55] In *T v T (Shared Residence)*, Black LJ noted the findings in evidence that, while the three adults litigating:

> may be very concerned about issues of status such as who could and should be classed as "the parents"… those matters are not… of particular concern to the children… labelling is an issue for or, more accurately, between the parents and adults.[56]

[50] *DB v AB (Contact: Alternative Families)* [2014] EWHC 384 (Fam), assuming always, at para. 38 per Holman J, that there is 'nothing to disqualify' the father from exercising contact from a child safety etc. perspective.
[51] E.g., *Re S (Parental Responsibility)*[1995] 2 FLR 648; *White v White* 2001 SC 689. This approach is also compatible with precedent about the 'right to respect for… private and family life' (Article 8(1) of the European Convention on Human Rights ETS Nos 5 and 155). See *G v Netherlands* (1993) 16 EHRR CD38; *Kroon v The Netherlands* (1995) EHRR 263; *Soderbach v Sweden* (2000) 29 EHRR 95; *Anayo v Germany* (2012) 55 EHRR 5.
[52] E.g. in *R v E (Female Parents: Known Father*)[2010] 2 FLR 383, the court endorsed the existing living arrangements whereby the child had been settled in England, living with both female parents, for 7 years (the known biological father lived in America).
[53] See *MA v RS (Contact: Parenting Roles)* [2011] EWHC 2455 (Fam) in which the adults' mutual hostility was noted to have impacted negatively upon the children's best interests.
[54] See English Welfare checklist in Children Act 1989, s. 1(3) and Scottish Welfare test in Children (Scotland) Act 1995, s. 11(7)(b).
[55] See, e.g., *MA v RS (Contact: Parenting Roles)* [2011] EWHC 2455 (Fam), at paras 21, 30, per Hedley J; *T v T (Shared Residence)* [2010] EWCA Civ 1366. For recent research about this, see Susan Golombok, *Modern Families: Parents and Children in New Family Forms*, (Cambridge: Cambridge University Press, 2015), pp. 192-218.
[56] *T v T (Shared Residence)* [2010] EWCA Civ 1366, para. 13, per Black LJ.

Some broad areas of consensus have emerged concerning the endorsement and exercise of parental roles. Where the female couple exercise residential care of the child(ren) for the majority of the time, the known biological father is not generally acknowledged as a parent of equivalent standing.[57] Nevertheless, minimal awards of 'identity contact', merely enabling the child to appreciate his or her heredity, are uncommon among the judgments to date.[58] In some cases, the court has endorsed a role akin to that of a 'distant avuncular'[59] relative for the biological father. In others, where the dispute concerns children living in what might be described as a 'three parent, two homes regime',[60] courts have shown willingness to invest known biological fathers with parental authority.[61] Such an award empowers these fathers to make various important parental decisions, for example, about their child's education or health, jointly with the female (usually also the 'legal') parents. Yet, developing a deeper consensus in respect of the finer points of decision-making, and establishing a common lexicon of terms, in known biological father cases continues to be problematic.

Lack of Consensus in Detail – and in Terminology

At first instance in *A v B (Contact: Alternative Families),* Jenkins J cautioned 'against the use of stereotypes from traditional family models'.[62] A number of factors have been proposed to which reference might be made in determining what arrangements might serve the child's best interests in known biological father cases. These include, for example, ranking adult/'parental' entitlement according to time spent with the child. Even this exercise is not without difficulty. In the Court of Appeal in *A v B (Contact: Alternative Families),* Thorpe LJ observed that, were the adults in the life of the child concerned to be placed in such a hierarchy, the full-time nanny – and none of the parties litigating – might well be the child's primary 'parent'.[63]

Another factor suggested is reliance on the nature of the adults' prior relationship and/or terms of any 'co-parenting' discussions, or agreement reached, by the parties at the outset.[64] While this

[57] In, e.g., *MA v RS (Contact: Parenting Roles)* ibid, the court drew a clear distinction between the roles of the female couple as primary carers and the role of the biological father and his partner.
[58] See, e.g., *A v B (Contact: Alternative Families),* [2012] EWCA Civ 285; *MA v RS (Contact: Parenting Roles)* [2011] EWHC 2455 (Fam).
[59] *Re B (Role of Biological Father)*[2007] EWHC 1952 (Fam), at para. 28, per Hedley J who also stressed, at para. 29, that the purpose of contact was not to give the father in that case 'parental status'.
[60] *A v B (Contact: Alternative Families),* [2012] EWCA Civ 285, at para. 45, per Black LJ, citing Jenkins J at para. 41.
[61] See, e.g., *T v T (Shared Residence)* [2010] ibid; *MA v RS (Contact: Parenting Roles)*, ibid.
[62] [2011] EWHC 2290 (Fam), para. 8.
[63] *A v B (Contact: Alternative Families),* [2012] EWCA Civ 285, para. 30.
[64] E.g., in *Re P (Contact),* [2011] EWHC 3431 (Fam), Hedley J, acknowledged, at para. 5, that, 'in a case like this we are in what is still new territory in defining the roles of the various parties in the context of parenting' but said that, unlike the gestational mother and her partner, the known biological father and his partner 'have never been, nor did they ever intend to be, resident parents'.

might seem superficially just, the nature of adults' prior relationships (i.e. whether platonic or sexual) surely should not dictate the nature any future relationship with their children? Nor, as Hedley J said in *Re P (Contact)*, should the intentions of parents-to-be (perhaps expressed long before the child's birth) rule out certain considerations about what might serve their child's best interests many years later.[65] In the end, what it is most 'likely to be important, in deciding what is in the child's best interests [is] to identify' in each case, and endorse, 'the source of the child's nurture, stability and security'.[66]

Further, the breadth of vocabulary that has emerged in recent years in attempts to characterise and regulate these family structures is in itself indicative of an absence of judicial consensus. In *B v A, C, D*, Dr Sturge, a Consultant Child and Adolescent Psychiatrist, gave evidence about 'just how deep rooted concepts and language are in relation to families'.[67] She went further, observing that 'the law, in a sense, pre-empts ways of understanding new family structures'.[68] Similar observations have been made in other cases by the judiciary. In *A v B (Contact: Alternative Families)*, Black LJ said that:

> new ways of family life [are] evolving but [have] not yet crystallised and that there [is] not even the language to accommodate them.[69]

Although the Court of Appeal ruled that the 'the only principle [to be applied] is the paramountcy of child's welfare',[70] Black LJ acknowledged that, 'despite the passage of time, courts continue to struggle to evolve a principled approach' to cases of this sort.[71] The struggle is an inevitable consequence of long-established, restrictive, statutory policy concerning who, or what, is a 'parent', and the lack of explicit statutory provision for multiple-parented children. In responding to the 'prompt of a minority' bringing such cases, family courts are 'in the vanguard of change.'[72]

The judiciary has on occasion made reference to social research,[73] and the vocabulary that has sprung up within, and around, such litigation is compendious. It includes, for example, describing

[65] Ibid, at para. 8, Hedley J also noted in the same para. that having regard to an agreement made at the outset did not negate the court's ability to override that if such an agreement no longer represented what was 'right for those children in that case.'
[66] *A v B (Contact: Alternative Families)*, [2012] EWCA Civ 285, para. 45, per Black LJ.
[67] *B v A, C, D (acting by her Guardian)* [2006] EWHC 2 (Fam), evidence of Dr Sturge, para. 57.
[68] Ibid.
[69] *A v B (Contact: Alternative Families)*, [2012] EWCA Civ 285, at para. 37, per Black LJ quoting herself in *Re G (Residence: Same-Sex Partner)* [2005] 2 FLR 957, paras. 33-34.
[70] Ibid, para. 23, per Thorpe LJ.
[71] Ibid, para. 38.
[72] *B v A, C, D (acting by her Guardian)* [2006] EWHC 2 (Fam), para. 32.
[73] E.g. in *B v A, C, D*, ibid, Dr Sturge referred to the social research in her evidence.

such families as 'different',[74] 'unconventional' or 'alternative',[75] 'new',[76] 'core' with additional 'identified male parents',[77] 'two-parent lesbian nuclear family'.[78] Parents and parenthood have, similarly, been characterised (and re-characterised) in an assortment of ways – 'biological and psychological' parenthood, 'invisible' and 'essential' parents',[79] 'genetic', 'gestational', 'social' and 'natural' parents,[80] 'core' and 'secondary parents'.[81] Further, questions have been posed which read like modern-day riddles to which the current law offers no clear or constant answer: for example, 'can a father who shows interest and commitment be a father and not a parent?'[82]

This emerging and varied vocabulary has done nothing to clarify the nature of the issues at stake. The language has grown steadily more opaque during the last decade. This has had the effect, on one hand, of rendering unreliable the application of existing legal concepts about family life[83] while, on the other, providing nothing fixed or certain to replace them. The statutory requirement that the child's best interests are the paramount consideration is certainly a flexible requirement but, as Sutherland observes elsewhere in this volume, 'the price of flexibility is a degree of uncertainty'.[84] While there is undoubtedly an underlying, and familiar, logic to decisions made in known biological father disputes, the judicial narrative lacks conceptual consistency. This is concerning for, as Sir James Munby (President of the Family Division) recently observed, the issues being determined are those of 'the most fundamental gravity and importance… to any child, to any parent, never mind to future generations and indeed to society at large'.[85]

D. Conclusions: Reform

[74] *Different Families: A Guide for Gay Dads*, Stonewall web-publication, 2010: www.stonewall.org.uk/educationforall.
[75] E.g., *A v B (Contact: Alternative Families)*, ibid; *DB v AB (Contact: Alternative Families)*, ibid.
[76] Brenda Hale, 'New families and the welfare of children' (2014) 36(1) *JSWL* 26-35.
[77] *A v B (Contact: Alternative Families)*, [2012] EWCA Civ 285, paras. 23; 41-42.
[78] Ibid, para. 27.
[79] Alan Brown, '*Re G; Re Z (Children: Sperm Donors: Leave to Apply for Children Act Orders)*: essential 'biological fathers' and invisible 'legal parents', ibid, 237-252.
[80] *Re G (Children) (Residence: Same-sex Partner)* [2006] UKHL 43, per Baroness Hale of Richmond, paras. 33-35. See also Leanne J Smith, 'Principle or pragmatism: Lesbian parenting, shared residence and parental responsibility after *Re G (Residence: Same-Sex Partner)*' (2006) 18(1) *CFLQ* 125 – 137.
[81] *MA v RS (Contact: Parenting Roles)* [2012] 1 FLR 1056 per Hedley J at para. 16-17, in which he referred to 'secondary parenting' and a parental role of 'secondary capacity'. However, this was later disapproved of by Thorpe LJ in the Court of Appeal in *A v B (Contact: Alternative Families*), ibid, at para. 30, who said that he 'would not endorse the concept of principal and secondary parents' and that he would 'certainly not categorise [biological fathers] as… secondary parent[s]'.
[82] *B v A, C, D (acting by her Guardian)* [2006] EWHC 2 (Fam), at para. 57, per Black LJ citing Dr Sturge.
[83] *In re P and L (Contact*) [2012] 1 FLR 1068, Hedley J observed in, para. 5, that such families are 'still new territory' to the law, noting that conventional models would not work and that 'a distinct concept of parenting and parental roles' would be necessary.
[84] See the chapter by Elaine E Sutherland.
[85] *A & Ors (Human Fertilisation and Embryology Act 2008)* [2015] EWHC 2602, para. 3.

Since 2004, UK statutes have bestowed a range of rights and remedies upon adults in intimate relationships other than heterosexual marriage.[86] This process of reform has produced a variety of new legal terms and statuses.[87] Notwithstanding extensive provision for adult relations, insufficient attention has been devoted to the growing diversity within the sphere of family life. Increasing reproductive freedom has generated new – and 'by no means unusual'[88] – multiple-parenting structures. These, in turn, require the amendment of existing law and/or the introduction of new legal structures if the child's best interests are to be served.

Certain steps towards reform are proposed. First, public consultation is required on the question of who, or what, ought to be considered in contemporary family life and society to be a 'parent'– and of the legal consequences that should attach to parental status. If law is to meet the needs of society then legal policymakers must clearly identify and reflect in statute what those needs are. Secondly, the approaches adopted by jurisdictions[89] already legislating for multiple-parenting should be studied. Thirdly, in view of current trends in assisted reproduction, the regulatory framework of the 1990 and 2008 Acts should be amended to provide more comprehensively for the allocation of 'legal parenthood' in private ('DIY') insemination cases. Also, the legislation[90] should enable, in appropriate cases, the registration of more than two adults as a child's 'legal parent'. Finally, in terms of current statute, gestational mothers can, by formal agreement, [91] share their parental authority with another adult, namely their child's father, a step-parent[92] or their female partner. These agreements were designed to enable co-parenting by adults who live in a permanent family relationship with a child and his or her mother. Consideration should now be given to extending the use of such parental agreements to all relevant adults in families in which a child has two female parents and a known biological father.

---

[86] See, e.g., the Civil Partnership Act 2004 (UK-wide legislation); Family Law (Scotland) Act 2006. In 2014, the Marriage and Civil Partnership (Scotland) Act 2014 and the Marriage (Same Sex Couples) Act 2013 each came into force enabling same-sex couples to marry throughout the UK.

[87] E.g., 'Civil Partner' (Civil Partnership Act 2004, s. 1); 'Cohabitant' (Family Law (Scotland) Act 2006, s. 25); 'Domestic interdicts', the new s 18A amendment introduced by the Family Law (Scotland) Act 2006, s. 31(3), to the Matrimonial Homes (Family Protection)(Scotland) Act 1981.

[88] *Re P* [2011] EWHC 3431 (Fam), per Hedley J at para. 5.

[89] See note 12 above.

[90] This would also require amendment of related legislation, such as the Births and Deaths Registration Act 1953 and the Registration of Births, Deaths and Marriages (Scotland) Act 1965.

[91] Children (Scotland) Act 1995, s. 4 ('Acquisition of parental rights and responsibilities by natural father'); s. 4A ('Acquisition of parental responsibilities and parental rights by second female parent by agreement with mother'); Children Act 1989, s. 4 ('Acquisition of Parental Responsibility by father'), s. 4ZA(b) ('Acquisition of parental responsibility by second female parent'). In both England and Scotland any such agreement must be made in the prescribed statutory form and formally registered before it has effect (1995 Act, s. 4(2); 1989 Act s. 4(2)).

[92] This step-parent provision only exists in English legislation: the 1989 Act, s. 4A(a) states that, if the mother's ex-partner also retains parental authority, 'both parents may by agreement with the step-parent provide for the step-parent to have parental responsibility for the child'.