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The Two-Parent Limitation in ART Parentage Law

Old-fashioned law for new-fashioned families

Mianna Lotz

Introduction

The expanding opportunities and increased acceptance of assisted reproductive technology (ART) have brought significant ‘new modalities’ of reproduction (Leckey 2009: 78) and along with those the seeds of potentially profound challenges to traditional assumptions about what constitutes a ‘family’ and ‘parent’. Widespread legislative reforms around same-sex marriage, parenting and adoption rights have transformed family law in a range of states, countries and continents. The role of gamete donors and surrogates, along with the increase of ‘blended’ families and open adoptions, stretch traditional conceptions of the family well beyond the dominant paradigm of the heterosexual, biologically-grounded and ‘exclusive’ nuclear family (Young 1998: 519).

Yet the undeniable social progressiveness of these reforms can obscure a recalcitrant fact: namely that what continues to prevail in law is, in key respects, a deeply traditional conception of the family as a *two-parent* nuclear construct. Furthermore, Kelly (2009) and Millbank (2008) point out that legal developments around ART parentage have in a number of cases served to protect or advance the claims of biological fathers at the *exclusion* of, rather than in addition to, those of lesbian co-mothers. This potentially entrenches traditional ideals of the family as biologically-grounded, rather than facilitating a more ‘inclusive’ and pluralistic revisioning of the family that more adequately reflects the realities of ART families.

This chapter considers the moral validity of maintaining adherence to a two-parent legal family construct, as assessed by reference to the interests of would-be parents and children as well as of families and society more broadly. The arguments presented here support a more inclusive legal conception of the family than currently prevails in most jurisdictions that have sought to develop a legal framework for assigning parentage in the ART context.

ART parentage law: Key aspects in international legislation

While the complexity and breadth of current ART-related legislation and recent reform processes make an exhaustive summary impossible here, key aspects of the legislative context prevailing in at least the Commonwealth and the United States can be highlighted.

Worth observing at the outset is a notable shift away from legislation assuming what McCandless and Sheldon (2010) refer to as ‘parental dimorphism’ (that is, a view of mothers and fathers as necessarily occupying distinct and complementary legal roles). As McCandless’s contribution to this volume also shows, the 2008 revisions to the Human Fertilisation and Embryology Act made it possible for the first time in the United Kingdom for lesbian partners accessing ART to *both* be recognised as legal ‘parents’ of a resulting child: the birth mother as ‘mother’ and her consenting female partner as ‘parent’¹. As a result, the UK’s ART parentage law now aligns with that which prevails in many other jurisdictions – including Australia², New Zealand³ and some provinces of Canada⁴. Of notable exception to these reforms is the fact that in no United States statute can legal parenthood status be allocated to the same-sex partner of a woman who conceives using ART, where the partner is not biologically related to the child (VCLR 2007: 11). At best (and only in some States) legal parenthood status can be achieved for a lesbian partner only via adoption, even where she consents to the ART and fully intends to co-parent the child. The US lags well behind the other countries considered here in terms of reforms to same-sex marriage and adoption law; reforms to ART parentage law in relation to legal parent recognition of same-sex non-birth partners are unlikely to be imminent.

In addition, the status of ART sperm donors, and of gestational surrogate mothers, is uniform across most of these legislatures in two key respects. First, a sperm donor is generally *not* recognised as the legal father⁵. In the context of a heterosexual couple using donor sperm, the man married or in civil union with the woman treated will everywhere presumptively be regarded as the ‘father’. If a woman is single, there will generally be no father recognised, with some exceptions (including Delaware, New Mexico, Texas, and New Zealand) allowing a donor who intends to take on the role of a parent to be recognized as a legal parent (though that status may not necessarily attract the full rights and liabilities of fatherhood). Second, while *genetic* contribution is deemed insufficient for parent status in the case of ART ‘fatherhood’ (because overridden by the marital status of a heterosexual ART treatment couple), in all jurisdictions it is *gestation* that counts for purposes of legal recognition as ‘mother’. Commissioning parents have no legal status with respect to the child in a legal surrogacy arrangement, even where they have provided the gametes for the conception. The child is legally recognised as the child of the gestating

woman and, if she is in a marital or civil union relationship, her male partner. This can only be altered post-birth, via a parenting order attained through the courts or by means of adoption. There exists no provision for the egg-donor (who may also be the contracting woman who intends to parent the child) to be given presumptive legal parenthood status, irrespective of the wishes and intentions of all parties.

What is particularly striking, and the main focus of the rest of my discussion here, is that these widespread reforms regarding *who* may count as a legal parent in the ART context, have not been accompanied by changes to *how many* may count. There is a *prima facie* oddity in this phenomenon, given that lesbian couples accessing ART will be using donor sperm (and perhaps even donor egg or donor embryo). Thus legal recognition of same-sex family structures has not prompted legal acknowledgment of the new context of ART parenthood as one in which there can be multiple contributors to a procreative project. Potentially, an ART-conceived child could result from an arrangement whereby a couple contracts to use the donated sperm of a third person and the donated ovum of a fourth person, to be fertilized using IVF and implanted to be gestated by a fifth person, with the consent of a sixth person (the surrogate's partner). While likely to be rare, in such a scenario we could have up to *six* persons with some grounds – genetic, gestational, contractual, intentional and/or social – for a claim to parenthood status, three (or even more) of whom could potentially advance a claim to 'mother' status: the ovum donor; the woman who gestates and gives birth to the child; and any woman or women – whether single, partnered, or indeed part of a would-be parental group; and whether gay, bisexual or heterosexual – who form the original intention to become parent(s) and to raise the child.

Yet in spite of the real prospect of procreative projects between at least three would-be parents, provisions almost universally preclude recognition of more than two legal parents. This *exclusivity* of the family paradigm underpinning ART parentage law becomes apparent when we consider that generally speaking, no sperm donor (or any male partner) is able to be recognised as a *second* 'father', or indeed as any kind of third legal parent, no matter how willing all parties might be. Likewise, if a lesbian couple uses ART and the female partner *is* registered as a parent, parentage law either explicitly or implicitly precludes any man from being identified as 'father' for purposes of birth registration⁶. The possibility that the grounds for recognition of two mothers might *coexist* with grounds for *also* recognising a man as 'father' or 'co-parent' is thus expressly excluded.

One significant implication of this plays out in situations in which the relationship of the original ART treatment couple breaks down. The two-parent legal limitation means that legal recognition of any new partner – who might occupy fully the social role of an additional parent in the child's life – is *incompatible with* the continued legal status of one of the original parents: granting of parent status

to someone additional would have to extinguish the legal parent status of one of the original two parents⁷. Yet there is no reason to expect that an existing legal parent, who – as per ART parenthood eligibility requirements – fully intended to undertake parenthood, would subsequently desire to alter her status, even (or perhaps especially) following relationship breakdown.

Lack of access to legal parent status for more than two co-progenitors has in some cases precipitated legal proceedings in which originally-intending parents (typically sperm donors) have sought greater recognition and security following deterioration of relationships with the other parties to the ART arrangement (often a lesbian couple)⁸. While courts have found in favour of custodial and guardianship entitlements for sperm donors in a number of these cases – usually on grounds of the child's best interests – the granting of legal status at the outset of a child's life to all consenting parties to an ART conception, would obviously establish their entitlement to continued involvement in the child's life and obviate the need for legal proceedings of this kind.

To summarize, a range of 'failures of recognition' result from the prevailing legal paradigm of the two-parent ART family. A considerable number of people are either unable to receive *de jure* recognition as the parents that, in terms of actual parenting practice, they *de facto* are; or are in a sense legally *misrecognised* as the parent of a child with whom they intend and have no active parenting role or relationship. In addition, nowhere is it possible for a friend or family relative of a single woman who accesses ART, to be registered as a legal co-parent of the child, even though they may undertake custodial and care-giving responsibilities equivalent to those of a parent. Kinship-based parenting is excluded as falling within what in UK law is termed 'prohibited degrees of relationship'; and both kinship and friendship-based co-parenting is precluded by a persistent commitment to the legal construct of the family as a fundamentally *sexual* unit. Accordingly McCandless and Sheldon (2010: 198) point out that '[while]... the two parent model might be seen to have outlived its moorings in the heterosexual couple, the sexual family model continues... to frame our understanding in so far as the couple at the heart of the family remains a sexual one' (see also McCandless, this volume). Yet it is far from obvious that to be raised collectively by people in a close kinship relationship – such as sisters, or a single woman supported by her parent(s) – or indeed by any persons not sexually intimate with each other, is necessarily incompatible with a child's best interests⁹.

One notable departure from the two-parent limitation has occurred in the Canadian case of *A.A v B.B*¹⁰. In this case 'A', the long-term female partner of an ART birth mother, sought a court declaration legally recognizing her as a mother of the resulting child *in addition to* his birth mother *and* his biological father (the sperm donor, a close male friend of the couple who agreed to assist them to start a family, be actively involved in the child's life, and be recognised legally as his father). Importantly, all parties wanted 'A' to be granted equal

legal status *without that extinguishing* ‘B’s legal parental status, as would of necessity have occurred had ‘A’ pursued the available alternative of seeking to adopt the child. While initially dismissed on technical grounds, ultimately the Ontario Court of Appeal unanimously voted in favour of a *non-excluding* extension of legal recognition to ‘A’ as the then five-year-old child’s mother, their decision resting on a judgment of the child’s best interests. It is that moral consideration – of the interest of the ART-conceived child – to which I first turn in analysing the moral considerations in favour of what might be referred to as a ‘three-parent-plus permission’ in ART parentage law.

Moral considerations favouring legal inclusivity

While the idea that a child’s best interests ought to be paramount in decisions affecting their welfare is now ubiquitous, nevertheless they are not the only interests directly at stake in this matter. Parents (and would-be parents) have distinguishable interests in legal parentage status, and these warrant consideration even if they are not fully separable from the child’s interests once s/he comes into existence. Finally, a consideration of the interests of children and parents (prospective and actual) should be supplemented by a broader assessment of the impact of reforming current legal parentage provisions, not just for those individuals but for families and social practices more broadly.

Importantly, the moral considerations that follow speak at most in favour of greater *permissiveness* in regards to legal parentage recognition. I do not intend any of my arguments to support a claim that the various parties to ART conception should be morally or legally *obligated* to be registered as parents. Nor, importantly, are the arguments here intended to designate any *specific* correlation between recognition of legal *parentage* status, on the one hand, and attribution of *parenting* rights and responsibilities, on the other. Legal parentage recognition need not and does not entail equal and full legal parenting rights and responsibilities. The specific (and potentially highly variable) distribution of parenting rights and responsibilities that will be appropriate for specific families is a matter for determination on a case-by-case basis; and while differentiated parenting rights and responsibilities *may* track differentiated grounds for legal parentage (for example social versus biological), that need not be the case, and should not be assumed *ab initio*.

Interests of the child

The Victorian Law Reform Commission (2007: 112) has pointed out that the assignation of legal parental status ‘is principally intended to protect children’, conferring powers on parents to enable them to provide due care. Accordingly, several considerations support the claim that in a significant class of cases an

ART-child's best interests would be served by allowing recognition of three or more legal parents, where that is the univocal wish of all parties.

First, a child's *financial security* stands to be significantly enhanced from permitting 'three-parent-plus' legal families. Legal parent status protects a child by ensuring that from the very outset of their life, readily-identifiable adults have stable ongoing responsibilities of care towards them as well as the authority to make decisions about significant matters in their life. Importantly, as noted by the New Zealand Law Commission (2004: 16), '... the rules regulating succession on intestacy, family protection, citizenship, and child support stem first and foremost from the status of "legal parent", not from guardianship'. Moreover, the provisions and corresponding rights and obligations of legal parent status endure beyond childhood, unlike in the case of guardianship. And of particular importance is the fact that both automatic inheritance upon intestacy, and the ability to make a claim against a deceased estate, is in every jurisdiction available only to legally-recognised children of a person who dies without a will. Furthermore, if an ART birth mother should die, her partner will not be legally recognized as having status or custodial rights in relation to the child unless a parenting or guardianship order has been obtained or she has adopted the child. Millbank (2009: 15) also notes that a lack of parental status disadvantages lesbian co-mothers in child-related legal disputes with the birth mother, potentially causing significant loss of contact between a child and a co-mother after relationship breakdown. Thus, while in many lesbian relationships the female partner *will* be appointed as a guardian, it is clear that neither parenting orders nor guardianship status are equivalent to full legal parent status; for that reason they are widely regarded as inadequate for fully recognizing the *de facto* status of the female partner in the child's life.

In most jurisdictions additional sources of financial security are likewise precluded in the absence of legal parent status, such as the ability to seek compensation for a parent's accident, death or injury. Finally, in the event of relationship breakdown anyone not legally recognised as a child's parent is not automatically liable for child support, a fact with the potential to significantly disadvantage a child. Given that the availability of ongoing financial support for a child is of critical importance where there is a relationship breakdown between parents, or where a parent becomes very ill or dies, expanding the range and number of legally recognisable parents to permit inclusion of same-sex partners of birth mothers, and potentially *also* sperm donors (where that is desired by all parties) would only further secure a child's financial position.

Of course, in order to be justified by reference to the best interests of the child, the financial provisions effected by legal parent status would need to apply only to financial benefits and not to financial burdens; accordingly only assets and protections, and not debt and liabilities, should be able to be incurred by the child. This imperative, however, is in line with existing practice

in most jurisdictions, and its extension to ART-families with more than two legally recognized parents presents no distinct problems or risks.

Beyond financial security, a child's *sense of psychological security* is also likely to be significantly enhanced by expanding legal recognition to all of those who *in fact* parent the child. Where three or more persons are fulfilling the roles and responsibilities of parent in relation to a particular child, it is surely not in a child's best interests to have any of those persons deprived of legal recognition as a parent. Endorsing a Supreme Court ruling in a relevant Canadian case, Bouchard (2007: 467) points out that 'the recognition of multiple parents would be in a child's best interests, regardless of number, provided they are actually acting as parents', namely because it will enable them to be able to count on the parental relationship continuing. Bouchard also notes that where legal recognition is bestowed on persons acting in the role of parent, that declaration of parentage brings a child's family 'out of the shadows', giving both practical and symbolic recognition to all of the most important relationships in the child's life (468). And as Young (1998: 517) points out, to deny legal parentage beyond two parents is in many cases simply misrepresentative, failing to 'reflect the multiple roles and [persons] involved in a child's life'. It is this misrepresentativeness that, for Young, constitutes the central normative objection to the exclusive two-parent family legal paradigm.

In considering a child's interests we must also acknowledge important lessons drawn from evidence and testimony in the adoption and, more recently, anonymous gamete donation context. A significant concern emerging from research studies is that widespread practices of secrecy and non-disclosure in relation to biological family history, can produce serious negative outcomes for child welfare (Turner and Coyle 2000; Lycett *et al.* 2004, 2005).¹¹ As noted by the New Zealand Law Commission (NZLC 2004: 5), '[l]aws that create fictional parenthood and extinguish the child's ties with the genetic parents' are increasingly under scrutiny. ART parentage law's insistence on presumptively recognising only male *partners* of women receiving ART, and on precluding coextensive recognition of sperm donors in any case in which two legal parents are already recognized, seems to create a legal fiction that is in considerable tension with our best evidence concerning the importance of full and independent access to information about one's familial history. In addition to enabling provision of full medical-genetic history and the ability to avoid consanguineous relationships, a significant benefit of legal parentage recognition for all consenting ART contributors is the protection that full disclosure of biological parentage offers against the possible identity-development challenges that confront many adoptees and other children resulting from alternative modes of family formation, including gamete donation and surrogacy (see also Shanley and Jesudason in this volume). Extensive research indicates that even where adoptees enjoy considerable legal safeguarding and support of their entitlements to information about their

adoption and birth parents, nevertheless there remains a discrepancy between adoptees' and adoptive parents' perceptions as to level of interest in and desire for contact with biological parents, and also levels of anxiety about disclosing interest in biological parentage (Hawkins *et al.* 2008; Jones and Hackett 2008; Brodzinsky 2005, 2006; Stein and Hoopes 1985). Importantly, I am not here arguing for *mandatory* full disclosure or genetic testing of biological parentage, nor for the prohibition of anonymous gamete donation. The arguments here apply exclusively to cases in which *there is known willingness to be identified* on the part of procreative contributors. In such cases, the potential benefits for the resulting child of having all parties legally registered as parents, and of therefore having independent, unmediated access to potentially important identifying information, strongly support legal permissiveness towards three-parent-plus families. To acknowledge this, however, is not to suggest that legal parenting status is necessary or morally mandated on these grounds. There clearly exist alternative mechanisms sufficient for achieving the goal of providing independent, unmediated parentage information.

Before turning to parental interests, one potential child-welfare-related concern about the proposed legal inclusivity warrants attention: namely, that permitting more than two legally-recognized parents will increase the risk of harm to children, either by predisposing them to increased stigmatization, or by predisposing multi-parent families to increased intra-familial conflict. Both concerns are significant, and deserve closer consideration than I can here give them. Yet three quick points can be made.

First, one highly efficacious way in which to de-stigmatize a given phenomena is precisely by according it legal standing. As McNair (2004: 9) points out, '[i]nadequate representation of diverse families in the public arena increases the already stigmatized nature of ART, infertility, surrogacy, and lesbian and gay families'. Enabling the formal sanctioning of diverse family forms that we know already exist in reality, could only assist with normalizing such families, helping to reduce stigma and the negative child outcomes associated with that.

Second, the potential for increased conflict arising from multi-parent families will not be eliminated by a refusal to legally recognize more than two parents. Relationship breakdown and re-partnering presents considerable challenges for families, and parental conduct sometimes falls well short of the ideal. Yet *all* families encountering post-separation conflict have full legal recourse through family courts and their instruments. Even if we accept the possibility that legal recognition of three-parent-plus ART families could increase the frequency or intensity of such conflict, families experiencing such conflict can avail themselves of the existing dispute resolution mechanisms that arbitrate on matters of custody and access. Indeed, weighing against concerns of a greater likelihood of intra-familial conflict, the New Zealand Law Commission (2004: 242) has noted that the fact that ART-family arrangements will typically have been the subject of extensive planning, thought and deliberation between

all intending parents prior to conception and birth, may well predispose these families to *reduced*, rather than increased, conflict.

Finally, it can be argued that it is in fact the *current* legal system – with its tenacious commitment to an exclusive, two-parent family paradigm – that exacerbates grounds for conflict. As Young (1998: 546) has pointed out, the fact that current law treats claims for legal parentage as a zero-sum game – namely by requiring extinguishment of an existing parent's legal status as a condition of the extension of legal status to any additional persons – creates a system of 'winners and losers' which 'fails to encourage the seeking of common ground'. Indeed it might be noted here the extent to which currently-prevailing and highly adversarial systems of post-separation family law arbitration likewise embody a 'zero-sum' model in which one party's gain is necessarily another's loss. Young notes that in many of the cases that have come before courts, lesbian couples have sought to exclude sperm donors from attaining or retaining legal status and from playing any role in the child's life, principally for the reason that such a status for the sperm donor is incompatible with legal recognition of both women as parents, and therefore threatens the lesbian relationship itself. The result of this is that '... the child, and the family as a whole, must forego certain relationships that could be complementary to, and supportive of, the core unit' (548). Thus a significant potential source of the very conflict that we are here concerned about, is in fact an artefact of prevailing parentage law itself (see also Scheib and Hastings, Graham, and McCandless, all in this volume).

Interests of parents

Notwithstanding the intimate co-dependence of children's and parents' interests, it is at least *conceptually* possible to distinguish parental interests that will be promoted by a greater permissiveness and inclusivity in ART parentage law.

The first of these is the interest in *equality of access to the 'goods' of legal family founding*. It is my view that the central goods of family founding are bound up not primarily with securing a realm of privacy or relations of intimacy (*contra* Schoeman 1980) but with the enhancement of individual flourishing, autonomy and self-realization. Founding a family offers the opportunity to pursue one's own conception of the good – one's own freely-chosen 'experiment in living' – not just within one's purely self-regarding sphere but amongst a sphere of intimates. This constitutes the building of a family as an inherently creative and self-expressive activity. As Brighthouse and Swift (2006: 92) note, the relationships that adults have with the children they parent 'have a different moral quality, make a different kind of contribution to their flourishing, and so are not interchangeable with other [intimate] relationships'. Citing Callan (1997: 142), Brighthouse and Swift argue furthermore that parents have 'a non-fiduciary interest in playing this fiduciary role', based on the fact that parenting develops capacities and self-knowledge that (for many) are central to a flourishing life (95).

If we accept this account of the important goods of parenthood and family-founding, then the equality argument establishes a moral imperative for law to ensure that *all* individuals are accorded equal opportunity to access these goods; and that any family-related legislation that is – in intent or effect – discriminatory, is removed. For many individuals (especially gays and lesbians) contributing sperm or ova to an ART conception represents the *only* opportunity they have to play a role in creating and parenting a child and founding a biologically-related family (which is, rightly or wrongly, currently highly valued in most societies). Claims of inequality and discrimination gain a footing wherever a person's unchosen attributes curtail their equal access to important personal or social goods. Any barriers to legal parenthood status that impact disproportionately and negatively upon same-sex couples or individuals are *pro tanto* discriminatory.

The second parent-centred argument for permitting three-parent-plus legal families in at least some cases concerns a *parent's interests in de facto/de jure parity*. Legal recognition or not, we know that there are, and will be, families of a less traditional composition in which the social roles and responsibilities of parenting are undertaken by three or more people. Yet access to child welfare support and carer entitlements of various kinds, and to employment entitlements such as parental leave, are limited to legal parents. Other restrictions similarly prevent full participation in a child's life, such as the ability to obtain a passport and citizenship for one's child, to register a child in school, to grant consent to medical treatment and in some cases to obtain medical information about a child. Only a legal parent can grant consent to a child's future adoption (a fact which may become relevant if a sole remaining parent faces terminal illness, for example); and as we have already noted, without a declaration of parentage or an adoption or guardianship order, a surviving partner is not entitled to make important decisions for a child whose birth mother has died.

In view of these significant impediments to full parental participation in a child's life, considerations of fairness suggest that those who *de facto* contribute to raising a child – and who may well have been involved in planning their conception – are entitled to equivalent *de jure* recognition, not least of all where that is required for access to significant entitlements and capabilities. Legal recognition is certainly in the *economic* interests of those who have committed to parenting a child; however, it is also a matter of the *symbolic recognition* of the significance of the person's role in the child's life. This symbolic recognition has the power to enhance both parents' and children's welfare, as expressed by one submission reported in *A.A. v B.B.* (ONCA 2, 2007: 6):

[L]egal recognition of our role as parents to our children is essential for their safety and social well being. It is critical to children that they have reflected back to them the value and integrity of their lives, including the legitimacy of their families ... Equal familial status sends a powerfully positive message to all social institutions that have an influence on our children's lives. It obliges them to acknowledge and respect the families our children live in.

Moral imperatives of social transformation

A final moral consideration in favour of increased inclusivity in existing ART parentage law is motivated not in the first instance by the direct interests of ART-conceived children or their progenitors, as central as these are, but by socio-political objectives more broadly conceived. A loosening of the two-parent family paradigm reflected in law embodies the potential to promote acceptance of diversity and pluralism more widely within our communities, increasing tolerance and enhancing welfare well beyond individual ART families.

Perhaps contrary to initial expectations, it also has the potential to weaken the grip of the biologically essentialist ideals underpinning traditional conceptions of family and parenthood, which might be thought to be enjoying something of a reification with the expansion of technological opportunities for people to contribute biologically to the creation of a child (Levy and Lotz 2005; Lotz 2008). However, enabling consenting families to register three or more legal parents would challenge traditional assumptions that ‘real’ or ‘true’ families comprise exclusively one mother and one father, united by a sexual bond, producing biologically related offspring. While a more inclusive parentage law can allow for increased recognition of biological or genetic contributors – in particular gamete donors – what is crucial is that enabling such persons to legally count as parents need not come at the cost of the parent status of any existing parent. Thus, expanding the legal model of the family beyond persons with biological grounds for parentage recognition, will serve the interests of same-sex partners, both male and female, who have no biological or genetic relationship to the child, and who occupy an exclusively *social* parental role. Greater inclusivity will ultimately promote equality and non-discrimination for all persons, regardless of sexual orientation, and will formally communicate acknowledgement of the significance of social parenting. In turn, increased acceptance of non-genetically-based parent-child relationships – such as are found within adoptive families – is also promoted via formal acknowledgement of the many diverse yet normatively equivalent foundations upon which parent-child relationships are built.

There might appear to be something paradoxical in the suggestion that an expanded legal parentage law – which will *inter alia* facilitate increased recognition of *biological* parents – is to be supported on the grounds that it will serve to promote more inclusive *non-biologicistic* conceptions of parenthood and family. Commenting on judicial decisions that have granted limited custody and guardianship to gay male donors where lesbian couples use ART, Legge, Fitzgerald and Frank (2007: 20) note the tension that exists in the fact that in such cases, biological kinship ‘is being prioritized in a manner which reflects the contemporary biologization of kinship ties, while at the same time... [providing] legal recognition to a wider and non-traditional family unit of three homosexual parents’. However, rather than exclusively entrenching biological kinship ideals, recognising three-parent-plus families at law in fact provides

‘simultaneous reinforcement *and destabilization* of the traditional family unit’ (Legge *et al.* 20, emphasis added). Thus it helps to *confound* traditional conceptions of parenthood and family, creating the space in which a much wider diversity of families can flourish and thereby loosening the grip of narrow genetic and biological conceptions of what constitutes a family and a parent.

The apparent paradox is further removed by re-calling attention to the point, made earlier, that legal parental *recognition* need not and does not entail equal and full legal parental *rights and responsibilities*. On the contrary, the distribution of parental rights and responsibilities both can and should track *differentiated* forms of parenthood. Thus a child’s birth registration might distinguish *amongst* the legal parents those that stand in the *social* relation of parent to the child as opposed to those who do not, signifying different degrees and spheres of parental entitlement and obligation accordingly. Such delineation can also assist, where applicable, in the appropriate and equitable distribution of financial and social entitlements and obligations between eligible parties. Importantly, I suggest, what should in *every* case determine the allocation of legal parent *rights and responsibilities* (as distinct from mere legal parental *status*) is the *actual social role* that a person plays, or intends to play, in the child’s life. The claims here are therefore not to be taken to support automatic recognition of gamete donors as legal parents, nor claims of a child’s need for a biological father, nor any arguments seeking to secure legal status on grounds of an alleged moral significance of biological or genetic contribution alone. Just as it might be appropriate to *limit* the scope of parental rights and responsibilities for some genetic or biological contributors, so too might it be appropriate to *extend* rights and responsibilities to more than two social parents. Thus an expanded conception of what it means to be a ‘parent’ can fruitfully ground a diversification of the types of rights and responsibilities accorded to ‘parents’; and the fact that one is a ‘parent’ is to be understood as under-determining matters of rights and responsibilities. I take these to be, in principle and in practice, fully achievable legal determinations and demarcations.

Conclusion

A substantial body of research now demonstrates that welfare outcomes for children in diverse family compositions cannot be linked to method of conception, the absence or presence of genetic or gestational link in parent-child relationships, parental sexual orientation, or family form; and that what matters above all else are factors such as the level of family functioning, stability and harmony, and openness of communication (Golombok 2006, 2004, 2002, 1999, 1996; McNair 2004; Brewaeys 2001; Wise 2003). Family structure in itself is not predictive of parenting quality, and is ‘an inadequate proxy measure for child outcomes due to the huge variation in levels of functioning within

any one family form' (McNair 2004: 19). Yet while legislative progress has been achieved to remove some discriminatory aspects of law in relation to matters of family, marriage, adoption and even ART parentage, the family construct that continues to prevail in law is one that is out of alignment with reality, and poorly suited to accommodating changed and changing family forms. Removing the two-parent limitation so as to allow a broader range of consenting contributors to a child's conception and parenting to potentially gain legal parentage recognition has the potential to substantially promote the welfare of children, parents, families and society more broadly. As Young (1998: 555) argued over a decade ago:

... [A]t a time when fewer and fewer children live with two parents, when more and more children live in strained economic conditions, and when the state appears to be less and less likely to provide support, the 'channeling function' of law could be deployed to encourage and support the creation and maintenance of more connections with those who may have special interests in a particular family or child, and a particular inclination to contribute... From this perspective, social policy should be contemplating ways of encouraging more people to feel greater levels of responsibility for more children.

Removal of the two-parent limitation in ART parentage law would make a significant contribution towards fulfilling that moral objective.

Notes

- 1 By Sections 33(1) and 42(1) of the HFE Act (2008).
- 2 In Australia reforms have progressed through State legislatures since 2002 with the final legislation (in South Australia) due to come into effect later this year. For a comprehensive overview of Australia's legal developments in same-sex parenthood see in particular Millbank (2009) and the Victoria Law Reform Commission Final Report (2007), hereafter cited as (VCLR 2007).
- 3 NZ Law Commission Occasional Paper (2004), hereafter cited as (NZLC 2004).
- 4 Namely Newfoundland, Quebec and the Yukon, with British Columbia achieving this via Human Rights Tribunal ruling. See Leckey (2009).
- 5 Though a man who assists reproduction by means of sexual intercourse is a legal parent, and indeed *cannot be removed* as such.
- 6 Per HFE Act (2008) section 45(1).
- 7 Ibid, per section 44(1).
- 8 Including in New Zealand the case of *P v K* ([2003] 2 NZLR 787); *P v K and M* ([2004] NZFLR 752); and *P v K* ([2004] 2 NZLR 421); and in Australia of *Re Patrick* (An Application Concerning Contact) [2002] FamCA 193 (5 April 2002).
- 9 McCandless and Sheldon (2010: 199) refer to a 2005 BBC report on the IVF arrangement between a married woman (infertile following chemotherapy), her consenting husband (who donated the sperm), and her two sisters – one of whom contributed the egg while the other gestated the baby. See 'Sisters make baby with three mums'.

- 10 A.A. v. B.B., 2007 ONCA 2 Date: 20070102 Docket: C39998. Court of Appeal for Ontario.
- 11 An excellent meta-analysis is provided in VLRC (2007), especially chapters 2 and 12, and Appendix 1.

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