



Brown, A. (2023) Trans (legal) parenthood and the gender of legal parenthood. *Legal Studies*, (doi: [10.1017/1st.2023.27](https://doi.org/10.1017/1st.2023.27))

There may be differences between this version and the published version. You are advised to consult the published version if you wish to cite from it.

<http://eprints.gla.ac.uk/302794/>

Deposited on 11 July 2023

Enlighten – Research publications by members of the University of Glasgow  
<http://eprints.gla.ac.uk>

## *Trans (Legal) Parenthood and the Gender of Legal Parenthood*

Dr Alan Brown\*

Keywords: legal parenthood, trans parents, Gender Recognition Act 2004, *R (McConnell and YY) v Registrar General for England and Wales*, fatherhood, motherhood

### **Abstract**

Trans identities are increasingly subjected to contentious public and political debate in the UK, and this has resulted in resource to the law across various contexts. Against that background, this article considers trans legal parenthood after the decision in *R (McConnell and YY) v Registrar General for England and Wales*. This judgment held that a trans man who gave birth was the legal ‘mother’ of his child. The wider consequence is that trans legal parenthood will not reflect trans identities, but birth assigned sex/gender, regardless of whether the parent holds a gender recognition certificate. Separate from this underlying social and political context concerning trans identities, the article argues that legal parenthood is a flexible and pragmatic concept, which lacks inherent normative content, and which has previously proved capable of accommodating a variety of different familial and reproductive circumstances. The article argues that the gendered descriptors of ‘mother’ and ‘father’, while remaining the law’s default, are not inherent to legal parenthood. Thus, the article concludes that, despite the ongoing political and cultural debates concerning trans identities, the existing concept of legal

---

\* Senior Lecturer in Private Law, University of Glasgow, [alan.brown.2@glasgow.ac.uk](mailto:alan.brown.2@glasgow.ac.uk).

An earlier version of this paper was presented in the Family Law stream at the Society of Legal Scholars Annual Conference at King’s College London in September 2022, I am grateful to the attendees for their comments. I would also like to thank Professor Jonathan Herring, Dr Lynsey Mitchell and the anonymous reviewers for their helpful comments on earlier drafts. Any errors that remain are my own.

parenthood is capable of properly recognising trans parenthood, without requiring any fundamental changes to the concept itself.

## Introduction

This article considers trans<sup>1</sup> legal parenthood in the UK, focusing on the judicial response to trans parenthood and exploring the wider implications of trans parenthood for legal rules and legal language. This consideration is underpinned by two countervailing wider trends – (i) the increasingly contentious contemporary social, political and legal debates around trans identities, and (ii) the greater recognition of the diversity of family forms within family law. First, the interaction between the concepts of ‘sex’ and ‘gender’ has become the site of significant debate, both inside and outside law in the UK.<sup>2</sup> This has encompassed a range of issues, including; potential reforms allowing for ‘self-identification’ of trans identities,<sup>3</sup> with proposed legislation in Scotland<sup>4</sup> blocked by the UK Government in early 2023,<sup>5</sup> and the interaction between the Gender Recognition Act (‘the 2004 Act’) and the Equality Act 2010 (‘the 2010 Act’); particularly the ‘protected characteristics’<sup>6</sup> of ‘sex’<sup>7</sup> and ‘gender reassignment’<sup>8</sup> under

---

<sup>1</sup> The term trans is used throughout this article, encompassing circumstances where an individual’s identity does not reflect the traditional, binary understanding of either sex or gender. However, in older case law and literature, the terms ‘transsexual’ and ‘transgender’ are used, reflecting then common language. This article will use those terms when quoting from such sources.

<sup>2</sup> See e.g. the ‘Future of Legal Gender’ Project at <https://futureoflegalgender.kcl.ac.uk/>, D Cooper ‘Beyond the Current Gender Wars’ (2019) 25(4) IPPR Progressive Review 393 and D Cooper ‘A Very Binary Drama: The Conceptual Struggle for Gender’s Future’ (2019) 9(1) *feminists@law*.

<sup>3</sup> Changing the requirements for the granting of a Gender Recognition Certificate (GRC) in Gender Recognition Act 2004, s 2 and s 3, and allowing for a GRC to be granted based upon a declaration to the Registrar General.

<sup>4</sup> s 4 Gender Recognition Reform (Scotland) Bill sought to insert a new s 8C into the 2004 Act.

<sup>5</sup> Under s 35(1)(b) Scotland Act 1998, see Secretary of State for Scotland ‘Policy Statement of Reasons on the Decision to Use Section 35 Powers with Respect to the Gender Recognition Reform (Scotland) Bill’, January 17<sup>th</sup> 2023, at -

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1129495/policy-statement-section-35-powers-Gender-Recognition-Reform-\\_Scotland\\_-Bill.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1129495/policy-statement-section-35-powers-Gender-Recognition-Reform-_Scotland_-Bill.pdf).

<sup>6</sup> s 4.

<sup>7</sup> s 11.

<sup>8</sup> s 7 (1).

the 2010 Act.<sup>9</sup> Further complexity arises because the terminology involved is contested by those that oppose liberalisation of the law, and debates often revolve around central philosophical or moral questions – ‘what is a woman?’ and ‘what is a man?’ This political and social context has led to several cases being brought concerning the legal definitions of ‘sex’ and ‘gender’ under different statutes.<sup>10</sup> Therefore, judicial consideration of trans legal parenthood is situated within this wider context of judicial interpretations of ‘sex’ and ‘gender’, and the contested socio-political terrain concerning trans identities.<sup>11</sup>

Second, there has been increasing legal recognition of family diversity,<sup>12</sup> seen through the Human Fertilisation and Embryology Act 2008’s (‘the 2008 Act’) ‘parenthood provisions’,<sup>13</sup> equal marriage<sup>14</sup> and mixed sex civil partnerships.<sup>15</sup> Fifteen years ago, Diduck commented: ‘[n]ew families and new parenthoods seem on their face to require new rules as well as new language.’<sup>16</sup> Trans parenthood represents a paradigmatic example of a ‘new parenthood’; it questions assumptions about the biological contributions of ‘mothers’ and ‘fathers’ to parenthood, due to the divergence between individuals’ ‘gender identity’ and their ‘assigned sex’,<sup>17</sup> and the legal change of sex and gender under the 2004 Act.<sup>18</sup> The law must respond to

---

<sup>9</sup> Full consideration of the issues that arise under the 2010 Act is outside the scope of this article.

<sup>10</sup> See e.g. *Fair Play for Women Ltd v Registrar General for Scotland* [2022] CSIH 7, 2022 SC 199, *For Women Scotland Ltd v The Lord Advocate* [2022] CSIH 4, 2022 SC 150 and *For Women Scotland Ltd v Scottish Ministers* [2022] CSOH 90, 2023 SLT 50. There has also been cases in various other contexts, such as *Bell v Tavistock and Portman NHS Foundation Trust* [2020] EWHC 3274 (Admin), [2022] 1 FLR 30 and *Forstater v CGD Europe* [2021] 6 WLUK 104, [2022] ICR 1.

<sup>11</sup> I would like to thank one of the anonymous reviewers for raising this point.

<sup>12</sup> Reflecting shifts in public attitudes, see e.g. E Harrison, ‘Family Life: Attitudes to Non-Traditional Family Behaviours’, British Social Attitudes Survey 37 (2020) - [https://www.bsa.natcen.ac.uk/media/39410/bsa37\\_family-life.pdf](https://www.bsa.natcen.ac.uk/media/39410/bsa37_family-life.pdf) and M Albakr, S Hill, N Kelley and N Rahim, ‘Relationships and Gender Identity: Public Attitudes Within the Context of Legal Reform’, British Social Attitudes Survey 36 (2019) - [https://www.bsa.natcen.ac.uk/media/39358/5\\_bsa36\\_relationships\\_and\\_gender\\_identity.pdf](https://www.bsa.natcen.ac.uk/media/39358/5_bsa36_relationships_and_gender_identity.pdf).

<sup>13</sup> Human Fertilisation and Embryology Act 2008, ss 33-58.

<sup>14</sup> Marriage (Same Sex Couples) Act 2013.

<sup>15</sup> Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019.

<sup>16</sup> A Diduck ‘If Only we can Find the Appropriate Terms to Use the Issue Will Be Solved: Law, Identity and Parenthood’ [2007] 19(4) Child and Family Law Quarterly 458 at 478.

<sup>17</sup> As noted above, terminology is contested. This article uses trans affirming language whenever possible.

<sup>18</sup> s 9(1).

men who give birth, women who provide sperm and parenthood of people who reject either sex/gender.<sup>19</sup> Judicial consideration of trans parenthood illustrates what McCandless and Sheldon described as ‘the tensions inherent in continuing to map our legal determinations of parenthood to a family model that is unmoored from its traditional underpinnings.’<sup>20</sup>

This article will first consider the concept of legal parenthood,<sup>21</sup> exploring the purpose(s) served by the concept, and how legal parenthood has developed. Second, the article will outline the statutory regime in the 2004 Act. Thereafter, the article will consider the case law on trans parenthood – *McConnell*<sup>22</sup> and *JK*<sup>23</sup> – focusing on the questions of language raised. Subsequently, the article will situate this language within legal parenthood, considering the role of the gendered descriptors of ‘mother’ and ‘father’, and why the law struggles to accommodate trans identities in the description of their legal parenthood. Ultimately, I will argue that legal parenthood should be capable of recognising trans parenthood and the identities of trans parents, and that the existing case law reflects apparent judicial understandings that determinations and descriptions of legal parenthood involve normative claims that I argue are not a necessary part of the concept of legal parenthood.

## 1. Legal Parenthood

---

<sup>19</sup> There are no reported cases involving non-binary or gender non-conforming parenthood, but such identities lack legal recognition within the UK, see *R (on the application of Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, [2022] 2 WLR 133.

<sup>20</sup> J McCandless and S Sheldon ‘The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form’ (2010) 73(2) *Modern Law Review* 175 at 202.

<sup>21</sup> The term ‘parental status’ is also used, but in this article ‘legal parenthood’ is preferred.

<sup>22</sup> *R (McConnell and YY) v Registrar General for England and Wales* [2020] EWCA Civ 559, [2020] 3 WLR 683 and the first instance judgment *R (On the Application of TT) v Registrar General for England and Wales* [2019] EWHC 2384 (Fam), [2019] 3 WLR 1195. The Supreme Court refused Mr McConnell’s application for permission to appeal on November 9<sup>th</sup> 2020.

<sup>23</sup> *R (on the Application of JK) v Registrar General for England and Wales* [2015] EWHC 990 (Admin), [2016] 1 All ER 354.

My starting point is Diduck’s observation that ‘[l]egal parenthood is first of all a legal construct’.<sup>24</sup> This is often obscured because of legal parenthood’s significant consequences. Legal parenthood does not necessarily attempt to describe ‘reality’ or provide the ‘objective truth’ of parenthood. The concept has a narrower purpose – the allocation or determination of a legal status from which legal consequences and obligations derive.<sup>25</sup> Legal parenthood’s constructed nature is shown by the different types of parenthood (social, intentional, biological, genetic) that are chosen between when determining legal parenthood. Such determinations are often not purely ‘factual’, but reflect choices between competing ‘options’, each with valid justifications and such choices are often pragmatic rather than normative.<sup>26</sup> As Eekelaar has noted ‘there is no supposition that the facts encapsulated in the new “legal truth” in any way represent the reality they are replacing.’<sup>27</sup> I argue that this relative conceptual narrowness is fundamentally important to legal parenthood’s purpose and function; the concept involves no claim to normative meaning beyond the law. Of course, this understanding of legal parenthood is contested, with Bainham previously arguing that ‘[t]he concept of parentage should rather be confined, to reflect as far as possible the unique position of biological parents.’<sup>28</sup> However, as discussed below, whatever the merits of this argument, it is clear that legal parenthood is diverging from biological parenthood in some factual and reproductive contexts.

However, this article acknowledges that legal parenthood can have tremendous normative or emotional significance for individual parents and children, and for how they are perceived by

---

<sup>24</sup> Diduck, above n 16, at 462.

<sup>25</sup> Financial obligations, Child Support Act 1991, acquisition of ‘parental responsibility’, Children Act 1989, and succession, Inheritance (Provision for Family and Dependents) Act 1975.

<sup>26</sup> N Lowe, G Douglas, E Hitchings and R Taylor *Bromley’s Family Law* (Oxford: Oxford University Press, 12<sup>th</sup> edn, 2021) p 388 and p 398.

<sup>27</sup> J Eekelaar ‘The Law, Gender and Truth’ (2020) 20(4) *Human Rights Law Review* 797 at 798.

<sup>28</sup> A Bainham ‘Arguments About Parentage’ (2008) 67(2) *Cambridge Law Journal* 322 at 349.

others,<sup>29</sup> because as Everett and Yeatman comment, ‘[t]he words we choose to use to describe relationships have power and we must choose them with care.’<sup>30</sup> Critical literature concerning trans identities has argued that formal legal processes (including birth registration),<sup>31</sup> which may appear to use neutral language, shape the social reality that these processes purport to merely record.<sup>32</sup> For trans parents, navigating the legal recording of their identity will not start with their legal parenthood, but rather with the registration of *their* birth in a sex/gender that is incongruent with their identity. Thus, as Meadow has argued, legal classifications and registrations ‘cut into the very real matter of human bodies and identities.’<sup>33</sup> In this article, it is not my argument to deny the significance that law and legal concepts can have for individuals; nor the specific effect that the binary legal classifications of sex and gender has for trans identities. Instead, I argue that this normative significance for many people is not inherent to the concept of legal parenthood itself. It is axiomatic that individuals can be a child’s ‘social’ parent without being their legal parent, and that legal parents sometimes play no role in children’s lives. The role of ‘genetics’ is of immense importance to some parents and children, and of limited or no importance to others. The normative or practical importance of those ‘parental’ relationships is not *necessarily* connected to the legal status they are assigned. Without seeking to deny the significance that legal determinations can have for individuals, I argue that the law should be wary of implying that legal determinations of parenthood have any inherent power beyond the law.

---

<sup>29</sup> *JK*, above n 23, at [113], Hickinbottom J noted the potential issue around a child not being informed of the parents’ trans identity if the birth certificate used language congruent with the parents’ identity, which shows that these ideas are exerting some influence on judicial reasoning. I would like to thank one of the anonymous reviewers for directing me to this paragraph of *JK*.

<sup>30</sup> K Everett and L Yeatman ‘Are Some Parents More Natural Than Others?’ [2010] 22(3) *Child and Family Law Quarterly* 290 at 306.

<sup>31</sup> See e.g. D Spade *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (Durham: Duke University Press, 2015) and P Currah and LJ Moore ‘“We Won’t Know Who You Are”: Contesting Sex Designations in New York City Birth Certificates’ (2009) 24(3) *Hypathia: A Journal of Feminist Philosophy* 113.

<sup>32</sup> I would like to thank one of the anonymous reviewers for raising this literature and its potential significance.

<sup>33</sup> T Meadow ‘“A Rose Is a Rose”: On Producing Legal Gender Classifications’ (2010) 24(6) *Gender and Society* 814 at 817.

Legal parenthood has proved capable of encompassing parenthood formed in various circumstances, and this has widened substantially over the past thirty-five years. Legal parenthood is attributed based upon different factors in different contexts, with different legal rules applying to ‘natural reproduction’,<sup>34</sup> assisted reproduction,<sup>35</sup> adoption,<sup>36</sup> and surrogacy arrangements.<sup>37</sup> The first two involve legal parenthood at birth,<sup>38</sup> reflected on birth certificates,<sup>39</sup> while the latter two concern legal parenthood created by court orders after birth,<sup>40</sup> with the original birth certificates unchanged. Thus, the relationship between legal parenthood and birth registration<sup>41</sup> also differs in different contexts. For unmarried men in natural reproduction, registration itself creates the (presumption of) legal parenthood, whereas in assisted reproduction, legal parenthood is determined by the 2008 Act’s ‘parenthood provisions’ at the point of conception, rather than at the point of registration, and both adoption and parental orders create legal parenthood subsequent to birth registration. The boundaries of legal parenthood have shifted, and the concept has adapted to changing circumstances, suggesting that legal parenthood is neither fixed nor immutable. While legal parenthood can reflect ‘biological’ parenthood,<sup>42</sup> or ‘genetic’ parenthood,<sup>43</sup> this is not *necessarily* what the concept is designed to do, and legal parenthood is explicitly capable of accommodating

---

<sup>34</sup> The common law presumptions for married couples and the provision for unmarried fathers, inserted in Births and Deaths Registration Act 1953, s 10 by Family Law Reform Act 1987, s 24.

<sup>35</sup> Human Fertilisation and Embryology Act 2008, ss 33-48.

<sup>36</sup> Adoption and Children Act 2002, s 46.

<sup>37</sup> Human Fertilisation and Embryology Act 2008, s 54 and s 54A.

<sup>38</sup> Subject to post-birth applications for ‘declarations of parentage’ under Family Law Act 1986, s 55A.

<sup>39</sup> Births and Deaths Registration Act 1953, ss 1-14A.

<sup>40</sup> The Law Commission of England and Wales and the Scottish Law Commission have proposed a ‘new pathway’ to parenthood, which (if enacted) will allow for intended parents to become legal parents from birth. See ‘Building Families Through Surrogacy: a New Law: Volume II: Final Report’ (Law Com No 411, Scot Law Com No 262, March 2023), chapters 2 and 4, at <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2023/03/2.-Surrogacy-full-report.pdf>.

<sup>41</sup> See A Bainham ‘What is the Point of Birth Registration?’ [2008] 20(4) Child and Family Law Quarterly 449 for consideration of the policy objectives of birth registration.

<sup>42</sup> See the *mater est quam gestatio demonstrat* presumption and Human Fertilisation and Embryology Act 2008, s 33(1).

<sup>43</sup> See Family Law Act 1986, s 55A.



different forms of parenthood formed by different types of family in different ways.<sup>44</sup> This flexibility and responsiveness to social change has been central to how legal parenthood has developed.

The default position remains for legal parenthood to be expressly gendered – one ‘mother’ and one ‘father’ – but there are exceptions. Adoption orders (‘An adopted person is to be treated in law as if born as the child of the adopters or adopter’)<sup>45</sup> and parental orders (‘the court may make an order providing for a child to be treated in law as the child of the applicants’)<sup>46</sup> both create gender-neutral legal parenthood. These provisions both use the phrase ‘treated in law’, suggesting an acknowledgement that legal parenthood is created, rather than law reflecting the ‘factual reality’ of parenthood.<sup>47</sup> The 2008 Act provides for one ‘mother’ and one ‘parent’ from birth in certain circumstances involving female same-sex couples undertaking assisted reproduction.<sup>48</sup> It is in factual contexts other than ‘natural’ reproduction that these gender-neutral descriptors are used, and outside of the limited circumstances of the 2008 Act gender-neutral language is applied to post-birth legal parenthood created through court orders.<sup>49</sup> Nonetheless, despite these acknowledged limitations, it appears uncontroversial to observe that legal parenthood is expressed using gender-neutral language in some contexts, and that this has been true since the Adoption of Children Act 1926 (‘the 1926 Act’).<sup>50</sup> The existence of legal parenthood which is not described using the gendered language ‘mother’ and ‘father’

---

<sup>44</sup> Both adoption orders, Adoption and Children Act 2002, s 46 and parental orders, Human Fertilisation and Embryology Act 2008, s 54 and s 54A, align legal parenthood with social parenthood.

<sup>45</sup> Adoption and Children Act 2002, s 67(1).

<sup>46</sup> Human Fertilisation and Embryology Act 2008, s 54(1).

<sup>47</sup> This language is arguably more significant and ‘treated in law’ could suggest that such orders only *treat* people as parents, they do not declare them to be parents. I would like to thank Jonathan Herring for raising this point. However, full consideration of this statutory language is outside the scope of this article.

<sup>48</sup> Human Fertilisation and Embryology Act 2008, ss 42-44.

<sup>49</sup> However, see the Law Commissions Final Report on Surrogacy, above n 40, which proposes gender-neutral legal parenthood from birth for both intended parents under the ‘new pathway’, para 4.252, p 107.

<sup>50</sup> s 5(1).

undermines suggestions that those gendered descriptors (although they remain the default) represent an inherent part of legal parenthood.

However, in contrast to this terminological flexibility, legal parenthood remains strictly limited to a maximum of two parents,<sup>51</sup> reflecting what I have described as ‘a binary, two-parent model, which is derived from the traditional, heterosexual, nuclear family model’.<sup>52</sup> Thus, the concept remains inflexible in terms of the number of parents permitted. Legal parenthood is underpinned by traditional, heterosexual norms, but these have been stretched to accommodate parenthood in diverse familial and reproductive contexts, subject to the continuing limitation to two people.<sup>53</sup> Undoubtedly, despite this ‘stretching’, legal parenthood remains premised upon these traditional, heteronormative assumptions and norms.<sup>54</sup> Consequently, limitations remain on legal parenthood based around the extent to which diverse parenting practices are able to sufficiently ‘mirror’ these hetero(norms) of parenthood. Thus, intended parents in surrogacy arrangements cannot both be legal parents at birth,<sup>55</sup> the 2008 Act does not allow for two legal ‘mothers’,<sup>56</sup> and in cases involving ‘natural’ reproduction, the gendered descriptors of ‘mother’ and ‘father’ remain.<sup>57</sup> However, despite these limitations, the flexibility of legal parenthood is evident in both the evolution of the different bases on which it can be attributed, and through the extension of who can become legal parents in some contexts.

---

<sup>51</sup> See P Bremner ‘Collaborative Co-Parenting and Heteronormativity: Recognising the Interests of Gay Fathers’ [2017] 29(4) *Child and Family Law Quarterly* 293.

<sup>52</sup> A Brown *What is the Family of Law? The Influence of the Nuclear Family* (Oxford: Hart, 2019) p 107.

<sup>53</sup> See L Smith ‘Clashing Symbols? Reconciling Support for Fathers and Fatherless Families After the Human Fertilisation and Embryology Act 2008’ [2010] 22(1) *Child and Family Law Quarterly* 46.

<sup>54</sup> See e.g. S Sheldon ‘Fragmenting Fatherhood: The Regulation of Reproductive Technologies’ (2005) 68(4) *Modern Law Review* 523, J Wallbank ‘Channelling the Messiness of Diverse Family Lives: Resisting the Calls to Order and De-Centring the Hetero-Normative Family’ (2010) 32(4) *Journal of Social Welfare and Family Law* 353 and A Zanghellini ‘*A v B and C* [2012] EWCA Civ 285 - Heteronormativity, Poly-Parenting, and the Homo-Nuclear Family’ [2012] 24(4) *Child and Family Law Quarterly* 475.

<sup>55</sup> Law Commissions Final Report on Surrogacy, n 48 above.

<sup>56</sup> This will be considered at subsection 4.B: ‘The Degendered “Parent” in the Human Fertilisation and Embryology Act 2008’.

<sup>57</sup> I would like to thank one of the anonymous reviewers for raising this point.

This article's subsequent arguments are founded upon three points that underpin my understanding of legal parenthood. First, legal parenthood is a flexible concept, capable of recognising parenthood arising in different factual circumstances, and this is based upon different factors depending upon the circumstances. Second, while the orthodox understanding of legal parenthood remains gendered, there are contexts in which legal parenthood is expressly gender-neutral. Therefore, gendered descriptors (although the default terminology) are not inherent to legal parenthood. This article acknowledges the significant role of the binary, two-parent model of the nuclear family within the legal understanding of parenthood,<sup>58</sup> but I argue that this significance does not diminish the point that there are exceptions made to the use of the gendered descriptors of legal parenthood. Third, most importantly and most controversially, legal parenthood is a legal construct, and as such, the concept contains no claims to any normative meaning beyond the law. While I accept the significance that legal parenthood can have for some parents and children in terms of their identify, I argue that the purpose of legal parenthood is not to provide the 'objective truth' or 'reality' of parenthood. Instead, legal parenthood should be understood as determining the individuals that are considered parents for legal purposes. In this article, I will consider the judicial engagement with trans parenthood through this understanding and suggest that the concept of legal parenthood should be capable of recognising trans legal parenthood congruently with trans identities.<sup>59</sup> Before that, this article will outline the UK's regime of 'gender recognition' which underpins judicial engagement with trans parenthood.

---

<sup>58</sup> See Brown, above n 52, pp 107-131 for my previous consideration of the role of the binary, two parent-model of the nuclear family within the attribution and determination of legal parenthood.

<sup>59</sup> I accept that such recognition of trans legal parenthood is likely to require statutory reform, and I return to this at subsection 4.C: 'The Implications for Trans Legal Parenthood'.

## 2. The Gender Recognition Act 2004

Legal recognition of trans identities is provided by the 2004 Act.<sup>60</sup> This responded to decision in *Goodwin v UK*,<sup>61</sup> where lack of recognition was held to violate Article 8 and Article 12 of the European Convention on Human Rights (ECHR), with the court noting, ‘the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone is [sic] not quite one gender or the other is no longer sustainable.’<sup>62</sup> The 2004 Act resolves this through section 9 (1):

Where a full gender recognition certificate is issued to a person, the person’s gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person’s sex becomes that of a man and, if it is the female gender, the person’s sex becomes that of a woman).

The effect of a gender recognition certificate (‘GRC’) is that an individual’s legal sex and gender are aligned with their ‘gender identity’,<sup>63</sup> rather than their birth assigned sex/gender. As Barnes has noted, ‘[t]he Act overwhelmingly uses the terminology of “gender” rather than “sex” but section 9 is an exception.’<sup>64</sup> The legislative history shows that this inclusion of ‘sex’ represented a deliberate policy choice.<sup>65</sup> However, the certificate is qualified by section 9 (2),

---

<sup>60</sup> See A Sharpe ‘Endless Sex: the Gender Recognition Act 2004 and the Persistence of a Legal Category’ (2007) 15(1) *Feminist Legal Studies* 57.

<sup>61</sup> *Goodwin v UK* (2002) 35 EHRR 18, Application No. 28957/95.

<sup>62</sup> *Ibid*, at [90]. Previously, the UK relied upon its ‘margin of appreciation’ to defend the lack of recognition, see *X, Y and Z v United Kingdom* (1997) 24 EHRR 143, Application No. 21830/93 and *Cossey v United Kingdom* (1991) 13 EHRR 622, Application No. 10843/84.

<sup>63</sup> The Act’s use of ‘acquired gender’ has been criticised for not reflecting trans identities, S Cowan ‘Looking Back (To)wards the Body: Medicalization and the GRA’ (2009) 18(2) *Social & Legal Studies* 247.

<sup>64</sup> L Barnes ‘Gender Identity and Scottish Law: the Legal Response to Transsexuality’ (2007) 11(2) *Edinburgh Law Review* 162 at 179.

<sup>65</sup> When the Gender Recognition Bill was first introduced, clause 5(1), which became s 9(1), did not include ‘sex’. This was added in response to House of Commons and House of Lords Joint Committee on Human Rights, ‘Nineteenth Report’ (Cm 5875, July 2003), at -

which states that a GRC ‘does not affect things done, or events occurring, before the certificate is issued’, meaning a GRC does not have retrospective effect, and by section 9 (3), which provides the GRC ‘is subject to provision made by this Act or any other enactment or any subordinate legislation.’ The 2004 Act contains various exceptions,<sup>66</sup> and other provisions relating to GRCs,<sup>67</sup> limiting section 9 (1)’s effects. For this article, the most important is section 12: ‘[t]he fact that a person’s gender has become the acquired gender under this Act does not affect the status of the person as the father or mother of a child.’ This language is ambiguous, it is unclear whether this applies to parenthood after a GRC, or clarifies the position for parenthood which exists when the certificate is granted. The explanatory notes state: ‘[t]his provides that though a person is regarded as being of the acquired gender, the person will retain their original status as either father or mother of a child. The continuity of parental rights and responsibilities is thus ensured.’<sup>68</sup> The language ‘their original status’ and ‘continuity’ suggests that when the legislation was enacted the provision was understood to apply to existing parenthood, not parenthood after the granting of the GRC.<sup>69</sup> Given the prevailing social understandings, it is arguable that parenthood after a GRC was beyond the contemplation of Parliament when debating the 2004 Act.<sup>70</sup> The interpretation of section 12 was central to *McConnell*, and the judicial approach is considered below.<sup>71</sup>

---

<https://publications.parliament.uk/pa/jt200203/jtselect/jtrights/188/188.pdf>, which commented, para 34, p 15, that the original drafting could lead to the Act ‘failing to achieve some of its purposes’.

<sup>66</sup> s 15 and s 16.

<sup>67</sup> s 13 and s 14.

<sup>68</sup> Note 43.

<sup>69</sup> *McConnell*, above n 22, at [40], the Court of Appeal dismissed an attempt to rely upon the explanatory notes when interpreting s 12.

<sup>70</sup> The 2004 Act does not contain surgical requirements, but given the requirement, s 2(1)(c), that ‘the applicant ... intends to continue to live in the acquired gender until death’ and the medical requirements, s 3, it is plausible that the idea that a trans man would want to give birth and be physiologically capable of giving birth, or that a trans woman would want to ‘father’ children was outside the contemplation of Parliament.

<sup>71</sup> Section 3: ‘The Trans Parenthood Cases’.

Finally, while increasingly contentious debates continue regarding reform for GRCs to be granted based on ‘self-identification’,<sup>72</sup> rather than through application to the Gender Recognition Panel,<sup>73</sup> in England and Wales such reform is not being taken forward,<sup>74</sup> and the proposed Scottish legislation was blocked by the UK Government.<sup>75</sup> Given the low uptake of GRCs,<sup>76</sup> there will continue to be a much larger group of trans people without GRCs, whose legal sex and gender remains that assigned at birth. There are significant legal consequences bestowed by a GRC and, as the UK Government have previously noted: ‘GRCs also provide trans people with the dignity and respect that can come from having their acquired gender officially recognise by the state.’<sup>77</sup> However, as the article now set outs, due to the judicial interpretation of the 2004 Act it appears that a GRC has no effect on legal parenthood.

### 3. The Trans Parenthood Cases

The English courts considered trans parenthood<sup>78</sup> in *R (on the Application of JK) v Registrar General for England and Wales*<sup>79</sup> and *R (McConnell and YY) v Registrar General for England*

---

<sup>72</sup> ‘Self-ID’ models have been adopted in other jurisdictions, including Argentina, Denmark, Norway, the Republic of Ireland and Sweden, see C Dietz ‘Governing Legal Embodiment: On the Limits of Self-Declaration’ (2018) 26(2) Feminist Legal Studies 185.

<sup>73</sup> Gender Recognition Act 2004, s 1(3).

<sup>74</sup> See Liz Truss MP, Written Ministerial Statement: Response to Gender Recognition Act (2004) Consultation, September 22<sup>nd</sup> 2020, at - <https://www.gov.uk/government/speeches/response-to-gender-recognition-act-2004-consultation>.

<sup>75</sup> See above n 3 and n 4.

<sup>76</sup> UK Government, ‘Reform of the Gender Recognition Act – Government Consultation’, (July 2018), para 5, p 10, 4910 GRCs had been granted since the 2004 Act, while estimating, para 2, p 10, the UK’s trans population between 200,000 and 500,000, at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/721725/GRA-Consultation-document.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721725/GRA-Consultation-document.pdf).

<sup>77</sup> Ibid, para 18, p 20.

<sup>78</sup> Previous cases concerning trans lives focused upon validity of marriages prior to equal marriage, see e.g. *Corbett v Corbett (otherwise Ashley) (No.1)* [1971] P. 83, *J v ST (formerly J) (Transsexual: Ancillary Relief)* [1998] Fam. 103, and *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467.

<sup>79</sup> *JK*, above n 23.

*and Wales*.<sup>80</sup> These involved judicial review of the Registrar General for England and Wales' decisions to use the gendered language of 'mother' and 'father' to register the trans parent on birth certificates. The challenges were that registration contrary to their identities – registering the trans parent in birth assigned sex/gender – breached their 'right to respect for private and family life' under Art. 8 ECHR. The circumstances and legal status of the respective trans parents were different. In *JK*, a trans woman had two 'naturally conceived'<sup>81</sup> children with her wife – one prior to and one after transition. The decisions to register her as 'father' on the second child's birth certificate and not to alter the first child's birth certificate after transition were challenged. When the second child was born, JK did not have a GRC, but by the hearing she had an interim GRC and had applied for a full certificate.<sup>82</sup> In *McConnell*, a trans man (Freddy McConnell)<sup>83</sup> gave birth to a son following assisted reproductive treatment using donor sperm. He challenged the decision to register him as 'mother' on the birth certificate. In contrast to JK, Mr McConnell had a GRC at both treatment and birth.<sup>84</sup> Therefore, he was a man 'for all purposes',<sup>85</sup> subject to the 2004 Act's exceptions. *McConnell* involved a trans parent whose legal sex and gender reflected their identity, while *JK* involved a trans parent who did not have such recognition. It might be expected that this difference would have had a consequential impact upon the decisions. However, both applications were unsuccessful, and the registrations were not changed. Given this, the article focuses upon the implications of the judicial reasoning for the understanding of trans legal parenthood.

---

<sup>80</sup> *McConnell*, above n 22.

<sup>81</sup> *JK*, above n 23, at [2].

<sup>82</sup> *Ibid* at [14] and [59]. Before the 2004 Act was amended by the Marriage (Same-Sex Couples) Act 2013, trans people were required to dissolve their marriages before a GRC could be granted. JK delayed her application until the date when the amendments came into force.

<sup>83</sup> His anonymity was waived in *R (On the Application of TT) v Registrar General for England and Wales* [2019] EWHC 1823 (Fam), [2020] 1 FCR 114.

<sup>84</sup> *McConnell*, above n 22, at [7].

<sup>85</sup> Gender Recognition Act 2004, s 9(1).

First, given that JK did not possess a GRC at the time of either birth, the judgment unsurprisingly focuses upon Art.8,<sup>86</sup> as she remained legally male. Despite holding that Art.8 was engaged,<sup>87</sup> and that the interference with JK's rights was material,<sup>88</sup> the judgment determined that the interference was justified due to 'the coherence of the birth registration scheme'<sup>89</sup> and 'the principle that a birth certificate shows the relevant details of a child as at his or her birth, and those details cannot be changed.'<sup>90</sup> In this article, I am not focused upon these human rights arguments,<sup>91</sup> or arguments regarding the birth registration scheme,<sup>92</sup> but upon the implications for the understanding of trans legal parenthood. This limitation to the scope of the central argument of this article is not intended to suggest that either of these arguments are unimportant, but instead is because my focus, in this article, is on the concept of legal parenthood, and what trans parenthood reveals about that concept. To that end, Hickinbottom J stated: '[i]t is therefore inherent in the GRA 2004 that, following a gender change, a "mother" may be a man and a "father" may be a woman.'<sup>93</sup> This (somewhat ambiguous) language seems to refer to legal 'motherhood' and legal 'fatherhood' continuing for trans parents where legal parenthood existed prior to the GRC. This interpretation is strengthened by the observation that, 'the principle that a transsexual should be able to keep private his or her gender reassignment bows to the principle that history should not be rewritten.'<sup>94</sup> These statements illustrate the divergence between the gendered descriptors of legal parenthood and trans identities. This disjuncture between a person's gender and the gendered descriptor of their legal parenthood represents a novel situation. I argue that this

---

<sup>86</sup> *JK*, above n 23, at [60]-[65], briefly considers the 2004 Act.

<sup>87</sup> *Ibid.*, at [77].

<sup>88</sup> *Ibid.*, at [89].

<sup>89</sup> *Ibid.*, at [123].

<sup>90</sup> *Ibid.*

<sup>91</sup> See P Dunne 'Recognising Transgender Parenthood on Birth Certificates: *R (JK) v Secretary of State for the Home Department*' (2015) 3 *International Family Law* 230.

<sup>92</sup> See J McCandless 'Reforming Birth Registration Law in England and Wales' (2017) 4 *Reproductive Bio-Medicine and Society Online* 52.

<sup>93</sup> *JK*, above n 23, at [65].

<sup>94</sup> *Ibid.*



creates problematic consequences for the capacity of the law to fully recognise trans parent’s identities if their parenthood cannot be expressed in language congruent with those identities. Relatedly, Hickinbottom J commented that, ‘[s]exual identity and the choice of gender represent important elements of an individual’s fundamental identity. However, parentage is also a vital element in that identity.’<sup>95</sup> This positions the child’s ‘parentage’, appearing to mean genetic paternity, in opposition to the parent’s ‘choice of gender’. However, legal parenthood does not simply recognise genetic parenthood. There are several contexts, discussed above, in which legal parenthood does not reflect genetic parenthood. The significance given to ‘parentage’ is questionable, because it implies a greater role for genetic paternity within legal parenthood than actually exists. With that said, the lack of GRC is fundamental to the *JK* decision. In contrast, *McConnell* involved trans legal parenthood that occurred after the granting of a GRC.

Second, the Court of Appeal judgment in *McConnell* focuses upon statutory interpretation and the Human Rights Act 1998 (‘the 1998 Act’).<sup>96</sup> The judgment held that the relevant provisions of the 2004 Act – section 9 and section 12 – compelled registration as ‘mother’,<sup>97</sup> and that Art.8 was not violated, meaning that neither section 3 nor section 4 of the 1998 Act was applicable.<sup>98</sup> As with *JK*, in this article, I am not focused upon the human rights arguments,<sup>99</sup> or the wider issues regarding the birth registration regime,<sup>100</sup> but the implications for the understanding of trans legal parenthood. Undoubtedly, the human rights arguments are crucial to the decisions in both *JK* and *McConnell*, but these arguments are largely separate from the

---

<sup>95</sup> *Ibid*, at [109].

<sup>96</sup> *McConnell*, above n 22, at [27].

<sup>97</sup> *Ibid*, at [28]-[39].

<sup>98</sup> *Ibid*, at [52]-[82].

<sup>99</sup> See A Brown ‘Trans Parenthood and the Meaning of “Mother”, “Father” and “Parent”—*R (McConnell and YY) v Registrar General for England and Wales* [2020] EWCA Civ 559’ (2021) 29(1) *Medical Law Review* 157, where I have explored the human rights arguments in more detail.

<sup>100</sup> See L Davis ‘Deconstructing Tradition: Trans Reproduction and the Need to Reform Birth Registration in England and Wales’ (2020) 22(1-2) *International Journal of Transgender Health* 179.

issues regarding the implications of the gendered descriptor used for trans legal parenthood. Both JK and Mr McConnell were legal parents, the issue was the gendered language used to describe their parenthood, which has no substantive legal significance. The human rights arguments are focused upon the identity implications for trans parents and their children of the current registration system, rather than upon the concept of legal parenthood itself.<sup>101</sup>

With that said, the interpretation of section 12 is described as ‘the critical issue’<sup>102</sup> within the judgment. However, as mentioned previously, the provision’s language is ambiguous. The judgment held that this provision had both prospective and retrospective effect.<sup>103</sup> This interpretation did not reflect the academic literature prior to *McConnell*;<sup>104</sup> with Gilmore having observed, ‘the better view is probably that this provision is aimed at parental status which existed prior to recognition of the acquired gender. Thus it does not affect a person’s ability to acquire legal parenthood in the acquired gender.’<sup>105</sup> The judgment adopted the contrary interpretation, and the legal parenthood of a GRC holder will be described in their birth assigned sex,<sup>106</sup> Mr McConnell is the legal ‘mother’. This decision goes further than *JK* and creates divergence between the female gendered descriptor of legal parenthood and Mr McConnell’s legally recognised male sex and gender. However, the Court of Appeal did not engage with the underlying questions regarding the meaning of ‘mother’, ‘father’, or ‘parent’,<sup>107</sup> and I have previously argued that the judgment’s approach allowed ‘the court to

---

<sup>101</sup> Therefore, it is for this reason that the article is focused upon what these cases illustrate about legal parenthood.

<sup>102</sup> *McConnell*, above n 22, at [28].

<sup>103</sup> *Ibid*, at [29].

<sup>104</sup> See e.g. S McGuinness and A Alghrani ‘Gender and Parenthood: The Case for Realignment’ (2008) 16(2) *Medical Law Review* 261 at 279 and McCandless and Sheldon, above n 20, at 200.

<sup>105</sup> S Gilmore ‘The Legal Status of Transsexual and Transgender Persons in England and Wales’ in J M. Scherpe (ed) *The Legal Status of Transsexual and Transgender Persons* (Cambridge: Intersentia, 2015) p 200.

<sup>106</sup> It is not my argument that the interpretation of section 12 is wrong according to the application of the rules of statutory interpretation, though the contrary interpretation is arguable. Instead, my argument is that the wider implications of this interpretation have troubling consequences for the recognition of trans legal parenthood.

<sup>107</sup> *McConnell*, above n 22, at [28].

ignore some of the more conceptual questions and the issues of public policy that are undoubtedly raised by the underlying issue of the parental status of men who give birth.’<sup>108</sup>

The meaning of these gendered descriptors is explored in the first instance judgment;<sup>109</sup> this reached the same conclusion as the Court of Appeal, but addressed these conceptual questions. The first sentence – ‘[i]n this case the court is required to define the term “mother” under the law of England and Wales’<sup>110</sup> – illustrates the scope of the judgment. Later, Sir Andrew MacFarlane P observed:

[B]eing a “mother” is to describe a person’s role in the biological process of conception, pregnancy and birth; no matter what else a mother may do, this role is surely at the essence of what a “mother” undertakes with respect to a child to whom they give birth. It is a matter of the role taken in the biological process, rather the person’s particular sex or gender.<sup>111</sup>

The judgment argued that ‘mother’ is not gendered, but rather related *only* to the gestational role in conception. In his conclusion, the President observed that ‘there is a material difference between a person’s gender and their status as a parent.’<sup>112</sup> Thus, trans legal parenthood is not determined by legally recognised sex and gender. The President reflected the language of *JK*, noting: ‘[i]t is now possible, and recognised by the law, for a “mother” to have an acquired gender of male, and for a “father” to have an acquired gender of female’.<sup>113</sup> The divergence between the gendered descriptors of legal parenthood and the gender of the trans parent

---

<sup>108</sup> Brown, above n 99, at 169.

<sup>109</sup> *TT*, above n 22.

<sup>110</sup> *Ibid*, at [1].

<sup>111</sup> *Ibid*, at [139].

<sup>112</sup> *Ibid*, at [279].

<sup>113</sup> *Ibid*, at [280].

unquestionably creates issues for trans parents' identities, because their legal parenthood is recognised using language that opposes their gender. For some trans parents this disjuncture could create significant identity dissonances that may lead them to reject the prospect of parenthood. This position is even more problematic where the trans parent has a GRC, where the descriptor used for their legal parenthood will be in opposition to their legally recognised sex/gender. A trans man with a GRC is legally a man, but will be a 'mother' for their legal parenthood and a trans woman with a GRC is legally a woman, but will be a 'father' for their legal parenthood. The 2004 Act contains exceptions to a GRC,<sup>114</sup> but the purpose of an exception for legal parenthood appears premised, at least based on the *McConnell* judgment, on wider considerations regarding the birth registration system,<sup>115</sup> rather than individualised considerations of trans parents' identities. Therefore, these decisions suggest that the choice to become a parent could create issues for trans people with their own identity, the identity of their future children, and the complete legal recognition of their sex/gender. Importantly, these issues would not arise if they chose to remain child-free,<sup>116</sup> and as Davis describes, '[t]his means that some trans parents may actively have to choose between starting a family knowing they will be (legally) misgendered, or abandon hopes of a family due to the lack of correct legal acknowledgement.'<sup>117</sup> To put it mildly, I argue that this is a troubling position for the law to find itself putting trans individuals in. This position could be avoided if gendered descriptors of legal parenthood that reflected trans parents' identities were used.

The result is that while trans parents can be recognised as legal parents, this recognition will definitely be incongruent with their identity and, if they have a GRC, it will be incongruent

---

<sup>114</sup> s 9(3).

<sup>115</sup> *McConnell*, above n 22, at [58].

<sup>116</sup> *TT*, above n 22, at [66]-[69], for a summary of the arguments advanced on this point by Mr McConnell at first instance.

<sup>117</sup> See Davis, above n 100, p 183.

with their legal sex and gender. The problems for trans parents differ from the problems of intended parents after surrogacy arrangements,<sup>118</sup> or female same sex couples in unregistered relationships who use ‘known donors’ outside of licensed clinics.<sup>119</sup> In those circumstances, recognition of legal parenthood may be unavailable due to the legal rules. For trans parents, the language used to describe and record legal parenthood presents an incongruent depiction of trans parents’ gender, or their legally recognised sex and gender. While trans legal parenthood is recognised, the recognition itself involves an undermining of their identity, both as individuals and as parents, through the use of gendered descriptors that do not align with their gender. The only slight potential existing parallel relates to female same-sex couples and the 2008 Act,<sup>120</sup> where the non-gestational parent is described using the gender-neutral language of ‘a parent’,<sup>121</sup> rather than using either gendered descriptor. However, the non-gestational parent is described in the 2008 as a ‘parent’, rather than using the gendered parental descriptor of ‘father’ that opposes their gender as for trans parents.<sup>122</sup>

The article now explores the significance of gender to legal parenthood. I will argue that despite its historical position, and the fact it remains the default linguistic framework, gender retains limited *substantive* significance within legal parenthood. Therefore, I will argue that the concept of legal parenthood should be capable of describing trans parenthood using appropriate gendered language.

---

<sup>118</sup> At birth the surrogate is the legal mother, Human Fertilisation and Embryology Act 2008, s 33(1) and her husband can be the legal father, s 35(1). The intended parents become legal parents through a ‘parental order’ post-birth, requiring the agreement of all legal parents, s 54(6).

<sup>119</sup> The ‘agreed female parenthood conditions’ in Human Fertilisation and Embryology Act 2008, s 43 and s 44 apply, ‘in the course of treatment services provided in the United Kingdom by a person to whom a licence applies’, s 43(a).

<sup>120</sup> ss 42-44.

<sup>121</sup> See Brown, above n 52, pp 116-118 and pp 158-167, for my previous detailed consideration of that role.

<sup>122</sup> This role will be considered below at subsection 4.B: ‘The Degendered “Parent” in the Human Fertilisation and Embryology Act 2008’.

#### 4. The Gendered Descriptors of Legal Parenthood and Trans Parenthood

This section will consider the role of gender within legal parenthood, focusing upon the significance of the gendered descriptors ‘mother’ and ‘father’, how the role of gender has evolved, and the implications for trans legal parenthood.

The *status* of legal parenthood is distinct from the legal understanding of the parental role – or the gendered parental roles.<sup>123</sup> As I have previously argued ‘this overarching “parental role” remains opaque within legal discourse and judicial interpretation; in sharp contrast to the traditional gendered parenting roles, the role of “parent” lacks any “natural” or “common-sense” construction.’<sup>124</sup> Judicial language has consistently reflected Lord Scott’s comment from *Re G (Children) (Residence: Same-Sex Partner)*,<sup>125</sup> that ‘Mothers are special’.<sup>126</sup> The construction of the role ‘mother’, and the importance attached to this role, has exerted substantial influence upon judicial decisions regarding children’s residence after parental separation and the parents’ roles in such circumstances.<sup>127</sup> In this article, I want to consider the implications of this understanding on the use of the gendered language of ‘mother’ to describe legal parenthood. Firstly, this understanding that the ‘mother [is] special’ is reflected by the legal ‘mother’ being determined by one factor – gestation – in all circumstances.<sup>128</sup> This

---

<sup>123</sup> See Brown, above n 52, pp 105-168.

<sup>124</sup> *Ibid*, p 132.

<sup>125</sup> *Re G (Children) (Residence: Same-Sex Partner)* [2006] UKHL 43, [2006] 2 FLR 629.

<sup>126</sup> *Ibid*, at [3].

<sup>127</sup> See e.g. *Re B (An Infant)* [1962] 1 All ER 872, *Re H (A Minor: Custody)* [1990] 1 FLR 51, *Brixey v Lynas* 1997 SC (HL) 1 and *Re T (A Child)* [2005] EWCA Civ 1397.

<sup>128</sup> I am not arguing that there are no differences between the biological contribution to parenthood of gestation and the provision of sperm. Nor that there should not be distinct rules for the attribution of gestational and non-gestational legal parenthood. I understand that pregnancy and gestation represent significant ‘care work’. Instead, my argument is that gestation can be recognised within the determination of legal parenthood without the gendered language of ‘mother’. I would like to thank Jonathan Herring for this point and his wider thoughts on this issue. See further J Herring ‘Sexless Family Law’ (2010) 11 *Lex Familiae*, *Revista Portuguesa de Direito da Familia* 33.

contrasts with legal fatherhood,<sup>129</sup> where different factors are determinative in different contexts.<sup>130</sup> Secondly, this privileging is explicit in the 2008 Act, where gestation is determinative of the legal ‘mother’ in all circumstances, including where the gestational mother is not the genetic mother.<sup>131</sup> Thirdly, there has been judicial emphasis on the ‘natural fact’ of gestation within ‘motherhood’, as Lord Simon observed in the *Amphill Peerage Case*:<sup>132</sup> ‘Motherhood, although also a legal relationship, is based on a fact, being proved demonstrably by parturition.’<sup>133</sup> As I have commented, ‘the law is content to affirm “motherhood” as a “natural”, quasi-mystical relationship and view this solely as a result of gender.’<sup>134</sup> Thus, legal motherhood is understood as ‘natural’, because it is always based upon gestation. Consequently, there can only be one mother, meaning that ‘motherhood’ is indivisible.

This apparent indivisibility of motherhood and its fixed relationship with gestation is complicated by trans men giving birth. This is illustrated by the language of male ‘mothers’ and female ‘fathers’ in *JK* and *McConnell*, and the President’s comment that: ‘[b]eing a “mother” or a “father” with respect to the conception, pregnancy and birth of a child is not necessarily gender-specific, although until recent decades it invariably was so.’<sup>135</sup> Despite the relatively anodyne expression, this is a radical statement when compared to the orthodox judicial understanding of the term ‘mother’. The separation of the gendered descriptors of legal parenthood from the gender of trans parents complicates the understanding of the role played by gender within those descriptors. If the gendered language only relates to the different roles played in the reproductive process, rather than the parents’ gender, it is unclear why gendered

---

<sup>129</sup> See S Sheldon and R Collier *Fragmenting Fatherhood: A Socio-Legal Study* (Oxford: Hart 2008).

<sup>130</sup> See Sheldon, above n 54.

<sup>131</sup> Human Fertilisation and Embryology Act 2008, s 33(1).

<sup>132</sup> *Amphill Peerage Case* [1977] AC 547.

<sup>133</sup> *Ibid*, 577.

<sup>134</sup> Brown, above n 52, p 144.

<sup>135</sup> *TT*, above n 22, at [280].

language is necessary, as opposed to gender-neutral descriptive language reflecting those roles in the reproductive process which acknowledges those different biological contributions, such as ‘gestational parent’ and ‘non gestational parent’.<sup>136</sup> However, if the gendered descriptors do relate to the parents’ gender, then trans parenthood questions the underlying ‘natural’ indivisibility of motherhood and its relationship with gestation, because trans men with GRCs who give birth are not women.<sup>137</sup> As McGuinness and Alghrani anticipated: ‘[b]y forcing definitions to stretch, so that males are acting as “mothers” and females as “fathers” we are tacitly accepting that enforced definitions of gender roles are more important than an acknowledgement of the reality of these situations.’<sup>138</sup> Thus, it is necessary to consider the role of gender within legal parenthood, and explore the reasons for the continued use of the gendered descriptors of ‘mother’ and ‘father’.

*(a) The Historical Gender of Legal Parenthood*

Historically legal parenthood was entirely gendered – one mother and one father. This language reflected substantive legal differences between the parental roles.<sup>139</sup> These were encapsulated by Blackstone’s statement that ‘for a mother, as such, is entitled to no power, but only to reverence and respect’,<sup>140</sup> and Brett MR’s observation in *Re Agar-Ellis*:<sup>141</sup> ‘the father has

---

<sup>136</sup> In the Canadian province of Ontario, the All Families are Equal Act (Parentage and Related Registrations Statute Law Amendment), 2016 introduced such gender neutral descriptive language for legal parenthood – ‘birth parent’, s 6(1) and ‘other biological parent’, s 7 (1). This Act allows legal parenthood for more than two people in a range of reproductive circumstances, including pre-conception ‘parentage agreements’, s 9 and surrogacy arrangements, s 10. See R Leckey, ‘One Parent, Three Parents: Judges and Ontario’s All Families Are Equal Act, 2016’ (2019) 33 (3) *International Journal of Law, Policy and the Family* 298. I would like to thank one of the anonymous reviewers for reminding me of this international context.

<sup>137</sup> Similarly, trans women with GRCs who ‘father’ children are not men.

<sup>138</sup> McGuinness and Alghrani, above n 104, at 279.

<sup>139</sup> Legitimacy was crucial to determining legal status; ‘fathers rights’ applied to ‘legitimate’ children, those born within marriage, and ‘illegitimate’ children possessed lesser status. This was gradually abolished over the 20<sup>th</sup> century, culminating in Family Law Reform Act 1987, s 1(1).

<sup>140</sup> Sir William Blackstone *Commentaries on the Laws of England* Volume 1 at 453.

<sup>141</sup> (1883) 24 Ch. 317.



control over the person, education, and conduct of his children until they are twenty-one years of age. That is the law.’<sup>142</sup> However, these substantive differences between the parental roles were gradually removed.<sup>143</sup> The gendered language represents an afterimage of this historical distinction between the legal status of men and women as parents. Legally recognised adoption under the 1926 Act provided the first context where legal parenthood was described using gender-neutral language.<sup>144</sup> The traditional gendered binary of *all* children having ‘one mother’ and ‘one father’ has not represented the totality of legal parenthood for ninety-five years. Despite this gender-neutral language for legal parenthood created through adoption orders, and the removal of the distinction between the legal powers of the parental roles, the gendered descriptors continued to be the default for ‘natural’ reproduction. This shifted to a position in which the gendered language largely represented a mere linguistic distinction. The remaining substantive difference relates to the acquisition of ‘parental responsibility’,<sup>145</sup> the legal responsibility for day-to-day care of children.<sup>146</sup> Under the Children Act 1989 (‘the 1989 Act’), legal mothers automatically acquire parental responsibility at birth,<sup>147</sup> whereas acquisition for legal fathers is more complex, with differences for married<sup>148</sup> and unmarried fathers.<sup>149</sup> I argue that this substantive difference does not require to the use of gendered descriptors, because it is premised on the fact of gestation, and on children having (at least) one adult with legal responsibility for them from birth. I argue that to suggest that this justifies the continued use of the gendered descriptors presents a circular argument. These differences could be retained if gender-neutral language was adopted for legal parenthood. The 1989 Act could alternatively

---

<sup>142</sup> Ibid, 326.

<sup>143</sup> See e.g. the Guardianship of Infants Act 1925.

<sup>144</sup> Then termed ‘adoptive parenthood’.

<sup>145</sup> Children Act 1989, s 3 (1): ‘all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property’.

<sup>146</sup> While the vast majority of legal parents possess parental responsibility, some legal parents do not, and parental responsibility can be held by people who are not legal parents.

<sup>147</sup> s 2(1).

<sup>148</sup> s 2(1).

<sup>149</sup> s 4(1).

be amended to take account of the specific circumstances of trans parenthood, as it was for legal parenthood under the 2008 Act, without altering the default position for parental responsibility.

*(b) The Degendered 'Parent' in the Human Fertilisation and Embryology Act 2008*

The default use of gendered descriptors for legal parenthood was altered by the 2008 Act's 'parenthood provisions',<sup>150</sup> which allowed two women to be legal parents from birth.<sup>151</sup> These provisions refer to the parent who gives birth as 'the mother'<sup>152</sup> and the other member of the couple as 'a parent'.<sup>153</sup> This provides for legal parenthood that is degendered, and unlike adoption and parental orders, legal parenthood under the 2008 Act occurs from birth. This represented a radical shift of language used to describe legal parenthood. However, the use of 'parent' in the 2008 Act is not wholly degendered, because it is only available in specific factual circumstances involving two female parents – a man cannot be listed as 'a parent'.<sup>154</sup> This distinction is reflected in the birth registration legislation,<sup>155</sup> and was noted in *JK*.<sup>156</sup> Thus, the gender-neutral descriptor of 'parent' for legal parenthood at birth is currently explicitly limited to a 'second female parent'. Moreover, the use of this gender-neutral terminology of 'parent' to describe the legal parenthood of the second female parent has been the subject of academic

---

<sup>150</sup> Family Law Reform Act 1987, s 27, granted legal parenthood from birth to a man who was not the genetic father of the child, with Human Fertilisation and Embryology Act 1990, s 28, extending that to include unmarried men. The common law presumptions being rebuttable by evidence of genetic paternity.

<sup>151</sup> Human Fertilisation and Embryology Act 2008, ss 42-44.

<sup>152</sup> s 33(1).

<sup>153</sup> s 42 and s 44.

<sup>154</sup> I would like to thank one of the anonymous reviewers for raising this point.

<sup>155</sup> The titles of Births, Marriages and Deaths Act 1953, s 10 and s 10ZA refer to the 'second female parent', although the text of the provisions refer to 'parent' without the qualification.

<sup>156</sup> *JK*, above n 23, at [93]: "'Parent" is restricted to a second female who is to be treated as a parent of the child by virtue of the HFEA 2008.'

criticism.<sup>157</sup> This has noted that the linguistic approach continues to be premised upon the indivisibility of the ‘mother’, because a child cannot have two legal mothers. This indivisibility occurs regardless of the familial reality which the 2008 Act endorses in granting legal parenthood to two women from birth. Fenton, Heenan and Rees described the provisions for same-sex female couples as being, ‘set out as a mirror image to that of heterosexual couples’,<sup>158</sup> reflecting the heteronormative assumptions that underpin legal parenthood. However, the 2008 Act rejected the gendered descriptor of ‘father’ for the second female parent, despite this ‘mirror image’ for ‘the father’ and ‘a parent’.<sup>159</sup> This suggests that the gendered descriptor of ‘father’ for women was considered somehow inappropriate, which is different from the approach adopted to trans parenthood. This linguistic distinction between ‘the mother’ and ‘a parent’ has potential significance for parents; and as Diduck has argued, for the degendered ‘parent’: “[d]oing” parenting may make lesbian parents “parents”, but it is often not enough to make them mothers and the difficulties presented by the limitations of language for that form of parenthood are clear’.<sup>160</sup> The statutory creation of circumstances where there is one parent with a gendered descriptor and one degendered ‘parent’ has potential implications for the perception of the two parental roles. However, the potential significance of this perception is not necessarily reflected by the sociological literature on parenting within female same-sex couples,<sup>161</sup> where Dunne has noted that couples believe they ‘approached and experienced parenting in ways that were very different from the heterosexual norm.’<sup>162</sup> Regardless of the

---

<sup>157</sup> See e.g. C Jones ‘Parents in Law: Subjective Impacts and Status Implications around the Use of Licensed Donor Insemination’ in A Diduck and K O’Donovan (eds.) *Feminist Perspectives on Family Law* (Abingdon: Routledge-Cavendish, 2006) p 70.

<sup>158</sup> R Fenton, S Heenan and J Rees ‘Finally Fit For Purpose? The Human Fertilization and Embryology Act 2008’ (2010) 32(3) *Journal of Social Welfare and Family Law* 275 at 279.

<sup>159</sup> Human Fertilisation and Embryology Act 2008, s 35-37 and s 42-44.

<sup>160</sup> Diduck, above n 16, at 465.

<sup>161</sup> See e.g. J Gabb ‘Lesbian M/Otherhood: Strategies of Familial-linguistic Management in Lesbian Parent Families’ (2005) 39(4) *Sociology* 585 and S Golombok ‘Lesbian Mother Families’ in A Bainham, S Day Sclater and M Richards (eds.) *What is a Parent?: A Socio-Legal Analysis* (Oxford, Hart Publishing, 1999).

<sup>162</sup> G Dunne, ‘Opting into Motherhood: Lesbians Blurring the Boundaries and Transforming the Meaning of Parenthood and Kinship’ (2000) 14(1) *Gender and Society* 11 at 25.

parenting practices of female same-sex couples,<sup>163</sup> the rejection of a child having two legal ‘mothers’ reinforces the heteronormative assumptions that underpin legal parenthood. Interestingly, despite this linguistic distinction between ‘the mother’ and ‘a parent’, and the potential for implications for individual’s identities, there are no substantive differences between the legal parenthood of the two parents.<sup>164</sup>

The potential issues for these ‘parents’ are apparent from the ‘known donor’<sup>165</sup> cases.<sup>166</sup> This is illustrated by Black J commenting in *Re D (Contact and Parental Responsibility: Lesbian Mothers and Known Father)*:<sup>167</sup> ‘I am considerably influenced by the reality that Mr B is D’s father. Whatever new designs human beings have for the structure of their families, that aspect of nature cannot be overcome.’<sup>168</sup> This case occurred before the 2008 Act,<sup>169</sup> when there was no provision for two women to be legal parents at birth. Nonetheless, this language of ‘reality’, ‘father’ and ‘nature’ remains revealing. I suggest that this invocation of ‘reality’ represents an attempt to provide a normative foundation for judicial *choices*. This reference to ‘reality’ is also problematic because it lacks clarity; is this the ‘biological reality’, or the ‘legal reality’, or a combination of the two? These distinctions are important because in *Re D*, the biological reality and legal reality converged,<sup>170</sup> whereas in other circumstances the ‘biological reality’

---

<sup>163</sup> See A Ziv ‘Querying Lesbian Fatherhood’ in H Wahlström Henriksson and K Goedecke (eds.) *Close Relations: Family, Kinship and Beyond* (Singapore, Springer, 2021). I would like to thank one of the anonymous reviewers for drawing this literature to my attention.

<sup>164</sup> Other than the above-mentioned point regarding the ‘parental responsibility’, Children Act 1989, s 2(1A) and s 2(2A).

<sup>165</sup> These involve ‘home-based’ assisted reproduction using the sperm of a man whom the couple knew in some way. Subsequently, only the woman who gave birth could be a legal parent and the donor would be the legal father. After the reforms, the 2008 Act’s provisions apply to couples who use ‘home-based’ insemination if they are married or in a civil partnership, but not otherwise, s 43 and s 36.

<sup>166</sup> See e.g. *A v B and C (Role of Father)* [2012] EWCA Civ 285, [2012] 2 FLR 607, *T v T (Shared Residence)* [2010] EWCA Civ 1366, [2011] 1 FCR 267 and *R v E and F (Female Parents: Known Father)* [2010] EWHC 417 (Fam), [2010] 2 FLR 383.

<sup>167</sup> *Re D (Contact and Parental Responsibility: Lesbian Mothers and Known Father)* [2006] EWHC 2 (Fam), [2006] 1 FCR 556.

<sup>168</sup> *Ibid*, 582.

<sup>169</sup> The majority of reported ‘known donor’ cases involve children born prior to the 2008 Act.

<sup>170</sup> This case had unusual facts. The conception occurred through sexual intercourse and the ‘ordinary’ rules of natural reproduction both applied and ‘fit’ the circumstances.

will not reflect legal parenthood, and after the 2008 Act an individual in a similar position to the ‘father’ in *Re D* would not necessarily be a legal parent. *Re G, Re Z (Children: Sperm Donors: Leave to Apply for Children Act Orders)*<sup>171</sup> shows this disjuncture between legal and biological ‘reality’, as the ‘known donors’ were not legal parents. Despite this, Baker J consistently refers to the men as ‘biological fathers’<sup>172</sup> and comments, ‘[a]s a matter of law, Miss Russell and Miss Fottrell are right to describe S and T as strangers to G and Z. But in another sense, they are not strangers.’<sup>173</sup> This illustrates the ongoing influence of the ‘biological reality’ on judicial understanding.<sup>174</sup> Regardless of these conceptual difficulties for the ‘parent’, the 2008 Act creates legal parenthood at birth that is described using neither gendered descriptor, which represents a significant evolution. When considering the legal parenthood and parenting of same-sex female couples, Smith has argued that: ‘[t]he cases therefore present an opportunity to question the parenting norms and models which currently underpin the legal regulation of parenthood.’<sup>175</sup> I argue that the trans parenthood cases present a similar opportunity to question the dominant assumptions about legal parenthood. From these cases, it is the gendered descriptors of legal parenthood and their underpinning norms that are called into question.

### *(c) The Implications for Trans Legal Parenthood*

---

<sup>171</sup> *Re G, Re Z (Children: Sperm Donors: Leave to Apply for Children Act Orders)* [2013] EWHC 134 (Fam), [2013] 1 FLR 1334. This case involved complex factual circumstances; a male couple who both acted as ‘known donors’ for two separate female couples, and the eldest child was born before the 2008 Act, meaning that the donor was the legal father of that child.

<sup>172</sup> *Ibid*, at [1], [115], [118] and [132].

<sup>173</sup> *Ibid*, at [116].

<sup>174</sup> See A 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) *Child and Family Law Quarterly* 237.

<sup>175</sup> L Smith ‘*Tangling the Web of Legal Parenthood: Legal Responses to the Use of Known Donors in Lesbian Parenting Arrangements*’ (2013) 33(3) *Legal Studies* 355 at 359.

The *McConnell* decision has puzzling implications for the 2008 Act's 'parenthood provisions' in circumstances where a trans parent is in a relationship with a cis woman<sup>176</sup> and a child is born through the assisted reproductive techniques covered by the provisions. The substance of the rules for 'fathers'<sup>177</sup> are replicated for second female 'parents'.<sup>178</sup> For men in registered relationships,<sup>179</sup> section 35 (1) (a), and for women in registered relationships, section 42 (1) (a), are written in almost identical language. In neither circumstance does the second person become a legal parent based upon their biological connection with the child,<sup>180</sup> instead legal parenthood is based upon their (and the mother's) consent.<sup>181</sup> The only difference is the language used for the parental role, 'the father' for men and 'a parent' for women, and circularly the only factor that determines which provision applies is their sex/gender. However, due to *McConnell*, the legal parenthood of trans parents will be described using the gendered descriptor that relates to their birth assigned sex.<sup>182</sup> Therefore, under the 'parenthood provisions', a trans man would be described as 'a parent' of his children, while a trans woman would be described as 'the father' of her children. This seems a particularly unsatisfactory result, given that the partner of the 'mother' becomes a legal parent based upon the same substantive rules in both situations. I argue that describing trans legal parenthood congruently with trans parents' identities in this context should be relatively straightforward given the basis upon which legal parenthood is attributed in the 2008 Act. These implications for trans legal

---

<sup>176</sup> Or with a trans man who gives birth.

<sup>177</sup> Human Fertilisation and Embryology Act 2008, ss 35-37.

<sup>178</sup> ss 42-44.

<sup>179</sup> The 'agreed fatherhood conditions', s 37, applying to unmarried men, are expressed in identical terms to the 'agreed female parenthood' conditions, s 44, applying to unmarried women, other than the different gendered language used. The Act's distinction between those in registered and unregistered relationships is the same for mixed sex and same sex couples.

<sup>180</sup> For women a genetic link is irrelevant to becoming a 'parent', s 47. See *Re G (Children) (Shared Residence Order: Biological Non-Birth Mother)* [2014] EWCA Civ 336, [2014] 2 FLR 897, for a case involving a 'genetic mother' who was not a legal parent.

<sup>181</sup> Presumed for those in marriages and civil partnerships, s 35 and s 42, and which must be given in terms of the statutory scheme for those not in registered relationships, ss 36-37 and ss 43-44.

<sup>182</sup> The Gender Recognition Bill, presented in July 2003, included Clause 8(2), which would have addressed this issue, both prospectively and retrospectively, but it was removed from s 12 of the 2004 Act.

parenthood, under the 2008 Act, illustrate the difficulty of applying *McConnell* to different contexts, which were naturally not considered by the court. In his judgment, Sir Andrew McFarlane P stated: ‘[t]he status of being a “mother” arises from the role that a person has undertaken in the biological process of conception, pregnancy and birth’.<sup>183</sup> This re-asserts the judicial understanding that legal motherhood is indivisible from the biological processes of gestation and childbirth. However, regardless of the validity of this argument in relation to the legal ‘mother’,<sup>184</sup> a comparable argument cannot be made regarding the legal parenthood of ‘the father’ and ‘a parent’ under the 2008 Act, because these gendered descriptors are not based upon the roles undertaken within the ‘biological process’ of conception. Instead, the roles played by both categories of legal parent are identical – these are births involving donor sperm and legal parenthood is based upon consent and the relationship with the ‘mother’. Thus, it is difficult to understand the purpose of these gendered descriptors in this context, or any justification for their continued use. However, I am not arguing that trans parents should be registered using different gendered terminology depending upon the reproductive role they perform in cases of assisted reproduction under the 2008 Act,<sup>185</sup> but rather that this shows the problematic implications of *McConnell* when applied to other contexts. The President’s reasoning assumes a connection between the gendered descriptor and a role ‘in the biological process of conception, pregnancy and birth’<sup>186</sup> that only applies to the legal ‘mother’ and is not generalisable across legal parenthood. Legal fatherhood is determined by various factors depending upon the circumstances and is not solely based upon a ‘biological’ role. Given this

---

<sup>183</sup> *TT*, above n 22, at [280].

<sup>184</sup> The legal construction of ‘motherhood’ has been critiqued, see e.g. G Douglas ‘The Intention to Be a Parent and the Making of Mothers’ (1994) 57(4) *Modern Law Review* 636 and K O’Donovan ‘Constructions of Maternity and Motherhood in Stories of Lost Children’ in J Bridgeman and D Monk (eds.) *Feminist Perspectives on Child Law* (Abingdon: Routledge-Cavendish 2000).

<sup>185</sup> An approach where trans men are ‘fathers’ under s 35-37, but ‘mothers’ through giving birth does not strike me as satisfactory.

<sup>186</sup> *TT*, above n 22, at [280].

existing reliance upon different factors in different contexts, I argue that it is conceptually unclear why a trans man cannot become a legal ‘father’ through giving birth.

I am not arguing that female same-sex couples provide a direct parallel or comparison with trans parenthood, but instead that the significance of the parenthood provisions is that legal parenthood at birth is no longer purely gendered, illustrating the concept’s flexibility. I argue that this context, where legal parenthood is explicitly separated from genetics and biology, and where the legal regime employs de-gendered language for some parents, starkly illustrates how the decisions regarding trans legal parenthood are not reflective of the flexibility within legal parenthood. The Court of Appeal in *McConnell* argued that: ‘it cannot simply be a question of this Court substituting a word such as “parent” for the word “mother”. This is because the word “parent” has a distinct meaning which has been given to it by Parliament in other legislation.’<sup>187</sup>

I do not dispute that the judgment is correct that the appropriate constitutional boundaries of the judicial role meant that such direct substitution was not open to the court.<sup>188</sup> However, the option of making a ‘declaration of incompatibility’, under section 4 of the 1998 Act, was available to the court and was not taken.<sup>189</sup> Therefore, I accept that legislative reform will be required to recognise trans legal parenthood congruently with trans identities. However, I argue that acknowledging this need for legislative reform represents a very different argument from the apparent suggestion in the judgment that the meaning of ‘parent’ in other legislative contexts precludes the use of such language to describe trans legal parenthood. As noted above, each legislative context is different, and the concept of legal parenthood is flexible. My argument here is not that the 2008 Act’s descriptor ‘a parent’ should necessarily be adopted for trans legal parenthood. Although, such an approach would be preferable to the existing judicial

---

<sup>187</sup> *McConnell*, above n 22, at [65].

<sup>188</sup> Full consideration of these public law issues is outside the scope of this article.

<sup>189</sup> See Brown, above n 99, at 168-170.



decisions, and would have been acceptable to Mr McConnell.<sup>190</sup> Instead, I argue that the provision made by the law to account for the circumstances of female same sex couples who use assisted reproduction shows that the concept of legal parenthood is capable of flexibly and pragmatically responding to parenthood formed in different ways,<sup>191</sup> and that this flexibility should comfortably allow for the recognition of the specific circumstances of trans legal parenthood using appropriate gendered descriptors. Ultimately, I argue that the gendered descriptors of legal parenthood do not possess the normative or substantive significance that the judgments considering trans legal parenthood appear to imply they possess. Thus, the existing concept of legal parenthood should be capable of describing JK (and others in her position) as ‘mother’ and Mr McConnell (and others in his position) as ‘father’ without challenging the understanding of legal parenthood.

## **Conclusion**

This article has considered trans legal parenthood in the UK after the *McConnell*<sup>192</sup> case. As described above, trans identities have become an increasingly contentious arena of social, political and legal discourse. This article’s discussion of trans legal parenthood does not exist in a vacuum from this contemporary social and political context, and the judicial approach reflects that the recognition of trans identities through the Gender Recognition Act 2004 remains partial, rather than complete.<sup>193</sup> In opposition to this, the law has increasingly recognised parenthood arising in various novel familial and reproductive contexts. The law’s

---

<sup>190</sup> *McConnell*, above n 22, at [1].

<sup>191</sup> Further shown through parental orders for male same sex couples, Human Fertilisation and Embryology Act 2008, s 54.

<sup>192</sup> *McConnell*, above n 22.

<sup>193</sup> See J M. Scherpe and P Dunne ‘The Legal Status of Transsexual and Transgender Persons – Comparative Analysis and Recommendations’ in Scherpe, above n 105.

attempts to accommodate new family forms within its existing regime and its dominant understandings of parenthood is an ongoing process.<sup>194</sup> These questions have been to the focus of academic critique for some time,<sup>195</sup> and the pace of change means that the law will be continually reacting to new family forms. Trans legal parenthood is situated within both of these overarching contexts, which do not necessarily converge, but nor does either context fully explain the understanding of trans legal parenthood. Nonetheless, this article has shown that trans parenthood provides another example of the problems caused by the continuing reliance upon the binary, two-parent model of the traditional, heterosexual, cis, nuclear family within the understanding of legal parenthood.

In this article, I have argued that legal parenthood lacks inherent normative content, that the concept has evolved to accommodate parenthood in various circumstances, and that the concept can continue to evolve in response to subsequent developments. However, this article accepts that the judiciary are constrained by their understanding of the boundaries of their constitutional role,<sup>196</sup> and their belief that trans parenthood is an area ‘of difficult or controversial social policy’<sup>197</sup> limiting recourse to a ‘declaration of incompatibility’ under the 1998 Act.<sup>198</sup> Consequently, legislative reform represents the only solution to address the issues raised by trans legal parenthood. I have previously observed that ‘there is a clear need for Parliament to legislate to address these issues for trans parents and to provide a comprehensive model of legal parenthood and birth registration that reflects the reality of 21<sup>st</sup> century family life.’<sup>199</sup> Despite the obvious difficulties, and apparent unlikelihood, of such legislative reform being initiated

---

<sup>194</sup> See the recent recommendations in the Law Commissions Final Report on Surrogacy, above n 40.

<sup>195</sup> See e.g. K O’Donovan *Family Law Matters* (London: Pluto Press 1993) and A Diduck *Law’s Families* (London: Markham 2003).

<sup>196</sup> *McConnell*, above n 22, at [81].

<sup>197</sup> *Ibid*, at [82].

<sup>198</sup> Human Rights Act 1998, s 4.

<sup>199</sup> Brown, above n 99, at 170.

due to the contemporary social and political discourse concerning trans identities, the pressing need for reform is echoed here. As Davis has previously commented ‘[t]rans families...should be recognized as per their social reality without having to jump through various legal hoops or societal interrogation, which would inevitably aid all families in combatting rigid norms about any “right” way to exist.’<sup>200</sup> In this article, I have argued that recognition of trans parenthood should be possible within the existing understanding of legal parenthood, a flexible and pragmatic concept that has evolved in response to different family forms and reproductive practices. I have sought to illustrate why accommodating trans parenthood and describing trans parents congruently with their identity – whether degendered legal parenthood for all parents,<sup>201</sup> or gendered descriptors for trans legal parenthood that align with trans identities, or a system of registering legal parenthood that allows a choice of terminology for all parents – does not require any challenges to the underlying concept of legal parenthood. Therefore, I argue that legislative reforms addressing trans legal parenthood, regardless of the potential political and cultural controversy, should not be considered controversial in terms of their impact upon the concept of legal parenthood.

---

<sup>200</sup> Davis, above n 100, at 188.

<sup>201</sup> See ‘Future of Legal Gender’ Project, above n 2 and the Ontarian legislation, above n 136.