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Parentage, Parenthood and Parental Responsibility: Subtle, Elusive Yet Important Distinctions

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1. INTRODUCTION

What is a parent? Judge De Meyer, giving judgment in the European Court of Human Rights in 1997, was quite confident that he knew the answer to this question.[1] The issue was whether the United Kingdom had violated rights to family life and had discriminated against a female-to-male transsexual (X) in refusing to register him as the father of a child (Z) born to his female partner (Y) following insemination by donor sperm. In holding that the UK authorities had not breached the Convention he said that the "principles and rules are quite simple . . . It is self-evident that a person who is manifestly not the father of a child has no right to be recognised as her father". So, the implication is, we all know a father when we see one—it is the man who has the genetic link with the child—the man whose sperm brings about the child's conception. The difficulty with this view is all too apparent and several other judges in the European Court drew attention to it.[2] If X had been born a biological *male* there would have been no question that he could have been registered as the father under the status provisions of the Human Fertilisation and Embryology Act 1990. This treats as the *legal* father of a child the man who undergoes licensed treatment together with a woman who conceives with the use of donated gametes.[3] The result seems to be that to qualify as a "father" (and hence a "parent") it is not necessary to be the genetic *father* but it is necessary to start life as a biological *male*. This view of the legal position of transsexuals is open to question but is beyond the scope of the present discussion.[4]

My concern in this chapter is whether it is just possible that Judge De Meyer was right after all—that being a parent is a genetic notion and that the mistake

[1] *X, Y and Z v The United Kingdom* (1997) 24 EHRR 143.
[2] See particularly the dissenting judgment of Judge Foighel.
[3] 1990 Act s. 28(3).
[4] For further discussion of the implications of this decision for transsexuals see Bainham (1997).

we have made as a society is to treat or regard as *parents* many social carers of children who lack this genetic connection.

Before examining the issues it is necessary to say something about the terminology used in this chapter. Judges and legal commentators frequently use the terms *genetic parent* and *biological parent* interchangeably as if they were synonymous. There are frequent references also to the *natural parent* and the *blood tie*. All these expressions have been used to distinguish those who have a genetic connection with a child from those who do not but may be caring for that child. The latter are usually described as *social parents*. The primary thrust of this chapter is to explore the legal significance of this distinction and, in this sense, any of these expressions would do equally well. However, it must be acknowledged that there are scientifically important distinctions to be drawn between the existence of a *genetic link* and what may be thought to be the wider components of *biological parentage*. These components are analysed in depth by Martin Johnson (in Chapter 3 below). The distinction between what is *biological* and what is *genetic* may be particularly important in the context of assisted reproduction.

Distinctions may also need to be drawn between *mothers* (who will usually, but not always, satisfy all the components of *biological parentage*) and *fathers* (who will frequently, but not always, have only a *genetic* connection with a child). Since the key arguments in this chapter surround the presence or absence of a genetic link, the expression *genetic parent* is generally preferred to that of *biological* or *natural parent*. But the reader should bear in mind that many *genetic parents* will clearly be *biological parents* in the wider sense identified by Johnson. Further, in the case of mothers, the various techniques of assisted reproduction can result in the four components of biological parentage being shared by more than one woman (most obviously the genetic and gestational components). In these instances careful thought needs to be given to the legal significance which is attached to each of these distinctive contributions.

I shall explore these issues by looking at the subtleties inherent in the concepts of *parentage, parenthood* and *parental responsibility*. One of my aims is to draw attention to the incongruity between the social and legal uses of these terms. In particular I suggest that in social usage a meaningful distinction can be drawn between the ideas of *parentage* and *parenthood* which is not currently reflected in the law. Legislation does not use the term *parenthood* as such and rarely uses *parentage*,[5] preferring instead to concentrate on the concept of *being a parent*.[6] I speculate on whether there could be value in establishing separate legal concepts of *parentage* and *parenthood* as a means of recognising the distinctive

[5] Under Family Law Act 1986, s. 56 a person may apply to the court for, *inter alia*, "a declaration . . . that a person named in the application is or was his parent". Such declarations are referred to in the legislation, in the heading to the section, as "Declarations of Parentage".

[6] This is true, for example, of the Children Act 1989, the Adoption Act 1976 and the Child Support Act 1991, although under this last mentioned legislation it is possible to refer *disputes about parentage* (s. 26) to court for a *declaration of parentage* (s. 27). I am very grateful to Stuart Bridge for this insight.

interests which children have in establishing and sustaining links with genetic parents where the social parenting role is performed by someone else.

My chapter attempts to cut across the familiar debate about "genetic" versus "social" parenthood by focusing more closely on the above distinctions. It will be my contention that, with growing recognition of the child's fundamental right to knowledge of genetic origins,[7] it will be necessary to have a clear concept that gives expression to this link. Alongside this, I accept that there ought to be equally clear recognition of the significance and importance of what has been termed *social parenthood* to children and that this status must also be given proper weight in law. Increasingly the question will not be whether to *prefer* the genetic or social parent but how to accommodate *both* on the assumption that they both have distinctive contributions to make to the life of the child. In essence I shall argue that, as far as possible, the notion of *being a parent* should turn on a presumed or actual genetic connection with the child, leaving *parental responsibility* as the device for giving to *social parents* most but, crucially, not all of the status which attaches automatically to genetic parents—at least where the child is born to a married couple.[8] Thus, although it would remain perfectly usual to describe those performing the social role of parents as *social parents* they would usually not be *legal parents*. Put another way, the concept of *social parenthood* would embrace the legal powers and duties associated with *parental responsibility* and its exercise but not the wider legal status of *being a parent*.

A difficulty arises in relation to those instances in which the law has already gone beyond conferring *parental responsibility* on social parents and has indeed allowed them to become *legal parents*. This is true in both adoption and certain instances of assisted reproduction where the link between genetic and legal parenthood has been broken. It is here that I will suggest there might be some utility in separating out the concepts of *parenthood* and *parentage* in law. In short it might, in cases like adoption and assisted reproduction, be important to find two independent concepts which can, respectively, give effect to the legal status of, say, the adopters as parents and the child's interest, perhaps right, to a certain level of knowledge about and contact with the genetic parent. The former we might call *legal parenthood* and the latter *legal parentage*.

2. IS IT ALL JUST SEMANTICS?

An obvious question to pose at the outset is whether it really matters at all that someone is *called* a "parent" or not. Suppose, for example, that following

[7] See particularly United Nations Convention on the Rights of the Child, Article 7.

[8] Where a child is born to a married couple both will be *parents* and both will have *parental responsibility* Children Act 1989, s. 2(1)). Where the mother and father are unmarried they will both be *parents* but only the mother will, initially at least, have *parental responsibility* Children Act 1989, s. 2(2)).

divorce a mother sets up home with a man whom she may or may not marry. In due course the children come to regard this man as their father and they call him "Dad". He is regarded as the father of the children by friends and others in the community. The law cannot, and would not want to, attempt to prevent the step-father or cohabitant from being known *informally* as the parent of the children. But *formally* the position is quite different even though this may not be fully appreciated by those concerned (see Pickford, Chapter 8 below). "Dad" remains in law as merely the *social* father, in no stronger position than any other *de facto* carer of children. The *legal* father is the genetic, now divorced, father. A recent decision of the High Court brings out this distinction between *informal* and *formal* parenthood rather well.[9] A mother had, independently, changed the surname of the children without the knowledge or consent of the natural father. It was ordered that, although the mother had behaved unlawfully, the children could continue to be known informally by the new surname but the mother was prohibited from taking any steps to "cause, encourage or permit any person or body to use the new surname without the prior consent of the father or the court". In effect the continuing legal parental status of the natural father was preserved through his name when it came to official dealings with educational, medical authorities and other outsiders.

So *being a parent* is not just a matter of language but something which confers a legal status. It therefore becomes important to consider closely the precise legal significance of establishing maternity or paternity, the circumstances in which the law should confer the full status of parent and what this ought to entail and, likewise, the circumstances under which parental responsibility should be obtained and how this might differ from being a legal parent. But, before doing so, it may be helpful to compare the way in which we generally use the expressions *parentage, parenthood* and *parental responsibility* with their technical legal uses.

3. SOCIAL AND LEGAL USAGES

(a) Being a parent: parentage and parenthood

We sometimes speak of the *parentage* of children. It is quite common to find legal commentators using the expression *parentage* interchangeably with *parenthood*. This is perfectly understandable since, as noted above, the law does not distinguish between the two and legislation instead usually refers to *parents* or, occasionally, to *mothers* and *fathers*. Yet *socially*, I suggest, we tend to use them somewhat differently. If we say "X's parentage is unknown" what we are talking about is *genetic* parentage. We are not usually raising questions about who has the right to look after the child. The dictionary definition of *parentage*

[9] *Re PC (Change of Surname)* [1997] 2 FLR 730.

which refers to "descent from parents, lineage" seems to confirm this view. Arguably, therefore, *parentage* is an exclusively genetic idea and it may be that we have here a concept capable of giving effect to the child's alleged right or interest in genetic origins.

The notion of *parenthood* in everyday usage is more problematic and ambiguous. While many people referring to *parenthood* would immediately associate it with the status held by the child's genetic father and mother, others might well associate it with those who are acting out the *social role* of parents by looking after a child. Often the expression *parenthood* is accompanied by a prefix. We talk of *step*-parenthood, *foster*-parenthood or *adoptive* parenthood. An umbrella term often used by commentators, though not, I suggest, in wider society, is *social parenthood*. One distinction then between *parentage* and *parenthood*, at least as a matter of everyday language, may be that the former, but not the latter, is an *exclusively* genetic idea. But this is not, in my view, the only point of distinction. *Parentage*, I suggest, has a "one-off" character. It is about genetic truth, or at least a *presumed* genetic link—as in marriage. Once parentage has been established following the birth of the child we tend not to continue using the term—unless perhaps someone in the family dies and it becomes important to resurrect the question of genetic links for the purposes of succession to property[10] or, more commonly, someone is denying financial liability for child support under the Child Support Act. *Parenthood* is arguably different. It conveys an on-going status in relation to the child and, in particular, is associated with the responsibility for raising a child.

So far as the law is concerned, *being a parent* is a legal status which has traditionally been associated with a presumed or actual genetic link.[11] But adoption (introduced in England in 1926) has long represented an exception to the principle that *genetic* and *legal* parenthood should coincide. In this context it is clear to everyone that the legal, adoptive parent is not the genetic parent. Since 1990 the instances of non-genetic parenthood have increased in the context of assisted reproduction. Under the Human Fertilisation and Embryology Act 1990 there are several instances in which a person who is patently not the *genetic* parent will be treated as the *legal* parent.[12] (See Bridge, Chapter 4 below). It should also be said that artificial insemination by donor (AID) has been around for half a century and that many children born into marriages will have been presumed (wrongly) to be the genetic children of the respective husbands. These cases are however distinguishable from those under the 1990 legislation since legal parenthood still arose in the pre-1990 cases from a *presumed genetic connection*,

[10] For a particularly striking illustration see *Re Overbury (deceased)* [1955] Ch 122.

[11] Within the context of marriage there is a legal presumption that a child born to a married woman is the child of her husband. The presumption is encapsulated in the Latin maxim *Pater est quem nuptiae demonstrant*.

[12] Thus under s. 28(2) the husband of a woman who did not object to her receiving various forms of infertility treatment will be treated in law as the father. The same is true of an unmarried man under s. 28(3) where there has been a course of treatment services provided for the mother and that man together.

albeit an inaccurate one. What made the 1990 legislation so special was the willingness of Parliament to acknowledge openly the *legal parenthood* of those who lacked *genetic parentage*.

The position is complicated further in that the legal parent may, in the case of a genetic father not married to the mother, lack parenthood in the full sense, in that the law withholds from him parental responsibility. Thus it is necessary, at least from a legal perspective, to distinguish between being a parent and having parental responsibility—a subtlety which is probably not appreciated by many in society including those most directly affected (see Pickford, Chapter 8 below).

(b) Parental responsibility

If we consider how the expression *parental responsibility* might be used in society we can again observe a distinction between its social and its legal usage. Let us take the example of a young unmarried mother whose parents (the baby's grandparents) look after the baby while the mother gets on with her life—perhaps, shall we say, by going off to college. If we were to ask people generally who has "parental responsibility" for the baby in these circumstances, we could reasonably expect that some would see the grandparents as exercising it. They would be, as it were, *in loco parentis* to the child. Yet they do not have *legal* parental responsibility. Parental responsibility, in the technical legal sense, remains vested in the mother and the grandparents have only those powers and duties which other *de facto* carers possess.[13] Parental responsibility in law is not therefore just about the fact of looking after a child. But equally it is not just about being a parent either. The unmarried father is undoubtedly a parent with the status of legal parenthood but he lacks the powers and duties which go with having parental responsibility[14] (see Pickford, Chapter 8 below). Conversely many social parents succeed in obtaining parental responsibility in the legal sense but do not thereby acquire the full status of being parents and the very expression "parent" is in this context a legal misnomer.

To summarise, therefore, we can say that the social usage and perceptions of *parentage, parenthood and parental responsibility* may not always coincide with the legal significance of these concepts and that the first two (though perhaps socially distinguishable) are legally conflated in the notion of *being a parent*. If therefore we want to ask the question "what is a parent?" we need to ask further questions about whether we are seeking to establish genetic parentage, invest someone with the status of legal parent or merely give to that person the

[13] Under Children Act 1989, s. 3(5) a person who does not have parental responsibility but has care of a child may "do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child's welfare".

[14] He can however acquire parental responsibility by agreement with the mother Children Act 1989, s. 4(1)(b)) or by obtaining from the court a parental responsibility order Children Act 1989, s. 4(1)(a)).

legal powers and duties which are associated with raising a child and are encapsulated in the legal concept of "parental responsibility". These are not just questions of terminology since there are real distinctions of substance between merely having genetic parentage established, being a legal parent and possessing parental responsibility.

4. WHAT IS THE LEGAL SIGNIFICANCE OF PARENTAGE, PARENTHOOD AND PARENTAL RESPONSIBILITY?

What makes the legal situation so complex is that genetic parentage, legal parenthood and parental responsibility may be split between different individuals or institutions in relation to a particular child. This is, of course, frequently not the case. Perhaps the best example is again the situation of the unmarried mother (or two married parents). Where an unmarried woman gives birth (assuming she conceived by sexual intercourse) she will be the genetic parent, the legal parent and she will possess parental responsibility. However, the genetic father, if established, will also be the legal parent but will not have parental responsibility. To take a second example, if the mother and her unmarried partner had "produced" a child together with the use of licensed donor sperm, the partner would *not* be the genetic parent (this would be the sperm donor); the partner would be the legal parent but would still not have parental responsibility. Suppose that the mother then separated from the partner and married another man with whom she successfully obtains a joint residence order. Now the former partner is still the *legal* parent but her husband, who is neither the legal nor genetic parent, shares parental responsibility with the mother by virtue of the residence order. In this last example genetic parentage, legal parenthood and parental responsibility are split between three different men. It would not be difficult to dream up more complicated situations than this (Eekelaar, 1994).

What these examples suggest is that careful thought needs to be given to the legal consequences which flow from the establishment of genetic parentage, the attribution of legal parenthood and the granting of orders which give parental responsibility. Perhaps, more importantly, there needs to be a re-evaluation of the circumstances in which it is appropriate to allocate to individuals the status which goes with these distinctive concepts.[15] Thus, for example, when it is argued that being a parent is nowadays more about the *intention* to perform the role of a parent, rather than the fact of procreation (Barton and Douglas, 1995), we need to be clear about whether we are concerned merely with the acquisition of parental responsibility or with the wider status of legal parenthood.

[15] There has, in particular been much debate about the legal status of step-parents which raises questions about whether they should be allowed to acquire the full legal status of parent (through adoption), parental responsibility (automatically, by agreement with the genetic parent or by court order) or whether they should merely have the legal status of other *de facto* carers.

(a) The legal significance of establishing genetic parentage

The establishment of *genetic parentage* will generally result in the attribution of *legal parenthood* with the consequences which attach to this status but, as discussed above, it will not always do so since there are instances in the context of assisted reproduction and adoption, in which the genetic parent either will not become, or will cease to be, the legal parent. Furthermore, whether or not the establishment of genetic parentage will create the *full* legal status of parenthood (inclusive of parental responsibility) will depend, in the case of the father, on the presence or absence of *marriage* to the mother.[16] Where the father, being married to the mother, acquires this full legal status of parenthood, it is not necessary to distinguish between the effects of legal parenthood and those of parental responsibility—he gets *both* since they are subsumed or conflated in the general notion of *being a parent*. Where however, he is *not* married to the mother, it is necessary to make this distinction. Hence we need to be able to separate the legal consequences of *being a parent* from those which derive from having *parental responsibility*. It is of course the case that many now argue that the unmarried father should automatically have a full parental status but this has thus far been resisted in England. (See Pickford, Chapter 8 below and on the different position taken by the Scottish Law Commission, see Scottish Law Commission (1992) and Bainham (1993)). The debate about this and other matters, such as liability for child support, largely hinges on the question of what consequences, if any, should flow from the *mere fact* of establishing genetic parentage; it might arguably be helpful to have an independent concept of *legal parentage* (as distinct from legal parenthood) as a mechanism for defining these consequences.

(b) The attribution of legal parenthood

As noted above, genetic parentage will usually trigger the legal status of parent. But we have now broken the necessary connection between the two. Legal parenthood may be attributed to social or intentional parents, as where a commissioning couple obtain a "parental order" under the Human Fertilisation and Embryology Act 1990.[17] Except in the case of the unmarried father, those who are legal parents will also have parental responsibility, but the distinction between the two concepts has an importance which goes well beyond this. This is because the legal effects which are peculiar to *parenthood* will not pass to *social parents* who get *parental responsibility*. Let me reinforce this point. Leaving aside the exceptional situation of the unmarried father, legal parenthood *includes within it* parental responsibility—but the reverse is not true. Parental responsibility *does not include* the wider legal effects of parenthood. This leads me to one of the most important issues for the future. In allocating parental responsibility to more and more social parents, is it necessary or desirable to go the extra mile and confer on them legal parenthood? It will be my strong contention that this is neither necessary nor desirable and that legal parenthood, with some exceptions, ought to be confined to genetic parents. This is because those legal effects, which are peculiar to parenthood, are fundamental to the genetic link and provide a basis for continuing to recognise this while parental responsibility, at the same time, can give a measure of legal security to social parents.

What are these fundamental effects of legal parenthood which do not pass with parental responsibility? The first is arguably the most important and is also the most frequently neglected. This is that legal parenthood, but not parental responsibility, makes the child a member of a family, generating for that child a legal relationship with wider kin going well beyond the parental relationship. This is expressed most concretely in the law of succession where entitlements on intestacy depend on being able to establish these kinship links. Beyond this, the social or psychological value of belonging to a particular family is a nebulous subject for lawyers and is more the terrain of the anthropologist or psychologist. What the lawyer *can* point out is that the loss of the legal status of parent will entail the loss, at least in law, of these wider relationships. Let us suppose, for example, that a mother divorces H1 and remarries H2. Both men have siblings. The mother and H2 apply to adopt the mother's children who are the genetic children of H1. If the adoption is granted, the children will lose their legal relationship with the uncles and aunts derived from H1. They will acquire new uncles and aunts from H2. If, on the other hand, a joint residence order is made rather than an adoption order, the children will retain the legal link with H1's siblings and any relationship with H2's siblings will be social rather than legal. It may be that this does not matter but it is surely a factor which should be considered before we allow too readily those who have performed a social role to become legal parents.

Other effects which arise specifically from legal parenthood are financial liability for child support,[18] the right to object or consent to adoption[19] (though this also depends on possessing parental responsibility), and the right to object to a change of the child's surname and to removal of the child from the jurisdiction,[20] the right to appoint a guardian[21] (although guardians themselves also have this right and the parent must possess parental responsibility), a presumption of

[16] Being married at the time of the child's birth here carries an extended meaning in accordance with Children Act 1989, s. 2(3) and Family Law Reform Act 1987, s. 1. The expression includes some children of void marriages, legitimated and adopted children and children who are treated as legitimate.

[17] 1990 Act, s. 30.

[18] Social Security Administration Act 1992, s. 78(b) and Child Support Act 1991, s. 1(2).

[19] Adoption Act 1976, s. 16.

[20] These rights, recognised at common law, are not lost where a residence order is made in favour of the other parent or someone else. See Children Act 1989, s. 13(1).

[21] Children Act 1989, s. 5(3).

contact where a child is in care[22] and an automatic right to go to court.[23] One might have thought that there would be an equivalent presumption of contact in the private context but decisions of the courts have cast doubt on this.[24]

Are these distinctive legal effects just anomalies, historical accidents of the piecemeal development of the law? Surely they should all now be subsumed under the central organising concept of parental responsibility? (Lowe, 1997). It is my contention that, on the contrary, they continue to serve a vital purpose in that they give expression to the continuing importance of the genetic link. What they all have in common is that they relate to fundamentals which go beyond the everyday decisions involved in upbringing. Allowing the child to be adopted severs the parental link completely (at least traditionally in English law); allowing the child to be taken permanently out of the country or changing the child's name threatens its existence, in the case of the latter perhaps only symbolically. If we are to move in the direction of giving effect to a child's right to knowledge of genetic origins we are going to need some legal means of preserving the genetic connection and it is the concept of legal parenthood which currently achieves this. As noted earlier there are limited exceptions to this principle in which some other distinctive mechanism is perhaps required, since legal and genetic parenthood have become divorced from one another.

(c) The effect of conferring parental responsibility

Parental responsibility is now a technical legal concept. It conveys a status which is held automatically by both parents where they are married and by the mother alone where the child is born out of wedlock. Yet many people who are not genetically related to children, but are looking after them, can acquire parental responsibility through court orders or, in the event of the death of a natural parent, through being privately appointed guardian by that parent (Douglas and Lowe, 1992). The most usual order will be the residence order, the effect of which is automatically to give parental responsibility to the person in whose favour it is made—but only for so long as the order lasts.[25] Orders will usually terminate when the child attains sixteen years of age.[26] Here we can see immediately one very clear distinction between being a legal parent and holding parental responsibility. The legal parent will remain a parent for life. Although many of the legal effects of parenthood will terminate when the child attains majority at eighteen, the legal family relationship of parent and child will

[22] Children Act 1989, s. 34(1)(a).

[23] Thus a parent may apply, without leave, for any "Section 8 order" under the Children Act 1989 (s. 10(4)) and this includes the unmarried father despite his lack of parental responsibility (see *M v C and Calderdale Metropolitan Borough Council* [1994] Fam. 1).

[24] See the House of Lords decision in *S v M (Access Order)* [1997] 1 FLR 980.

[25] Children Act 1989s. 12(2).

[26] Children Act 1989, s. 91.

endure for good.[27] Thus, in quite a number of countries (and formerly under the English Poor Law), adult children have legal obligations in certain circumstances to provide for the financial support of elderly parents. In contrast parental responsibility is really a sort of trusteeship over the child which is more limited and, since the Children Act 1989, will usually cease even before the child reaches majority. Under the draft Adoption Bill 1996 it would be possible for orders over children to be extended to the age of eighteen thus ensuring a continuation of parental responsibility (Department of Health and Welsh Office, 1996). But this has not been brought before Parliament.

So what exactly is *parental responsibility*? A great deal has been written on the subject and while the Scots have attempted in their 1995 legislation to define its content,[28] the English approach has been to leave things rather vague, at least on the statute book, and to presuppose some knowledge of the effects of being a parent which the courts have formulated over a long period of time at common law. But, for what it is worth, the Children Act defines *parental responsibility* as

> "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property".[29]

The definition does not tell us what these are, which is why some question its usefulness, but it is, in a broad sense, fairly clear what it is talking about. At the risk of over-simplification, the person possessing parental responsibility will have a right to look after the child (unless this has been removed by a Court order)[30] and the right and duty to take all major decisions relating to the child's upbringing including such matters as where the child is to live, which school the child should attend or what medical treatment the child should, or should not, receive.[31]

Thus, where a social parent succeeds in obtaining parental responsibility he or she will have the legal right to look after the child and to take all the everyday and important decisions about upbringing which a parent could take. But the social parent will not *become* the legal parent in the fullest sense and one obvious question for policy-makers is why the social parent might feel the need to press for full legal parenthood. Why isn't having parental responsibility

[27] It was largely for this reason that an adoption order was made in *Re D (A minor) (Adoption Order: Validity)* [1991] 2 FLR 66. The child here was only six days short of majority when the adoption application was made but suffered from severe mental handicap. It should also be noted that some jurisdictions still allow the adoption of adults.

[28] Children (Scotland) Act 1995, ss. 1 and 2 set out, respectively, the *responsibilities* and *rights* of parents. English law subsumes the rights of parents, insofar as they exist, in the general notion of *parental responsibility*.

[29] 1989 Act, s. 3(1).

[30] The effect of a residence order or care order could be to prevent a person with parental responsibility from having the right to look after the child.

[31] These rights or powers are not absolute (*Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112) but they do confer a good deal of discretion with which the courts may be reluctant to interfere (see, for example, *Re T (Wardship: Medical Treatment)* [1997] 1 FLR 502).

enough in itself? Why is it, for example, that so many step-parents, following the liberalisation of divorce in 1969, sought to adopt their step-children rather than merely to acquire the equivalent of what is now parental responsibility through a joint custody (or, latterly, a residence) order with their spouses? (Houghton, 1972). At least part of the explanation must surely lie in the fact that orders that confer what is now parental responsibility are *revocable* whereas adoption (which creates full legal parenthood) is *permanent* other than in very restricted circumstances.[32] This is particularly striking in the case of the unmarried father who, having acquired parental responsibility, may subsequently have it revoked by the court. So adoption offered greater *security* to *de facto* carers like step-parents, foster-parents and others, and the wish to have this security is readily understandable. But there is more to the push for parenthood than this. It seems entirely likely that many of those raising children have a psychological need to be regarded as, or called, *parents* and here we are perhaps back to the semantic debate alluded to earlier in this chapter. For many people, perhaps especially step-parents in a reconstituted family, it is not enough to be given the powers and duties of parents—they want to *be* parents.

The policy of the law has been to restrict the circumstances, again with step-parents particularly in mind, in which the *de facto* carer should be able to go beyond acquiring parental responsibility and actually attain full legal parenthood. I believe this policy to have been well-founded in view of what is increasingly recognised as the importance of the genetic link to the child. I turn to this in the next section. But before doing so, it should not go unnoticed that there has been some erosion of this policy and that the Children Act amended earlier provisions that were designed explicitly to discourage step-parent adoption and adoption by natural relatives (Bainham, 1990). Another point which ought to be raised here is that the concern of social parents for legal security in the process of raising a child is real and justifiable. It certainly suggests that further consideration should be given to the introduction of an *irrevocable* order, such as an irrevocable residence order or a form of *inter vivos* guardianship, which would stop short of making the social parent the legal parent but would also erase any real fear that the child could be removed from the social parent during the child's minority.

5. IS THERE A RIGHT TO KNOWLEDGE OF GENETIC ORIGINS?

Exactly what is the value of the genetic link to children or indeed to adults in later life is not something upon which lawyers are fit to pronounce. This is surely a matter for others such as geneticists and psychologists. But it does seem to be accepted that there are perhaps two major reasons why knowledge of

[32] For an unsuccessful attempt to revoke an adoption order see *Re B (Adoption: Jurisdiction to Set Aside)* [1995] 2 FLR 1. For a rare successful revocation see *Re K (Adoption and Wardship)* [1997] 2 FLR 221.

genetic background is thought to be important (O'Donovan, 1998). The first relates to information about an individual's medical history in the context of the wider family, and the second stresses the psychological need of individuals to have knowledge of their background in acquiring a sense of identity. Any uncertainty over the value of the genetic link has not stopped the international community from passing an extremely widely ratified Convention which appears to acknowledge the child's fundamental right to establish connections with his or her genetic parents. Article 7(1) of the United Nations Convention on the Rights of the Child provides that:

> "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents".

Article 8(1) reinforces the previous article by providing obligations relating to the preservation of the child's identity, family relations etc. It provides that:

> "States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference".

It might be argued that the expression "parents" in Article 7 is wide enough to include not only genetic parents but also those performing the social role of parents. What is not in dispute is that the purpose behind Article 7 was an attempt to combat the problem of children's statelessness. Article 7, as Jane Fortin puts it, "makes it clear that states parties must provide a method whereby the child is 'labelled' or named immediately she is born and thereby linked accurately and quickly to the people who brought her into the world, her birth parents" (Fortin, 1998). It is equally clear that Article 8 was inspired by the international community's need to respond to "the abuses committed by the military regime in Argentina during which babies had been abducted from their mothers at birth, before their births could be registered and illegally given to childless couples, associated with the armed forces and police" (Fortin, 1998; see also Le Blanc, 1995; Van Bueren, 1995).

Notwithstanding this background, the Convention contains no definition of "parents" and its meaning is therefore legitimately a matter of interpretation upon which opinions may differ. It is argued here, for a number of reasons, that the expression should be interpreted in the conventional sense of genetic parents. First, the history of Articles 7 and 8 reveals that the concern of the international community was with the rights of children from the moment of birth and in relation to their birth parents. It was precisely the threat of removal of the child from the birth parents by others which was the *raison d'être* of Article 8. Secondly, we must remember that the Convention is a *legal* document. In 1989, when it was adopted, there was, for example, no legislation anywhere in the world regulating assisted reproduction which has been the engine for the re-evaluation of traditional definitions of parenthood. Leaving aside adoption,

legislation worldwide has traditionally defined parenthood as genetic parenthood. The legal tie has closely followed the genetic connection. Thirdly, as noted below, the jurisprudence generated under another international Convention, the European Convention on Human Rights, again supports the notion of "family life" from birth and has confirmed that this includes the potential relationship of a child with his or her genetic father even where unmarried. Finally, as discussed below, the conventional interpretation was adopted by the Court of Appeal in the one reported decision which directly invokes Article 7. For all these reasons it is submitted that "parents" in the Convention was intended to mean genetic parents and that the onus is very firmly on those who would argue for an unconventional interpretation.

Although the United Nations Convention is not directly incorporated into English law, it does require the government to adopt a social policy that is consistent with its international obligations, and Article 7 has already had a significant, perhaps decisive, influence on the outcome of one paternity dispute which reached the Court of Appeal.[33] In that case the mother, who had both a lover and a husband who had had a vasectomy, was told robustly by Lord Justice Ward that "honesty was the best policy", that she ought not to be telling lies and that the child had the right to know the truth of his paternity and "the sooner the better". Lord Justice Ward was at pains to distinguish between the two separate rights in Article 7. For him, the fact that the genetic father was not in a position to care for the child did not detract from the child's *independent* right to know of his genetic origins. A succession of decisions by the European Court of Human Rights have also made it plain that under the European Convention there are *positive* obligations on states to foster the "family life" of children from birth and that this "family life" is not confined to relationships within marriage.[34] These decisions are also founded in part on the importance of the genetic link which generates mutual fundamental rights for both children and parents in or out of marriage.

What the lawyer can therefore say with some confidence is that there are legal obligations which mean that it will not be lawful for states to devalue or ignore the link between the child and his or her genetic parents, though the extent of these obligations, especially positive obligations to take action, remains unclear.

How far English law currently complies with these international obligations is open to doubt. Adopted adults have a legal right of access to their original birth certificates but they do not, as the law stands, have a right to be told that they are adopted nor access to their original birth certificates *during childhood*. Children born with the use of donated gametes do not have the right to be told, while children, that they were conceived in this way but there are limited rights to "non-identifying information" to establish that there is no risk of marrying someone to whom a person is closely genetically related (Maclean and Maclean,

[33] *Re H (Paternity: Blood Test)* [1996] 2 FLR 65.

[34] See, for example, *Johnston v Ireland* (1986) 9 EHRR 203 and *Keegan v Ireland* (1994) 18 EHRR 342.

1996). There is no general obligation to establish genetic paternity in all cases of childbirth and there is some ambivalence in the attitude of the courts to the direction of blood testing or DNA tests in the event of paternity disputes.[35] It should perhaps be said that, with the ready availability of DNA testing and the possibilities for surreptitious removal of small quantities of genetic material such as hair roots, the role of the courts may in future be somewhat pre-empted by resort to such DIY measures.

The extent to which the law does or should accommodate biological parenthood alongside social parenthood is therefore going to be the subject of on-going debate and in the next two sections I attempt to outline two possible approaches.

6. A RADICAL APPROACH—SHOULD PARENTHOOD BE EXCLUSIVELY GENETIC?

A radical and extreme response to the emerging right of the child to knowledge of genetic origins (and perhaps the logical conclusion from the existence of such a right) would be to regard as *parents* only those who can establish the genetic relationship. We should perhaps note, in passing, that Article 7 is not simply about knowledge—it talks of the right of the child "to know *and be cared for* by his or her parents" but only "as far as possible". This would seem to imply that the Convention is concerned not merely with establishing the initial link (what I have called the *parentage* issue above), but also with the on-going status of being a parent (what I have identified with *parenthood*).

I should say immediately that I am not advocating the following approach and it is my view that there is no possibility whatever of its adoption in England. The clock simply could not be turned back in this way. But there is value in speculating on what changes would flow from a reconceptualisation of our view of legal parenthood. I emphasise that I am only talking about the *legal* status of parenthood since, as discussed above, the law has no real control over the *social* usages of the term.

What, then, would have to change if we woke up tomorrow morning with the startling news that *only* those with an established genetic link with a child would, in law, be regarded as *parents*? The first and most obvious point is that it would make no difference whatever to the situation which applies already to the majority of children. Most children born into marriages are *in fact* the genetic children of both parents. Birth registration and indeed birth within marriage are not, of course, conclusive proof of a genetic connection with the men concerned, but these events do give rise to a *presumption* that this is the case. If we wanted to be absolutely sure we would have to test everyone, including the child, in every case of childbirth but, as far as I am aware, no-one has seriously

[35] Contrast particularly *Re F (A minor) (Blood Tests: Parental Rights)* [1993] Fam 314 with *Re H* (n. 34 above).

proposed this. Certainly the radical approach would suggest that if anyone decided to *contest* paternity and put these presumptions in doubt, scientific tests should always be directed by the courts. This would certainly involve a change from current practice and I return to this issue in the next section. However, one point which ought not to be lost is that, in my view, legal paternity under these rules does not arise *because* of marriage or *because* of birth registration. It arises from the *presumed genetic link* which is triggered by these events. To that extent these rules are consistent with the radical thesis that parenthood is genetic.

The first real problem the radical approach would have to face is adoption. The effect of adoption under English law is what has been called a "legal transplant". The birth parents are replaced by the adoptive parents who step into their shoes. So *legal parenthood*, and not merely parental responsibility, is transferred. This form of adoption, as we know it in England, would have to go. But we should not make the mistake of believing that there is something inevitable or sacrosanct about the "transplant" model. Many civil law countries (essentially those whose legal systems derive from Roman law) have long recognised a distinction between *full adoption*, which broadly corresponds with the English version, and *simple adoption*, which does not extinguish the child's links with the wider birth family. In recent years a number of Latin American countries have reformed their adoption laws and the future of the dual system of adoption seems somewhat uncertain (Grosman, 1998; Alzate Monroy, 1998). The point is that it would not be impossible to conceive of a new kind of adoption order which gave long-term legal security to the adoptive parents but which also continued to preserve the legal link with the birth family in some way.

What about assisted reproduction? If legal parenthood were to be exclusively genetic, the anonymity of gamete donors would have to go—radical indeed, and calculated to reduce the number of volunteers, but scarcely revolutionary. Sweden has done it and Switzerland has enacted legislation which gives to the sixteen-year-old child, born of medically assisted procreation, the right to know a sperm donor's identity (Guillod, 1997). Surely surrogacy would represent a massive problem. On a closer examination perhaps the problem would not be as great as it seems at first sight. Under current legislation a commissioning couple can obtain a "parental order", the effect of which is similar to adoption in that it makes that couple the legal parents of the child and extinguishes the parental status of the surrogate mother.[36] The requirements for making such an order are themselves an interesting reflection of official ambivalence about what parenthood is, since at least one commissioning parent must have a genetic link with the child, they must be married and they must already be acting as the child's social parents. We may well speculate, in the light of this, whether it is the fact of procreation, family life within marriage or the intention to act as social parents which generates the greatest claim to legal parenthood. If legal parenthood were to be exclusively genetic, a "non-genetic" member of the

[36] Human Fertilisation and Embryology Act 1990, s. 30(1) provides that the effect of the order is that the child is "to be treated in law as the child of the parties to a marriage".

commissioning couple could no longer be the legal parent but this would not prevent him or her from being given parental responsibility. In the context of heterosexual unmarried cohabitation, we already have one intriguing decision which has allowed the male partner to adopt while giving the female partner only parental responsibility under a residence order.[37] Where a surrogacy arrangement breaks down, the law already arguably attaches greatest importance to the biological position since the surrogate mother, who carries the child and gives birth, will be the legal mother.[38] Cases of full surrogacy do, of course, raise questions as to whether the genetic link is to be regarded as more important than the biological contribution involved in carrying a pregnancy and giving birth.

The determination of fatherhood in cases of assisted reproduction would undoubtedly present a major problem. The attribution of legal fatherhood to the husband or partner[39] who receives licensed treatment services "together with" his wife or partner would have to be abolished. But, again, this would not necessarily involve denying that man any legal status. He too could be given parental responsibility rather than being made a parent and this would give him the legal powers and duties he would need to raise the child.

What this review perhaps reveals is that, although there would be substantial doubts about the desirability of reserving legal parenthood as an exclusively genetic concept and, although this is clearly not going to happen, it would not be impossible to achieve. It might be somewhat easier to achieve than would be commonly supposed with an intelligent use of the alternative legal notion of parental responsibility.

7. A MODERATE APPROACH—HOW CAN WE ACCOMMODATE GENETIC AND SOCIAL PARENTHOOD?

If we reject the radical approach, as now we surely must, how else might due weight be given to the genetic link alongside the very proper recognition of social parenthood? Again we perhaps need to focus on those instances in which the law separates genetic from legal parenthood by giving the legal status of parenthood to the social parent. The broad question which needs to be asked is whether the law adequately upholds the child's right to knowledge of genetic origins and preservation of that link.

What about adoption? The law and practice of adoption has already been moving slowly but surely towards a more "open" system although, as Bridget Lindley has pointed out, there are different manifestations of "openness" and the meaning of "open adoption" is not wholly clear (Lindley, 1997). Nor is the

[37] *Re AB (Adoption: Joint Residence)* [1996] 1 FLR 27.

[38] Human Fertilisation and Embryology Act 1990, s. 27(1). In some of these instances of course the gestational mother will not be the genetic mother.

[39] Human Fertilisation and Embryology Act 1990, ss. 28(2), (3).

precise shape of adoption reform.[40] But we do seem to have arrived at the point where we are prepared, in some circumstances, to countenance on-going contact of a limited kind with the birth family following adoption.[41] It has also been proposed that a child should have a legal right to be told that he or she has been adopted—but the question of precisely when the child should be given information, and how much, remains contentious. It is even more contentious in the case of the children of assisted reproduction, but we need to continue to ask hard questions about why adopted children are allowed access to much more information about their genetic beginnings than are these children (Freeman, 1997; Maclean and Maclean, 1996).

More, much more, needs to be done about the process of establishing genetic paternity but already there are signs that the courts are beginning to shift the balance more towards genetic truth and are less obsessed with preserving family stability. As Lord Justice Ward has put it, when deciding to direct blood tests in the "vasectomy" case, "the issue of biological parentage should be divorced from psychological parentage . . . Mr B's parental responsibility should not dent Mr H's social responsibility".[42] Thus Lord Justice Ward was of the opinion that we should not *necessarily* assume that to establish the genetic parentage of an outsider will "upset the apple cart" as far as the social family situation is concerned. The child may have interests, perhaps rights, in an *inclusive* approach which acknowledges the different but complementary roles of genetic and social parenthood. With the growing societal acceptance of social parenting, and the very great range of family arrangements in which children move in and out of different kinds of households (Maclean and Eekelaar, 1997), there may be much less stigma attached to paternity outside marriage than there used to be.

I would go further than this. We need to look more closely at the responsibility of *the state* in establishing the genetic connection. If the child does have fundamental rights, this is a matter which perhaps ought not to be left to the various adults concerned. In Scandinavia and, until recently, Germany, the state has taken on a much more active role in attempting to establish genetic paternity in *all* cases of child birth—although the *pater est* presumption is still applicable to births in wedlock (Eriksson and Saldeen, 1993). The German case is an interesting one since the state, perhaps surprisingly, has traditionally had a much more assertive function in the former West Germany than in the former German Democratic Republic (Frank, 1997, 1998). It now seems, following reunification, that the state's role will recede at least in part because the kind of investigations carried out by social welfare agencies in the West would be found unacceptable by East Germans. In France and many other civil law jurisdictions there is much greater opportunity for a man to acknowledge his paternity

[40] The 1996 Draft Adoption Bill has never been presented to Parliament and, at the time of writing, there is no indication that the Labour Government intends to make adoption reform a priority.

[41] See, for example, *Re C (A minor) (Adoption Order: Conditions)* [1988] 2 FLR 259 and *Re T (Adopted Children: Contact)* [1995] 2 FLR 792.

[42] See n. 34 above at 82.

independently and without the initial need for co-operation by the mother or a court order (Senaeve, 1993; Meulders-Klein, 1990). Compare these approaches with the stance taken in England. I think it is fair to say that the only circumstances in which the state, in the guise of the Child Support Agency, bothers to get interested in the establishment of paternity is where the mother is dependent on social security. Otherwise she is under no obligation to register the name of the father and a man believing himself to be the father has no right to acknowledge his paternity without either the mother's consent or a court order.[43] There is not so much as a whiff of any independent right of the child in all this.[44]

A final consideration might be that we should continue to scrutinise carefully the circumstances under which social parents are actually allowed to become legal parents. Top of the list here is the position of step-parents. It is a matter of regret that the strong recommendations of the Houghton Committee (Houghton, 1972) which led to provisions in the Children Act 1975 designed to discourage step-parent (and relative) adoption,[45] were first subverted by the courts[46] and then eroded by Parliament, without much discussion, in the Children Act 1989 (Bainham 1990). The vast majority of step-parents become step-parents following the divorce of their spouses. In most of these cases the divorced parent will still be on the scene and perhaps involved with the children to a greater or lesser extent. We should be vigorously defending the parental status of the divorced parent in these cases and not pretending that a step-parent is a parent. To do otherwise would be directly contrary to the philosophy of continuing parental status following divorce.[47] Neither am I personally convinced that we should even go so far as to confer parental responsibility on the step-parent—at least not routinely. I think Brenda Hale got it exactly right when she said that the step-relation is not the same as the "normal" family constituted within marriage and "perhaps we should not pretend that it is" (Hoggett, 1987, p.126). The step-relationship may, however, arise in rather different circumstances. Perhaps the mother is widowed or the relationship with the natural father broke down before the child was born. In cases like this there is a much stronger case for giving parental responsibility to the step-father or, even perhaps, parenthood through adoption. These last examples do perhaps suggest that a general distinction should be drawn between cases in which the genetic parent is known and "on the scene" from those in which he or she is either unknown or has disappeared. The case for creating a new parent for the child

[43] Births and Deaths Registration Act 1953, s. 10, as amended.

[44] The child does not, for example, have a right to require the state to disclose information about his father's whereabouts which it has obtained as a result of its investigations for the purposes of enforcing his liability to support the child financially. See *Re C (A minor) (Child Support Agency: Disclosure)* [1995] 1 FLR 201.

[45] Children Act 1975, s. 37(1), (2) and Adoption Act 1976, ss. 14(3), 15(4).

[46] *Re D (Minors) (Adoption by Step-parent)* [1980] 2 FLR 102; *Re S (A minor) (Adoption or Custodianship)* and *Re A (A minor) (Adoption: Parental Consent)* [1987] 1 WLR 153.

[47] The theory of the Children Act is very clear and is that parents remain parents despite divorce. Thus, both parental status and parental responsibility are unaffected by termination of the marriage.

to replace one which has been effectively lost is, I suggest, much stronger than where the child already has both parents intact. But this itself involves a deep philosophical question about why it is that children are apparently not entitled to more than *two* parents and sometimes have less than two.[48]

8. CONCLUSION

The great irony of the present time is that just at the moment when it has become possible to establish genetic parentage virtually conclusively it seems to matter less to do so since we are now much more accepting of social parenthood in its many manifestations. This has given rise to a good deal of debate about whether we should attach more importance to the one rather than the other. In the context of paternity disputes it has been presented as an issue of truth versus stability. Elsewhere there is much talk of genetic versus social parenthood.

A primary aim of this chapter has been to suggest that as we move into the twenty-first century we are not really going to be confronted with this polarised "either/or" dilemma. Because of the acceptance internationally of the child's fundamental rights regarding his/her genetic origins, to say nothing of domestic concerns about medical knowledge and psychological well-being, it is going to be necessary to take an *inclusive* approach. The Children Act 1989 is in fact full of inclusive ideas of partnership and the notion that children can relate to a range of adults.[49] Yet we remain stoutly resistant to the idea that a child could have more than two parents. On the other hand it is a feature of the new concept of parental responsibility that it can be shared out among a potentially unlimited range of adults. The real question in this sharing process will be who gets legal parenthood and who gets only parental responsibility, if anything. It could have been exceptionally neat and tidy to say that those with a proven genetic connection are the parents and everyone else gets parental responsibility and no more. But this is not the course we have followed in England and it is too late to change course now. Given that legal and genetic parenthood will not coincide in a number of instances, it may just be that thought needs to be given to resurrecting or creating a legal concept which could be exclusively genetic and could thereby serve the independent rights or interests of children to knowledge of origins in these cases. I tentatively put forward the idea that *parentage* might in law be distinguished from *parenthood* and be given a technical importance which would, I believe, bring it closer to its ordinary social usage.

[48] Under the provisions of the Human Fertilisation and Embryology Act 1990, s. 28, where no man is deemed to be the legal father the child can be "fatherless" viz. without a legal father.

[49] A principle which applies particularly to the relationship between the state and parents and which is also reflected in the provision that "a person who has parental responsibility for a child at any time shall not cease to have that responsibility solely because some other person subsequently acquires parental responsibility for the child".

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