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Public Lecture

22nd Kilbrandon Lecture: Who then, in law, is my parent?

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Introduction

It is an immense honour to have been asked to deliver the 2024 Kilbrandon Lecture. Past lecturers have included politicians, health care professionals, journalists, authors, and the occasional lawyer. Having recently retired from Strathclyde Law School after 33 years there as a child law specialist, I am pleased to note that two of the most eminent lawyers who have been Kilbrandon Lecturers – Lady Elish Angiolini and Lord Hope of Craighead – both have strong connections with Strathclyde. Lady Elish is a graduate of and a visiting professor in our law school, and Lord Hope for many years was Strathclyde University's Chancellor. 2024 is the year in which both the university and the law school are celebrating their 60th anniversaries, and there is a pleasing symmetry in the fact that 2024 also marks 60 years since the publication of Lord Kilbrandon's famous *Report*, which led to the establishment of the children's hearing system in Scotland.

I said that I specialise in child law, which is how the discipline is normally designated today, but in fact my major textbook on the subject carries the rather more traditional title *The Law Relating to Parent and Child in Scotland*, (Wilkinson & Norrie, 1992, 1999, 2013), which consciously refers back to Lord Fraser's important 19th Century work *Parent and Child*, (Fraser, 1866). This title I think better reflects the fact that for the vast majority of children their parents are the most important people in their lives; and the parent-child connection is the legal relationship that is most protected by our law.

That immediately raises an important and surprisingly difficult question: who, in law, *is* a parent? That is the question that I want to explore in this lecture tonight. The United Nations Convention on the Rights of the Child, incorporated this year into Scots law and containing a clear definition of 'child', avoids defining its other central concept, 'parent', which reflects the fact that there simply is no universal understanding of what a parent is that applies across the

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world, across cultures and across time. I was interested to note that in the recent Scottish Government consultation on the 'Redesign' of the Children's Hearing system[1], one of the questions asked is whether the hearings legislation should include a definition of 'parent'. I answered that question with a resounding no, for many of the reasons this lecture will touch upon.

The artificiality of everything

During my long years teaching undergraduate law students I always emphasised to them this uncomfortable truth about lawyers: we are not a loved race. Amongst the many reasons for lawyers being so disliked is that we have a tendency to turn everything – including the most natural things in the world – into artificialities, from reality into abstractions. Lawyers do this because the law can only operate through a complex and interrelated set of classifications, which are human impositions onto the natural world. While these classifications may well seek to reflect reality, they can do so only imperfectly since the very process of classification acts to simplify the inherent complexities of life. However, this distortion is essential in order to make these complexities administratively manageable.

To give an obvious example, the law classifies human persons into children and adults (with an occasional intermediate category of 'young person'). To do so the law will often draw the line at particular anniversaries of the individual's birth: whether 12, 16, 18 or whatever. Later we do the same for age-related entitlements, pensions, bus passes, free TV licenses and the like. Now in reality of course every child grows up at their own pace and none of them wakes up on their 16th or 18th birthday with an intellectual or physical capacity that they did not have when they went to bed the night before. So, setting ages at which all young people acquire legal capacity is clearly artificial, though it is administratively convenient and indeed necessary for the efficient operation of the rules. It would be a nightmare to require the seller of alcohol or tobacco or fireworks (see Licensing (Scotland) Act 2005, ss.102-110; Tobacco and Primary Medical Services (Scotland) Act 2010, s.4; Fireworks and Pyrotechnic Articles (Scotland) Act 2022, ss.4-7), say, to assess the actual intellectual capacity of every young person seeking to purchase a restricted item.

Equally artificial, if perhaps less obviously so, is how the law identifies and defines a child's parents. Lady Hale famously said in the House of Lords decision of *Re G (Children) (Residence: Same-Sex Partner)* [2006] UKHL 43 that parenthood can be either genetic, gestational or social and psychological, but she emphasised that she was talking about 'natural' parenthood and was *not* suggesting that each of these concepts of parenthood makes an individual a legal parent, with legal consequences.

[1] For more information on Scotland's system of Children's Hearings see https://www.chscotland.gov.uk

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The law, indeed, has long recognised that there is a difference between legal parenthood and natural parenthood. The natural child of a natural father was what was called an 'illegitimate' child: a person whose father was not married to their mother. That relationship was 'natural' in the sense that it was recognised by nature rather than by the law, and it had minimal legal consequences: shades of that position survived in Scotland until as late as 2022 (or even 2024), when the last 'natural' child born before the Family Law (Scotland) Act 2006 attained the age of 16 (or 18). A more obvious circumstance today in which we distinguish between legal and natural parenthood is with adoption, which allows the parent-child relationship to be created by court process rather than anything found in nature. Parenthood in the eyes of the law is as much a construct of the law as is the adult relationships of marriage and civil partnership.

Actually, what is natural about the natural relationship? We are used to thinking today that parenthood naturally comes from the genetic connection between parent and child, but (becoming quite meta here) that natural connection is itself artificial, in the sense that it is human choice to give social and legal consequence to the fact of genetic connection. The Romans, with little understanding of genetics, did not make that choice and had no problem seeing fatherhood as a deliberate act of accepting one person as the child of another – Julius Caesar and Octavius, and Trajan and Hadrian, are only the best-known examples of sons who became so simply by declaration of older men. It was not until much later in history, during the medieval period, that blood came to be seen as the crucial and only determinant of fatherhood, for this was the time that Norman notions of primogeniture solidified into our law, and rights came to be devolved *iure sanguinis* – by right of blood.

An equally naturalistic way of looking at parenthood is to see it as a question of doing rather than of being. The word 'parent' can quite legitimately be used as a verb as well as a noun, and it is no grammatical solecism to identify a parent as the person who *parents* a child, in the sense of being the adult who actually carries out the tasks of caring for and bringing up the child. This is almost certainly how children, especially young children, perceive who their parents are. So, our legal system's choice, around 800 years ago, to locate 'parent' in terms of blood rather than care, is just as artificial as an adoption order. It is worth noting that that choice had nothing to do with the interests of the child: it was made because of feudal society's need for certainty in property succession in a male-oriented world.

We can see this in the language that we use. We use the word 'illegitimate' to describe the natural child, but what was legitimate or illegitimate was never the child's own existence but rather the child's claim to their father's estate (known in Scots law by the technical term 'legitim'). The child's claim was 'legitimate' if, being the child of the father's wife, there is a high probability of the child being that man's blood child; it was an 'illegitimate' claim otherwise. We used the word 'adultery' to describe the civil offence (which continues to provide a ground

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for divorce in Scots law) of having sex outwith marriage. What was being adulterated was not the marital relationship itself, but potentially the male blood line (and gay sex, therefore, can never be adultery, even when occurring outwith marriage). All these rules served a social function: security of succession between males, which prevented disputes, and in extreme cases such as succession to the Crown, fratricide and war. These rules stabilised society, in other words.

The artificiality of parenthood is at its most apparent with statute law and lawyers, being natural 'Humpty Dumptys', are entirely comfortable with words in an Act of Parliament meaning whatever the legislator wants them to mean.

The word 'parent' was central to, for example, the Social Work (Scotland) Act 1968, best known of course as the Act that established the children's hearing system. The 1968 Act tells us (ss.30 and 94, as originally enacted) that the word 'parent' means (where the child is 'illegitimate') 'his mother to the exclusion of his father'; parent also includes 'guardian', and 'guardian' is defined to include 'any person who … has for the time being the custody or charge of or control over the child' – the person who *parents* the child, in other words, is within the 1968 definition of 'parent': while some fathers are not. The key to understanding this complicated definition is to realise that its purpose was never to identify who the child's parents were but rather its purpose was to delineate who had what today we call the right of participation at a children's hearing. Parenting has always been seen within the children's hearing system as more important than genetics, which actually explains why the natural father was excluded – it was assumed in the 1960s that when the parents were not married to each other only the mother would be involved in bringing up the child: only the mother would be *parenting*. That assumption continued in law long after it had become palpably untrue: until, that is, the Children's Hearings (Scotland) Act 2011 came into force in 2013, a mere 11 years ago. We can see similarly wide definitions of 'parent' in the Education (Scotland) Act 1980, s.135, the Antisocial Behaviour etc. (Scotland) Act 2004, s.117 and the Criminal Justice (Scotland) Act 2016, s.23(4) – all of which are designed to identify the persons upon whom certain legal responsibilities are placed.

An even odder definition of parent is found in s.40(7) of the Age of Criminal Responsibility (Scotland) Act 2019: 'parent' is a person who satisfies three conditions: is 'aged 18 or over', 'has parental responsibilities … in relation to the child' *and* 'is related to the child'. We are further told that being related includes 'being married to or in a civil partnership with a person who is related to the child'. Now, read in isolation this is pretty meaningless, and it makes sense only when you realise that what s.40 is doing is identifying a responsible person who can accompany the child at an investigative interview with the police. It is not about deciding who is a parent – it is using that word as a shorthand.

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In other words, parenthood, like it or not, in law is a mechanism to achieve particular purposes, whether imposing obligations to attend children's hearings or police interviews, universal issues like bearing responsibility to bring up or educate the child, or more venal issues such as identifying who should inherit property when someone dies. Who, then, in law, is my parent?

Who is a 'Mother'?

Mater certa semper est, said the Romans – or motherhood is always certain. This was never quite true, for even before the development of IVF and other infertility treatments motherhood could be a matter of contention, for example if there were alleged to be a mix-up at the hospital and the wrong baby is sent home with the wrong parent; or where immigration officers refuse to believe that the child a woman is attempting to bring into the country is her child; or as in the 18th Century Scottish decision from the House of Lords where succession to land, wealth and titles turned on the question of whether Lady Jane Douglas had at the age of 50 given birth to twin boys as she claimed, abroad, or had instead sought to perpetrate a fraud on her aristocratic family: *Archibald Douglas v Duke of Hamilton* (1769) 2 Pat 143.

What the Romans really meant was that there was no room for dispute as to how we *define* a mother: the mother is self-evidently the woman who was pregnant and gave birth. There may be difficulties in proof, but these do not challenge that unquestioned fact.

However, the development of infertility treatment, and in particular egg donation, towards the end of the 20th Century challenged this age-old understanding of motherhood. Suddenly the law was faced with the question: if the egg comes from one woman and is inserted into the womb of another woman, who is the mother? The common law had no obvious answer to this, and it could be argued either way. In fact, there was a third choice available, one indeed that may better reflect the reality of the egg donation situation. Both women make absolutely essential contributions to the creation of the child, so the law could have chosen to allow the child to have two mothers.

Now, that third choice would have led to multiple social and legal complexities and it was never seriously considered. When the UK Parliament in 1990 came to make its choice, it determined without any real discussion or opposition that the woman who becomes pregnant and gives birth is for all legal purposes the mother of the child (Human Fertilisation and Embryology Act 1990, s.27 and then Human Fertilisation and Embryology Act 2008, s.33(1)). It is interesting to note in passing that the Supreme Court of Ireland in 2014, in the absence of any equivalent legislative guidance in the Irish statute book, came to this same conclusion on the basis of the Irish common law: *MR and DR & ors v An t-Ard-Chláraitheoir & ors* [2014] IESC 60.

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The point I am seeking to emphasise here is that defining 'mother' as *one* of the women who makes *one* of the crucial contributions was a choice – it was artificial, though no less valid for that: it was a matter of human judgment and (not least) social and administrative convenience rather than a matter of the law reflecting nature. Motherhood is of necessity a legal artifice, but it is a powerful one.

The strength of motherhood is seen in the case of *Regina ex p McConnell v Registrar General)* [2020] EWCA Civ 559. Here a female to male transgender man, Freddy McConnell, became pregnant through infertility treatment and he gave birth after his transition. He wanted to be registered as the child's father, but the English courts insisted that the law regarded him as the child's mother, even although he had obtained, before becoming pregnant, a gender recognition certificate changing his gender from female to male. What interests me about this case is why Mr McConnell cared so much, given that the law never denied he was, in one form or another, a parent. He claimed that an official record (his child's birth certificate) revealing his transgender history was a breach of his right to privacy; he argued that the parental exception to the law's recognition of his change of gender in s.12 of the Gender Recognition Act 2004 was a disproportionate interference with his private and family life; he asserted that the law was incoherent in declaring him to be, in effect, a male mother: and he said that from the child's perspective the relationship was in reality a father-son relationship while the law insisted that it was a mother-son relationship. The Court of Appeal rejected all these arguments, and in doing so emphasised that while a child gains benefit from a second parent, irrespective of that second parent's gender, gender-identity or sexuality, a child *always has a mother* – even if that mother is for all other purposes of law a man.

Who is a 'Father'?

Fatherhood is no less, and indeed more obviously, an artificial concept, and has been recognised as such for millennia. For it is a fact that has bedevilled the male psyche since the very dawn of time itself that while women always know who their children are, men never do. Men have to rely on what women tell them and, shocking though it may be, sometimes women are not truthful in this matter. For at least 800 years the law has identified the father of the child with the provider of the male genetic material that led to the mother's pregnancy. Both legally and socially we give that value, which is the underlying premise of that fabulous film *Mamma Mia* (even although none of the three men who had had sex with Meryl Streep's character had ever been a father to the character's daughter in any sense that surely mattered). That film is set, of course, in the modern age so the daughter could identify her genetic father, but for most of humankind's history it was a factual impossibility actually to prove the genetic link between a child and any particular man.

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The law since Roman times has got over this evidentiary gap by operating a presumption as to who the father of a child is. This is known as the *pater est* presumption: *pater est quem nuptiae demonstrant*, or the father is he to whom the marriage points. There is a logic to this. Most children come about by sex, and married women are more likely to have had sex with their husbands than anyone else, and so it is perfectly rational for the law to presume the connection between the husband and the child. Modern Scots law has an additional presumption: if a man's name is registered on the child's birth certificate, then he is presumed to be the father, because it is likely that he is. Both presumptions are now contained in the Law Reform (Parent and Child) (Scotland) Act 1986, s.5(1).

Though today the evidentiary gap can be easily filled by a DNA test, these presumptions, based on likelihood, apply even when we know that in a not insignificant number of cases, they will not be accurate. However, that is actually the whole point: just as the rules of legitimacy enhanced social and familial stability in the middle-ages so today family stability is enhanced by the pretence that the Register of Births is accurate in all cases, until proven otherwise.

Parenthood after infertility treatment

So, paternity always was a fluid concept, designed primarily to achieve social stability, and settled lines of succession, rather than anything else. However, stability depends on stable definitions, and the definition of 'parent' became far more fluid in law with the development of infertility treatment. This is because overcoming a couple's infertility often depends on using genetic material donated by a stranger, whom no-one intends to be the parent. Before the Human Fertilisation and Embryology Act 1990, the donor of sperm was excluded from paternity only by keeping his identity secret, and the man who was attempting to become a father did so only by relying on no-one challenging the presumptions I've already talked about: this was all very insecure. But the 1990 Act changed all that by removing the genetic link as the backstop determinant of paternity in cases of infertility treatment and replacing it with the notion of consent – either to the infertility treatment or to being treated as the father (depending on the relationship with the mother).

Having removed genetics from the definition of father, the logical extension of these rules to female couples came about with the Human Fertilisation and Embryology Act 2008. But the 2008 Act does struggle with terminology when dealing with same-sex couples. The woman who gives birth is always designated the 'mother'; if she has a male partner, he is designated the 'father'. However, the 2008 Act cannot quite bring itself to call the mother's female partner another mother: instead, she is designated as gender-neutral 'parent'. This makes little practical difference, but words carry emotional and political heft, as we have already seen in the case of Freddy McConnell. And there is a premium to be had from having the status of mother rather than parent.

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Consider, for example, the case of *Re E (Assisted Reproduction: Parent)* [2013] EWHC1418 (Fam), which involved a female couple who wished to have a child together. They attended a licensed clinic where one of them was artificially inseminated with donor sperm; she became pregnant and in the fullness of time twins were born. The women were registered on the children's birth certificates as 'mother' and 'other parent'. Unfortunately, when the twins were still toddlers the women separated, and the fairly pedestrian contact dispute that followed soon became vicious. The mother opposed contact between the twins and her ex-partner with the devastating argument that the ex-partner was not a parent after all. She showed that the consent forms they had both signed had been given to the clinic *after* the insemination process had started rather than before, as the 2008 Act requires. The court held that since the conditions in the Act had not been fully satisfied the woman registered as the children's 'other parent' was not a parent of the children she had helped plan into existence and bring up in their early years.

Now, one of the major themes of this lecture tonight is that we shouldn't worry about the inherent artificiality of parenthood – but this is surely taking matters too far. The court's demands that the Act be followed in every minute detail, including when a form is signed, seems to me to preference legal technicality over social reality. And worse, it suggests that motherhood, a natural state, has a stronger claim to the law's protection than mere parenthood which is a creation of the law.

This is not a unique case. *P v Q* [2024] EWCA Civ 878 also involved a female couple, but this time they were married to each other, and married female couples don't need to involve clinics or sign forms. All they need is a blob of sperm and, frankly, the world is awash with the stuff. Through social media they contacted a man who was willing to provide the genetic material they needed, and one of the women became pregnant and gave birth to a child. The birth certificate again showed both women as the parents. As in the previous case the relationship broke down and the mother sought a declaration that her ex-wife was not in law a parent at all. Here the problem was not with the forms required by a licensed clinic, because no clinic was involved. Rather, the mother asserted that as well as attempting to become pregnant through artificial insemination she had also had sexual intercourse with the man providing the sperm.

Now, here is the problem. The 2008 Act only applies – parenthood is only transferred from the man who provides the genetic material to the partner of the mother – if the insertion of that genetic material into the mother is done *artificially*. But in this case the closeness in time between the mother attempting artificial insemination and having sex with the man providing the sperm meant that there was no scientific possibility of determining which insertion of his sperm – the artificial or the sexual – was the one that in fact led to this pregnancy. What was the court to do?

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The Court of Appeal resolved the issue by utilising the ultra-legal concept of onus of proof. The onus lies, the Court held, with the party seeking to dislodge the common law and seeking to establish that the 2008 Act applied: the ex-wife in other words had the burden of proving that the conception was artificial. We already know – and the Court knew – that such proof was a scientific impossibility, so the decision on who had the legal onus to prove the impossible effectively decided who lost the case. Now, it seems to me that the court could just as easily have placed the onus on the mother. A man named in the birth certificate as a father is presumed to be so until this presumption is proven to be false; a woman named as other parent could equally have been presumed to be other parent until that presumption is proved false, by showing that the 2008 Act did not apply. Yet the Court of Appeal chose to place the onus on the parent rather than on the mother, and this I think is because the court conceptualised motherhood as something that trumps parenthood.

We can also see motherhood being treated as stronger than any other form of parenthood in the slightly unexpected location of a Scottish children's hearing case. *JS, Appellant* 2021 SLT (Sh Ct) 116 involved an unmarried (straight) couple, now separated, who had both been attending children's hearings for their child. After a couple of years, the mother declared that her ex-partner was not, in fact, the father. Since he had not been registered as the father, and the couple were not married, this meant that he could not rely on any presumption of paternity, and so the reporter[2] indicated that he could no longer be regarded within the children's hearing system as a relevant person. The man offered to undergo DNA testing but the mother, who had put the issue in doubt, refused to allow the child to be tested, to have the doubt resolved.

The sheriff[3] resolved this fairly tricky situation by attaching to the compulsory supervision order a condition that the child be DNA tested. Now, though her motivations were good, my own view is that the sheriff made a clearly incompetent order – for all sorts of reasons which I seek to explain in 'Paternity, DNA Testing and the Children's Hearing' 2023 *Juridical Review* 1. I mention the case here to show again the comparative strength of motherhood, in this case compared with fatherhood. The reporter's argument that he could no longer treat the man as father once the mother denied he was father was wholly inconsistent with his having previously treating the man as father simply on the mother's say-so.

The English High Court earlier this year adopted a much more pragmatic approach to a similar issue in *Re D (Parentage: Local Authority Application)* [2024] EWHC 305 (Fam). This involved a couple in England who were having difficulty conceiving and could not afford to access infertility treatment. So, the

[2] The reporter is an official whose main function is to receive and investigate concerns about children and decide whether to refer them to the children's hearings system. See: https://www.scra.gov.uk

[3] A sheriff is a judge presiding in a Sheriff Court and other tribunals in Scotland.

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man mixed his sperm with the sperm of his own father, which was then inserted into the woman, who became pregnant. Some years after the child was born the local authority (for quite different reasons) instituted care proceedings and sought to have the child and the two men DNA tested to determine paternity. The application was dismissed on the ground that the local authority had no interest in the issue – in other words determining who the child's father was *in law* had no relevance to any issue that the local authority had to address in its child protection processes.

Now, I am not saying that finding out whose sperm had been used to create this child was unimportant: it may well be essential to the child's own developing sense of self-identity to know whether his father was actually his natural brother, and his grandfather actually his natural father. However, that was an issue for the child and not for the child protection process.

All of these cases show that the law gives a uniquely important status to motherhood which it does not confer on other forms of parenthood. This is perhaps no surprise, given that reverence for motherhood is hardwired into cultural traditions that transcend both time and place, from Ganga Mata (Mother Ganges) to Mary, mother of God, from the Egyptian goddess Nut to the Greek Gaia (Mother Earth).

Surrogacy and male couples

Yet sometimes the modern law allows a child to have no mother at all. The infertility treatment provisions in the Human Fertilisation and Embryology Act 2008 trace parenthood through the mother and as such, while they offer a route to parenthood for members of both opposite-sex and same-sex female couples, these provisions offer nothing to gay male couples. The 2008 Act did give male couples access to the parental order after surrogacy. Since 2008, surrogacy has flourished among the gay male community.

The law of surrogacy is a complex and fascinating study, but what is particularly interesting for our purposes tonight is how the law and the courts conceptualise the parental order after surrogacy. The order is only available to the couple who are in fact parenting the child: it is designed to reflect that social reality. However, the law does require that the genetic material of at least one of the intended parents be used, and that genetic link is the justification for rejecting adoption as the mechanism to transfer parenthood away from the surrogate: people should not have to adopt 'their own child'.

In other words, the intended parents are seen as the 'real' parents even before the order is sought, and the courts have gone out of their way to ensure that the order is granted. I find it intriguing that while the courts have adopted an excessively strict interpretation of the infertility provisions in the 2008 Act (as we have already seen), they have at the same time adopted an extremely loose interpretation of the surrogacy provisions in exactly the same Act – even to the

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extent of ignoring the clear rules set by Parliament in relation, for example, to the time-limits for applications (see for example *AB, Petitioners* 2023 SLT 893 (Lady Carmichael); *PM, Petitioner* 2024 SLT (Sh Ct) 33 (Sheriff Sheehan), both of which explicitly followed the English approach in numerous decisions to that effect). What the courts have consistently done here is to treat the parental order after surrogacy as a means to regularise the situation, or to reflect the parenting reality, rather than as a radical transference of parenthood from one set of parents to another, which is what, in strict legal terms, the parental order accomplishes. Legal technicality in this instance gives way to social expectation; it is a rare example of parenting trumping parenthood.

New family structures

Given the long history of same-sex couples establishing their own family units outwith the designs of the law, it is perhaps no surprise that even after the 2008 Act allowed same-sex couples to access both infertility treatment and surrogacy, a large number of female couples continue to prefer private arrangements than the medicalised (and expensive) options regulated by the Human Fertilisation and Embryology Acts. Also, the very much more limited options for parenting available to male couples have led men, in particular, to seek to fashion new styles or forms of parenthood which, by and large, women have resisted.

There have been a number of cases before the UK courts in which female couples have informally received sperm from gay men, in return for some involvement in the child's life. Often these arrangements work well, but very regularly cases come to court when relationships between the parties break down – the women on one side, the man on the other. We call them the 'known donor cases' and the breakdown in relationship is nearly always caused by the parties misinterpreting each other's intentions: they perceive the very idea of parenthood differently. When a female couple offer a gay male friend the chance to be a 'father' if he gives them some of his sperm, the man tends to interpret that as much more involving than the women mean. The first case to get to court was the Scottish case of *X v. Y* 2002 SLT (Sh Ct) 161 (see Norrie, 2002), but there have been dozens of similar cases in England since then. In for example *L and R v. W and W* [2011] EWHC 2455 (Fam) the women had advertised for a male couple who, in return for their sperm, would be offered the role of 'father' and 'step-father'. The men with whom they entered into an agreement to that effect understood these terms to have far more practical content than the women intended: they were using the words almost symbolically. Likewise, in *Re B (Role of Biological Father)* [2007] EWHC 1952 (Fam) the role the women offered the man was an 'avuncular' one, that of a benign, but distant, uncle; the man saw the chance (and perhaps his only chance) to become a parent in an involving sense.

What I find most interesting about these known donor cases is that in each of them the men are attempting to create a new form or style of parenthood where

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they have status recognition though less day to day involvement than expected (or demanded) of the traditional father: they are seeking to be a third parent with some involvement in the decision-making relating to the child's life, not to be the full-time carer but with more involvement than a typical non-resident father would normally have. Female couples, by and large, have preferred to replicate the nuclear model of family life, which excludes outsiders for all practical purposes except when they determine otherwise. The courts have resisted moving beyond the nuclear model because they reject out of hand the idea that a child can have more than two legal parents, even when that is the reality on the ground in these cases.

Yet many children are recognised to have more than two parents already. Adopted children have birth parents and adoptive parents; step-children usually have three or four parents, each with differing parental responsibilities. This leads me to wonder if actually the key to a better conception of parenthood is to see it in essence as a bundle of legal consequences which are normally held by no more than two people but which in some circumstances are spread more widely. The Children (Scotland) Act 1995, for example, easily accommodates more than two people having parental responsibilities and parental rights; the Family Law (Scotland) Act 1985 imposes a parental obligation of aliment on most step-parents in addition to birth parents; the Damages (Scotland) Act 2011 allows claims for wrongful death to parents and to those who adopt a parenting role in the child's life; the concept of the 'relevant person' in the children's hearing system has no limitation to a maximum of two. It seems to me that it is only in the field of succession law that are there strong policy reasons to restrict the number of our legal parents to two, but that area is properly governed by principles appropriate to property and succession law rather than child law.

Conclusion

Where does all this take us? I have described the various complexities in the law's approach to parenthood in order to make two fundamental points. The first I mentioned right at the start: parenthood, like everything defined by the law, is inherently artificial. However, we should not worry about this because it reflects the reality of many children's lives. By accommodating a variety of family forms, it avoids prejudicing children brought up in more unusual circumstances. Focusing on what is perceived as 'natural' serves no purpose today, and certainly offers nothing of benefit to the child. I am not arguing that the fact of genetic connection should be ignored, for it will usually have emotional and sometimes medical significance. I am questioning why in the modern world we continue to give significant *legal* consequence to its existence.

The second point that I want to make is that while every child is different and has different family circumstances, children are the same in one crucial respect: above all things they need stability in their lives, and the assurance that there are adults who love them and whose role is to put their interests first. Children

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are astoundingly resilient creatures and can cope with any family structure so long as it provides them with that stability and that assurance. The role of the law, it seems to me, is to seek to ensure that stability by regarding parenthood – in its many different guises – as an anchor for every child, which is immoveable even if their life circumstances change due to the evolving relationships of the adults around them. I find deeply disturbing the cases I've talked about this evening where people who were originally regarded as the child's parents have had that status removed on legal technicalities in cases that are not primarily about who the child's parents are.

Professor Gillian Black (2018) has made a powerful argument that we in Scotland should adopt the approach common in continental Europe of severely restricting the mechanisms for challenging established parent-child relationships. I find this persuasive, if for no other reason than that cases where parenthood is challenged are all about serving adult interests – even if wrapped up in child-welfare language. Other than with adoption, where the child's interests are central to the whole process from start to finish, I would make it virtually impossible to remove a person's parenthood once they are officially recognised, by whatever means, as having some or all of the attributes of a parent. An individual attribute of parenthood, such as having parental responsibilities and parental rights, can of course be altered, but this should happen only when the child's welfare is the real issue at stake and not simply a mechanism to further adult interests.

Taking both these points together leads me, finally, to answer the question I set myself in this lecture: 'Who, then, in law, is my parent?'. And the answer I am afraid is that typical, frustrating, lawyer's response: it depends on the context and can have a different answer in different situations. If you find that unsatisfactory, then even more so is the typical, frustrating, academic's answer: the question itself is ultimately meaningless, because what is important to the law are the various consequences that flow from the recognition of a particular connection between a child and an adult: irrespective of what you call that connection.

Of course, I've already accepted that the words that we use to describe these connections do have social significance, but perhaps we need to leave it to children themselves to develop their own language to capture their own perceptions of who the adults around them actually are, and what *they* want to call them. That, rather than a focus on genetic inheritance, or legal technicality, or adult interests, seems to me to be a better recipe for ensuring the wellbeing of all children, whoever their parents are.

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