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Grounding Paternity in the Context of Assisted Conception: Is Fatherhood a *Symbolic* or *Active* Legal Construct?

Julie McCandless
Keele University
j.mccandless@keele.ac.uk

Abstract:
This paper seeks to explore how paternity is legally constructed in the context of assisted conception, and to consider critically how this might relate to the gendered nature of parenthood. Basing its theoretical framework around the concept of the sexual family, the paper argues that legislation in this area works to foment the construction of fatherhood as a symbolic 'care about' institution. It examines specifically section 28 of the Human Fertilisation and Embryology Act, and uses *R v ex parte Blood* [1997] 2 All ER 687 (Court of Appeal), [1997] 35 BMLR 1 (High Court and Court of Appeal) and the subsequent Human Fertilisation and Embryology (Deceased Father's) Act 2003 to reinforce analytical arguments about the symbolic 'care for' legal construction of fatherhood. The paper calls for a reconsideration of the parentage provisions of the Human Fertilisation and Embryology Act around an ideological premise that gives better authority to the central purpose of parenthood—the care of children— as opposed to the fomenting of the gender order.

Keywords: Assisted Conception, *Blood*, *C*are and Dependency, Human Fertilisation and Embryology Act, Human Fertilisation and Embryology (Deceased Father's) Act, Fatherhood, Parentage, Paternity, Sexual Family

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Introduction

In this paper I wish to explore how paternity is legally constructed in the context of assisted conception, and to consider critically how this might relate to the gendered nature of parenthood.[1] The paper stems from my broader doctoral research project, entitled 'Law, Gender and (Assisted) Parenthood: Deconstructing Stereotypes, Reconstructing Care'. Despite recent enthusiasm for gender neutrality in UK law, women and men remain constituted differently by law in their familial relations. My thesis seeks then to relate the divergent legal constructions of maternity and paternity, in the context of assisted conception, to normative notions about the roles of 'good' mothers and fathers. Both the thesis and this paper work from the premise that normative ideas must be seen as contributing to the differing subjective commitments women and men make to family life and the private care obligations of parenthood. In turn, law—as a marker of society's values— must be seen as both reflecting and implicated in the construction of normative ideas. Therefore, the paper does not seek to make normative or empirical claims about the actual practices or desires of fathers. It is instead a sociological analysis only in the context of how the legal framework, specifically section 28 of the Human Fertilisation and Embryology Act 1990 (hereinafter HFEA), constructs normative idea(s) of 'good fatherhood'.

The concept of 'the sexual family' forms the theoretical crux of the paper (Fineman, 1995). In the preceding sections I shall elaborate on what I mean by the sexual family and why it is a useful critical concept in the substantive legal context of assisted conception and parentage. I will also explain how deploying a sexual family critique in this legal context helps develop it as an analytical tool for feminist and gender-based legal theory. I will then attempt to outline some of the probing issues that assisted conception techniques have presented for paternity, and follow these with my analysis of the relevant parentage provisions in the HFEA. Finally, I use the well-known case of Diane and Stephen Blood (*R v ex parte Blood* [1997] 2 All ER 687 (Court of Appeal), [1997] 35 BMLR 1 (High Court and Court of Appeal), hereinafter *Blood*) to briefly relate the legal framework to the theoretical concept of the sexual family and normative ideas about 'good fatherhood'.

[1] I would like to thank the organisers of the CIGS 2006 Postgraduate Conference, 'Thinking Gender: The NEXT Generation', especially Melanie Shearn for organising the panels on fatherhood. I would also like to thank Marie Fox and Michael Thomson for commenting on drafts of work that this paper was drawn from.

The Concept of the Sexual Family

For almost three decades assisted conception techniques have provided a rich site for analysis by the vast spectrum of feminist thought, from texts proclaiming their liberalising potential (Firestone, 1970) to those denouncing their oppressive nature (Corea, 1988). More recently, much work has been done to explore the lived experiences of assisted conception, and how they relate to, or denaturalize the biological model of kinship that has come to dominate contemporary understandings of the term (Strathern, 1992a; Franklin, 1997; Franklin and Ragone, 1998). This paper seeks to add to this latter body of work by arguing that the principles here grounding legal paternity (and inherently, maternity) are based on an ideological preference for the sexual family unit. In other words, law curbs the disruptive potential of assisted conception—the ability to separate out the composite elements of parenthood—by assigning legal parentage to best reflect the sexual family. Although gone are the days when marriage was the only channel to a legally recognised parental relationship, the law still prescribes what parental ties will and will not be recognised. This is particularly so in the context of parentage, as opposed to say the legal framework for awarding parental responsibility (Children Act 1989, ss.2-4). While a more flexible framework has developed for the latter (Sheldon, 2001), law somewhat ironically remains committed to the one-mother, one-father model of parentage in the context of assisted conception. This compares also to the recent reforms under the Adoption and Children Act 2004, which permit same-sex partners to adopt as a *couple*, clearly disrupting the traditional model by allowing the child to have two legal parents of the same sex. However, how far these reforms will be transposed into assisted conception law remains to be seen. While the HFEA is under review by the current government, the parentage framework was not a specific issue addressed by their consultation process.

The unwillingness to address alternative parentage frameworks in official legal arenas is reflective of two phenomena. Firstly, the fears people have of assisted conception. As Marilyn Strathern has written in the context of donor insemination, '[i]n the 1980s…the debates are less about the animality of the procedures than about the intrusion of technology into the biological process' (Strathern, 1992, p.41). Regulation came to be seen as necessary if the inhuman potential of the reproductive technologies was to be contained. Law was deployed as a means of doing so, to include limiting parentage to the traditional model. Secondly, the extent to which

the sexual family unit has become naturalised plays a crucial role in the dearth of legal debate on alternative frameworks. While the (hetero) sexual family unit of course reflects a reproductive imperative, it has further become the 'natural' form for the social organisation of concepts such as intimacy, privacy and dependency, and is the pivot around which gendered familial relationships are regulated (Fineman, 1995, pp.143-192). While the legal boundaries of the sexual family have relaxed recently in the UK to include same-sex couples, such reforms merely reinforce the valorisation of the sexual family form. They also lend support to the argument that it is a socially constructed as opposed to biologically determined unit. In relation to parenthood and the care of children, it is the adult sexual relationship that naturalises the family unit, as opposed to other organising concepts such as dependency or care. This ideological preference relates to the patriarchal gender order in that it carves out distinct expectations for women and men; crucially, that women are expected to undertake these private dependency commitments.[2]

The concept of the sexual family has been used to usefully critique various areas of family legal regulation, such as welfare and tax entitlements, custody law and official state and legal responses to domestic abuse. It has however been underused in the context of parentage regulation, particularly beyond work on single mother families (see however Sheldon, 2005). This paper then seeks to develop feminist legal analyses of assisted conception by deploying a critical theoretical concept that tends to remain reserved for examinations of parent*hood* rather than parent*age*. In examining the extent to which paternity is constructed in law as a symbolic 'care about' as opposed to an active 'care for' status, the paper is concerned to relate the ultimate aim of the sexual family critique—that families be regulated around care and dependency—to fatherhood.

Law, Paternity and Assisted Conception

While many people undertake their parental activities without having to give any thought to law, we should be prudent not to underestimate the extent of its symbolic and normative power (Fineman, 1995, pp.11-25), as demonstrated by the burgeoning demands of various socio-

[2] To what extent same-sex families (will) disrupt these gender binaries and the crude notion of the 'public' and the 'private' parent, is a topic beyond the scope of this paper.

political groups to be legally recognised (Honneth, 1995). Indeed, the legal recognition of a person's parental status can be fundamental to their identity and often leads to the granting of more substantive parental rights and entitlements such as child-care leave and the ability to consent to medical treatment. The critical outcome of this is that law has a powerful ability to contain non-normative practices by refusing to give recognition to them, and nowhere is this seen more clearly than in the regulation of assisted conception. The legal regulation of assisted conception is a fairly recent phenomenon with the HFEA being one of the first pieces of explicit legislation in the field. Techniques of assisted conception open up a wide range of family forms, beyond the traditional and gendered reproductive unit of 'man, woman and child'. However, as this paper seeks to demonstrate, it is precisely this unit that the legislation revolves around. Before moving on to analyse how the legislation achieves this, I wish to use a hypothetical scenario (Figure 1) to help demonstrate why a consideration of how we ground legal paternity is far from straightforward. In reading the scenario, consider: 'Who should count as a father?' and 'What are the sociological consequences of any decision that we make?'

Hypothetical Scenario:

Alice married Bill in 1995. They separated in 2000 after failing to conceive. Alice then meets Charlie who also failed to conceive with his last partner. They enter a relationship and hope to have a child together with the help of fertility treatment. They receive a course of IVF using donor sperm (donated by David). The first rounds of IVF are not successful and their relationship ends under the stress. Alice however continues with the treatment (without Charlie's knowledge) and has a successful pregnancy. He then meets Edward, and sets up home with him and her child. The child calls Edward 'dad'.

Figure 1.

Complicating Paternity

In this scenario, what should legal paternity be grounded on? Should it be the marital relationship, or the biological connection to the child? Should it be a question of expressed intent, either by engaging in a course of fertility treatment with Alice, or by setting up home with her and her child? Or indeed, should the child's point of view be the indicative factor? Various critical questions also emerge from this proposed scenario. For example, how (if at all) does law accommodate the recognition of more than one man as a child's father? Should there be legal recognition of different types of fathers and who should assign their legal status? Is

there a hierarchy amongst the potential fatherhood 'types' and how does each relate to ideas about masculinity, gender-based roles and our traditional understandings of the family? What role should legal (as opposed to social) fatherlessness play in such a situation?

Legal Parentage

Before moving on, it is perhaps useful at this stage to explicitly consider what legal parentage is. It has been argued that familial relations (fatherhood in particular) are becoming increasingly fragmented (Silva and Smart, 1999 and Sheldon, 2005). Indeed, a considered conclusion from the hypothetical scenario above would have been that several men could have counted as a father for different reasons and purposes. As Andrew Bainham has suggested, parenthood can be usefully fragmented into three parts: biological parenthood (gamete provider); legal parenthood (a person who is legally recognised as a child's parent); and social parenthood (or the power to act as a parent as manifest in being awarded parental responsibility under the Children Act 1989) (Bainham, 1999, pp.25-46). While biological and legal parenthood will often rest in the same person(s), the practices of adoption and assisted conception make this a useful taxonomy. Indeed, section 28 of the HFEA only regulates paternity when the common law principle—that the genetic link creates the parental tie—is interrupted through the use of donor sperm (*Re. B (Parentage)* [1996] 2 FLR 15). Similarly, a child's legal social parent(s) may not necessarily be the person(s) named on their birth certificate.

Bainham's taxonomy helps highlight and place the composite parts of parenthood. What we must consider further, is what parental status is being conferred by an award of legal paternity under section 28 of the HFEA. This is detailed in section 29(1) – '…that person is to be *treated in law* as [the]…father of the child for all purposes' [my emphasis]. Impressive as 'for all purposes' sounds, nowhere is this rather lucid definition clarified, and we must look beyond the HFEA to give the provision substantive meaning. Bainham has listed what he considers the status of legal parentage to entail (Bainham, 1999, pp.33-35): child support liability; the right to make decisions relating to the child's surname and jurisdiction; presumption of contact where the child is in care; automatic right to go to court; property inheritance rights and the right to dispose of the child's property upon their death. However, he notes that certain parental rights and responsibilities—such as the ability to object or consent to a child's adoption, to appoint a guardian, or to be entitled to take parental leave—are further

contingent upon having parental responsibility. This legal status is not conferred by the HFEA, and is in fact only an automatic status for married fathers under the Children Act 1989. Non-married fathers will have to either jointly register the child's birth with the mother or obtain a Parental Responsibility Order from the court before they are awarded the same parental status as married fathers (Children Act 1989 s.4).

Marriage and Paternity

In simply trying to define the parenthood status that an award of legal paternity confers under the HFEA, we already see preferred constructs of fatherhood emerging. While there may be cogent arguments for parental responsibility not being automatic for non-married fathers in the course of everyday reproduction (Sheldon, 2001), is it justified in the context of assisted conception where men and women very deliberately have children together? Or rather, should it been seen as a legislative prizing of the marital unit? It does seem odd to pitch the status so grandiosely in section 29, yet fail to award a parentage status 'for all purposes' in law to some categories of father. As the HFEA was enacted the year after the Children Act, and thus the establishment of the concept of parental responsibility, the drafters must have been aware of the different assignment rules for married and non-married fathers. In failing to address this issue in the very different context of assisted conception, the HFEA pays credence to the notion that married fatherhood is the preferred construct of fatherhood. As the substantive discussion of section 28 will demonstrate, the actual structure of the section similarly valorises married fatherhood. Therefore, while the HFEA does not prohibit non-married fathers from being awarded legal parenthood, their parentage status is worth less than that of a married father. While the HFEA may be constructed round the concept of the sexual family, as opposed to the common law doctrine *pater est quem nupitae demonstrant* (the nuptials show who the father is)—and the significance of this should not be underestimated—marriage remains an important vessel in legal constructions of fatherhood.

In sum, to be awarded paternity status under the HFEA is important as it confers a series of parental rights and entitlements when the biological link is non-existent. Married fathers are awarded a more comprehensive status by virtue of being automatically awarded parental responsibility under the Children Act. Unmarried male partners must take further action to

obtain this legal status. However, legal paternity remains an important status for unmarried fathers as it may logically lead to the granting of other parental rights and entitlements. What I want to move unto now is my critical analysis of section 28. In this section I aim to demonstrate that section 28 has been designed to facilitate the legal status of parentage to those men who most clearly reflect the traditional model of fatherhood. In other words, it is constructed to contain fatherhood in the sexual family unit, preferably that of marriage.

The Legal Framework[3]

The One Father Quota

Section 28 is entitled 'The Meaning of Father', and its purpose is to identify the legal father in assisted conception procedures regulated by the HFEA when donor sperm has been used.[4] It is a lengthy and dense section, suggesting an attempt to think through the various assisted conception family possibilities. As will become clear from the discussion, the section deploys various provisions to ensure that the child has only one legal father, in accordance with the sexual family unit. Firstly, under sub-section 28(6), when a man donates sperm in accordance with the procedures in the HFEA, he waives his right to parentage. In other words, he is legally removed from the child's family unit, irrespective of whether the parties involved want his paternity legally recognised or not. Secondly, sub-section 28(4) provides an explicit statement to the effect that if a man is to be treated as a child's father under section 28 (see discussion of sub-sections 28(2)-(3) below), 'no other person is to be treated as the father of the child'. Finally, subsection 28(5) saves the common law presumption of paternity, as will be discussed below.

Legal Fatherlessness

With the sperm donor out of the legal picture, the legislation looks to assign fatherhood to either the husband of the woman who is receiving treatment, or her male partner. It should be noted

[3] Please note the limited nature of this analysis. Due to space limitations, it is specific to the wording of section 28 as opposed to further incorporating the case law that has been decided under the provision.
[4] Note that this analysis relates only to living fathers. The parentage of men whose sperm is used after their death, or who consent to their wife or female partner being inseminated with donor sperm before their death is also regulated by the HFEA, as amended by the Human Fertilisation and Embryology (Deceased Fathers) Act 2003. This issue will be elaborated upon in the discussion of *Blood*.

here that legal fatherlessness is a possibility under the HFEA. Women are not prohibited from receiving fertility treatment without a male partner, and the sperm donor will not be forced to be the child's legal father. (Although access issues and the infamous section 13(5) welfare principle that the child's need for a father must be considered before treatment is offered, have perhaps helped ensure that 'man *is* included' more often than not). Therefore, if a woman receives treatment without a male partner, the child will simply be legally fatherless, which compares to the impossibility of being legally motherless. Section 27 makes legal maternity contingent upon the act of giving birth, even in cases of surrogacy. Motherhood is constructed then as a fact of nature, while fatherhood is more a fact of rational thinking suited to situational legal regulation as opposed to a one-size-fits-all proviso. The issue of intentionality and fatherhood will be discussed further below. If the woman has a male partner, it is his relationship with her (thus the family unit) and his intent to be (or rather, not to be) the child's father that ground his paternity status. Subsections 28(2) and 28(3) are the central provisions.

Husbands and Partners

Subsection (2) provides a *presumption* that the woman's husband is the child's father. This changes the previous common law position which held that there was no legal link between the husband of a woman and a child that she has had through donor insemination, irrespective of his knowledge and consent to treatment (*Re. M (Child Support Act)(Parentage)* [1997] 2 FLR 90). Subsection 28(2) then extends the Family Law Reform Act 1987 which provided for the same presumption but only in cases of donor insemination, as opposed to the other treatments—such as gamete donation—regulated by the HFEA. However, it is important not to see subsection 28(2) as merely a modern day equivalent of *pater est quem nupitae demonstrant.* This is because the husband may rebut the presumption if he can show that he did not consent to his wife's treatment. Therefore, in the contemporary provision we see a more direct emphasis on a man's intent to be (or not to be) a father, rather than his intent being inherent in the marital relationship.

If no man is to be treated as the child's father under subsection 28(2), the courts are then directed under subsection 28(3) to consider whether treatment services under the HFEA have been provided for a woman and man 'together'. In creating a legal tie between a man and a child to whom he has no genetic link or no legal tie with the mother, subsection 28(3) represents

entirely new law, and its significance should therefore not be underestimated. Given that treatment is typically only vested upon the woman, 'treatment together' has come to be interpreted as meaning a 'joint enterprise to create a child'[5] and we see the significance again of intentionality for grounding paternity. Unlike subsection 28(2) however, paternity here is not presumed but assigned when the legislation has been satisfied, indicative of the marriage hierarchy in the legislation. While there is no explicit requirement that the pair be involved in a marriage like relationship or that they live together as cohabitees, the genesis of the provision in Parliament makes it clear that the purpose of this subsection is to act as a secular alternative to subsection 28(2), rather than as a facilitator of, for example, families based on a male-female platonic relationship, as opposed to a sexual one. Indeed, a fertility clinic's code of practice guidelines may direct practitioners to enquire about the marriage like qualities of the couple's relationship. However, even if a platonic couple were to receive treatment, such a family form still remains conceptually limited given that it resembles the sexual family unit in all but name, with the aforementioned sub-section 28(4) ensuring that any collaborative family beyond the one-mother, one-father dyad is prevented legally.

The saving of the common law presumption of paternity in sub-section 28(5) is also raises some interesting issues. Positively, it prevents for example, a husband from later changing his mind about a child that he has 'held out' as his own for several years, despite perhaps not consenting to the treatment initially. However, the question of whether the statute or the common law will triumph when a husband has consented to his wife's treatment with another man remains uncertain, and is a situation not likely to have been considered by the legislators. As the growth of collaborative reproduction does not make this scenario unimaginable, it is interesting to consider what result a test case might yield, and how such might relate to the concept of the sexual family.

Beyond legal musings, what should be clear from asserting family form possibilities such as these, is that section 28 is framed to regulate fatherhood in a purposeful fashion. The HFEA was never designed to merely sensibly facilitate the reproductive choices of the parties involved. It has instead clear constitutive underpinnings. As Sally Sheldon has written,

[5] *Re. B (minors)(parentage)* [1996] 3 FCR 697 at 701-2. See also *Re. B (Parentage)* [1996] 2 FLR 15; *U v W* [1997] 2 FLR 282; *Re.R (Contact: HFEA)* [2001] 1 FLR 247.

> …the provision suggests an attempt to think through the various complex possibilities raised by the reproductive technologies and, in each potential factual situation, to allocate fatherhood status in such a way as to most clearly approximate the nuclear family (Sheldon, 2005, p.541).

Those who are outside this familial dyad or who intrude upon its boundaries will find the legal status much more difficult to obtain, if near impossible.

Interpreting Section 28

How then should we decipher section 28: what is its rationale(s) and how does it construct fatherhood? I want to suggest that while the principles used to vest parentage in this context are perhaps inconsistent, we are nevertheless able to draw discursive conclusions about legal (thus normative) fatherhood. As already suggested, the most obvious principle goading section 28 is a constitutive desire to contain the family form challenges of assisted conception to the sexual family unit. This constructs desirable fatherhood in the context of heterosexual relations (Collier, 1995), which in turn constructs fatherhood in a binary gender order. From the brief reference of maternity and section 27, we learn that motherhood is constructed as being governed by nature—a status defined by 'doing'. Fatherhood on the other hand, is constructed more as a status of intent or rational thinking. A father's role is to symbolically 'care about' the child as opposed to actively 'care for' it. The Parliamentary debates on the HFEA pay further testimony to these ideas, as does the inclusion of the aforementioned section 13(5) welfare principle. The HFEA fails to elaborate on what exactly this is to mean, failing again to construct fatherhood beyond its symbolic 'care for' status.

With this dominant construction in mind, it is of course curious that the HFEA allows for the creation of legally fatherless children, representing the inconsistency in section 28 between its underlying sexual family ideology, and the construction of fatherhood as a rational legal status. What should not be forgotten about here, is the context in which we are considering paternity; that of 'assisted' as opposed to 'natural' reproduction. If we consider other substantive areas of assisted conception law, such as the ownership of frozen embryos (see *Evans v Amicus Healthcare Ltd and others* [2004] EWCA (Civ) 727), the legal principle of protecting a man's right *not* to procreate and/or become a father appears to be primary. The

opposite could be said of parentage in the context of sexual reproduction, where the law essentially assigns paternity on the basis of biology, irrespective of intent (Sheldon 2001a). Whether we see this as a discursive consequence of the historical stigmatisation of conception procedures using donor sperm (equating it to adultery), or as evidence of the principle of rational choice being afforded recognition in relation to legal parentage, is an issue for debate. However, for the purposes of this paper, it is clear that in constructing paternity, the law pays more credence to its symbolic significance as opposed to its substantive meaning in relation to the active care of children. I wish now to develop this notion of the symbolic legal father by briefly exploring the *Blood* case and the subsequent reforms to the HFEA that it provoked in relation to 'dead fathers'. While space constraints do not allow a full analysis, I hope to draw some indicative conclusions in relation to how fatherhood is legally constructed.

The Story of Diane and Steve 1,000

Diane Blood and her husband Stephen had been trying for a child when Stephen became seriously ill with meningitis. He fell comatose and the hospital removed some of his semen just before his death. Due to the swiftness of his illness, there had not been the time to obtain his written consent for the use of his sperm after his death. Diane Blood sought to use her husband's sperm, and claimed that his consent could be presumed in their marital relationship, akin to section 28(2), which is how the provision came to be evoked, despite the fact that it was not donor sperm that was to be used. The Courts decided against her, and she was denied access to the sperm. The Human Fertilisation and Embryology Authority (hereinafter, the Authority) also refused to make a specific direction under section 24(4) of the HFEA in order to allow her access. While she accepted that no fertility clinic in Britain would inseminate her with Stephen's sperm, she wanted access to it so she could receive the treatment in Belgium. She therefore sought judicial review of the Authority's decision. Sympathetic to her situation, the Court of Appeal accepted the argument that the Authority's decision to refuse to make specific directions allowing her access to the sperm was an interference with her rights under Articles 59 and 60 of the Treaty of Rome—the right to free movement of services (see further Morgan and Lee, 1997, pp.846-53).

Without trivialising the sensitive nature of the case, I seek to highlight some of the discourses inherent in the case and the subsequent legislative change that it has evoked. While Diane Blood successfully bore children after receiving treatment in Belgium, Stephen's name could not appear on their birth certificate until the enactment of the Human Fertilisation and Embryology (Deceased Fathers) Act in 2003. While a man's sperm could be used after his death if he had provided written consent, section 28(6) of the original HFEA prohibited him from being treated as the child's father. This was to ensure the finality of inheritance. *Blood* however ensured a review of the provision. How the reforms constructed fatherhood have been aptly coined by Derek Morgan and Robert G. Lee in an article part-entitled, 'In the Name of the Father' (Lee and Morgan, 1997). Irrespective of whether one agrees or disagrees with the new legislation, it is important to place the reforms in the context of a regulatory regime that prescribes rather than facilitates people's parental-child legal ties. It should also be emphasized that the Human Fertilisation and Embryology (Deceased Father's) Act has been the only reform to the parentage provisions of the HFEA, and that further reform does not appear likely despite the current review. Therefore, that its provisions reinforce the sexual family unit and the symbolic 'care about' construction of fatherhood is pertinent, particularly when we acknowledge that it is currently impossible for corporeal non-traditional parents who encroach the boundary of the sexual family to obtain legal parentage status. This strongly reinforces the underlying gender-based framework of the parentage provisions, as opposed to it being a framework contingent upon care and dependency relations.

The Reforms

In brief, the 2003 reforms amend section 28(6) to allow a dead man to be registered as the father when his sperm has been used, and his written consent given before his death. The status conferred under this amendment is limited to being registered as the child's father, and is not the wider status conferred by section 29. Importantly, the amendments also permit this connection when his sperm has not been used in treatment following his death, again, contingent upon obtaining his written consent. The amendments also require the mother's consent, and she has 42 days from the child's birth to decide whether she wants her dead husband or partner's name to appear on the birth certificate. However, what is perhaps even more remarkable is that the amendments have *retrospective* effect. Therefore, in cases like *Blood* since 1990, where the

man has not consented to having his name registered as the child's father, it can still be done, despite this not being the law in place at the time of his death. Stephen Blood therefore is not only the biological father of his children, but has 'from the grave' had his name printed on their legal birth certificate. In sum, the reforms permit a man who has no biological, legal (read marital) or social connection to a child to be its legal father.

Some Concluding Observations

From this case and the subsequent legislative amendments, I would like to make three observations. Firstly, the case supports the idea that legal parentage is still an important legal concept to many people. While having parental responsibility is of course the key to being a practical parent (at least in the legal sense), legal parentage is highly symbolic and its regulation reaps normative consequences in relation to family forms. While this was readily recognised in *Blood* and the 2003 reforms, it is no coincidence that acknowledging it here reinforced the concept of the sexual family. When parentage candidates do not so readily fall within this framework, the law tends to downplay the significance of legal parentage.

Secondly, the reforms are somewhat demonstrative of the aforementioned legal recognition of the fragmented status of fatherhood in that while the dead father can be recognised as the child's legal father, this does not preclude another man from being recognised as his social father. However, it should be noted that while the law is increasingly accepting that *different* men can play *different* fatherhood roles in a child's life (Sheldon, 2005), there is little evidence of the law being willing to recognise *different* men for the *same* aspect of parenthood, unless it serves to reinforce the sexual family unit, by for example, awarding a step-father parental responsibility along with the biological father. This claim is especially true for parentage, even when the use of assisted conception techniques have disrupted the traditional framework (see especially *The Leeds Teaching Hospitals NHS trust v Mr A, Mrs A and Others* [2003] EWHC 259).

Finally, while the discursive consequences of the case and the legislative reforms clearly reinforce rather than challenge the gendered 'care about' legal construction of fatherhood, we can perhaps remain hopeful that real-life cases will in the future disrupt the ideological premise of the parentage framework under the HFEA. Although legislative change is clearly a

complicated affair, and old ideological preferences remain a powerful influence, difficult cases like *Blood* ultimately can provoke change.

Conclusion

This paper has shown that Ffatherhood is constructed in law as primarily a symbolic 'care about' institution, firmly located in the gendered sexual family structure. While there are perhaps trends of the law recognising that different men can play different fatherhood roles to the same child, legal parentage remains a monolithic status despite its significance for many 'parents'. Recent legislative changes to parentage provisions for dead fathers have served only to reinforce the symbolic construction of fatherhood, especially when compared to the 'care for' construction of motherhood that the paper briefly referred to. This paper therefore concludes that the parentage provisions of the HFEA should be reconsidered, and anchored instead around an ideological premise that gives better authority to the central purpose of parenthood—the care of children— as opposed to the fomenting of the gender order.

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