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# **Deconstructing Motherhood: A critique of the legal regulation of surrogacy**

Chantell Burrows

## **ABSTRACT:**

Surrogacy has been a point of contention for feminists and others since the 1980s. More recently surrogacy has developed a heightened profile within the media, imposing further scrutiny upon the social and legal perspective on motherhood. The legal framework surrounding surrogacy and, in particular, its construction of motherhood is a key area of concern. Surrogacy openly, and obviously, challenges the hetero-normative family form. Subsequently, surrogacy is the ideal lens through which to observe the legal framework surrounding mothers as this practice reflects the socially adaptable nature of motherhood. This thesis argued that the legal regulation of surrogacy frames motherhood as a hetero-normative concept which is open to, and ready for, challenge. This *legal* construction of motherhood, in the context of surrogacy, is in conflict with social understandings of motherhood. In other words, the way that surrogacy is currently regulated does not reflect the lived experiences of motherhood and requires urgent reform.

The legal conceptualisation of motherhood should reflect the social experience of mothers. It is crucial that societal and legal doctrines of motherhood coincide to present a comprehensive understanding. This will ensure that women's choices to engage with motherhood in the context of surrogacy are observed and protected. It is argued that contract law provides possible solutions to the difficult relationship between surrogacy and motherhood, helping to re-envision the legal hetero-normative framework currently governing familial structure and women's choices. The introduction of surrogacy contracts will offer greater legal recognition to non-normative families which are so prevalent within contemporary society. The social reality of motherhood should be the starting point from which to develop a new legal framework. This improved legal framework should incorporate alternative regulatory methods to fully address feminist concerns about women, maternity and the law.

**Deconstructing Motherhood:  
A critique of the legal regulation of surrogacy**

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*2011*

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## **STATUTE LIST**

Adoption and Children Act 2002

Human Fertilisation and Embryology Act 1990 (as amended by the Human Fertilisation and Embryology Act 2008)

Human Fertilisation and Embryology (Parental Order) Regulations 2010 (S. I No. 985)

Special Guardianship Regulations 2005 Surrogacy Arrangements Act 1985

Surrogacy Arrangements Act 1985

## CASE LIST

*A v C* 1985] F. L. R. 445

*Brixley v Lynas* [1996] 2 F. L. R 499

*CW v NT* [2011] EWHC 33 (Fam)

*R (on the application of Rose) v Secretary of State for Health* [2003] *Family Law* 19

*Re A (Joint Residence: Parental Responsibility)* [2009] Civ 358; [2009] 3 F. L. R 1593

*Re Adoption Application (Adoption: Payment)* 1987] 2 F. L. R. 291

*Re B (A Child)* [2009] UKSC 5; [2010] 1 F. L. R

*Re C (A Minor) (Wardship: Surrogacy)* [1985] F. L. R 846

*Re D (Contact and Parental Responsibility: Lesbian Mother and Known Father) (No. 2)* [2006] EWHC 2 (Fam)

*Re Evelyn* No. B. R. 7321 (1997) (unreported)

*Re G (Children) (Residence: Same-sex Partner)* [2006] UKHL 43; [2006] 1 W. L. R 2305

*Re L (A Child) (Surrogacy: Parental Order)* [2010] EWHC 3146 (Fam)

*Re MW (Adoption: Surrogacy)* [1995] 2 F. L. R 759

*Re N (A Child)* [2007] EWCA Civ 1053

*Re P (Minors) (Wardship: Surrogacy)* [1987] 2 F. L. R 421; [1988] F. C. R 140; [1987] *Fam Law* 414

*Re P (Surrogacy: Residence)* [2008] 1 *Family Law Report* 177

*Re Q (Parental Order)* [1996] 1 F. L. R 369

*Re R (Residence)* [2009] EWCA Civ 358, [2009] 2 F. L. R 819

*Re S (Parental Order)* [2009] EWHC 2977 (Jud)

*Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam)

*W v H (Child Abduction: Surrogacy) (No. 2)* [2002] 2 FLR 252



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## 1. INTRODUCTION

There is nothing new about surrogacy.<sup>1</sup> It is the practice 'whereby one woman carries a child for another with the intention that the child should be handed over after birth'<sup>2</sup> and has been utilised as a reproductive method for many centuries. However, the development of assisted reproductive technologies has broadened the scope of this practice widening its use in society. The technology of *in vitro* fertilisation (IVF) has been subsumed into the practice of surrogacy and enables surrogates to give birth to children with whom they have no biological relationship thus separating gestation, biology and social care as typical 'mother' roles. Eric Blyth observes that '[s]urrogacy is a social practice that, more than any other reduces parentage to its constituent parts.'<sup>3</sup> Surrogacy therefore openly and obviously challenges hetero-normative ideals surrounding motherhood as a gendered concept driven by maternal bonding. The surrogate rejects social maternity, leaving the care of the child to another woman thus repudiating gendered ideals about women as primary caregivers.

The challenge presented by surrogacy to hetero-normative constructions of the family unit has led to considerable societal response. In 2010 alone, the public response to surrogacy was vast. The practice has encountered celebrity endorsement, media attention and widespread coverage throughout the internet. For example, Barrie and Tony-Drewitt Barlow's experiences' of surrogacy as gay men is well-documented in popular media.<sup>4</sup> High profile surrogacy arrangements such as those which include Elton John<sup>5</sup> and Nicole Kidman<sup>6</sup> have lead to renewed

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<sup>1</sup> N. Gamble, L. Ghevaert, 'Surrogacy, parenthood, and disputes: are there any lessons to be learned?' *BioNews* (14 February 2011) <[http://www.bionews.org.uk/page\\_89334.asp?dinfo=AYhRMsAEPNA6dQvDaYPgfE89](http://www.bionews.org.uk/page_89334.asp?dinfo=AYhRMsAEPNA6dQvDaYPgfE89)> accessed 15 February 2011

<sup>2</sup> The Warnock Report, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cmnd. 9314, London, HMSO 1984) at para 8. 1

<sup>3</sup> E. Blyth, 'Section 30: The acceptable face of surrogacy?' (1993) (15) *Journal of Social Welfare and Family Law* at 248

<sup>4</sup> H. Vickers, 'UK's first surrogacy advice centre opened' (*BioNews*) (10 January 2011) [www.bionews.org.uk/page\\_85336.asp](http://www.bionews.org.uk/page_85336.asp) Visited at 1 February 2011

<sup>5</sup> O Craig, 'Elton John baby: "Thanks to Zachary, gay surrogacy will become more acceptable' *The Telegraph* (01 February 2011) < <http://www.telegraph.co.uk/health/8235149/Elton-John-baby-Thanks-to-Zachary-gay-surrogacy-will-become-more-acceptable.html>> accessed 16 February 2011

<sup>6</sup> B. Bamigboye, 'Surprise! Surrogate baby joy for Nicole Kidman and Keith Urban as they welcome Faith to the family' *Daily Mail* (18 January 2011)

public interest in the practice not encountered since the 1980s. This has led to broader consideration of how surrogacy is understood as a social practice, the ethical issues it presents, and how it is regulated in law.

Surrogacy is also a significant cause for feminist concern. Alison Diduck and Katherine O'Donovan note that 'feminism is concerned to ask questions about the lives of women, and the lives of women have traditionally centred upon their families.'<sup>7</sup> This is particularly the case in the context of surrogacy. Feminist concerns regarding surrogacy include the impact of surrogacy upon constructions of motherhood as it separates the 'mother' roles. This thesis examines legal constructions of motherhood as it is a socially significant context for many women.

The objective of this thesis is to critique legal constructions of motherhood in the context of surrogacy and its regulation. It examines to what extent societal constructions of motherhood are reflected and protected in law. Using surrogacy as lens, it explores how far current legal regulation reflects society's multi-faceted understanding of motherhood. This thesis considers how the lens of surrogacy can be used to reshape the legal response to non-normative mothers in order to reflect the social reality and lived experiences of women.

## **1.1 Surrogacy: The Legal Context**

From same-sex parenting to recent celebrity surrogacy arrangements, surrogacy continues to inspire legal and ethical controversy - it is therefore unfortunate that the practice of surrogacy fails to provoke legislative concern. The initial legal response to surrogacy was a knee-jerk reaction to the case of Kim Cotton<sup>8</sup> in 1985. This commercial surrogacy case was the first of its kind to be addressed by the courts and signalled the beginning of the debate surrounding commercial surrogacy and whether women could "sell" their reproductive services. Societal attitudes towards surrogacy at this time were largely negative and in response to this, the Surrogacy Arrangements Act 1985 (SAA 1985) was

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<sup>7</sup> A. Diduck, K. O'Donovan, 'Feminism and Families: *Plus ça change?*' at 1 in A. Diduck, K. O'Donovan (eds) *Feminist Perspectives on Family Law* (Routledge-Cavendish: 2006)

<sup>8</sup> *Re C (A Minor) (Wardship: Surrogacy)* [1985] F. L. R 846

enacted. The SAA 1985 imposes a blanket prohibition upon commercial surrogacy.

As a reproductive method which may utilise IVF, surrogacy is also regulated, to a certain extent, by the Human Fertilisation and Embryology Act 1990 (as amended by the Human Fertilisation and Embryology Act 2008) (HFE Act). The HFE Act regulates surrogacy arrangements which involve medical treatment such as IVF or donor insemination, detailing who is to be recognised as legal parents in the context of surrogacy which may involve many potential parents. Surrogacy arrangements which are not commercial and are carried out at home are therefore unregulated. One of the central criticisms of the HFE Act 1990, and indeed why it was extensively reformed by the HFE Act 2008 was that it ‘framed assisted reproduction law for heterosexual couples, aiming to shore up traditional family values and the institution of marriage and to discourage same sex and single parents.’<sup>9</sup> This thesis will question to what extent the amended HFE Act 1990 continues to preserve hetero-normative ideals for individuals who engage with surrogacy. The review of the Human Fertilisation and Embryology Act 1990 was the ideal opportunity to re-examine the legal response to surrogacy to ensure that its prevalence as a socially accepted reproductive practice is recognised and protected. However, surrogacy received very little attention in terms of assessing how the law works in practice, and in fact did not even address simple issues such as how many surrogacy births there are in England and Wales. The legal context of surrogacy demonstrates legislative reluctance to engage with the practice, possibly due to the complex ethical issues surrogacy presents. Analysis of statutory provision and case law is used as backdrop through which to identify the key issues with surrogacy regulation. This thesis argues and demonstrates that current legal problems are a consequence of a rigid hetero-normative legal response to motherhood.

## **1.2 Chapter Outlines**

Chapter One maps out social and legal constructions of motherhood. The first section of Chapter One identifies the various ‘mother’ roles recognised in

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<sup>9</sup> N. Gamble, L. Ghevaert, ‘In Practice: The Human Fertilisation and Embryology Act 2008: Revolution or Evolution?’ [2009] *Family Law* at 730

society such as gestational, biological and social motherhood. It assesses how these roles are constructed socially, utilising real-life examples of how motherhood is conceived in society. Examples include adoption and step-parenting. This section questions to what extent the act of mothering is integral to being a mother and to what extent these concepts are gendered. The second section of Chapter One re-conceptualises social motherhood through development of a comprehensive definition of social motherhood. This definition distinguishes the concept of being a mother and the act of mothering. Feminist literature in the area of motherhood is unsurprisingly wide-ranging both within and beyond the legal sphere. However, Katherine O'Donovan and Jill Marshall suggest that '[a]lthough the literature is vast, the distinctions between pregnancy, childbirth and rearing children are often blurred and rarely made explicit.'<sup>10</sup> This thesis explicitly defines the differences between gestational, biological and social motherhood to assist with the overall aim of critiquing legal constructions of motherhood. The comprehensive definition of social motherhood developed in Chapter One is utilised throughout the thesis in order to determine whether the social reality of motherhood is reflected in the specific the context of surrogacy in Chapters Two and Three.

Next, this section addresses gendered constructions of motherhood. This thesis utilises a gendered 'woman-centric' construction of motherhood. Drawing upon feminist commentary of gendered constructions of motherhood, it is argued that a 'woman-centric' approach to motherhood is required in order to adequately critique legal constructions because legal constructions of motherhood should reflect social reality. The social reality of motherhood is that it is a socially significant context for many women and not men. This section implores social commentary of women's interaction with motherhood and their ability to make autonomous decisions in order to assess why motherhood should be framed as a gendered construct.

The definition of social motherhood developed in Chapter One is then used to evaluate the legal response to motherhood. The legal response to motherhood

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<sup>10</sup> K. Donovan, J. Marshall, 'After Birth: Decisions about Becoming a Mother' at 102 in A. Diduck, K. O'Donovan (eds) *Feminist Perspectives on Family Law* (Routledge-Cavendish: 2006)

is explored through in-depth analysis of the case of *Re G*<sup>11</sup>. This House of Lords case is significant for several reasons, most importantly because it examines and defines the differences between ‘natural’ (social) parenthood and legal parenthood, similar to the objective in Chapter One. The application of this decision in subsequent case law is considered in order to assess the impact of this case. *Re G* has been critiqued extensively within academic legal commentary and the viewpoints expressed are used here to outline how this case constructs motherhood. In the context of *Re G* and subsequent case law, common themes and differences between social and legal constructions of motherhood are exposed.

Finally, Chapter One explores the construction of motherhood in the context of assisted reproduction. Assisted reproduction is introduced to further emphasise the differences between the ‘natural’ mother roles. By doing so, the importance of recognising non-normative motherhood due to the prevalence of assisted reproduction in society is emphasised. Due to this importance, surrogacy is highlighted as the lens through which the legal response to non-normative motherhood can be examined. Surrogacy challenges hetero-normative constructions of motherhood and therefore the legal response to this practice is pivotal in order to assess whether the law adequately responds to the social reality of motherhood.

Chapter Two utilises the social and legal constructions of motherhood established in Chapter One in the specific context of surrogacy. Chapter Two first outlines the social and legal context to the current legal framework regulating surrogacy as a precursor to analysis of the legal construction of motherhood in the context of surrogacy. This chapter outlines the feminist and societal response to surrogacy to provide a contextual background to current legal regulation, referring to governmental response to surrogacy such as the Warnock<sup>12</sup> and Brazier Reports.<sup>13</sup> It is argued that the legislative response to surrogacy continues to be inadequate due to the prevalence of surrogacy in society and more importantly, its relationship with women’s lives as mothers.

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<sup>11</sup> (*Children*) (*Residence: Same-sex Partner*) [2006] UKHL 43; [2006] 1 W. L. R 2305

<sup>12</sup> n. 2

<sup>13</sup> Brazier M, Campbell A, Golombok S, *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation* (Cmnd. 4068) (1998)

Chapter Two highlights current tensions between legal and social constructions of motherhood in the context of surrogacy, suggesting that the legal response to motherhood is founded upon hetero-normative ideals surrounding motherhood. As a consequence of traditional constructions of motherhood in law, the route to legal motherhood in surrogacy is difficult. The status of legal mother must be transferred from one woman to another, however crucially the surrogate is the default legal mother. Problems with this legal standpoint will be explored in relation to the transferral of motherhood and how the HFE Act 1990 facilitates this. A critique of the legal mechanisms utilised to transfer motherhood is offered, considering case law in the area of parental orders which extinguish the legal rights of the surrogate in favour of the commissioning party.

As a result of conflict between legal and social constructions, the social reality of motherhood as outlined in Chapter One is not represented in law. This point is reinforced with examples from case law, in particular cases which are concerned with disputed surrogacy arrangements. Also, single parents and their exclusion from the remit of the HFE Act in relation to parental orders are also explored. Attention to these issues details the real-life legal response to motherhood and indicates a legal preference for traditional constructions of motherhood which marry gestation and maternal care. Overall, Chapter Two argues that a lack of legal response to surrogacy from the outset evidenced by lack of regulation has created an unstable platform from which surrogacy regulation has developed. As a result of this, women's interests as mothers are not protected and this should be rectified.

Chapter Three addresses the current failings of the legal surrogacy framework and offers a solution. Consulting 'surrogacy-friendly' jurisdictions such as Israel, this chapter outlines a possible way-forward in relation to the current problems posed by a legal failing to respond to non-normative motherhood. Chapter Three suggests that the introduction of a new Surrogacy Act is required in order to improve the legal position on motherhood in the context of surrogacy. This new Surrogacy Act, it is argued, attends to current legal failings and could radically improve the way in which surrogacy arrangements are regulated. It is proposed that an intention-based test is introduced to track the intentions of those

involved in the surrogacy arrangement which are then evidenced in the form of a surrogacy contract. Chapter Three utilises examples from contract law (as expressed in academic literature) to develop a new legal structure for surrogacy which attends to the intentions of the parties involved, overall improving the legal recognition and understanding of the separate and various 'mother' roles. In addition, this chapter claims shared legal motherhood and shared parental responsibility should be utilised in conjunction with enforceable surrogacy contracts to fully reflect the lived experiences of women as mothers in a legal context.

This thesis concludes that an urgent re-think of the current legal framework governing surrogacy is required because at present, the legal structure is guided by hetero-normative ideals which are detrimental to the autonomy of women. Ultimately, a new holistic model of legal motherhood in surrogacy is required in order to reflect the social complexities of motherhood in this context.



## **2. SOCIAL AND LEGAL CONSTRUCTIONS OF MOTHERHOOD**

### **2.1 Introduction**

Though motherhood is often idealised as an exclusive mother-child bond driven by maternal instinct and biology, the social reality of contemporary motherhood challenges this notion. The role of 'mother' is unrestricted in form, practice or personification. Motherhood is a multifaceted concept capable of change. Emily Jackson observes that 'the meaning of motherhood...has always been culturally, geographically and temporally specific'.<sup>1</sup> It will be argued that though the role of mother continues to be socially recognisable the amorphous nature of motherhood challenges idealised depictions and legal constructions of 'mother'. This chapter questions legal and social assumptions surrounding motherhood. It will argue that social and legal constructions of motherhood are in tension because current legal regulation continues to utilise a restrictive hetero-normative understanding of 'mother' and the act of mothering which are at odds with social reality. As a result of this, stereotypical ideals regarding motherhood are reinforced, negating and failing to recognise the lived experiences of many mothers.

This chapter aims to challenge the current static legal approach in order to question the extent to which the law reflects the social reality of motherhood. It is important to examine and assess legal constructions of motherhood to ensure the reproductive autonomy and choices of women are protected in law. Reproductive choices impact heavily upon the lives of women in both the public and private sphere. Foregoing feminist concerns surrounding women's career choices<sup>2</sup>, women's pay<sup>3</sup> and women and the family home<sup>4</sup> are the unfortunate result of a gendered construction of women and maternity. Consistent assessment of how law seeks to reflect social reality is therefore essential to achieving a legal framework which protects the autonomous choices of women and their engagement with motherhood.

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<sup>1</sup> E. Jackson, 'Degendering Reproduction' (2008) *Medical Law Review* at 347

<sup>2</sup> M. Goodwin, 'Assisted Reproductive Technology and the Double Blind: The Illusory Choice on Motherhood' (2005) (9)(1) *Journal of Gender, Race and Justice* 1 -54

<sup>3</sup> S. Fredman, 'Reforming Equal Pay Laws' (2008) (37) *Industrial Law Journal* 193-219

<sup>4</sup> S. Singer, 'What provision for unmarried couples should the law make when their relationships break down?' [2009] *Family Law* 234 - 238

## 2.2 Defining Motherhood

Ann Dally observes that '[t]he word 'mother' is one of the oldest in language'<sup>5</sup>. The matriarchal figure known as 'mother' is recognisable in children's fairy tales, literature and within every day family life. It is therefore unsurprising that societal understandings of motherhood now form part of our *a priori* knowledge concerning family relationships. The societal understanding of motherhood is relatively straightforward and easily identifiable because of the 'mother' role's prevalence within society. Mothers are recognised most obviously as women who have given birth. The most commonplace definition of 'mother', therefore, is focused centrally upon the gestational capacities of women to give birth and experience pregnancy. Contemporary societal understandings of motherhood, however are inclusive of and extend far beyond this traditional conceptualisation of 'mother'.

The Collins dictionary defines 'mother' as 'a female who has given birth to offspring' and more broadly as 'a person who demonstrates 'motherly qualities' such as maternal affection. First, this definition limits mother to being a woman who can give birth to a child. Second, it defines 'mother'(ing) as a practice. In other words, a mother is a person who engages with the act of mothering. Mothering constructed in late modernity is narrated by women as the provision of care, education and a healthy environment (physically and psychologically) for a child – all of which are recognised in the context of 'motherly qualities'.<sup>6</sup> While women who give birth also often demonstrate motherly qualities, gestation and the act of mothering remain distinct. Many non-gestational mothers provide and care for their children and many gestational mothers do not undertake the practice of mothering. This is evidenced by current social practices such as fostering, adoption and step-parenting. To demonstrate this point, a step-mother has no gestational or biological relationship with her step-children but is nonetheless recognised in a social capacity as a mother. The conceptualisation of gestational motherhood and mothering as distinct represents current social perceptions of

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<sup>5</sup> A. Dally, *Inventing Motherhood: the consequences of an ideal* (Burnett Books 1982) at 17

<sup>6</sup> T. Miller, *Making Sense of Motherhood: A Narrative Approach* (Cambridge University Press 2005) at 12 - 13

mothers and how motherhood is experienced within society. The path to identifying and defining motherhood is thus clear. Within society, various types of motherhood are recognised. The recognition of various types of motherhood is not a contemporary concept. This distinction is also recognised within legal doctrine.

Baroness Hale in *Re G*<sup>7</sup> outlines three broad ways by which a natural parent may be identified, 'each of which may be very significant in the child's welfare, depending upon the circumstances of the particular case'.<sup>8</sup> First, Baroness Hale describes genetic parenthood. She states that the genetic role is important as it enables the child to learn of their origins 'which is an important component in finding an individual sense of self'.<sup>9</sup> The second way through which to identify a mother is gestational parenthood. Baroness Hale observes that gestational parenthood is clearly established as the mother who has given birth can be unambiguously identified. Baroness Hale also recognises the 'process of carrying a child and giving him birth' as evidence of a 'special relationship between mother and child' developed throughout this period.<sup>10</sup> Third, relationships developed upon the child's social and psychological needs also identify a child's mother. This relationship is developed from the most basic level of feeding, up to educating and guiding.<sup>11</sup>

Baroness Hale's construction of motherhood recognises the various mother roles and how motherhood is experienced in society. Many women will sustain a genetic, gestational and social relationship with their child however an increasing number of women will not. This is particularly the case for mothers who adopt, foster or step-parent their children. The prevalence of these societal practices indicates that motherhood is a shared experience. Adoption, fostering and step-parenting demarcate gestational, genetic and social mother roles as separate entities. It is often the case that the gestational mother will forego her role as a social mother, allowing this role to be assumed by another woman – however this is not always voluntary. The commonality of adoption and other similar practices

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<sup>7</sup> (*Children*) (*Residence: Same-sex Partner*) [2006] UKHL 43; [2006] 1 W.L.R 2305

<sup>8</sup> *ibid* ~ Baroness Hale at para 33

<sup>9</sup> *ibid*

<sup>10</sup> *ibid* ~ Baroness Hale at para 34

<sup>11</sup> *ibid* ~ Baroness Hale at para 35

emphasise the relevance and acceptance of the separation of mother roles in society<sup>12</sup>. It is therefore important that constructions of motherhood reflect this reality.

Outlining the parameters of the social reality of motherhood is also essential. Without this, a balanced critique of the legal construction of motherhood in relation to women's experience cannot be put forward. So far, it is established that motherhood consists of both persons and action. A woman is recognised through her pregnancy and also through her care-giving recognised by society as motherly. However, if a woman does not self-identify as a mother in this context, this does not reflect the social reality of the lived experiences of women. For example, a woman may give birth to a child but chooses not to care for the child. Instead, the child is adopted. Although this woman has given birth, through her decision not to engage with mothering, she does not identify as a mother. It therefore follows that self-identification as a mother is imperative to establish the social reality of motherhood based upon women's experience. Society may perceive this woman as a mother through her pregnancy but this is not the reality based upon her individual experience. Tina Miller raises concern regarding narrative accounts of women's experience as making sense of individual experience is often undermined when our experiences do not match the societal and cultural norm<sup>13</sup>. In other words, a true account of individual experience, particularly in the context of motherhood, is perhaps unachievable. However, the social reality of motherhood is not concerned with individualistic storytelling.

Jill Marshall comments that '[m]ost feminists would agree that the ideology of motherhood constructs both maternity and motherhood in terms of connection, physically and emotionally, and that women have not fitted in with the traditional idea of autonomy'.<sup>14</sup> Primarily, motherhood is concerned with relationships. In

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<sup>12</sup> The Office for National Statistics reports that there were '[t]here were 4,655 children entered into the Adopted Children Register following court orders made in 2009'. Those children entered on the Adopted Children Register are now cared for by parents with who they have no gestational or genetic relationship. [Office for National Statistics, Statistics on Adoptions in England and Wales (2009) <<http://www.statistics.gov.uk/cci/nugget.asp?id=592>> accessed 20 February 2010

<sup>13</sup> n. 6 at 12

<sup>14</sup> J. Marshall, 'Giving Birth But Refusing Motherhood: Inauthentic choice or self-determining identity?' (2008) (4) *International Journal of Law in Context* at 176

response to liberal constructions of autonomy which create tension between autonomy and motherhood, Jennifer Nedelsky argues that it is important to 'start with people in their social contexts'<sup>15</sup> as this encourages narratives to develop which are inclusive of self-determination. Autonomy is increasingly important due to the broad ways in which women can be identified as mothers. Katherine O'Donovan and Jill Marshall note that '[c]ertain feminists have viewed women's capacity for motherhood as a natural biological phenomenon, but one that thereby prevents women from being capable of living a fully autonomous life'<sup>16</sup>. Women must and should be able to make autonomous choices about their engagement with motherhood due to the changeable nature of family form within contemporary society. In drawing attention to women's social contexts this will allow for self-identification and will in turn recognise women's autonomous choices to engage with motherhood.

### **2.3 Re-conceptualising Motherhood: A Comprehensive Definition**

To critique the legal construction of motherhood and its ability to reflect its social reality it is essential to outline a comprehensive societal definition of motherhood. The interpretation of motherhood developed and adopted throughout this thesis defines 'mother' as a woman who self-identifies as involved in the creation and/or upbringing of a child. This definition is comprehensive for several reasons. This definition incorporates the three various ways in which a woman is socially recognised as a mother, adopting Baroness Hale's terminology in *Re G*. This intentionally broad definition preserves both biological and social aspects of motherhood which are upheld in society as well as recognising women's choices to engage with motherhood. The 'mother' definition used throughout this thesis will now be examined, exploring its central elements.

#### **2.3 [a] 'Creation of a Child'**

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<sup>15</sup> J. Nedelsky 'Reconceiving autonomy: sources, thoughts and possibilities'(1989) (1) *Yale Journal of Law and Ethics* 7- 36 in *ibid* at 9

<sup>16</sup> K. O'Donovan, J. Marshall, 'After Birth: Decisions about becoming a mother' in K. O'Donovan, J. Marshall (eds), *Feminist Perspectives on Family Law* (Routledge-Cavendish 2006) at 104

First, a woman is defined as a mother if she has contributed to the creation of a child. This incorporates both gestational and genetic motherhood. Through carrying/gestating a child, a woman's involvement in the creation of that child is most clear. A woman will carry a foetus for nine months, providing nourishment and care until the child is born. Her role as mother is identifiable in her contribution to the creation of the child through her gestational capacities. A woman is also defined as a mother when she provides ovum. This creates a genetic relationship between a woman and foetus. This genetic relationship is equal to the gestational relationship in terms of contribution to the creation of a child. Both mother roles are essential to conceiving a child as without both, the creation of a child is not possible. The gestational and genetic 'mother' roles may be fulfilled by different women and each are socially recognised as mothers. Women fulfilling either of these roles must also identify themselves as a mother based upon their contribution to the creation of the child.

### **2. 3 [b] 'Upbringing of a Child'**

A woman involved in the upbringing of a child and not creation, engages with the act of mothering. Sara Ruddick construes mothering as 'a kind of work or practice'.<sup>17</sup> Acknowledging the differences between children, Ruddick maintains that 'there is sufficient commonality among children to define a "maternal" work. Children require protection in their vulnerable early years, nurturance to develop intellect and guidance to assist moral development.<sup>18</sup> Ruddick's construction of 'mothering' as a practice is appropriate for this thesis in its aim to deconstruct motherhood as it detaches mothering as action from 'mother' as a mode of identity. By doing so, gendered normative constructions of motherhood which combines both being a mother and the act mothering, can be challenged. The hetero-normative ideal surrounding motherhood links gestation and 'mother' status with a responsibility to care for a child. In the instance of adoption, fostering and step-parenting, it is clear recognition as a mother is not dependent upon gestational capacities. Instead, mother status stems from the woman's active engagement

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<sup>17</sup> S. Ruddick, 'Thinking Mothers/Conceiving Birth' in D. Bassin, M. Honey, M. M. Kaplan (eds), *Representations of Motherhood* (Yale University Press 1994) at 33

<sup>18</sup> *ibid*

with a child in her care. The non-normative construction of motherhood challenges hetero-normative ideals as the conservative approach persistently attaches gestation to parental responsibility. Traditional motherhood which describes the fulfilment of all mother roles by one woman is no longer perceived as the only form of socially recognised status as a mother. Alison Diduck notes 'single parent family living, step parent family living, non-co-residential family living, as well as same-sex family living have all demanded changes to the language, concepts and norms of family form'<sup>19</sup> which is particularly relevant in the context of 'mother' status and its relationship with mothering.

Mothering conceived as singular practice is gender neutral. Ruddick observes that 'there is then no difficulty in imagining men taking up mothering...or women declining to mother'.<sup>20</sup> Mothering is a distinct concept and thus male mothering and women who do not self-identify as mothers through their rejection of maternal practice is separate to identity as a mother. Many women and men engage with mothering as fathers, grandparents and family friends. This action is separate to rhetoric concerning definitions of mothers. The relationship between mothering and recognition is conceived only when there is an interest in the creation of the child through the desire to participate in the upbringing of a child. This definition of 'mother' is inclusive of those who wish to engage with social mothering and at the same time does not exclude those who wish to assume a purely gestational or biological role and vice versa. This is ultimately dependent upon the woman concerned identifying with the role of 'mother' and her interest in the child's life.

Ruddick argues that a comprehensive understanding of motherhood should 'represent birth giving as distinguished from *and* connected to mothering in a way that allow us to honour both of these activities as they play themselves out in women's and men's lives'<sup>21</sup>. The definition of motherhood developed here is inclusive of birth giving and mothering as distinct *and* connected concepts. This offers a clear social overview through which to examine the legal response to

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<sup>19</sup> A. Diduck, 'If only we can find the appropriate terms to use the issue will be solved': Law, identity and parenthood' [2007] *Child and Family Law Quarterly* at 458

<sup>20</sup> n. 17 at 35

<sup>21</sup> n. 17 at 38

motherhood. However, the definition of motherhood presented here is subsequently gender-specific as it focus' rests upon the experiences of women. The woman-centred construction of motherhood to be utilised throughout this thesis will now be explored.

## **2.4 Gendered Approaches to Motherhood**

The wide-ranging definition of motherhood utilised here is woman-centric, excluding men from being recognised as mothers or engaging with mothering in the specific context of motherhood. This woman-centric approach attempts to reflect social reality and work upwards with an uncompromising standpoint that only women can be defined as mothers. In 1982, Dally observed that '[m]otherhood has become full of uncertainty and paradox, fraught with dilemmas at all stages...creating illusion and also being altered by it.'<sup>22</sup> Over twenty years later, this remains the case and is why a women-centred approach to motherhood is required.

In recent years, motherhood as a gendered construct has received criticism and reaction. The fathers' rights movement, including the Fathers for Justice campaign group, utilised politically-motivated publicity stunts in order to campaign for greater access to contact with their child post-family separation. This backlash to women's recognition as primary caregivers has provoked debate surrounding the roles of 'mother' and 'father' and the legal parity between them. Contrary to this, studies concerning the family home conclude that women continue to assume the role of primary caregiver and as a result of this often compromise their autonomy. For example, many women who are single parents are often placed in disadvantaged socio-economic position due to continually changing and often ineffective child support schemes. Julie Wallbank's commentary on this issue maintains that '[f]eminist researchers should seek at all costs not to undermine...women's subjective experiences, because they provide a useful source for understanding how power relations are constructed in society'.<sup>23</sup> Focussing centrally on women as mothers will expose the monolithic narrative

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<sup>22</sup> A. Dally, *Inventing Motherhood: the consequences of an ideal* at 17

<sup>23</sup> J.Wallbank, *Challenging Motherhood(s)* (Pearson Education 2001) at 35



which surrounds motherhood as a gendered construct. It will help to break down hetero-normative ideals which reinforce power imbalances between men and women as mothers and fathers.

Martha Fineman argues that '[a]lthough women as mothers are not well represented in the legal or the political process, it is essential that their perspectives be articulated in the context of law and policy proposals'.<sup>24</sup> Gender neutral constructions of parenthood will not assist in giving women as mothers a voice in the legal and political process. Instead, it will undermine the subjective experiences of women in everyday life.

Fineman explains:

'Consistent with the feminist commitment to gender neutrality, parenthood – like personhood – has become the preferred designation because it encompasses both father and mother without the idealised (and real life) distinctions associated with those'.<sup>25</sup>

However real life distinction and the social reality of motherhood cannot, and should not, be ignored. Fineman states that '[t]he very gendered and mothered lives most women live continue'.<sup>26</sup> In society, motherhood is gendered. It is therefore nonsensical to create a false dichotomy of motherhood as gender-neutral if women's interests are to be observed and protected. Ultimately, a gender neutral focus on motherhood may lead to 'a further reduction of attention to women and women's interests'<sup>27</sup>. It is hoped that a construction of motherhood as a gender specific construct will achieve greater inclusion of women's interests in all aspects of society.

Thus far, 'mother' is defined as both person and action recognisable within a broad range of family structures. 'Mother' is a gendered concept and requires

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<sup>24</sup> M. Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) at 87

<sup>25</sup> n. 24 at 88

<sup>26</sup> *Ibid* at 89

<sup>27</sup> J. Hearn, 'Men, fathers and the state: national and global relations' in B. Hobson (ed) *Making Men into Fathers: Men, Masculinities and the Social Politics of Fatherhood* (Cambridge University Press 2002) at 250

self-identification within this role if a woman is to be defined as a mother *socially*. To what extent is the social construction of motherhood represented within the legal framework? Legal constructions of motherhood will now be assessed, drawing out common and divergent themes within the legal and social response to motherhood.

## 2.5 Legal Constructions of Motherhood

At common law, the gestational mother of a child is the legal mother. Gestation thus determines 'mother' status from the outset. The starting point for legal motherhood is therefore determined by the gestational/biological relationship between mother and child which is unambiguously identifiable. Legal motherhood is gender-specific. In law, there can only be one legal mother and this title cannot be shared between individuals. The statutory legal position states that the gestational mother is the legal mother<sup>28</sup> and no other woman is to be recognised as such. However motherhood can be transferred from one woman to another in a number of ways.

Legal motherhood may be transferred by the process of adoption. If a child is adopted, the legal title of the gestational mother is extinguished and transferred in full to the adoptive mother<sup>29</sup>. Adoption orders transfer parental responsibility, permitting the adoptive mother (and also her partner) to make lawful decisions regarding the child's welfare. Parental responsibility is the legal mechanism which describes the social act of mothering. Section 3 (1) of the Children Act 1989 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'. Adoptive mothers are recognised legally as mothers and in a social 'mother' context as they engage with the act of mothering.

It is usually the case that upon transferral of motherhood, the legal rights and responsibilities of gestational/genetic mother are extinguished. But there may be times when a mother does not want to or cannot actively engage with

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<sup>28</sup> s. 27 Human Fertilisation and Embryology Act 1990 as re-enacted by s. 33 Human Fertilisation and Embryology Act 2008

<sup>29</sup> s. 46 Adoption and Children Act 2002

mothering but may retain legal status. Current legal regulation of motherhood permits wider transference of legal parental responsibility and recognises various types of mother beyond adoptive mothers. Whilst legal 'mother' status automatically awards parental rights and responsibilities, legal title and responsibility are two distinct mechanisms. Parental responsibility can be awarded to step-mothers and foster mothers where the legal mother wishes to maintain her legal title. Parental responsibility may be acquired through section 4A of the Children Act 1989, residence orders<sup>30</sup> and special guardianship (in the instance of foster carers)<sup>31</sup>. Step mothers and foster mothers are not recognised as legal mothers insofar as they cannot acquire legal title without the consent of the legal mother. If step mother or foster mothers wish to achieve full legal parental title, the adoption process must be initiated. However legal rights and responsibilities are transferred which removes the parental responsibility of the legal mother for a specified period of time. The provisions enacted to transfer parental responsibility indicate a temporary form of motherhood. At this point, a child has more than one legal mother. To a certain extent, this reflects social understandings of motherhood. As discussed, it is often the case that motherhood is a shared experience and a child may recognise a number of women as its mother. The legal approach to temporary motherhood corresponds well with current social perceptions of motherhood and reflects the lived experiences of many women. It is therefore unfortunate that temporary motherhood status and the legal recognition it affords to various women in relation to a child is not the starting point from which legal motherhood is awarded. Instead, a two-parent dyadic family form is preferred as only one legal mother (and one other legal parent, either a same-sex partner or father) with full legal title is allowed at any one time. Even though a child may recognise two mothers within their family structure, only one of these women is recognised as their legal mother although both may have legal responsibility. Is this situation problematic? Further even, what is the social significance of this?

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<sup>30</sup> S. Gilmore, 'Contact/Shared Residence and Child Well-being: Research Evidence and its Implications for Legal Decision-Making' (2006) 20 (3) *International Journal of Law, Policy and the Family* at 344

<sup>31</sup> The Special Guardianship Regulations 2005

Andrew Bainham argues that there is a 'pervasive concern about the social acceptability of personal and family relationships and the need to secure for them the imprimatur of the law.'<sup>32</sup> Due to the two-parent dyadic structure, it is clear that law is not responding to the contemporary family form. Through recognition of step-mothers and adoption, transferring and attaching legal status in the form of parental responsibility, it appears that law goes some way to secure legal recognition for the various 'mother' roles, but still has a considerable way to go. Leanne Smith comments, '[i]t is arguably one of the great strengths of English family law that several adults may exercise parental responsibility in relation to the same child concurrently'<sup>33</sup> and whilst it is evident that the law recognises multifarious types of mother, legal recognition of the various mother roles is not equal or developed always entirely upon the best interests of the child. This can be seen most obviously when there is conflict between the legal interests of the various mother roles. The legal response to conflict provides greater insight into the legal construction of motherhood in practice.

## **2.6 Case Study: *Re G (Children) (Residence: Same-sex partner)*<sup>34</sup>**

*Re G* is an example of how the law responds to motherhood in practice. This case concerns conflict between two women who both wished to receive legal recognition as mothers in a social context. Both women wished to acquire parental responsibility which would provide them with rights and responsibilities in relation to the upbringing of their child. This case study will detail how the House of Lords responded to this and examine how the outcome of this case is relevant to the critique of the legal construction of motherhood presented here.

*Re G* involved a separated lesbian couple, CG and CW. Using artificial insemination to develop a family, CG gave birth to two children, both of which were raised by CG and CW together. Upon separation, the children resided with CG, and CW applied for a joint residence order which was at first rejected, and then

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<sup>32</sup> A. Bainham, 'Status Anxiety? The Rush for Family Recognition' in F. Ebtehaj, B. Lindley, M. Richards (eds) *Kinship Matters* (Hart Publishing, 2006) at 48

<sup>33</sup> L. Smith, 'Principle or pragmatism? Lesbian parenting, shared residence and parental responsibility after *Re G (Residence: Same-sex partner)* [2006] *Child and Family Law Quarterly* at 130

<sup>34</sup> n. 7

granted by the Court of Appeal. CG then moved from Leicester to Cornwall without notice and it was feared by CW that although contact with the children remained at present, this would gradually diminish. At this point a sole residence order was awarded to CW. This decision was unanimously dismissed by the House of Lords, and the sole care order removed.

The primary issue in the case of *Re G* was that although both women were recognised as mothers in various forms in a social context, both parties wished to acquire legal recognition to allow them to fulfil the role of social mother as a result of the relationship between mother and child. This case explicitly sought to address the definitions of 'natural' and 'legal' parent. As indicated earlier, Baroness Hale of Richmond outlined the three possible ways through which parenthood is identified, explicitly distinguishing forms of 'natural' parent (gestation, genetic and social) from legal parenthood. Further, Baroness Hale emphasised 'the fact that CG is the natural mother of these children in every sense of that term, while raising no presumption in her favour, is undoubtedly an important and significant factor in determining what will be best for them now and in the future'<sup>35</sup>. There are two key points to make here. First, Baroness Hale's distinction between 'natural' and 'legal' parenthood was championed within academic commentary surrounding *Re G*. Robert Stevens notes, Baroness Hale's decision 'emphasised the relational nature of family law, recognising 'psychological relationships) as well as the gestational ones) between children and adults'.<sup>36</sup> Recognising the relational nature of families in a broader social context in law is essential if law is to reflect the social reality of motherhood with a view to improving women's recognition as mothers.

Additionally, sexuality in family law cases has previously been an important (often discriminatory) factor as was the case in *C v C (A Minor) (Custody: Appeal)*.<sup>37</sup> *Re G* potentially signifies 'a new dawn for lesbian parents' as same-sex parenting and heterosexual parenting cases of this kind are to be treated equally. Baroness Hale states 'the issues arising are just the same as those which may arise between

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<sup>35</sup> n. 7 ~ Baroness Hale at para 44

<sup>36</sup> R. Stevens, 'Recent developments in the relational aspects of family law'(2008) (172) *Criminal Law and Justice Weekly* at 274

<sup>37</sup> [1991] 1 F. L. R 223

heterosexual couples. The legal principles are also the same'.<sup>38</sup> This reflects the social reality of lesbian parents who identify themselves as mothers but who do not have a gestational or genetic relationship with the child. Previously case law concerning same-sex parenting has placed great emphasis upon the biological connections between parent and child. In *J v C*<sup>39</sup> the House of Lords 'were at pains to state that the welfare principle (and thus a child's best interests) would be best facilitated by 'maintaining the tie of nature' as observed by Sarah Beresford<sup>40</sup>. In *Re G* natural parenthood is not specifically defined by biology in the form of genetic or gestational parenthood as was the case in *J v C*. Instead, the definition of natural parent is far broader. This then leads on to consideration of the second key point in relation to this case.

Baroness Hale's widening of the framework to identify natural parenthood is not without its problems. Beresford argues that the language of law used here, defining natural as beyond the biological 'still retains the power of inclusion and exclusion. Thus, that which is natural is included, and that which is not is excluded. Only the judge can make this determination'<sup>41</sup>. Beresford argues that Baroness Hale has created a hierarchy of 'natural' with biological parenthood being at the top' because nowhere in Hale's opinion does she 'emphasise the importance of a child being reared by her psychological or gestational parent' in the same way as she emphasises biological parenthood.<sup>42</sup> Daniel Coombes argues that the gestational relationship 'between mother and child is probably the most significant aspect of the decision'<sup>43</sup> and therefore conflation of 'natural' and 'gestation' have undermined Baroness Hale's seemingly broad approach to parenthood.

However, although CG in this case was the gestational mother and the default legal mother, Baroness Hale explicated stated that there is no presumption in her favour<sup>44</sup>. Baroness Hale's reasoning for returning custody to CG is founded

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<sup>38</sup> n. 7 ~ Baroness Hale at para 6

<sup>39</sup> [1970] AC 668

<sup>40</sup> S. Beresford 'Get Over Your (Legal) 'Self': A Brief History of Lesbians, Motherhood and the Law' (2008) (30) *Journal of Social Welfare and Family Law* at 96

<sup>41</sup> *ibid* at 102 - 103

<sup>42</sup> n. 40 at 102

<sup>43</sup> D. Coombes, 'Mothers are special' (2006) (156) *New Law Journal* at 1701

<sup>44</sup> n. 7 ~ Baroness Hale at 44

upon the separation of 'natural' mother roles, emphasising the distinction between 'natural' mother roles as opposed to 'natural' and legal distinctions. CG did not experience a gestational relationship that 'is different from any other'<sup>45</sup> with her child and this played an important role when assessing the best interests of the child. Unfortunately, Baroness Hale's attempt to clarify the distinction between natural parenthood and legal presumption is undermined by Lord Nicholls' opposing comments.

## 2.7 Gestational Motherhood: Opposing Positions

Within the House of Lords judgment in *Re G* opposing positions in relation to the construction of gestational motherhood are apparent. Baroness Hale's welfare judgment in favour of the gestational mother was because gestation 'must count for something in the majority of cases' but it does not induce a legal presumption of the gestational mother overturning the decision in *J v C*. Lord Nicholls however placed the role of gestation and biology more broadly as the criteria through which legal parenthood should be addressed. Lord Nicholls stated:

'In reaching its decision the court should always have in the mind that the ordinary way the rearing of a child by his or her biological parent can be expected to be in the child's best interests ... A child should not be removed from the primary care of his or her biological parents without good reason'.<sup>46</sup>

Lord Nicholls approach clearly states that there is a legal presumption in favour of biological parents *unless* there is sufficient reason otherwise. Placing such importance upon gestational motherhood impacts negatively upon motherhood more broadly as the hierarchical tendency of the legal definition of 'mother' implies that women who are social mothers are not in an equal legal position to their gestation/genetic counterparts. This view is clearly in tension with the social reality of motherhood, particularly in cases where conflict does not arise.

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<sup>45</sup> *ibid* at para 34

<sup>46</sup> *Ibid* ~ Lord Nicholls at para 2

Due to the conflict between judicial opinions concerning the gestational 'mother' role, it has led to inaccurate reformulations of the ratio set out in this. Coombes comment on this decision noted:

'The judgment has reinforced the importance of the biological link between children and their parents. While each case must be determined on its own facts – and compliance with court orders will be relevant – it appears that it will now be harder for a nonbiologically related person...to secure an order displacing a child from its biological parent'.<sup>47</sup>

This conclusion is ultimately guided by Lord Nicholls reasoning (and at times by Baroness Hale's conflation of 'natural' and biological parenthood). However subsequent case law has, pleasingly, sought to clarify this legal position on presumption in favour of natural biological parents.

## 2.8 After *Re G*: Subsequent Decisions

Kim Everett and Lucy Yeatman suggest that subsequent decisions following *Re G* demonstrate a judicial enthusiasm 'for elevating the significance of the genetic link in determining welfare'.<sup>48</sup> Cases such as *Re A (Joint Residence: Parental Responsibility)*<sup>49</sup> and *Re R (Residence)*<sup>50</sup> indicate a 'move back to the restrictive notion of parenthood which excludes all but the genetic parent'.<sup>51</sup> This highlights the impact of Lord Nicholl's comments upon future judicial considerations, undermining the progressive approach taken by Baroness Hale in relation to 'natural' parenthood.

Most recently, the Supreme Court case of *Re B*<sup>52</sup> sought to clarify the legal position in *Re G* which explicitly states that there is no presumption in favour of natural parents. This case is an example of the court 'rowing back'<sup>53</sup> from

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<sup>47</sup> n. 43 at 1705

<sup>48</sup> K. Everett, L. Yeatman, 'Are some parents more natural than others? [2010] (22) *Child and Family Law Quarterly* at 290

<sup>49</sup> [2009] Civ 358; [2009] 3 F. L. R 1593

<sup>50</sup> [2009] EWCA Civ 358, [2009] 2 F. L. R 819

<sup>51</sup> n. 48 at 295

<sup>52</sup> (*A Child*) [2009] UKSC 5, [2010] 1 FLR

<sup>53</sup> A. Bainham, 'Rowing Back from *Re G*? Natural Parents in the Supreme Court' (2010) *Family Law* 394



subsequent misinterpretation of the decision in *Re G* and reaffirming the distinctions between ‘natural’ and legal parenthood outlined by Baroness Hale. The case of *Re B* is unusual and concerned a biological father and maternal grandmother. Both father and grandmother sought to acquire parental responsibility which would allow the child to reside with them. Upon appeal, residence was transferred to the child’s father. Bainham notes that,

‘Judge Richard was found by the Supreme Court to have misunderstood the decision in *Re G* and was led into a number of errors. He had referred to ‘the right of the child to be brought up in the home of his or her natural parents. This, it was held, betrayed a failure on his part to concentrate on the factor of overwhelming – indeed, paramount – importance which is, of course, the welfare of the child.’<sup>54</sup>

The Supreme Court in *Re B* states that the lower courts in this case misinterpreted the decision in *Re G*. The lower courts in this case followed Lord Nicholls’s additions to Baroness Hale’s leading judgment, overlooking her nuanced distinction between natural and legal parenthood. Following Lord Nicholl’s remarks in *Re G*, the Court of Appeal in *Re B* opined that ‘the court should always bear in mind that, ordinarily, the rearing of a child by his biological parent could be expected to be in his best interest’.<sup>55</sup> Lord Kerr in the Supreme Court took this opportunity to reaffirm and reiterate the key issues in *Re G*, in particular, the paramountcy of the child’s welfare consideration which should not be guided by a legal presumption in favour of a natural parent<sup>56</sup>.

This indicates how the courts face difficulty and can erroneously blend natural parenthood and legal parenthood. Legal parenthood is distinct from natural parenthood and this is the issue which Baroness Hale was seemingly trying to make clear in *Re G*. Overall, *Re G* is an example of how the courts have attempted to progress legal constructions away from hetero-normative ideals. As Beresford notes, ‘natural’ [parenthood] was defined directly in terms of heterosexuality’ and thus for lesbian mothers, identification in law as a social

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<sup>54</sup> *ibid* at 395

<sup>55</sup> E. Walsh, ‘The Supreme Court: Grandparents and *Re B*’ [2010] *Family Law* at 103

<sup>56</sup> *ibid*

mother was a difficult process. Separation of the 'mother' roles offers greater legal recognition to social parenting, in alignment with social attitudes towards motherhood. However greater recognition in terms of legal status was not achieved in this case. Everett and Yeatman argue that:

*Re G* 'was a missed opportunity... [as] the effect of [Baroness Hale's] discussion of the significance of natural parenthood along with the speeches of Lord Scott and Lord Nicholls led to a revival of the natural parent presumption, albeit blanketed in the language of the child's welfare'.<sup>57</sup>

The House of Lords attempt to clarify legal motherhood ultimately reaffirms a traditional understanding of 'natural' motherhood as a woman who gives birth to a child which is at odds with the social reality of motherhood.

## 2.9 Conflicting Constructions

To summarise, the societal understanding of motherhood is clear. The meaning of motherhood is a subjective construct, open to interpretation and personal identification with the role of 'mother'. The legal understanding of motherhood is also explicitly clear. Both, however, represent conflicting positions. The boundless societal response to motherhood is in contrast to the restrictive legal approach which sometimes confines motherhood to pregnancy. Is this problematic? What is the relevance of these conflicting positions? Ultimately, why is it important that legal and social constructions of motherhood are in alignment?

Women's identity is a central feminist concern and '[c]ritiquing the formation of women's preferences and related ideas of autonomy have been recurring subjects in feminist scholarship'<sup>58</sup>. It is therefore important that women's chosen identity as mothers, or not, is acknowledged and respected in law through adequate legal regulation. Ruddick observes that '[r]epresentations of mothers have a way of becoming, for mothers, representations of themselves'.<sup>59</sup> In other words, representations of mothers and how women see themselves in this

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<sup>57</sup> n. 48 at 297

<sup>58</sup> n. 14 at 175

<sup>59</sup> S. Ruddick, 'Thinking Mothers/Conceiving Birth' in D. Bassin, M. Honey, M. M. Kaplan (eds), *Representations of Motherhood* (Yale University Press 1994) at 29

role are intrinsically linked. Representation of motherhood as interchangeable in a social context encourages women to view themselves as mothers on their own terms. Motherhood is represented by their actions and family form without restriction allowing self-identification as a mother. However, a legally restrictive representation of motherhood (which is in conflict with the social representation) may confine women to view themselves only as mothers if they adhere to the hetero-normative ideal. This undermines the importance of 'mother' roles different to gestation. Because legal rights enable women to carry out their role of mother in a social context through parental responsibility it therefore follows that the legal representation of motherhood is the prevailing viewpoint. As it is clearly problematic, the conflict between social and legal representation should be broken down to offer a united approach to motherhood. This enables women to self-identify based upon their own choices and family structures, free from prescribed legal descriptions of 'mother'.

However, to what extent is legal recognition of subjective motherhood a realistic, achievable aim? First, Jill Marshall notes that 'a woman's decision to 'accept' maternity, or at least to remain pregnant and give birth, but to refuse motherhood, is largely unexamined.'<sup>60</sup> This is because for the majority, women's experience as mothers comprises both pregnancy and mothering. Non-normative accounts of motherhood thus remain on the periphery. In addition to this, O' Donovan notes that various stories of motherhood 'range from natural instinct, to altruism or martyrdom, to self-interest, and unpicking these is difficult'.<sup>61</sup> However this is not reason enough to suggest that non-normative accounts of motherhood do not require further examination – in fact, the opposite is true. Further, non-normative motherhood and its recognition in law are particularly problematic in the context of assisted reproduction where the separation of biological 'mother' roles becomes ever more apparent. This brave new world of assisted reproduction technologies highlights further areas for consideration when comparing the legal and social constructions of motherhood.

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<sup>60</sup> n. 14

<sup>61</sup> K. O'Donovan "'Real mothers" for abandoned children' (2002) (36) *Law and Society Review* 367-378 in n. 14 at 179

## 2. 10 A Brave New World: Assisted Reproduction

In 1978 the first 'test tube baby', Louise Brown, was born<sup>62</sup>. Louise was conceived via *in vitro* fertilisation, a process whereby an egg (the ovum) is fertilised with sperm outside of the womb in a controlled environment, followed by the transference of the zygote to the female womb with the intention of procuring a successful pregnancy. Louise's birth marked the beginning of a scientific revolution in the realm of assisted reproduction. The process of *in vitro* fertilisation permits women to donate their eggs to be fertilised and implanted into other women. The primary consequence of IVF in the context of motherhood is that this assisted reproduction technique can separate genetic and gestational motherhood.

The definition of motherhood presented in this chapter enables an egg donor to self-identify as a mother as she has contributed to the creation of a child, regardless of whether she wishes to engage with social mothering. However, the legal regulation of biological motherhood does not permit this. An egg donor cannot be recognised as a legal mother by virtue of s. 47 HFE Act 2008 unless she goes on to adopt the child. The egg donor is aware that she will have no parental rights or responsibilities and consents to this upon donation. Richard Collier comments that 'egg, sperm and embryo donors are not parents because the act of donation signals their clear intention not to become so.'<sup>63</sup> However, this argument is questionable. Do women who donate eggs view themselves as non-mothers because this is the construction presented in law? Robin Mackenzie maintains that social acceptability of egg donation as distinct from motherhood has hinged upon analogies made with praiseworthy altruistic and socially valued activities such as blood or organ donation and medico-surgical procedures'.<sup>64</sup> As a result of this, the legal starting points for gestational and biological mothers are very different.

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<sup>62</sup> BBC News, On This Day, 1978: 'First 'test tube baby' born

[http://news.bbc.co.uk/onthisday/hi/dates/stories/july/25/newsid\\_2499000/2499411.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/july/25/newsid_2499000/2499411.stm)

<sup>63</sup> R. Collier, S. Sheldon, *Fragmenting Fatherhood: A Socio-Legal Study* (Hart Publishing: 2008) 98

<sup>64</sup> R. Mackenzie, 'Beyond genetic and gestational dualities: surrogacy arrangements, legal parenthood and choice in family formation' in K. Horsey, H. Biggs (eds) *Human Fertilisation and Embryology: Reproducing Regulation* (Routledge Cavendish, 2007) 189

The different legal starting for gestational and donating biological mothers is not problematic when the egg donor does not choose to engage with the upbringing of the child and this is an autonomous decision. However, when there is conflict between the genetic mother and the social mother, or even the genetic, gestational and social mother a legal framework which treats these differently is extremely problematic. This is particularly the case for lesbian couples where one woman will contribute an egg to be carried by her partner. Both women therefore carry out two separate 'mother' roles.

Conflict between these various mother roles may arise most obviously in the context of surrogacy. Surrogacy arrangements may take one of two forms. Partial surrogacy involves the ova of the surrogate mother, and the sperm of either the commissioning male or a donor. The surrogate's egg is fertilised either through sexual intercourse or artificial insemination. The surrogate therefore is the gestational and genetic mother and is recognised also as the legal mother. Full surrogacy is the process whereby IVF is used to implant the egg and sperm of either a commissioning couple, or donors in to a surrogate. The surrogate will therefore have no biological connection with the child that she is carrying. Social mothering in the context of surrogacy is most commonly carried out by the intending mother who has commissioned the birth who may or not also be the biological mother. The practice of surrogacy most obviously demonstrates the various 'mother' roles and how they are constructed in law and society. Surrogacy explicitly utilises the various 'mother' roles carried out by several different women with the overall aim being to enable one woman to become a mother in a social capacity. Surrogacy is an example of non-normative motherhood and is the antithesis to the traditional hetero-normative construction of motherhood as a gestational enterprise which is associated with maternal care. Surrogacy is a long-standing method of assisted reproduction, albeit rare<sup>65</sup>. It is therefore important that non-normative forms of motherhood are also recognised in law and are constructed in light of social reality.

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<sup>65</sup> Susan Fischer and Irene Gillman note that 'the practice of using a surrogate mother dates back to the time of the Old Testament'. S. Fischer, I. Gillman, 'Surrogate Motherhood: Attachment, Attitudes and Social Support' (1991) (54) *Psychiatry* 13

## 2. 11 Recognising Non-Normative Families

Martha McMahon observes that '[c]ultural meanings of motherhood...provide guiding metaphors not simply for the construction of identity but for the representation of idealized social bonds. Motherhood symbolizes connectedness.'<sup>66</sup> McMahon's depiction of motherhood transcends the maternal-foetal bond and instead focuses on connection. Motherhood centres upon connection between carer and child which may take place as part of the gestation process or post-birth through the act of mothering. Motherhood should not be essentialised into two different categories of 'biology' and 'social' motherhood. Motherhood currently regulated in terms of gestation and mothering as a continuous experience for women as is apparent in statute and common law, or as a social process whereby parental responsibility is awarded and not full legal title. Although motherhood can be transferred, the transferral process is constructed in such a way that the non-normative mother is only recognised when the legal rights and recognition of another woman as a mother have been extinguished<sup>67</sup>. Why must the law choose between types of mother? It follows that due to a desire to choose one legal mother, and one only, the current legal understanding is in great tension with social motherhood. In its attempt to restrict the family form, the current legal understanding attempts to inaccurately and ineffectively regulate mothers. Legal motherhood in the first instance is not determined by relationships with other women or men and in the instance of assisted reproduction engaging with others is crucial to the creation of a child. This is particularly relevant in the context of surrogacy. Social motherhood is determined by the choices of women. This choice should be respected in law. In the event of surrogacy, parental responsibility is afforded to surrogates in the first instance, although their initial engagement with surrogacy indicates that they wish for the act of social mothering to be carried out by another person. Surrogacy as a practice requires far greater legal and social attention due to its potential to

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<sup>66</sup> M. McMahon, *Engendering Motherhood – Identity and Self-Transformation in Women's Lives* (Guilford Press: 1995) 276

<sup>67</sup> Full legal title (not parental responsibility) can only be awarded to women who have no gestational relationship with a child when the legal rights and responsibilities of the gestational mother are extinguished. Adoption and parental orders are used to transfer legal title from the gestational mother to the social mother. The gestational mother therefore will no longer have any right to act in a legal capacity as the child's carer.

challenge traditional constructions of motherhood. The legal regulation of surrogacy is pivotal when assessing the extent to which the law reflects the social reality of motherhood. Surrogacy can therefore be used as a lens to rethink the legal recognition of mothers and mothering.

## 2.12 Conclusion

Hetero-normative ideals continue to dominate the legal regulation of motherhood due to prevalent discourse surrounding biology. Although societal understandings of motherhood are inclusive of non-normative mothers, the legal regulation of motherhood has a long way to go. The misinterpretation of the decision in *Re G* by the Court of Appeal signifies current legal difficulty to separate the various mother roles and assess them on their own merit. McMahon recognises that ‘the politics of motherhood extends beyond issues of reproductive choice’<sup>68</sup> but the politics of motherhood should now be focussed explicitly upon the autonomy of women.

The hetero-normative legal response to motherhood overshadows reproductive choice, and attempts to impose its own definition of whom and what a mother should be and do. The legal response to motherhood fails to effectively understand the differentiation between being a mother and the act of mothering. Assisted reproduction practices such as IVF or surrogacy theoretically provide women with greater choice as potential mothers, however the ‘politics of motherhood’ (the legal response) continues to hinder the reproductive experiences of women.

A family developed through assisted reproduction, or involving adoption or step-mothering *is* different to the traditional family unit consisting of one mother and one father. The law should appreciate this difference and attempt to facilitate the changing family form to reflect social reality. The legal approach to motherhood should utilise the experiences of women as mothers as its starting point when regulating motherhood in order to reflect the true social reality and diversity of motherhood. This is particularly the case when non-normative

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<sup>68</sup> n. 66 at 7

mothers (such as surrogacy mothers) subvert idealised stereotypes regarding maternity in order to prevent tension between law and society. The law should work upwards from the experiences of women in order to provide an accurate regulatory system to regulate motherhood. If social reality is not reflected in law, hetero-normative ideals reinforce gendered constructions of maternity impacting upon women's ability to freely engage with motherhood.

Surrogacy and its regulation which facilitates the transferral of mother status highlights an area of law which can be assessed with a view to exposing the hetero-normative behaviour of law when faced with non-normative examples of motherhood. Vanessa Munro argues that:

To attend to context, in the way that the feminist ethical project demands, we must abandon the pursuit of polarised premises and commence a search for mechanisms that afford the greatest amount of respect and credibility to the wishes expressed by individual women.<sup>69</sup>

Examination of the legal regulation of surrogacy will help to expose and abandon hetero-normative ideals which balance social motherhood against the importance of biological motherhood. Motherhood achieved through surrogacy rejects the polarised premises of traditional conceptualisations and offers a way forward to reconsider legal motherhood.

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<sup>69</sup> V. Munro, 'Surrogacy and the construction of the maternal-foetal relationship: the feminist dilemma examined' (2001) (7)(1) *Res Publica* at 3



### **3. THE LEGAL REGULATION OF SURROGACY**

#### **3.1 Introduction**

The social construction of motherhood details a broad understanding of who a mother is and what she does. This wide-ranging construction of motherhood should be reflected in law. In order to assess whether the multi-faceted nature of motherhood is reflected in law, surrogacy and its regulation will be used as lens through which to outline the legal response to motherhood. Surrogacy is used as it most obviously distinguishes the various ‘mother’ roles outlined in Chapter One. Further, the voluntary organisation Surrogacy UK reports that there have been over 700 successful births since 1985 and is a popular reproductive method within the ever-growing realm of assisted reproduction.<sup>1</sup> The social relevance of surrogacy is therefore important in assessing the relationship between law and motherhood.

This chapter will outline the feminist and societal response to surrogacy to provide a contextual background to current legal regulation. It will then specifically analyse and critique the acquisition and transfer of legal motherhood within the context of surrogacy. Utilising statutory provisions and case law, it will emphasise current issues and problems with surrogacy regulation. It will argue that current tensions between law and society are a consequence of a hetero-normative response to motherhood. This hetero-normative response creates legal obstacles and challenges for non-normative mothers who wish to assume or relinquish motherhood. This typically involves those who are aided by assisted reproduction methods, and more specifically in the context of surrogacy. It will be argued that the current legal position reflects a fixed, specific hetero-normative understanding of mothers and as a result of this does not reflect the social reality of motherhood specifically in the context of surrogacy. The legal construction of mothers represents an idealised, essentialist understanding: mothers are women who are driven by their innate maternal instinct to care and nurture the offspring that they have given birth to. As a result of this, the various ‘mother’ roles are not reflected in law and reform is required. This chapter will conclude that a holistic

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<sup>1</sup> Surrogacy UK <<http://www.surrogacyuk.org/Index/html>> accessed 01 January 2011

model of motherhood should be adopted within surrogacy law and this can only be achieved if surrogacy law radically reformed.

### 3.2 Early Societal Response to Surrogacy

Surrogacy as a practice is neither new nor radical. Susan Fischer and Irene Gillman comment that '[t]he practice of using a surrogate biological mother dates back to the time of the Old Testament (*Genesis* 16:2).'<sup>2</sup> However, it was not until the 1980s that surrogacy was firmly placed upon the feminist and political agenda due to development of IVF and new reproductive technologies. At a time dominated by radical feminist thinking, feminist theories regarding surrogacy began to develop. Radical thinkers such as Catharine Mackinnon<sup>3</sup>, Andrea Dworkin<sup>4</sup> and Carol Pateman<sup>5</sup> perceived surrogacy as male control over the reproductive freedoms of women, likening the practice to "baby-farming" and exploiting women as "reproductive vessels". Pateman argued that surrogacy is used by men to provide their wives with 'the gift'<sup>6</sup> of a child. This argument suggests that men effectively use surrogacy as a means to an end, the end being to satisfy the desire of another woman to have a child. The male is perceived as the central actor in this potentially exploitative environment. She compares surrogacy and prostitution, and argues that like prostitution, surrogacy is the use of a woman's body 'contracted out for use by a man who fills it with his seed'.<sup>7</sup> Lorraine Harding comments that comparisons between surrogacy and prostitution are easily identified: 'Both appear to be an arrangement in which a woman "sells her body" in a way deemed more intimate and somehow more problematic than, say, the selling of muscle power as labour'.<sup>8</sup> Early comparisons between surrogacy and prostitution highlight strong feminist concerns over surrogacy as a practice that could potentially exploit women's bodies in a reproductive context. As well as

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<sup>2</sup> S. Fischer, I. Gillman, 'Surrogate Motherhood: Attachment, Attitudes and Social Support' (1991) (54) *Psychiatry* at 13

<sup>3</sup> C. A. Mackinnon, 'Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence' (1983) in K. Bartlett, R. Kennedy (eds) *Feminist Legal Theory Readings in Law and Gender* (Westview Press 1991) at 186

<sup>4</sup> A. Dworkin, *Right Wing Women: The Politics of Domesticated Females* (The Women's Press 1983)

<sup>5</sup> C. Pateman, *The Sexual Contract* (Polity Press, 1988)

<sup>6</sup> *ibid* at 211

<sup>7</sup> n. 5 at 214

<sup>8</sup> L. Harding, 'The Debate on Surrogate Motherhood: the current situation, some arguments and issues; questions facing law and policy' (1987) (9) *Journal of Social Welfare* at 59

claims that surrogacy is an example of patriarchal oppression, Judith Bourne and Caroline Derry argue that the practice of surrogacy exerts control over women's bodies. The authors argue a 'surrogate mother will be affected throughout her body' due to the common effects of pregnancy such as back pain and will also be subject to social scrutiny if she does not give up social habits such as smoking'.<sup>9</sup> Surrogacy is therefore conceived by some feminists as a form of control, however the affects of pregnancy suffered by a surrogate are no different to any other woman's choice to become pregnant.

Despite a largely negative feminist reaction, there are 'other feminist writers who champion choice and who maintain that surrogacy could be used to transform gender relations by potentially empowering women to use their reproductive capacity as they chose'<sup>10</sup>. This discourse of 'choice' has been prevalent within the surrogacy debate from the outset and is relied upon by those who view surrogacy as an expression of reproductive autonomy.

Broader early societal response to surrogacy was largely negative in alignment with radical feminist views which claimed surrogacy was an expression of commercial exploitation where payment is involved. Lorraine Harding comments that press reports in the 1970s and early 1980s detailing incidents of surrogacy were met with 'public debate and concern, even outrage',<sup>11</sup> particularly when the surrogacy arrangement was commercial. Public outrage was fuelled most aggressively by the case of Kim Cotton, otherwise known as *Re C*<sup>12</sup>. The case of Kim Cotton concerned a surrogacy arrangement between an American couple and a British surrogate. Kim Cotton was paid in her role as surrogate to the couple and this was exposed via the media<sup>13</sup>. This led to the portrayal of the practice of surrogacy as a transatlantic 'baby-selling business' which required political and legal attention.

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<sup>9</sup> J. Bourne, C. Derry, *Women and Law* (Old Bailey Press 2005) at 71

<sup>10</sup> R. Cook, S. Day Sclater, F. Kaganas (eds), *Surrogate Motherhood: International Perspectives* (Hart 2003) at 9

<sup>11</sup> n. 8 at 38

<sup>12</sup> *Re C (A Minor) (Wardship: Surrogacy)* [1985] *Family Law Review* 846

<sup>13</sup> BBC News, On This Day, 'Inquiry over 'baby-for-cash' deal' (1985)

[http://news.bbc.co.uk/onthisday/hi/dates/stories/january/4/newsid\\_2495000/2495857.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/january/4/newsid_2495000/2495857.stm)

In light of the Kim Cotton case, the lack of legal regulation for commercial surrogacy arrangements in particular was exposed. Public outcry in response to the Cotton case was met with the commission of The Warnock Committee to examine legal and ethical issues presented by the scientific development of new reproductive technologies, primarily *in vitro* fertilisation which could be used within full surrogacy arrangements. As a result of the development of IVF and its use within surrogacy, as well as heightened social concern about surrogacy as disruptive practice, it was now deemed to be a cause for 'public concern'<sup>14</sup> which required the scrutiny of the Warnock Committee.

### 3.3 The Warnock Report

Blyth remarks that '[t]he appointment of the Warnock Committee...provided the first opportunity for the formal acknowledgement of surrogacy as a major social issue in Britain.'<sup>15</sup> The Warnock Committee's response to the regulation of surrogacy would therefore be instrumental in shaping social and legal conceptualisation of surrogacy. Referring to research carried out by Haines, Blyth comments that 'members held three perspectives on surrogacy'<sup>16</sup>. First, that surrogacy should be criminalised; second, that it should be left to professionals or; third, surrogacy should be removed from the exclusive control of professionals and subjected to similar regulatory systems as were being proposed for other fertility treatments.<sup>17</sup> However, the majority viewpoint was that surrogacy was inherently unacceptable. As a result of this, the Warnock Report recommended that surrogacy arrangements should not be enforceable by law. It was argued that, [t]here is little doubt that the Courts would treat most, if not all, surrogacy arrangements as contrary to public policy and therefore unenforceable.<sup>18</sup> Further, the committee was of the view that all commercial surrogacy arrangements should be prohibited in order to prevent the exploitation of surrogate mothers and the commodification of children. It was believed that

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<sup>14</sup> The Warnock Report, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cmnd. 9314) (London: HMSO, 1984) 6

<sup>15</sup> E. Blyth, 'Section 30: The acceptable face of surrogacy?' (1993) (15) *Journal of Social Welfare and Family Law* at 252

<sup>16</sup> E. Haines, *Family Connections: the Management of Biological Origins in the New Reproductive Technologies* (1990) University of Newcastle (PhD thesis) in *ibid* at 252

<sup>17</sup> n. 15 at 252

<sup>18</sup> n. 14 at para 8.5, 43

'baby-selling' would inevitably follow if commercial surrogacy contracts were to be legally enforceable. It was recommended that the involvement of criminal law would act as a deterrent to those who might become involved in commercial surrogacy as a business enterprise.<sup>19</sup> It was proposed that criminal sanctions should be placed upon those who attempt to advertise or promote surrogacy as a commercial enterprise. However, the Warnock Committee were not entirely unanimous in their response to surrogacy. Committee members raised dissenting concerns that the committee's recommendations would leave future arrangements 'unsupported by medical and counselling services.'<sup>20</sup> In sum, surrogacy was constructed in the Warnock Report as 'morally and socially unacceptable'<sup>21</sup> and was not legitimised through legislation.

Additionally, the Warnock Report's consideration of surrogacy was tangential to a broad examination of human embryology. It is therefore unfortunate that the Warnock Report's response to surrogacy was to become the foundation of current legal regulation. The Warnock Report's viewpoint portraying surrogacy as inherently unacceptable within society was the impetus behind subsequent legislation which responds to surrogacy. However, as Margaret Brazier notes the Warnock Committee's 'recommendations on surrogacy were only partially accepted by government and then hastily and ham-fistedly hurried through Parliament'<sup>22</sup>. For example, the Warnock Report recommended that '[i]t be provided by statute that all surrogacy agreements are illegal contracts and are therefore unenforceable in the courts.'<sup>23</sup> Whilst surrogacy arrangements are not currently enforceable in law, surrogacy arrangements are not illegal indicating a compromise position between the Warnock recommendations and current legal provision.

### **3.4 Legal Background**

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<sup>19</sup> *ibid* at 47

<sup>20</sup> *ibid* para 4, 88

<sup>21</sup> J. A. Priest, 'Assisted Reproduction – Developments in England' (1988) *International & Comparative Law Quarterly* at 535

<sup>22</sup> M. Brazier, 'Regulating the Reproduction Business' (1999) (7) *Medical Law Review* at 169

<sup>23</sup> n. 14, Recommendation 59 at 86

Several years later, the Surrogacy Arrangements Act (SAA) 1985 was enacted. The objective of the SAA 1985 enacted as a result of the Warnock Report and public outcry to the Kim Cotton case, was to prohibit the practice of surrogacy from becoming a commercial enterprise. This is effectively summarised by Jacqueline Priest: '[t]he government's explicit intention was to deal swiftly with what was perceived to be the most repugnant manifestation of surrogacy'<sup>24</sup> – that is, commercial surrogacy. The SAA 1985 explicitly prohibits and imposes a blanket ban on commercial surrogacy. Section 2 of the Act states that no person shall on a commercial basis initiate or take part in any negotiations regarding the surrogacy arrangement (s. 2 (1)(a)), offer or agree to negotiate (s. 2 (1)(b)), or compile any information with a view to negotiating a surrogacy arrangement (s. 2 (1)(c)). However, section 2 (2) states that no criminal offence shall be imposed on either the surrogate or the commissioning party should they enter into a commercial agreement in order to prevent association between the birth of a child and criminality. The involvement of money within agreements is not entirely prohibited. Reasonable expenses paid to the surrogate are permitted in order to reimburse any loss the surrogate may have incurred, for example, loss of earnings. The central purpose of the Act was therefore to prohibit the possibility of the commodification of childbirth. However, while surrogacy arrangements may be lawful, they are not contractually enforceable. As Shaun Pattinson notes, '[t]he commissioning couple cannot sue for damages or performance, and the surrogate cannot sue for payment. This legal vulnerability is intended to discourage surrogacy arrangements,'<sup>25</sup> as desired by the Warnock Committee.

The SAA 1985 was effectively a symbolic piece of legislation, responding to social discomfort towards 'baby-selling' as evidenced by the feminist response to surrogacy as outlined earlier. The legal parameters of the Act do not extend beyond commercial surrogacy and therefore altruistic arrangements remain unregulated. In 1990, the SAA was incorporated into the Human Fertilisation and Embryology Act (the HFE Act) 1990. The HFE Act was the first regulatory instrument to govern human fertilisation and embryology. The purpose of the Act is to control and monitor reproductive research and clinical practices. As

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<sup>24</sup> n. 21 at 545

<sup>25</sup> S. Pattinson, *Medical Law and Ethics* (2<sup>nd</sup> ed) (Sweet & Maxwell 2009) at 300

surrogacy arrangements may utilise *in vitro* fertilisation or artificial insemination requiring a sperm donor, the practice is within the jurisdiction of the Act. However, a surrogacy agreement arranged within the private domain using the surrogate's egg fertilised *in vivo* without the aid of medical assistance remains unregulated. Ultimately, practice of surrogacy remains largely unregulated, despite an increase in popularity.<sup>26</sup> The decision to allow surrogacy to remain unregulated signifies the discouragement of a complex peripheral reproductive method in favour of the hetero-normative family structure. Surrogacy is thus regulated indirectly in the context of assisted reproductive medicine. If the surrogacy arrangement does not incorporate medical treatment such as IVF, the arrangement is wholly unregulated.

Unlike the SAA 1985, the HFE Act 1990 (as amended by the HFE Act 2008) defines legal parentage and how parentage may be transferred when assisted reproductive methods are used. In 2008, the HFE Act 1990 was subject to an extensive review process, because 'it was never expected that the Act would remain unchanged in this area of fast-moving science'<sup>27</sup> and 'was faced with the challenges of trying to keep up with the fast past of change...also in respect of society's expectations and demands.'<sup>28</sup> Lord Darzi presenting the HFE Bill 2007 before the House of Lords stated that the 'aim in undertaking this review was to ensure that the law remained effective and fit for purpose in the 21<sup>st</sup> century.'<sup>29</sup> The practice of surrogacy, however, received very little attention. As a result of the 2008 reform, same-sex couples can now recognised in law as the legal parents of a child both in the context of IVF/donor insemination used by lesbian partnerships and surrogacy used by gay men to become biological parents. However, in relation to default legal status as a mother, the legal framework remains unchanged. The

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<sup>26</sup> Robin Mackenzie, ('Beyond genetic and gestational dualities: Surrogacy arrangements, legal parenthood and choice in family formation, in K. Horsey, H. Biggs (eds) *Human Fertilisation and Embryology: Reproducing Regulation* (Routledge-Cavendish, 2007) 190) argues that demand for surrogacy will 'inevitably rise' due to modern factors such as environmentally induced falls in sperm counts, the decline in fertility and gamete quality after the age of thirty five, tendency towards delayed parenthood, infertility due to sexually transmitted diseases, the wish of the socially infertile to become parents such as gay and lesbian couples, a cultural rejection of childlessness and a decreasing number of children, especially babies put up for adoption.

<sup>27</sup> Department of Health, *Review of the Human Fertilisation and Embryology Act: a Public Consultation* (2005)

<sup>28</sup> D. Birk, *Human Fertilisation and Embryology Act: The New Law* (Family Law 2009) at 4

<sup>29</sup> HL Deb 19 November 2007 Column 664

gestational mother as outlined in Chapter One is the legal mother<sup>30</sup>. No other mother is recognised as a default legal position, although parentage can be transferred (as will be discussed below). This legal framework therefore only offers legal protection to surrogates who receive medical treatment and their associated commissioning party. This is primarily because the surrogate is viewed as a patient whose interests should be protected throughout the course of treatment. As the surrogate is receiving medical treatment, there is a clinical obligation to protect her interests. This is evidenced by s. 27 of the HFEA Act 1990 which states that the legal mother of the child is the gestational mother. Excluding reasons for this based upon constructions of motherhood, the legal status of the surrogate is protected in her role as a patient.

The legal status of fathers however is not so clear in the context of surrogacy. The surrogate's husband does not typically contribute to the existence of the child, either biologically or socially, however - by virtue of marriage - the surrogate's husband is the legal father of the child born through surrogacy.<sup>31</sup> If the surrogate is married, the legal status of the commissioning male cannot be recognised even though he may be the biological father. When the surrogate is not married, or her husband does not provide his consent, section 36 of the HFE Act applies 'where no man is the father by virtue of s. 35 (i.e. there is no consenting husband) and no woman is the other parent by virtue of s. 42 (i.e. there is no consenting civil partner).'<sup>32</sup> Under the agreed fatherhood provisions detailed in s. 37 of the HFE Act 2008, where treatment is provided to a woman, a man may be treated as a legal father providing that both consent to this in writing.

The HFE Act 1990 (as amended by the 2008 Act) requires any desired treatment such as IVF as part of the surrogacy arrangement to be carried out by a licensed fertility clinic. If a donor or the commissioning mother's egg is used, IVF treatment must be carried out by a licensed clinic which is governed by the Human Fertilisation and Embryology Authority<sup>33</sup> and its Code of Practice<sup>34</sup>. It is

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<sup>30</sup> s. 27 HFE Act 1990 as amended by the 2008 Act

<sup>31</sup> Section 35-37 of the HFE Act 2008 outlines the fatherhood provisions. Section 35 states that the husband of the surrogate is the legal father, but only if he willingly consents to her treatment.

<sup>32</sup> n. 25 at 305

<sup>33</sup> See <<http://www.hfea.gov.uk>> regarding the Human Fertilisation and Embryology Authority, accessed 01 January 2011



important to note however that current government plans to abolish the HFE Authority are underway. At the time of writing, it is suggested that the HFE Authority may be consumed by another regulatory body however this remains uncertain and does not require further discussion here<sup>35</sup>. A licensed fertility clinic may provide treatment for a number of purposes in the context of surrogacy. Treatment may be provided using gametes, except when it is partner-donated sperm that has been neither processed nor stored (s. 4 (1) (b) HFE Act 2008) to allow the process of *in vitro* fertilisation. Robin Mackenzie succinctly summarizes the criteria which must be satisfied in order for treatment to be carried:

‘Where surrogacy involves IVF, it is subject under the Human Fertilisation and Embryology Authority Code of Practice to quality control provisions over the sperm used, as well as to criteria for treatment and supervision by the clinic of hospital’s independent ethics committee, and is provided only after the welfare principle of the child-to-be, and the children of the gestational mother and those commissioning the pregnancy has been taken into account’.<sup>36</sup>

Treatment will only commence when significant consideration has been given to various factors. For example, the welfare principle must be satisfied prior to the award of a treatment licence. The welfare principle is effectively a *best interests* test and seeks to determine whether it would be in the best interests of the child to be cared for by those applying for treatment. The HFEA’s Code of Practice provides guidance on how this test must applied in order to assess whether there is ‘a risk of significant harm or neglect to any child’ who is not yet born, or already in existence and in the care of the surrogate or the commissioning party.<sup>37</sup> Factors to be taken into consideration to highlight any significant risk of harm include previous criminal convictions, mental or physical conditions, and a commitment to wellbeing and health of the child’.<sup>38</sup> Further, section 13(5) HFE Act

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<sup>34</sup> HFEA, *Code of Practice* 8<sup>th</sup> ed <http://www.hfea.gov.uk/3401.html>

<sup>35</sup> See, Public Administration Committee - Fifth Report Smaller Government: Shrinking the Quango State (December 2010); V. Raper, ‘Leaked letter ‘proves’ fertility watchdog faces last bark’ *BioNews* (September 2010) <[http://www.bionews.org.uk/page\\_71303.asp](http://www.bionews.org.uk/page_71303.asp)> accessed 01 January 2011

<sup>36</sup> n. 26 at 187-88

<sup>37</sup> n. 34 ‘Guidance Notes, The Welfare Principle’ para 8.3 <[http://www.hfea.gov.uk/docs/complete\\_CoP8.pdf](http://www.hfea.gov.uk/docs/complete_CoP8.pdf)> accessed 01 January 2011

<sup>38</sup> *ibid* at para 8.10, 8.11

1990 (as amended by s. 14 (2) (b) HFE Act 2008) states that the 'need for supportive parenting' must also be taken in to account. This amendment, replacing the consideration of 'the need for a father', broadens the scope of the Act to be inclusive of same-sex couples and their desire to have a family. John Sentamu argued that the government placed the 'right to be a parent over the welfare of the child'<sup>39</sup> through its amendment of the welfare principle. However, a move away from the hetero-normative family structure represents a greater understanding of the welfare of the child and reflects progressive societal attitudes towards non-normative families.

On the other hand, the welfare principle and how the welfare of the child is assessed is in itself not without criticism. Emily Jackson's work reflects critically upon the welfare principle, raising questions such as: 'How could it be possible to base a decision upon whether to try to bring a child into the world upon assessment of *that child's* best interests?'<sup>40</sup> Jackson's argument implies that the welfare principle is nonsensical, as we cannot know what would be in the best interests of that child as it simply does not exist. In order to determine the best interests of a non-existent child, presumptive moral judgements must be made with regard to what *would* be in the best interests of the child should that child exist? Further, Jackson adds: 'Infertility clinicians do not receive training in addressing future parenting ability and nor will they have access to the sort of detailed information that might be necessary to make such a complicated assessment'<sup>41</sup> emphasising the disingenuity of the welfare test. It is not contested here that the welfare of a child should be a primary consideration when awarding a treatment licence, however an improved welfare test is required if the test to function adequately instead of acting as an arbitrary mechanism used discriminately against those who wish to cannot carry out reproductive decisions within the private sphere. Jackson argues,

'[m]onitoring these exceptional personal choices in order to identify ill-judged or improper conception decisions would be unreservedly

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<sup>39</sup> A. Blackburn-Starza, 'Lords criticise proposals to remove the 'need for a father' *BioNews* (November, 2007) <[http://www.bionews.org.uk/page\\_13244.asp](http://www.bionews.org.uk/page_13244.asp)> accessed 01 January 2011

<sup>40</sup> E. Jackson, 'Rethinking the preconception welfare principle' in K. Horsey, H. Biggs, *Human Fertilisation and Embryology: Reproducing Regulation* (Routledge-Cavendish: 2007) 49

<sup>41</sup> n. 40 at 53

condemned as an unacceptably intrusive abuse of state power if the welfare principle was applied to those couples who were able to conceive without the aid of reproductive treatment'.<sup>42</sup>

In relation to surrogacy, this argument extends further. The best interests test is applied only to those who seek medical treatment as part of the agreement. Arrangements which do not involve medical intervention are unregulated and are not placed under the scrutiny of the test. This suggests that there is now a two-tier system of regulation. Uncomfortable social response to surrogacy led to legislation which chose not to recognise surrogacy. The legislative response to surrogacy aimed to discourage this process, however surrogacy legislation could not be avoided in the context of medical treatment. Moreover, this inconsistency of legal regulation renders the welfare principle ineffective in its aim to protect the best interests of the child as not all arrangements are monitored. The welfare principle requires further consideration. Greater training should be offered to clinicians and the application of the best interests tests need to be re-examined. At present, the best interests test monitors non-normative families who seek medical reproductive treatment. Those who do not require medical treatment and make decisions within the private sphere akin to the hetero-normative family structure remain unregulated, highlighting an adequate yet unclear legal framework. As a result of this, the HFE Act 1990 has undergone considerable scrutiny, both in 1998 and more recently in 2008. The Brazier Report in 1998, similar to the Warnock Report in 1984 will now be considered to assess the impact of the SAA 1985 and HFE Act 1990 and the criticisms received.

### **3.5 The Brazier Report**

The Brazier Committee sought to examine the existing law on surrogacy, questioning whether the law protected the best interests of the child born as part of an agreement, and whether the interests of the surrogate, her family and those of the commissioning couple were protected<sup>43</sup>. Emily Jackson observes that '[w]hile undoubtedly less hostile to surrogacy than the Warnock Committee, the

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<sup>42</sup> *ibid* at 48

<sup>43</sup> M. Brazier, A. Campbell, S. Golombok, *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation* (Cmd. 4068) (1998)

Brazier Committee were nevertheless again concerned that regulation should not appear to either endorse or encourage the practice of surrogacy<sup>44</sup>. The Brazier Report made several recommendations with regard to a new Surrogacy Act, some of which were to limit the payments to surrogate mothers to only 'genuine expenses, and to provide a new Code of Practice for surrogacy arrangements<sup>45</sup>. Michael Freeman argues that, '[t]he Report fails to appreciate that withdrawing remuneration from surrogates will only drive potential surrogates into an invisible and socially uncontrolled world where the regulators will be more like pimps than adoption agencies'<sup>46</sup>. At the time of the Brazier Report, the legal position on surrogacy is clear. Commercial surrogacy is strictly prohibited and as evidenced by Freeman's commentary, continues to be an area of continual contention and debate. Altruistic surrogacy is, and should remain unregulated unless the surrogacy arrangement involves medical assisted reproduction which is regulated by the HFE Act 1990. The Brazier Report clarifies this position, noting that altruistic surrogacy is the only form of acceptable surrogacy and regulation is not required unless assisted reproductive methods are involved. Altruistic surrogacy presently guides current regulation, in particular, the transferral of motherhood from the surrogate to the intending mother. The transferral of motherhood in surrogacy law will now be examined in order to assess whether social and legal constructions of motherhood are in harmony or conflict.

### **3.6 The Transferral of Motherhood**

The altruistic model of surrogacy presented in law can be seen most obviously through assessment of the parenthood provisions which outline who can be recognised as a legal mother and father. Prior to the enactment of the HFE Act 1990, adoption was the primary route by which the commissioning couple could obtain legal parenthood of the child, transferring legal status from the gestational mother to the intending social mother. However, surrogacy is different to adoption in many ways. Surrogacy is pre-emptive as the birth is commissioned on the basis that the gestational mother will transfer her legal rights and responsibilities from the outset. Additionally, at least one member of the

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<sup>44</sup>E. Jackson *Medical Law: Text, Cases, and Materials* (Oxford University Press, 2006) at 873

<sup>45</sup>n. 43 at 58-61

<sup>46</sup>M. Freeman, 'Does Surrogacy Have A Future After Brazier?' (1999) 7 *Medical Law Review* at 10

commissioning party will also usually have a biological relationship with the child. In response to this, parental orders, regulated by section 30 of the HFE Act 1990 (as amended by section 54 of the HFE Act 2008) offer an alternative route. Gamble and Ghevaert observe that essentially '[a] parental order acts like an adoption order, extinguishing the parental responsibility of the surrogate parents and conferring full legal parenthood on the commissioning parents'.<sup>47</sup> A parental order permits re-registration of the child's birth and is only awarded if a series of conditions are satisfied. Under the HFE Act 2008 amendments, section 54 outlines how the commissioning party may acquire legal status. First, the provision states that an application may be made by two people for a parental order if:

- a) the child has been carried by a woman who is not one of the applicants, as a result of an embryo or sperm and eggs being placed in her or her artificial insemination (s. 54 (1)(a))
- b) the gametes of at least one of the applicants were used to bring about the creation of the embryo (s. 54(1)(b), and
- c) the conditions in subsections (2) to (8) are satisfied.

These conditions state that the applicants must either be husband and wife (s. 54 (2) (a)), or civil partners (s. 54(2) (b)) or must be living as partners in an enduring family relationship (s. 54) (2) (c))<sup>48</sup>. Further, the applicants must apply for a parental order within 6 months of the child's birth (s. 54 (3)), the child's home must be with the applicants (s. 54 (4)(a)), and at least one of the applicants must be domiciled in the United Kingdom, Channel Islands or Isle of Man (s. 54(4)(b)).

The court must also be satisfied that both the woman who carried the child and any other person who is a legal parent of the child 'have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order' (section 54(6)(a)(b)). However, section 54(7) states that if the agreement to the order is given by the gestational female less than six weeks after the child's birth, the agreement is ineffective. This period of six weeks is presumably a

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<sup>47</sup> N. Gamble, L. Ghevaert, '*Re X and Y (Foreign Surrogacy): 'A Trek Through a Thorn Forest'* [2009] *Family Law* at 241

<sup>48</sup> It is important to note that prior to April 2010, same-sex couples and unmarried couples were not eligible to apply for a parental order under the HFEA Act 1990.

'cooling off' period which provides the surrogate with sufficient time to ensure that she wishes to relinquish her parental rights and responsibilities. However, in the majority of surrogacy arrangements the surrogate's intention to relinquish her parental rights is demonstrated prior to conception. It therefore appears nonsensical to impose this condition and undermines the choices of the surrogate to engage with gestational motherhood only. In keeping with the altruistic model of surrogacy represented by the SAA 1985, the parental order provisions are clearly developed the notion that the surrogate is fulfilling the role of gestational mother as a 'gift'. Parental orders allow her time to renege on the agreement without recognising her original intentions to relinquish motherhood. This is an example of legal hetero-normative tendencies which prescribe that gestational motherhood is synonymous with social motherhood although social constructions of motherhood reject this.

Further, section 54(8) holds that the court must be satisfied that no money or benefit (excluding reasonable expenses incurred) has been given or received by the applicants for or in consideration of the making of the order (s. 54(8)(a)), any agreement required by subsection (6) (s. 54(8)(b)), the handing over of the child to the applicants (s. 54(8)(c)), or the making of arrangements with the view to the making of the order, unless authorised by the court (s. 54(8)(d)). Adoption and parental orders transfer legal parentage when the surrogacy arrangement is not contested. However, when the parental order conditions are not satisfied or the agreement is contested, the transferral of legal parenthood is far more problematic. Section 54(8) is relevant here as the majority of cases which come before the courts concern parental orders and payments made to surrogates. If the commissioning party do not meet the conditions of the parental order process, their only route to legal parenthood is adoption even if a biological relationship between parent and child is present. Further, if payment has been made adoption will be also be prevented as any payment involved in the process is prohibited. Adoption orders are typically used to transfer legal status to a parent who had no involvement in the conception of the child. Adoption as the only available route to legal parenthood even where a biological relationship is present as a result of surrogacy highlights the inadequacies of surrogacy law to effectively regulate

arrangements. If the commissioning party are not able to acquire legal title or parental responsibility either by parental order or adoption, a child may become a ward of court in which it is then within the jurisdiction of the court to determine who will be recognised as the legal mother. A child may be made a ward of court if a residence order is applied for. A residence order may be sought by virtue of section 8 of the Children Act 1989 and is 'an order settling the arrangements to be made as to the person with whom a child is to live' (s. 8 (1)). Unlike adoption and parental orders, a residence order transfers only parental responsibility and the right to make a claim to care for the child.

In summary, the statutory legal position on motherhood is limited. Beyond identifying the legal mother and the introduction of legal mechanisms to transfer legal motherhood, the legal framework in the context of surrogacy is sparse. Most obviously, the legal framework outlined so far highlights that the SAA 1985 and the HFEA 1990 and 2008 Acts do not recognise the various 'mother' roles within surrogacy equally. The role of the social mother and her intentions to become a legal mother are not included in the current legal framework although it is she who will eventually hold legal status. The common law position on the transferral of motherhood will be addressed to compare the statutory and judicial approach. Notably, case law in surrogacy concerns conflict of interest cases, typically between various mothers. An examination of the case law in the area of surrogacy will detail explicitly the legal construction of motherhood in the context of surrogacy.

### **3.7 Case Law – Contested Surrogacy Arrangements**

The majority of surrogacy arrangements are not contested.<sup>49</sup> There have only been a 'handful'<sup>50</sup> of failed surrogacy arrangements which have made their way to the courts<sup>51</sup>. However this does not suggest that unsuccessful arrangements are necessarily rare. It may be the case that where a surrogacy

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<sup>49</sup> N. Gamble, L. Ghevaert, 'Surrogacy, parenthood, and disputes: are there any lessons to be learned?' *BioNews* (14 February 2011) <[http://www.bionews.org.uk/page\\_89334.asp?dinfo=AYhRMsAEPNA6dQvDaYPgfE89](http://www.bionews.org.uk/page_89334.asp?dinfo=AYhRMsAEPNA6dQvDaYPgfE89)> accessed 15 February 2011

<sup>50</sup> *ibid*

<sup>51</sup> There are only 3 cases at present: *Re N (A Child)* [2007] EWCA Civ 1053; *W v H (Child Abduction: Surrogacy)* (No. 2)[2002] 2 FLR 252; *CW v NT* [2011] EWHC 33 (Fam)

arrangement fails, the parties involved rarely invoke the aid of the legal system, particularly when surrogacy is carried out in the home and legal parenthood is not transferred. A small number of cases means that failed arrangements are not commonly presided over but unfortunately common law developing in this area is helping to shape legal and social reaction towards surrogacy. This small number of cases has been the catalyst for hyped media attention surrounding surrogacy creating a complex relationship between law, media and reproductive decisions. In this section, each of these cases will be discussed in turn in order to assess judicial reaction to surrogacy and motherhood broadly conceived. Case law details how motherhood is transferred in practice and how the law attempts to deal with multiple mother scenarios. This section will seek to address the following questions: when there is conflict between various parties wishing to assume legal motherhood in the context of surrogacy, is there a judicial consensus on how this should be addressed? How far have the views of judges changed over time? Do judicial perspectives of surrogacy reflect the broader societal response to surrogacy?

Early examples of surrogacy case law include *Re P*<sup>52</sup>. This case concerned a surrogate who gave birth to twins as part of a surrogacy arrangement using the commissioning male's sperm. Post-birth, the surrogate's intentions changed and she no longer wished to relinquish her parental rights and responsibilities. Although the commissioning male was the biological father, he was not automatically recognised as the legal father with a right to challenge the surrogate's status as she was married. The commissioning couple sought to have the children made wards of court in order for the court to assess who should be awarded custody of the twins. It was held that the twins should remain with their gestational, biological mother - the surrogate. As with any wardship case the court held that, 'the first and paramount consideration'<sup>53</sup> was the best interests of the child. It was found to be in the children's best interest to remain with their gestational mother, 'preserving the link with the mother to whom they are bonded'<sup>54</sup>. However, as a gestational mother is the only person within the

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<sup>52</sup> (*Minors*) (*Wardship: Surrogacy* [1987] 2 F.L.R 421; [1988] F.C.R 140; [1987] Fam. Law 414

<sup>53</sup> *ibid* ~ Sir John Arnold P at 425

<sup>54</sup> *ibid* ~ Sir John Arnold P at 427



surrogacy arrangement with full legal capacity, she maintains the right to develop a bond with the child over all other ‘mother’ types post-birth. This decision establishes that it is *almost always* in the child’s best interest to remain with its gestational mother because as Mary Hibbs comments, ‘[t]o compel a woman who has carried and given birth to a child to hand over that child to the commissioning parents would be unacceptable.’<sup>55</sup>

Early examples of surrogacy case law and indeed most current examples demonstrate a presumption in favour of the surrogate if she no longer wishes to relinquish her parental rights. Cases such as *A v C*<sup>56</sup> and most recently *CW v NT*<sup>57</sup> both held that it was in the best interests of the child to remain with the surrogate, the gestational mother. Although these cases are fact-based decisions and do not set a precedent, the constructions of motherhood which they present are worrying. Gamble and Ghevaert comment that ‘[t]his decision was based on the close attachment formed between the surrogate (and biological) mother and the baby...and the risk of emotional harm if the baby was moved into the care of the intended parents in the stark manner the intended parents proposed.’<sup>58</sup> The central issue here is that if the surrogate originally intended to relinquish her rights, why was bonding between mother and daughter allowed to ensue? This attachment between mother and child clearly developed post-birth in this case and is facilitated by the current legal approach which provides the surrogate with parental responsibility and legal title as a mother as a default starting point. As a result of this, the commissioning parents begin the legal path to parenthood in a disadvantaged position. This demonstrates the hetero-normative structure of the legal regulation of surrogacy as it reveres gestational motherhood and upholds its importance much to the ignorance of the commissioning party’s involvement in the conception of the child.

Further, how the best interests of the child are determined must also be questioned. Eric Blyth argues that ‘conventional assumptions about the ‘ideal’ environment for child-rearing, based on theological doctrine and the stereotype of

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<sup>55</sup> M. Hibbs, ‘Surrogacy legislation – time for change?’ [1997] *Family Law* at 565

<sup>56</sup> [1985] F. L. R. 445

<sup>57</sup> [2011] EWHC 33 (Fam)

<sup>58</sup> n. 49

the contemporary, white, westernised middle class nuclear family, result in the denial of parental aspirations to those who do not conform to the norm.’<sup>59</sup> If the best interests of the child are influenced by idealised norms, non-normative mothers such as the intending social mother will be treated differently in law. This suggests that the way in which the best interests test is executed requires reform, rethinking and incorporating ideas surrounding the contemporary family unit. The best interests test should reflect the social reality of familial relationships.

In the case of *Re N (A Child)*<sup>60</sup> it was found that it was in the best interests of the child to reside with the commissioning party. This unusual case challenged the legal portrayal of the gestational mother role as superior to all other mother roles. The case concerned a surrogacy arrangement founded upon deception. Mrs P, the gestational mother of child N entered into a sham surrogacy arrangement with a family, the J’s. Mrs P never held any intention to part with the child conceived with the sperm of Mr SJ and wished to fulfil the social mother role. The J’s believed that they were entering into a typical surrogacy arrangement in which Mrs P would relinquish her parental rights and responsibilities. Mrs P informed the J’s that she had miscarried however they eventually became aware of the birth of N. The J’s sought to challenge the legal status of Mrs P as a mother and wished to gain responsibility as the main carers of N.

At first instance, Coleridge J awarded parental responsibility in favour of the J’s. The P family appealed against the transference of parental responsibility which the Court of Appeal unanimously dismissed. The Court of Appeal argued that the appeal in question was ‘almost impossible to advance’<sup>61</sup> and its only purpose being to ‘bring to a final conclusion the contest between rival options.’<sup>62</sup> The case was heard and decided upon with great speed in order to settle the future of N, protecting his best interests.

In his leading judgment, Thorpe LJ drew upon the earlier judgment of Coleridge J, in which he stated ‘[t]he fact that both families constitute one of the

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<sup>59</sup> E. Blyth, ‘Assisted Reproduction: what’s in it for the children?’ (1990) 4 (2) *Children and Society* at 174

<sup>60</sup> [2007] EWCA Civ 1053

<sup>61</sup> *ibid* ~ Thorpe LJ at para 17

<sup>62</sup> *ibid*

child's natural parents means that both sides start from the position, neither side being able to claim that their blood ties should favour their claim.'<sup>63</sup> Thorpe LJ's approach, balancing the claims of the gestational mother and commissioning party, challenges the hierarchical ladder of mother roles which elevates the position of the gestational mother. However, other common law decisions such as *Re G*<sup>64</sup> suggest that the surrogate's legal claim to care for the child is greater than those of the commissioning couple placing great emphasis upon the gestational process which secures the initial legal title of the surrogate.<sup>65</sup> The presumption that it is almost always in the best interests of the child to remain with his or her gestational mother due to issues of attachment and maternal-foetal bonding are given less weight in this case, taking into consideration the method of conception, the intentions of the commissioning party and the actions of Mrs P.

The Court of Appeal's decision to sustain the award of parental responsibility in favour of the J's was influenced by the fact that the P family had 'deliberately embarked upon a path of deception, driven by Mrs P's compulsive desire to bear a child.'<sup>66</sup> Coupled with the unstable setting of the P family, it was decided to be in the child's best interest to be placed in the care of the J family. However, it was explicitly stated by Coleridge J that the application in favour of the J's had 'nothing whatever to do with penalising the P's for breaking their agreement...or...their deliberate deception.'<sup>67</sup>

It must also be noted that as Mrs P was the legal mother and she was married, the legal father of the child is Mrs P's husband by virtue of the fatherhood provisions within the HFE Act 1990 (as discussed previously). As a result of this, the J family had no legal right to challenge the legal parenthood of the Ps. Why,

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<sup>63</sup> n. 60 ~ Thorpe LJ at para 13

<sup>64</sup> (*Children*) (*Residence: Same-sex Partner*) [2006] UKHL 43; [2006] 1 W. L. R 2305

<sup>65</sup> Contrary to this, it has been stated in the case of *Brixley v Lynas* [1996] 2 F. L. R. 499 that there is *no presumption* in favour of the gestational mother when assessing parental responsibility, and each case must be taken on its facts. This case was not a surrogacy-related case, however dealt with issues that are relevant when assessing parental responsibility and who this should be awarded to. In this custody case, it was decided that it was in the small child's best interests to remain with its gestational mother. This is confirmed in the recent Supreme Court case *Re B (A Child)* [2009] UKSC 5; [2010] 1 F. L. R.

<sup>66</sup> n. 60 ~ Thorpe LJ at para 4

<sup>67</sup> *Re P (Surrogacy: Residence)* [2008] 1 *Family Law Report* 177 at para 22

therefore, was this matter for the courts?<sup>68</sup> Presumably it was due to the unusual nature of the case and the biological relationship between Mrs SJ and N. It would have been unreasonable to deny leave to apply for a residence order and therefore the courts had to adopt a pragmatic approach to the instance before them. Further, as this case was not technically a matter for the courts irrespective of the method of conception, or the biological relationship between the child and the intending social father, suggests that the current legal system fails to address the practice of surrogacy adequately. Or, put another way, the fact that this was not automatically a matter for the court is a cause for concern in itself as conflict between parental figures would not be in the child's best interests.

The child's best interests must remain as the central focus for all cases concerning surrogacy disputes. This view is affirmed by Callman J's comments in *Re MW*<sup>69</sup>. Discussed in Samantha Ashenden's feminist judgment of *Re N*, 'Callman J held in favour of the adoption of a child born as a result of a surrogacy agreement...on the grounds that the residential status quo with the commissioning couple provided amply for this his welfare.'<sup>70</sup> However to determine the welfare interests of the child, greater legal attention should be paid to the intentions of the parties to care for the child in the courts formulation of what is in the best interests of the child. *Re MW* establishes strong support for the 'continuity of care with early caretakers'<sup>71</sup> but because the surrogate in law is the default legal person with parental responsibility, she is established in her role as early caretaker upon the conception of the child. This is in contrast to the legal position of the social mother who cannot acquire parental responsibility to legally engage with caretaking until the surrogate's rights are awarded in her favour. This exposes conflict between the legal construction of motherhood as a gestational mother who is legally provided for in terms of her social relationship with the child and the social context of surrogacy arrangements. As in the majority of cases the surrogate will

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<sup>68</sup> Section 10(4), Children's Act 1989 states that any parent (s. 10(4)(a)) may apply for a residence order (s. 8, Children's Act 1989) therefore it was a discretionary decision by the court to assume that Mr J was the legal father, and therefore able to bring proceedings, negating the legal status of Mrs P's husband by virtue of the HFE Act 1990.

<sup>69</sup> (*Adoption: Surrogacy*) [1995] 2 F. L. R 759

<sup>70</sup> S. Ashenden, 'Re N' in C. McGlynn, R. Hunter, E. Rackley (eds) *Feminist Judgments: From Theory to Practice* (Hart 2010) at 91 - 92

<sup>71</sup> *ibid* at 93

not contest her parenthood as she does not intend to be recognised as a mother, enabling her as the legal default in terms of maternal care is at odds with the social reality of surrogacy and subsequently plays out awkwardly in the courts creating disparity between the mother roles.

To a certain extent, the case of *Re N* has unbalanced the status quo and points towards greater recognition of all parties involved in surrogacy. The focus has now shifted from the exploitation of the surrogate and her legal position as gestational mother to the commissioning party and other mother roles as a result of the unusual facts of the case. As a result of this, this case challenges assumptions about motherhood and the supposed altruistic face of surrogacy, Pattinson comments that '[e]thical division is amplified by the reality that few surrogates act for altruistic reasons – surrogacy is not necessarily the personification of virtue ethics'<sup>72</sup> - and the case of *Re N* emphasises the difficulties which may arise due to the idealised legal construction of surrogacy as pure altruism. In addition, this case conceptualised 'good' and 'bad' mothers. Mrs P is constructed as a 'bad' mother due to her deceptive behaviour which is evidenced by the removal of Baby N from her care. This adds a further area for consideration when assessing the legal construction of motherhood. Mothers must also conform to 'good' and 'bad' ideals surrounding motherhood to be recognised in a legal capacity. The role of 'mother' in this case was assessed in terms of how the legal mother is 'mothering', that is, whether she is acting or has acted as a 'good' or 'bad' mother. In this case, Mrs P and her deceptive actions detach her from the construction of 'mother'. Hetero-normative ideals about the role of mother and its attachment to good mothering are reinforced further, placing the gestational mother once more at the top of the hierarchical ladder of mother roles.

To prevent this and also to avoid the courts entering into subjective discourse about 'good' and 'bad' mothers, where surrogacy agencies are used it should be ensured that all parties involved in the surrogacy are screened in order to protect their interests, and that of the child, prior to conception. This point expressed in the case of *CW v NT*<sup>73</sup> suggest that increased legal involvement

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<sup>72</sup> n. 25 at 297

<sup>73</sup> n. 51

through the regulation of surrogacy agencies could ensure that the backgrounds and suitability to engage with surrogacy are monitored and are available to provide support. A key failing of the current legal scheme is that through a lack of legal interaction with surrogacy, very little is known about its effects. To improve surrogacy regulation overall, greater research in to the impact of surrogacy upon the child, surrogate and commissioning party should be carried out. This will ensure that legal regulation is guided by the lived experiences of all involved and is paramount in achieving effective regulation.

### **3.8 Case Law - Non-Contested Surrogacy Arrangements**

In contrast to judicial consideration of contested cases, there has been an abundance of non-contested cases that have come before the courts due to the criteria that must be satisfied in order to transfer legal parenthood away from the surrogate. Prior to the enactment of the HFE Act 1990, in the case of *Re Adoption Application*<sup>74</sup> 'it was held that a surrogacy arrangement would not contravene the Adoption Act 1976 so long as the payments made did not constitute an element of profit or financial reward'<sup>75</sup>. Similarly, after the enactment of the HFE Act 1990, it was held in the case of *Re Q*<sup>76</sup> it was held that payments could be sanctioned retrospectively provided that this payment was reasonable'<sup>77</sup>. However, case law surrounding payments and parental orders has evolved to a state which now also permits payments which exceed what is reasonable, as was found in the case of *Re L*<sup>78</sup>. Hedley J in this case opines that non-reasonable payments may be sanctioned as the Human Fertilisation and Embryology (Parental Order) Regulations 2010<sup>79</sup> 'import into s. 54 applications the provisions of s. 1 of the Adoption and Children Act 2002' which states that that the court's *paramount* consideration is the child's welfare<sup>80</sup>. Under the previous 1994 Regulations the child's welfare was a *first* but not paramount consideration. The places public policy concerns regarding commercial surrogacy as a secondary factor in relation to the child's welfare.

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<sup>74</sup> (*Adoption: Payment*)1987] 2 F. L. R. 291

<sup>75</sup> n. 55 at 565

<sup>76</sup> (*Parental Order*) [1996] 1 F. L. R 369

<sup>77</sup> *ibid* ~ Johnson J at 374

<sup>78</sup> (*A Child*) (*Surrogacy: Parental Order*) [2010] EWHC 3146 (Fam)

<sup>79</sup> (S. I No. 985) 2010

<sup>80</sup> n. 78 ~Hedley J at para 10

Whilst this should be the correct approach, this renders surrogacy regulation and s. 54 of the HFE Act ineffective. There is seemingly no justification beyond providing guidelines to couples who enter into surrogacy arrangements about what they should and should not do if the actions of the party are *almost always* rubber-stamped by the courts. There is no incentive to adhere to the current legal structure as legal protection is not offered to recognise the legal interests of the parties involved in surrogacy arrangements. Surrogacy is only partially regulated by law where the arrangement is commercial; however now, even when the arrangement is commercial the transferral of parenthood is not prohibited. The issue is not that excessive surrogacy payments should not be sanctioned where this is in the child's best interests, the issue is that the foundations of surrogacy law have been broken down and at present, the legal regulation is achieving very little.

The impact of this is that the legal construction of motherhood which facilitates transferral of parental rights thus reflecting the socially shared experience of motherhood within surrogacy is hindered because the process is so difficult. This is evidenced by the large number of cases where surrogacy payments have been made and also in the event of overseas surrogacy arrangements. Most notably, the case *Re X and Y*<sup>81</sup> concerned issues surrounding the location of the commissioning party. In *Re X and Y* the surrogacy arrangement was between a couple residing in the UK and a Ukrainian surrogate. In this case, Ukrainian and UK law were in opposing positions concerning the legal status of the parents of the twins born through the surrogacy arrangement. UK law recognised the Ukrainian surrogate as the legal mother and the biological commissioning father retained neither parental responsibility nor legal title as a parent because the surrogate was married. Gamble and Ghevaert note that '[h]ad the surrogate mother been unmarried, the twins would have been neither parentless nor stateless since their British biological father would have been treated as their legal father'.<sup>82</sup> Hedley J found it was in the best interests of the child for a parental order to be granted in spite of lack of legal recognition of the commissioning party as parents. Difficult parenthood provisions which construct the surrogate as the

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<sup>81</sup> (Foreign Surrogacy) [2008] EWHC 3030 (Fam)

<sup>82</sup> n. 47 at 242

default legal mother led to Hedley J's conclusion that 'the path to parenthood has been less a journey along a primrose path, more a trek through a thorn forest'.<sup>83</sup>

### 3.9 A United Position?

To summarise, the legal response to surrogacy recognises non-normative families and transfers motherhood accordingly. However, the response to non-normative motherhood founded upon hetero-normative understandings culminates in a difficult legal situation. To what extent does the legislator's response, surrogacy case law, and surrogacy in practice co-operate effectively? Are there any tensions/conflicts?

When there is no conflict, motherhood is transferred and the intentions of the party are 'rubber-stamped' by the courts in best interests of the child. Where there is conflict, the gestational mother will most often maintain her parental rights due to hetero-normative understandings of motherhood which frames 'best' as 'biological parenthood' in the form of gestation in order to determine the best interest of the child.

Gamble and Ghevaert observe that, 'English law allows and supports surrogacy if it fits the model deemed acceptable: altruistic, non-commercial, consenting and privately arranged'<sup>84</sup> and is perhaps why the law remains unchanged by reform. However, altruistic surrogacy presents further problems, particularly in terms of identifying 'mother' roles. If surrogacy is to operate on a purely-altruistic basis it is more likely that arrangements will be made with those who are known to the commissioning couple, such as family members. This means then that a family member may gestate the child (and will be the legal mother) but will go on to fulfil another family role. This highlights the difficulty with rigid legal definitions of motherhood when socially these difficulties are largely absent.

It is evident then that there are tensions between the law and society in the context of surrogacy. The social reality of surrogacy incorporates several women each contributing equally to the creation and/or upbringing of a child, however the

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<sup>83</sup> n. 81 at Hedley J at para 2

<sup>84</sup> N. Gamble, L. Ghevaert, 'The Chosen Middle Ground: England, Surrogacy Law and the International Arena' [2009] *International Family Law Journal* at 237



law opts to choose only one of these women as the person who holds legal rights and responsibilities greater than all others within the arrangement.

### **3. 10 Critique - The Uneasy Road to Legal Motherhood**

At present, the current legal situation is particularly unclear. Surrogacy is governed by three statutes, the SAA 1985, the HFE Act 1990, and the Act's 2008 amendments. As a result of this, understanding the law is difficult, both in understanding and in practice. How effective is the current regulation? Do current legal mechanisms offer a straight forward route to legal motherhood within the context of surrogacy, protecting the best interests of all involved?

Recent reform signifies a step forward in terms of recognising the hetero-normative preferences within the HFE Act 1990. Prior to April 2010, transfer of the legal status from the legal mother to same-sex couples who utilise surrogacy was limited to the process of adoption by virtue of ss. 50 and ss. 144 (4) of the Adoption and Children Act 2002 if the couple are civil partners. Post April 2010, legal parentage for same-sex couples may now be obtained via parental order due to the agreed female parenthood and fatherhood provisions. Parentage may be transferred to same-sex couples, however only one member of this party will be recognised as a mother or father. The other parent will be recognised as a 'parent'. The extension of the application of parental orders permits two male partners or two female partners to be registered on a child's birth certificate as the legal father and parent. Further, a female civil partner or unmarried female partner could acquire legal parentage through her partner if she has contributed her egg within IVF or a surrogacy arrangement. This then places all commissioning couples, regardless of sex, sexuality or marital status in the same legal position to apply for a parental order. This highlights a significant move away from the hetero-normative foundations of the HFE Act 1990. In conjunction with this, the review process in 2007 should have reconsidered surrogacy with a view to improving the balance between recognition of intending social parents, biological parents and legal parents more broadly. The current legal framework reflects a two-parent (although not gendered) approach to family structure. This is in conflict with the societal understanding of the contemporary family. The contemporary family may

take many forms as is evidenced by the practice of surrogacy itself that allows for up to 6 legally identifiable parents. At the opposing end of the spectrum, the contemporary family unit also comprises single-parent families.

### **3.11 Singled Out - The Non-Inclusion of Single People**

At present, current legislation reflects a two-parent approach when regulating assisted reproduction which mirrors the hetero-normative family structure. Gamble and Ghevaert comment that 'single parents remain poorly catered for, one example being their ineligibility to apply for a parental order to become the legal parent of a child through surrogacy'<sup>85</sup>. The law now permits those outside of the heterosexual family unit to apply for a parental order; however the single person is still prohibited. It is noted that, '[b]etween 1970 and 1990 the percentage of lone-mother families more than doubled to 18 per cent. The anxiety of the 1980s and 1990s was therefore about the separation of marriage and parenthood'<sup>86</sup>, and it therefore unsurprising that the HFE Act 1990 illustrates a strong preference for dualistic parenting. Again, the tenacity of the dualistic approach to parenting (reflected by the exclusion of single parents to acquire parental orders) is a further example of how the legal approach to assisted reproduction attempts to guide the family structure in order to preserve the hetero-normative family unit, despite social change and an increasing number of single parent families. It is observed that 'the two-parent ideal is often some distance from the social reality of parents and children'<sup>87</sup>; law should attempt to reflect society, instead of attempting to conjure a social structure that no longer universally exists. However, Richard Collier and Sally Sheldon's discussion of the HFE Bill 2007 (now enacted as the HFE Act 2008) reveals 'a growing acceptance of single-parent and same-sex parent families'<sup>88</sup> although the extent of this is questionable.

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<sup>85</sup> N. Gamble, L. Ghevaert, 'In Practice - The Human Fertilisation and Embryology Act 2008: Revolution or Evolution?' (2009) *Family Law* 732

<sup>86</sup> J. Lewis, 'The problem of fathers: policy and behaviour in Britain' in B. Hobson (ed) *Making Men into Fathers: Men, Masculinities and the Social Politics of Fatherhood* (Cambridge University Press 2002) at 130

<sup>87</sup> C. Lind, T. Hewitt, 'Law and the complexities of parenting: parental status and parental function' (2009) 31 *Journal of Social Welfare and Family Law* at 400

<sup>88</sup> R. Collier, S. Sheldon, *Fragmenting Fatherhood: A Socio-Legal Study* (Hart Publishing 2008) at 97

### 3.12 Conclusion

Gillian Douglas remarks that '[i]n its approach to surrogacy, the government originally tried to ignore it as far as possible in the hope that it would go away.'<sup>89</sup> Subsequent case law and lack of legislative attention suggest that this remains the case. Difficult and ethical moral debate surrounding surrogacy has been neglected in the legal sphere, particularly in terms of the relationship between surrogacy and the separation of motherhood. Instead, the legal regulation of surrogacy remains largely unchanged in the medical context, and largely unregulated more broadly. Avoiding issues raised by the legal regulation of surrogacy does not mean that the practice will cease to exist or individuals will be deterred from turning to surrogacy as a means through which to produce a family. Jackson comments that,

'making it difficult to engage lawfully in surrogacy arrangements is unlikely to lead people who cannot have children in any other way than simply resign themselves to their childlessness. Rather restrictive regulation may be the catalyst for them to travel abroad to find a surrogate mother, or to make unlawful contracts in a regulatory vacuum'<sup>90</sup>.

This chapter has shown transferring mother status is a difficult process as the social construction of motherhood is not reflected in the legal regulation of surrogacy and instead creates a fictitious picture of motherhood. This fictitious picture of motherhood detailed in surrogacy prescribes the gestational as the default legal mother, when in fact, the surrogate often does not identify as a mother at all in a social context. Moreover, the role of social mother is not reflected or protected in surrogacy regulation typically because only one woman can assume the role of legal mother mirroring the hetero-normative construction of a mother who fulfils all 'mother' roles.

The difficulties inherent within surrogacy regulation are a direct result of the hetero-normative ideals it seeks to preserve. Whilst the current law fails to regulate and provide protection to *all* interested parties within the surrogacy

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<sup>89</sup> G. Douglas, *Law, Fertility and Reproduction* (Sweet and Maxwell 1991) at 164

<sup>90</sup> E. Jackson, *Regulating Reproduction* (Hart 2001) at 315-316

arrangement (such as the social intending mother) the HFE Act's response to medically-assisted surrogacy imposes restrictive conditions upon arrangements particularly in relation to parental orders. The transferral of parenthood and motherhood more specifically, provides a stark contrast to the non-regulation of surrogacy more broadly. The legal approach to surrogacy is not consistent, and through its inconsistency frames motherhood as a hetero-normative gendered construct which is at odds with social understanding.

Consequently, legal reform is urgently required. The review of the HFE Act 1990 was the ideal opportunity to re-think the legal regulation of surrogacy, welcoming it in to the public sphere. This, however, was not the case. Gamble and Ghevaert add that 'by tidying the existing law rather than taking a fresh perspective, there is a lot the Act has not done.'<sup>91</sup> While public attention and feminist concern over surrogacy has continued to mount, inadequate parliamentary space is consistently allocated to the legal regulation of surrogacy. The structural core of surrogacy regulation must be reshaped in order to offer greater inclusion to non-normative mothers that will reflect the true social reality of motherhood. Only a holistic model of motherhood will be able to adapt to the multi-faceted construction of who can be a mother ensuring that the best interests of the child are determined adequately within the context of surrogacy.

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<sup>91</sup> n. 85 at 74

## 4. RETHINKING SURROGACY ARRANGEMENTS

### 4.1 Introduction

Due to an uncomfortable societal response to surrogacy in its beginnings as an accepted method of conception enveloped in ethical issues, the initial legal response to surrogacy has proved troublesome. As a consequence of this, surrogacy is inadequately regulated by law due to conflict between social and legal representations of motherhood. This chapter will argue that greater legal recognition of the various mother roles involved in surrogacy will provide a way forward in improving how the best interests of the child are determined. Developing the arguments of Wallbank, it will be suggested that current regulation 'should move away from a system whereby one mother is chosen over another.'<sup>1</sup> This will encourage acceptance of non-normative mothers in law and society more broadly, rejecting and helping to dispel hetero-normative ideals surrounding motherhood.

Diduck and O'Donovan point out that,

'[f]amily law is ... about the regulation of individuals *and* the regulation of the relationships those individuals form, and one of the tensions inherent in feminist family law is the treatment of the family rather than the individual as the unit of analysis. Looking at both simultaneously, or leaving the choice to persons as to where they situate themselves, seems to be desirable.'<sup>2</sup>

This chapter will adopt Diduck and O'Donovan's terminology, incorporating understanding of the individual and her choices to engage with motherhood through pregnancy or social mothering as well as her relationships. This will provide an alternative route through which to regulate surrogacy. At present, the legal approach to surrogacy focuses explicitly on the hetero-normative family unit and its protection which leads to the alternative route suggested in this chapter. The alternative approach to surrogacy regulation presented here will simultaneously recognise the interests of the gestational, genetic and social

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<sup>1</sup> J. Wallbank 'Too many mothers? Surrogacy, kinship and the welfare of the child' (2002) *Medical Law Review* 272

<sup>2</sup> A. Diduck, K. O'Donovan, 'Feminism and Families: *Plus ça change?*' at 8 in A. Diduck, K. O'Donovan (eds) *Feminist Perspectives on Family Law* (Routledge-Cavendish 2006)

mothers as well as the impact of her choices upon the broader familial structure which in turn will strive to protect collective interests. Central (and most persistent) reasons against the practice of surrogacy are that the practice breeds exploitation and commodification of women's bodies<sup>3</sup>. Focussing explicitly upon the choices of women who wish to become mothers (whether surrogate or social) as the impetus behind surrogacy law will ensure that worries about exploitation and other similar concerns (as far as is reasonably possible) may be soothed.

At present, gestational motherhood is constructed in law as the central pillar of the family unit, particularly in the context of surrogacy in England and Wales. Family formation is dependent upon her consent; without consent the intending mother cannot be recognised as a legal mother, nor can a parental order be awarded. In contested cases, unless it is viewed by the courts to be in the best interests of the child to reside with the intending parent(s) (and as discussed, this eventuality is rare<sup>4</sup>) the surrogate is the legal mother with full rights and responsibilities. This ultimately undermines the involvement of the commissioning party in the conception of the child. Kirsty Horsey observes that without the 'initiative and intention' of the intending parent(s) 'the child would not have been created. It is undeniable that *but for* them, the conception and birth of that particular child could not have happened'.<sup>5</sup> In spite of this, the intending parents' involvement in the conception of the child (as well as any genetic contribution), the gestational relationship between the surrogate and child is the lynchpin which determines the child's familial structure. The two-parent dyadic structure which places the surrogate as the only automatic legal parent attempts to preserve the hetero-normative family.

The importance and relevance of the patriarchal family within society in the context of surrogacy is diminished. While the best interests of the child should

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<sup>3</sup> For example, Woman's Hour (19 January 2011) <<http://www.bbc.co.uk/programmes/p00dc89s>> accessed 19 January 2011. Julie Bindel raised concerns in conversation with Tony Drewitt-Barlow and Louisa Ghevaert that thousands of women are being exploited by richer parents and could potentially suffer health effects from surrogacy.

<sup>4</sup> The unusual case of *Re N* [2007] EWCA Civ 1053 is the *only* case in England and Wales whereby the court opined that it would be in the best interests of the child to reside with his intending parents so far.

<sup>5</sup> K. Horsey, 'Challenging presumptions: legal parenthood and surrogacy arrangements' (2010) *Child and Family Law Quarterly* at 456

remain central when determining legal parentage (both in statute and common law), the practice of surrogacy represents a clear challenge to the two-parent dyadic structure. Considerations of surrogacy in law as a practice should not be ignored but at present law reinforces hetero-normative ideals surrounding motherhood. In so doing, the interests of the intending parents, both in the conception of the child and intention to be recognised as primary caregivers are ignored in the first instance. Wallbank suggests that,

‘Multiple parenthood abounds in contemporary society through fostering, open adoption and step-parenting in the best case scenario, without causing undue harm and distress to children. Perhaps the way forward with surrogacy law is to provide a model that recognises and institutes that all the parties involved (including the child) have a potential interest in the child’s welfare and that there should be no need to decide cases on the either/or approach.’<sup>6</sup>

Multiple parenthood is recognised in law through the legal mechanism of parental responsibility. However the legal approach to surrogacy specifically is unsatisfactory. This chapter will argue that surrogacy law should be reshaped and reformed in alignment with Wallbank’s view that surrogacy law should recognise *all* parties who engage with surrogacy, focusing on their intentions and interests in the child’s welfare. This will include the interests of the surrogate, and the commissioning party.

This chapter will argue that the gestational relationship between surrogate and child, and ideologies surrounding this relationship as supremely natural, should not drive forward legal presumptions in favour of the natural mother<sup>7</sup>. To do so, surrogacy regulation should recognise the various ‘mother’ roles as equal. At present, the hierarchical structure of ‘mother’ roles in law is at odds with the social construction of motherhood. Subsequently, it will be argued that the social reality of motherhood is not represented in law, instead imposing a restrictive view of motherhood upon those who engage with assisted reproduction practices

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<sup>6</sup> n. 1 at 282

<sup>7</sup> This issue is discussed in detail in Chapter One; see case study of *Re G (Children) (Residence: Same-sex Partner)*.

such as surrogacy. It will be argued that surrogacy law does not provide legal recognition to all mother roles adequately by outlining two primary failings. These are: 1) lack of legal involvement; 2) failure to recognise various types of motherhood within surrogacy and their relationship with the long-term best interests of the child. Each failing will be considered in turn, whilst offering potential solutions to the current legal uncertainty surrounding surrogacy.

This chapter will argue that in order to respond to current legal failings, a new Surrogacy Act should be enacted. This Act will allow incorporate the introduction of surrogacy contracts, looking to 'surrogacy-friendly' jurisdictions for instruction and guidance. Surrogacy contracts will change the current default legal status of the surrogate based upon intention, offering greater legal parity between all interested parties in the child's welfare. The Act will also adapt parental status to recognise different types of mothers, offering a solution to the current problematic legal framework. This Act will also actively recognise different types of 'mother' in law utilising shared legal motherhood.

To summarise, this chapter will argue that the current legal regulation of surrogacy reinforces hetero-normative ideals surrounding motherhood because it preserves the two-parent dyadic structure. As a result of this, the various 'mother' roles are treated differently in law, protecting the role of the gestational mother over others. By so doing, legal and social constructions of motherhood are at odds. It will be argued that conflict between legal and social constructions of motherhood exists ultimately because the current legal framework is not involved in the development of surrogacy arrangements. The introduction of a new Surrogacy Act will be presented as a solution to the current legal failings introducing surrogacy contracts and shared legal motherhood, ultimately improving the legal construction of motherhood and reflecting the lived experiences of women.

#### **4.2 (Mis)understanding Surrogacy – Changing Attitudes**

Following on from discussion regarding social attitudes towards surrogacy in Chapter two, the relationship between changing social attitudes and law will now be examined. Understanding the societal/feminist reaction to surrogacy is



imperative in determining how surrogacy arrangements should be regulated by law. The purpose of law broadly is a much debated philosophical question with no right answer; however whether one believes that law is a system of rules to be followed<sup>8</sup>, or is developed and guided by moral beliefs, it can be satisfactorily accepted that law must develop and evolve with the practices and attitudes of society.<sup>9</sup> Current societal attitudes towards surrogacy have, to a certain extent, progressed from the radical feminist position towards surrogacy as outlined in Chapter Two. It will be argued in this section that because attitudes towards surrogacy are changing, so too should the law. A positive legal response to surrogacy will highlight and encourage societal acceptance of families conceived in this way.

Early feminist reaction to surrogacy and the wider social response to surrogacy were often similar in their negativity<sup>10</sup>. Writing from an Australian legal perspective, Jocelyne Scutt's response to surrogacy<sup>11</sup> in 1991 mirrors the contemporary response to surrogacy from women such as Julie Bindel<sup>12</sup> speaking publicly on radio in the UK.<sup>13</sup> Scutt's argument centres upon traditional criticisms of surrogacy, for example, that surrogacy does not recognise the status of the surrogate as 'the "real" mother'<sup>14</sup>. The irony of this is that in law in the UK, the surrogate *is* recognised as the "real" mother as she is the default legal mother. Scutt argues that surrogacy law supports the notion of "woman as receptacle"<sup>15</sup>; and most importantly laws should discourage surrogacy arrangements so that women are deterred from entering into "surrogacy" arrangements.<sup>16</sup> Similarly,

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<sup>8</sup> H. L. A. Hart, *The Concept of Law* (2<sup>nd</sup> ed) (Clarendon Press 1997)

<sup>9</sup> R. Dworkin, *Taking Rights Seriously* (Gerald Duckworth & Co Ltd 1996)

<sup>10</sup> See, T. Cohen, 'Childless couple win right to pay a surrogate mother' *Daily Mail* (December 9, 2010); J. Parks 'Rethinking Radical Politics in the Context of Assisted Reproductive Technology' (2009) (23)(1) *Bioethics* 20 - 27

<sup>11</sup> J. A. Scutt, 'At Issue: Whose surrogate? Surrogacy, ethics and the law' (1991) (4) (2) *Issues in Reproductive and Genetic Engineering* 93- 107

<sup>12</sup> n. 3

<sup>13</sup> The legal approach to surrogacy in England and Wales and Australian are not dissimilar. Commercial surrogacy is prohibited in both of these states, adopting a legal model which supports altruistic surrogacy.

<sup>14</sup> n. 11 at 93

<sup>15</sup> *ibid* at 94

<sup>16</sup> Scutt's use of punctuation here is significant. She uses inverted commas to imply that the use of the term "surrogacy" provides a smokescreen for the true realities of the situation. She believes it is not a "surrogacy" arrangement and the surrogate should be perceived as the "real" mother, unlike the viewpoint taken here which is dispel notions of 'true' and 'real' mothers. n. 11 at 99

Bindel raised concerns 'about thousands of women being exploited by richer parents'<sup>17</sup> and forced into surrogacy for economic purposes.

The broader societal response has often been in agreement with the (predominantly radical) feminist perspective on surrogacy<sup>18</sup>. However, central differences are present. Radical feminist thinkers reject surrogacy due to its ability to reinforce hetero-normative structure through the exploitation of women.<sup>19</sup> Corea - writing in 1985 - voices concerns surrounding surrogacy; the role of mothers<sup>20</sup>; and male control over women bodies to uphold the hetero-normative family unit.<sup>21</sup> She argues: '[t]here is no discussion [*within the reproductive technologies debate*] about the construction of motherhood and the question of real 'choice' a woman has in a society that continues to equate 'real' woman with mother and wife.'<sup>22</sup> Instead Corea argues the aim is to allow men control over reproductive matters, which in turn reinforces their positions as patriarchal centre of the family unit. Contrary to this, wider social response raised concern that surrogacy had the potential to *challenge* the hetero-normative family form. This can be seen most obviously in the form of the Warnock Report. The Warnock Committee's view that '[t]here is little doubt that the Courts would treat most, if not all, surrogacy agreements as contrary to public policy and therefore unenforceable'<sup>23</sup> suggests that concerns about surrogacy rest not only upon commercial surrogacy arrangements but upon policy concerns about how families are formed. Judith Bourne and Caroline Derry comment that 'the Warnock Report's opposition to surrogate motherhood can be seen to be based upon

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<sup>17</sup> n. 3

<sup>18</sup> Many feminist writers are in favour of surrogacy – for a good overview of feminist arguments for surrogacy, see V. Munro, 'Surrogacy and the construction of the maternal-foetal relationship: the feminist dilemma examined' (2001) (7)(1) *Res Publica* 13-37. To a lesser extent, commercial surrogacy is supported. Whilst its ethical implications are not central issues for this thesis, see 'R. Epstein, 'Surrogacy: The Case for Full Contractual Enforcement' (1995) 81 *Virginia Law Review* 2305 for a legal economic approach to surrogacy.

<sup>19</sup> See, A. Dworkin, *Ring Wing Women – The Politics of Domesticated Females* (The Women's Press 1983); G. Corea, *The Mother Machine* (The Women's Press 1985); D. Morgan 'Making motherhood male' (1985) 12 *Journal of Law and Society* 219

<sup>20</sup> G. Corea *et al*, *Man-Made Women- How new reproductive technologies affect women* (Hutchinson: 1985) at 66

<sup>21</sup> *ibid* at 65

<sup>22</sup> *ibid* at 67

<sup>23</sup> The Warnock Report, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cmnd. 9314) (London: HMSO, 1984) at para 8.5 43

supporting the patriarchal family.’<sup>24</sup> Mackenzie acknowledges the ‘disruptive potential’<sup>25</sup> of surrogacy for the idealisation of the traditional family unit and it perhaps this concept which fuelled the Warnock Report’s criticism of surrogacy.

As discussed previously in detail, surrogacy separates ‘mother’ roles and therefore family structures involved in surrogacy are different to the traditional norm. The wider social issue here is that surrogacy allows non-normative family units to develop due to ‘unnatural’ constructions of motherhood. Van den Akker discusses the traditional family and structural functionalist theory. She observes that surrogacy allows perceptions of ‘unnatural’ motherhood to develop as diversity from traditional norms based upon biological and in social terms is seen as deviant<sup>26</sup>. The majority of women who become mothers fulfil all three mother roles (gestation, genetic and social) - as this type of motherhood is most common, it is assumed to be the most natural form of motherhood in particular by the courts, as can be seen during recent cases such as *CW v NT*<sup>27</sup>. The difficulty lies in the surrogate’s (and to a lesser extent, the intending mother’s) rejection of ‘natural’ motherhood in its truest form. Ultimately, to define surrogate motherhood and surrogate families as ‘unnatural’ in a legal sense undermines the reproductive choices and autonomy of women who freely choose to become surrogates. McCandless and Sheldon note, ‘the coherence of the legal ‘sexual family’ ideal is increasingly out of touch with demographic reality’<sup>28</sup> as the authors point out many children are not raised by two parents<sup>29</sup> and an increasing number of children are conceived with the aid of reproductive techniques. The law as it stands reinforces the patriarchal family form whilst neglecting non-normative families which are developed through surrogacy. The choices of women to engage

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<sup>24</sup> J. Bourne, C. Derry, *Women and Law* (Old Bailey Press 2005) at 69

<sup>25</sup> R. Mackenzie ‘Beyond genetic and gestational dualities – Surrogacy agreements, legal parenthood and choice in family formation’ in K. Horsey, H. Biggs *Human Fertilisation and Embryology: Reproducing Regulation* (Routledge-Cavendish 2007) at 189

<sup>26</sup> O. van den Akker, ‘The importance of a genetic link in mothers commissioning a surrogate baby in the UK’ (2000) (15)(8) *Human Reproduction* at 1849; see also, J. Bernardes, ‘Responsibilities in studying post modern families’ (1993) (14) *Journal of Family Issues* 35 – 49; J. Bernardes *Family Studies: An Introduction* (Routledge 2000) at 27 - 46

<sup>27</sup> [2011] EWHC 33 (Fam)

<sup>28</sup> J. McCandless, S. Sheldon, ‘The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form’ (2010) (73) (2) *Modern Law Review* at 187

<sup>29</sup> *ibid* at 187

with non-normative forms of motherhood are therefore overshadowed and reform is required to rectify this.

Moreover, Helene Ragone argues that: '[f]rom the couple's perspective, surrogacy is conceptualised not as a radical departure from tradition but as an attempt to achieve a traditional and acceptable end: to have a child who is biologically related to at least one of them'<sup>30</sup>. If this view is correct, it is evidence of how society privileges the hetero-normative family structure, despite its increasing absence. One of the reasons for this may be due to the legal response to the family unit. Law continues to privilege traditional constructions and as society and its practices mirror this attitude as a result, society generally fails to welcome surrogacy families as an example of a normative family.

Recent research has shown that,

'negative feelings towards surrogacy and parenthood in general are held by the part of the population that is not involved with surrogacy and are likely to impact on the feeling of stigma associated with the practice. However, they (the researchers) suggest that such negative effects could possibly be helped by their study, which links 'alternative means of becoming a family to positive (rather than negative) family values.'<sup>31</sup>

Poote and van den Akker discuss the lack of academic interest in public opinions regarding assisted conception and surrogacy and attempt to bridge this gap.<sup>32</sup> However, they found that further research is required using larger sample sizes to determine majority attitudes towards surrogacy.<sup>33</sup> Social attitudes will only be improved with the aid of further research into the practice of surrogacy. As a result of this, further reassessment of the legal recognition of mothers and surrogacy more broadly will follow. This will create a clearer picture for those

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<sup>30</sup> H. Ragone *Surrogate Motherhood – Conception in the Heart* (Westview Press 1994) at 13

<sup>31</sup> K. Horsey, 'Attitudes to surrogacy are improving, say researchers' – reporting from ESHRE conference, Barcelona *BioNews* (July 2008) <[http://www.bionews.org.uk/page\\_3044.asp#BMAJID\\_INNERB](http://www.bionews.org.uk/page_3044.asp#BMAJID_INNERB)> accessed 01 January 2010

<sup>32</sup> A. E. Poote, O. B. A. van den Akker, 'British women's attitudes to surrogacy' (2009) (24) (1) *Human Reproduction* at 139

<sup>33</sup> *ibid* at 143

involved in surrogacy and, more broadly, for society about surrogacy in practice and the law.

Further, as surrogacy is an unexplored area, information available to commissioning parties and the surrogate in terms of legal rights can often be misguided. In the case of *Re X and Y*<sup>34</sup> Hedley J commented that ‘the quality of the information currently available is variable and may, in what it omits, actually be misleading.’<sup>35</sup> Further, Coleridge J highlighted the lack of regulation governing surrogacy agencies which often provide information to intending parents (and indeed did so to the surrogate in the matter of Baby N). He urged ‘all such agencies to ensure their checks into the background of all parties... (are) as thorough as they can be’.<sup>36</sup> Agencies screening those involved in surrogacy arrangements must be accurate, both in the information they provide and about the suitability and well-being of those involved. Further exploration of the practice of surrogacy, psychologically, legally and socially will encourage greater acceptance of surrogacy within the public sphere and in turn would improve what is known about surrogacy. Surrogacy figures are currently rare, with information from Surrogacy UK (discussed previously) appearing now to be out of date, however it can be assumed that due to the vast amount of media attention directed towards this practice particularly for gay men, the number of surrogacy families is increasing. As the public profile of surrogacy increases, it will increase its acceptability as a reproductive method and there may be more surrogacy as a result of this.

It has been suggested that ‘concerns about privacy have led to limited availability of research participants, especially intended parents.’<sup>37</sup> This is problematic – if research into surrogacy cannot move forward, the practice itself remains shrouded in secrecy, particularly for those who engage with surrogacy in the home and do not engage with IVF clinics. In turn, without research and greater insight into surrogacy and its potential benefits, the legal picture will remain unchanged in favour of the normative family structure. To improve the legal regulation of surrogacy is a two-pronged process. Those who engage with

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<sup>34</sup> [2008] EWHC 3030 (Fam)

<sup>35</sup> *ibid* ~ Justice Hedley at para 27

<sup>36</sup> *Re P (Surrogacy: Residence)* [2008] 1 FLR 177 ~ Justice Coleridge at para 115

<sup>37</sup> J. Ciccarelli, L. Beckman, ‘Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy’ (2005) 61 *Journal of Social Issues* at 24

surrogacy often offer advice and guidance which so far has helped to inform those entering into surrogacy arrangements that are unaware of its complexities – a good example of this is the work of Barrie and Tony-Drewitt Barlow<sup>38</sup>. Academic research into surrogacy has found that the practice is not damaging to children as it often present in media ‘scare’ stories<sup>39</sup>. A recent study has ‘found that there were surprisingly few differences between egg donation, donor insemination, surrogacy and natural conception families in terms of family relationships and parent and child psychological wellbeing.’<sup>40</sup> Whilst the study is still ongoing, (as they continue to follow the development of the families involved), it is a step in the right direction in terms of removing the social stigma attached to the practice of surrogacy as it re-examines societal concerns about the ‘unnatural’ nature of surrogacy, and the prevalence of the gestational relationship above other mother roles. Judges and those engaging with surrogacy are beginning to speak out, voicing concerns and are receiving answers from those who engage most with the practice.<sup>41</sup> As a result of this, the role of law in regulation surrogacy is diminished as social attitudes continue to change. This leads to the question, how might the law change to reflect societal understandings of surrogacy and contemporary families?

### 4.3 Primary Failings – And a Solution

There are two primary failings of current surrogacy regulation which have resulted in disjuncture between societal attitudes and law. Law must follow societal attitudes in order to provide effective regulation, as well as helping to improve remaining stigma surrounding surrogacy and its acceptance. These primary failings are: 1) lack of legal involvement 2) failure to recognise various types of motherhood within surrogacy and their relationship with the long-term

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<sup>38</sup> See, H. Vickers, ‘UKs first surrogacy advice centre opened’ *BioNews* (10 January 2011) <[http://www.bionews.org.uk/page\\_85336.asp](http://www.bionews.org.uk/page_85336.asp)> accessed 12 January 2011

<sup>39</sup> See, J. Knowsley, ‘Surrogate mother says, Sorry, but I’m keeping your babies’ *Daily Mail* (17 December 2006) <<http://www.dailymail.co.uk/femail/article-423125/Surrogate-mother-says-Sorry-Im-keeping-babies.html>> accessed 20 March 2011

<sup>40</sup> J. Readings ‘Child development and parent-child relationships in assisted reproduction families’ *BioNews* (August 2008) <[http://www.bionews.org.uk/page\\_3044.asp#BMAJID\\_INNERB](http://www.bionews.org.uk/page_3044.asp#BMAJID_INNERB)> accessed 1 January 2011

<sup>41</sup> The work of Natalie Gamble and Louisa Ghevaert is evidence for this point. These fertility lawyers are engaging with those who use assisted reproductive techniques and are experiencing the relationship between law, society and reproduction first hand and often voice concerns about how the practice can be improved.

best interests of the child. Each failing will be addressed and responded to in order to examine how the law can, and should, be changed to develop a model of law which reflects the experiences of those involved. Surrogacy is a shared experience of motherhood as discussed in Chapter One. This shared experience should be recognised in law explicitly, as well as preserving and protecting the best interests of the child and all others involved. Arguments surrounding an increased use of surrogacy are important, but as Blyth argues ‘a *demand* for surrogacy alone is insufficient to account for its prevalence.’<sup>42</sup> That surrogacy takes place at all is obviously dependant on the willingness of women to become surrogate mothers. Surrogacy law should therefore be changed with a view to incorporating the experiences of women involved of surrogacy detailing understanding of the relationship between surrogate mother and intending parties.

It is a traditional feminist argument that women’s reproductive choices should not be restricted by the state in reference to legal regulation preventing women from governing their own bodies; for example, in the context of abortion<sup>43</sup>. However many feminists argue differently about surrogacy, despite parallels between them. This is primarily due to the association between surrogacy and economic coercion. In the context of surrogacy, concerns regarding exploitation of women (much like prostitution<sup>44</sup>) persist. It is argued by contemporary feminist voices that surrogacy regulation should be brought into the public sphere to remove this stigma. Jackson suggests that arguments linking surrogacy and prostitution such as those presented by Dworkin<sup>45</sup> are similar to conservative ideals which suggest ‘that women’s sexual and procreative lives should be confined to the private sphere.’<sup>46</sup> She argues that there continues to be ‘an unwarranted pessimism about our capacity to institute effective regulation’<sup>47</sup>, keeping women and children from harm. Bringing surrogacy law in to the public sphere will not result in ‘baby-selling’ or necessarily in increased exploitation of women,

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<sup>42</sup> E. Blyth, ‘Section 30 – The Acceptable Face of Surrogacy?’ (1993) (4) *The Journal of Social Welfare and Family Law* at 250

<sup>43</sup> See, S. Nasim, ‘The right to reproductive freedom: a critical assessment of feminist attitudes to abortion and surrogacy’ (1997) (4) *UCL Jurisprudence Review* 182-197

<sup>44</sup> See, S. M. Suter, ‘Giving in to Baby Markets: Regulation Without Prohibition’ (2009) (16) (1) *Michigan Journal of Gender and Law* at 234, 241

<sup>45</sup> A. Dworkin, *Ring Wing Women – The Politics of Domesticated Females* (The Women’s Press 1983)

<sup>46</sup> E. Jackson, *Regulating Reproduction: law, technology and autonomy* (Hart 2001) at 302

<sup>47</sup> *ibid* at 306

particularly because at present it is claimed 'pessimistic prophesies of the damage wreaked by surrogacy thus seem unfounded.'<sup>48</sup> Increased regulation and state interference with surrogacy will help to improve social attitudes towards non-normative families. In order to bring surrogacy in to the public sphere, it is argued here that legal involvement in the surrogacy arrangement process should be improved. This raises the issue of the first, and most significant, primary failing which should be addressed – a lack of legal involvement.

#### **4.4 Lack of Legal Involvement**

At present, legal involvement with surrogacy is minimal. All surrogacy arrangements are unregulated unless the arrangement is commercial in nature. Legal involvement occurs only within a medical context when IVF treatment is required, thus law governs fertility treatment - not surrogacy. Surrogacy arrangements are often privately arranged oral agreements or involve surrogacy agencies such as COTS (Childlessness Overcome Through Surrogacy) negotiating contact between parties.<sup>49</sup> As a result of this, there is no regulatory body or legal instrument to ensure that the best interests of all parties involved are protected. Based upon current legislation (SAA 1985) as its starting point, a new Surrogacy Act should be developed to govern *all* surrogacy arrangements and improve legal involvement with surrogacy. Monitoring surrogacy arrangement is paramount to understanding the development of non-normative families; preventing exploitation of women; and ensuring the rights of commissioning parties are recognised. A new approach is required and, importantly, should not be seen to place further burdens upon those who chose to develop their families through surrogacy. Current legal involvement with surrogacy through the HFE Act (1990 and 2008) has received criticism for its restrictive approach to non-normative families. Jackson in particular has raised concern in relation to the HFE Act's attempt to govern conception choices and the welfare principle which must be satisfied prior to the commencement of treatment by clinics for IVF and other assisted reproduction methods. Jackson argues that,

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<sup>48</sup> *ibid* at 307

<sup>49</sup> O. B. A. van den Akker, 'Organizational selection and assessment of women entering a surrogacy arrangement in the UK' (1999) (14)(1) *Human Reproduction* at 262



'[m]onitoring these exceptional personal choices in order to identify ill-judged or improper conception decisions would be unreservedly condemned as an unacceptable intrusive abuse of state power if the welfare principle was applied to those couples who were able to conceive without the aid of reproductive treatment.'<sup>50</sup>

This argument could also be forwarded against greater legal regulation of surrogacy arrangements. However, greater legal involvement would not condemn or influence reproductive decisions – instead it would help those involved to make informed decisions. Increased legal recognition of surrogacy in the form of regulation would provide a clearer picture to those entering in to surrogacy. Gamble and Ghevaert state that '[t]here is clear demand for informal assisted conception at home and for treatment at clinics abroad, giving rise to new legal problems for the families involved'<sup>51</sup> and therefore new legal mechanisms should be introduced to oversee this demand.

#### **4.5 A New Surrogacy Act**

In order to address the current legal failings of surrogacy regulation, a new Surrogacy Act should be enacted. The critique of the legal regulation of surrogacy presented does not address in full the complex legal and ethical issues surrounding surrogacy, but commercial surrogacy arrangements will remain prohibited placing greater focus upon the enforceability of surrogacy contracts and the parenthood provisions.

Second, the Surrogacy Act will allow surrogacy contracts. Surrogacy contracts, discussed extensively by academics such as Jackson and Mackenzie, offer a central solution to the current failings of surrogacy regulation in terms of improving legal involvement and beyond. The introduction of pre-conception surrogacy arrangements, or pre-arrangement assessment as termed by Mackenzie<sup>52</sup>, or 'memorandum of understanding'<sup>53</sup> as termed by the Brazier's

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<sup>50</sup> E. Jackson, 'Rethinking the pre-conception welfare principle' in K. Horsey, H. Biggs (eds) *Human Fertilisation and Embryology: Reproducing Regulation* (Routledge-Cavendish, 2007) at 48

<sup>51</sup> N. Gamble, L. Ghevaert, 'In Practice: The Human Fertilisation and Embryology Act 2008: Revolution or Evolution?' [2009] *Family Law* at 734

<sup>52</sup> n. 25 at 190

Reports recommended Code of Practice, would signify a radical departure from a complex, and often restrictive, legal framework. The introduction of surrogacy contracts provides the opportunity for *all* surrogacy arrangements to be regulated by law unlike current legislation. Gamble reports that many couples are unaware of the 'potential legal pitfalls', particularly those travelling abroad for surrogacy.<sup>54</sup> It is therefore follows that the legal regulation of surrogacy requires great improvement primarily to ensure that children born through surrogacy are not affected by legal obstacles which may upon impinge the identification of their legal parents. The legal position of those entering in to surrogacy arrangements must be clear to ensure that the legal mother and father are identified, and furthermore that the legal mother and father are those who wish to undertake the care and well-being of the child. Surrogacy contracts would enable the surrogate and commissioning party to overcome the current legal hurdles which may affect transferral of legal parentage faced by many surrogacy families. Surrogacy contracts would help to avoid situations such as those in *Re X and Y*<sup>55</sup> in which the children involved were potentially stateless and parentless as all parties would be made aware of the legal process in relation to parenthood prior to entering in to a legal relationship. A move away from the legal current framework which upholds altruistic surrogacy as the preferred model is required to ensure that informal agreements are not entered in to. The altruistic model of surrogacy preferred by the Warnock Report<sup>56</sup> (and hence the reason surrogacy is inadequately regulated) is based upon the selfless act of the surrogate to give birth for the benefit of others. This means that some surrogacy arrangements are regulated (where fertility treatment is used) and the rest are not because surrogacy is framed in law as a form of altruism. Lack of regulation is not in the best interests of the child as decisions regarding the child's parentage must be made post-birth. Horsey comments that: 'it is surely better all round for the parents of a planned child to be determined prior its birth – and where better than at conception (or pre-

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<sup>53</sup> M. Brazier, A. Campbell, S. Golombok, *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation* (Cmnd. 4068) at para 8.12

<sup>54</sup> N. Gamble, 'Crossing the line: the legal and ethical problems of foreign surrogacy' (2009) (19) (2) *Reproductive BioMedicine Online* 151-152 <[www.rbmonline.com/Article/4484](http://www.rbmonline.com/Article/4484)> accessed 2 February 2011

<sup>55</sup> n. 34

<sup>56</sup> The Warnock Report, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cmnd. 9314, London, HMSO 1984) 42 - 23

conception) to avoid uncertainty or dispute?’<sup>57</sup> Enforceable surrogacy contracts should be utilised to map out the intentions of those involved in the surrogacy arrangements to avoid conflict and impact upon the welfare of the child.

Additionally, information regarding surrogacy law is often received by commissioning parties through not-for-profit agencies such as COTS<sup>58</sup> and concern has been voiced regarding the regulation of non-profit agencies. Speaking publicly, Lord Macfarlane said, ‘I did express concern that these agencies, well meaning though they undoubtedly are, were not audited or regulated in any way as to the quality of advice that they gave couples approaching them for their service.’<sup>59</sup> Although not-for-profit agencies may operate lawfully, they are not regulated by law. Further, Dewinder Birk notes that both the 1990 and 2008 provisions do not

‘allow for effective monitoring of the incidences and the outcome of partial surrogacy in contrast with the obtaining and maintaining of information and records the HFEA is charged with carrying out in respect of other treatment.’<sup>60</sup>

The introduction of surrogacy contracts would ensure that the law is understood thoroughly by the parties and would allow greater access to information about the outcome of arrangements. But, this can only happen if it is stipulated *by law* that all surrogacy arrangements will only be recognised *in law* if they are detailed in contractual terms. For surrogacy contracts to be effective, there must be an incentive for surrogates and commissioning parties to enter in to legal proceedings. Here, the key incentive is that surrogacy contracts ensure that the legal interests of the party are negotiated and legally preserved prior to conception should the arrangement fail. The disadvantage of this approach is that this key incentive may not entice those who wish to limit state interference with their reproductive decisions. It may also be difficult to incite a shift away from the current unregulated model of altruistic surrogacy. The introduction of surrogacy contracts would not necessarily ensure that those engaging in surrogacy will move

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<sup>57</sup> n. 5 at 464

<sup>58</sup> COTS <[http://www.surrogay.org.uk/About\\_COTS.htm](http://www.surrogay.org.uk/About_COTS.htm)> accessed 19 February 2011

<sup>59</sup> BBC Radio 4, Transcript of “File on 4”, “Surrogacy” (January 2009) 18 <[http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/27\\_01\\_09\\_fo4\\_surrogacy.pdf](http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/27_01_09_fo4_surrogacy.pdf)> accessed 19 February 2011

<sup>60</sup> D. Birk, *Human Fertilisation and Embryology Act: The New Law* (Family Law: 2009) at 157

away from oral agreements in favour of time-consuming, and possibly expensive legal agreements.

However, Jackson, a strong advocate for the incorporation of contract law into the realm of surrogacy, argues that ‘contract law might offer a productive framework for *some* aspects of the facilitative regulation of surrogacy.’<sup>61</sup> Jackson argues that contract law is well-equipped to deal with unfair arrangements and is able to govern and render void (or, indeed, voidable) exploitative agreements in the context of surrogacy, but it is also capable of much more.<sup>62</sup> Contract law would also permit surrogacy arrangements to be carried out within the private sphere, away from interference by the state due to the principle of freedom of contract.<sup>63</sup> In sum,

‘[g]iven its capacity to promote reproductive freedom while simultaneously policing onerous or unconscionable bargains, unlike the commonly favoured family law model some aspects of modern contract law might offer a flexible and accommodating framework for the voluntary transfer of parental obligations.’<sup>64</sup>

A new legal approach to surrogacy through contract will enable the law to track the intentions of surrogate mothers and commissioning parties whilst at the same time allowing them to define their own familial structure in terms of how the arrangement is carried out. The contractual terms of the arrangement should be decided by the parties themselves preserving the current way in which surrogacy arrangements vary in terms of medical intervention and process thus, instead of retrospective involvement with surrogacy concerning payment or foreign arrangements, the court will be aware of the interests of all involved from the outset through documentation and court-approval, as will be discussed in detail below.

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<sup>61</sup> n. 46 at 309

<sup>62</sup> *ibid* at 309. Jackson states that ‘contract law has always reserved the right to influence the shape of legally binding agreements, through, for example, implying certain “necessary” terms, and invalidating other unfair terms.’

<sup>63</sup> *ibid* at 309

<sup>64</sup> *ibid*

This will place the individuals who enter into a surrogacy arrangement in a much improved position. When the arrangement is non-contested, difficulties which may occur when obtaining a parental order such as time constraints or that the child must reside with the intending parent(s) (who do not have legal responsibilities) from birth will be avoided and dealt with prior to conception. The court will also be better equipped to deal with other instances of failed surrogacy, for example, what should occur if the contract does not stipulate what should happen if the child is born disabled or the commissioning party separate if they are a couple. This will ensure that in the event of a failed agreement, the decision to determine the child best interest's remains with the courts. In so arguing it is important not to overstate the number of contested surrogacy arrangements. Surrogacy arrangements are in court for a number of reasons. Most obviously is when the surrogate's intentions change and she wishes to remain as the child's legal and social mother – but this is in fact relatively rare. More common are cases that come before the courts due to difficulties in obtaining a parental order, typically because payment has been made to the surrogacy (usually in an overseas foreign agreement). The reason behind a larger number of cases concerning parental orders is because the current legal framework imposes legal obstacles, making surrogacy and the legal transferral of rights difficult in the UK.

Ultimately, the process of surrogacy should be regulated by contract law, moving away from the current altruistic model of surrogacy which leads to informal arrangements often based upon inaccurate legal information about parentage. Most importantly, surrogacy contracts provide the opportunity to track the intentions of the parties in the unlikely event that the arrangement is contested. Because the intentions of the parties will be discussed and agreed, this ensures that all 'mother' roles are included and their interests are recorded legally. Surrogacy contracts will also prohibit the current problems with parental orders as outlined in Chapter Two allowing those parents who wish to be recognised in a legal capacity to do so more easily.

#### **4.6 Legal Status of Surrogacy Contracts**

Rethinking surrogacy regulation within the ambit of contract law raises several questions. The most important issue for consideration is the legal status of surrogacy contracts. At present, all surrogacy arrangements are unenforceable in law. The introduction of surrogacy contracts would reverse this position. It is proposed here that surrogacy contracts should be used to guide and monitor all surrogacy arrangements through the legal process of transferring legal status from the surrogate to the intending party. Applying basic principles of contract law to surrogacy, all agreements must be enforceable otherwise the purpose of the contract is diluted. The doctrine of consideration, and an intention to create a legal relationship would apply. In other words, there must be a legal consequence to the contractual process between parties if both parties intend to enter in to a legal relationship that will result in the birth of a child and transferral of parenthood. Without enforceability, it is clear that the best interests test often favours the surrogate and her wishes when the arrangement fails. Enforceable surrogacy contracts will enable the courts to explicitly take into account the conception method of the child when determining who is most able to care for the child. This is particularly important for the commissioning party as without their initial arrangement the surrogate, the child would not have been born. It therefore follows that there must be a legal consequence to the surrogacy context and this consequence should be the transferral of legal parenthood through parental order (which will be discussed in more detail below).

Interplay between family and contract law may prove troublesome in an area which is ethical sensitive. However, Jackson argues that surrogacy contracts (due to their specificity in time as pregnancy lasts for 9 months only) 'may be more akin to a contract *for services*' and 'if either party were to fail to fulfil their obligations under the agreement, the remedy would lie in damages, rather than specific performance.'<sup>65</sup> This would prohibit enforced separation between the child and the surrogate should she no longer wish to complete the contract. This approach, Jackson continues, 'would not have the same potential to wreak havoc with the basic liberties of the surrogate mother.'<sup>66</sup> Further, unfair clauses which may be seen to interfere with her bodily integrity or 'restrict the surrogate

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<sup>65</sup> n. 49 at 312

<sup>66</sup> n. 49 at 312

mother's decision-making authority about the management of her pregnancy could be struck out.<sup>67</sup> Jackson's model of surrogacy contract law also acknowledges the need for 'statutory prohibition of terms relating to the health of the child' and the risk of an unwanted child.<sup>68</sup> She recommends default rules allocating 'responsibility for that risk to the individuals responsible for the child's conception, namely the commissioning couple.'<sup>69</sup> The advantages of Jackson's model which may be used to reshape surrogacy law can clearly be seen.

#### 4.7 Intention

The transferral of motherhood will be a trackable process and surrogacy contracts will ensure that legal parenthood is determined based upon intention. The surrogacy contracts will be drawn up based upon the intention that the commissioning couple wish to become parents, actively caring for the child, whereas the surrogate does not intend to do this. By entering into a surrogacy contract, intention is the impetus for transferral of parenthood. Jackson argues that '[t]o ignore the centrality of their [commissioning party] intention to keep the child may not promote the child's welfare.'<sup>70</sup> It is consequently in the interests of all parties, especially the child, to ensure that the intention of the parties is recognised in law. Horsey argues that:

'intention' should operate as the pre-birth determinant in 'awarding' parental status' defined as 'the motivation to have a child, initiation and involvement in the procreative process and a commitment to nurture and care'.

Horsey presents four arguments in favour of utilising intention as a legal concept specifically in the context of surrogacy. First, the conception of the child does not commence *but for* the intention of the commissioning. Second, the intending parent(s) initiated the child's birth *and* intend to be the ones actively in

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<sup>67</sup> *ibid* at 313

<sup>68</sup> *ibid* at 313. For example, refraining from eating certain foods which may be harmful to the child, not smoking and abortion may all be relevant within a surrogacy contract.

<sup>69</sup> *ibid* 313

<sup>70</sup> *ibid* at 270

its care<sup>71</sup>. Third, intention should be noted as it is unfair to permit the surrogate to renege on the agreement when it was her original intention to relinquish her parental rights. Fourth,

‘there are good pragmatic reasons for acknowledging parenthood before conception, centred upon a need for certainty and uniformity: intending parents would understand from the outset that they will be presumed legal parents and are therefore responsible for the child’s well-being’<sup>72</sup>.

Horsey’s argument in favour of an intention-based test to determine parenthood in surrogacy strengthens arguments here in favour of a contractual intention-based approach to surrogacy and parenthood. An intention-based test reflects the social reality of motherhood. The surrogate will not intend to act in a legal capacity as a mother, just as the social mother intends to be recognised as a legal mother (eventually) from the outset. This is an example of retrospective legal intervention after the child has been born which is clearly not in the best interests of the child as who are the child’s legal parents will be uncertain.

Horsey also notes that the introduction of an intention-based examination (as well as the introduction of contract law in the new Surrogacy Act discussed here) will abolish the complex parental order process.<sup>73</sup> Surrogacy contracts will remove the need for parental orders as parental status will be awarded based upon intention. Concerns regarding parental orders include the ‘non-extendable time limit of 6 months from the date of birth for the commissioning parents to apply for a parental order’<sup>74</sup> and the notion that ‘eligibility for a parental order is conditional upon the child *already living with* the commissioning couple.’<sup>75</sup> These conditions appear to be nonsensical as they require a child to live with two individuals who will have no legal relationship with the child (even though a

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<sup>71</sup> K. Horsey, ‘Challenging presumptions: legal parenthood and surrogacy arrangements’ (2010) *Child and Family Law Quarterly* at 454

<sup>72</sup> *ibid* at 454, 455

<sup>73</sup> *ibid* at 462

<sup>74</sup> N. Gamble, L. Ghevaert, ‘*Re X and Y (Foreign Surrogacy): ‘A Trek Through a Thorn Forest’* [2009] *Family Law* at 242

<sup>75</sup> J. Bridgman, S. Millns, *Feminist Perspectives on Law: Law’s Engagement with the Female Body* (Sweet & Maxwell 1998) at 275



biological relationship will be present between at least one of the individuals and the child). There appears to be a great deal of legal uncertainty in the initial stages of the child's life as the legal status of his/her mothers remains undecided. Six months is also a small period of time especially if the couple have travelled abroad to enter into an agreement with a foreign surrogate. The practical problems regarding birth registration and extra-territorial considerations may mean that the six month time limit should be extended to allow for the increasing popularity of foreign surrogacy arrangements. Parental orders will therefore be replaced with intention to determine parentage as part of the contractual process.

It is proposed here that the parental order process should be removed in favour of an intention-based test. Once a child has been born and the contract is complete, parental status will automatically be attached to the intending parent(s). At present, only couples can acquire legal status as parents through surrogacy. This excludes single parents. The introduction of surrogacy contracts and intention would ensure that single women could engage with this reproductive method. It is also stated that a biological relationship must be present between at least one intending parent and the child, and '[w]hy this is the case is unclear'.<sup>76</sup> This will ensure that any legal ambiguities surrounding legal parentage and responsibility arising out of the parental order process will be avoided. It is important to avoid such ambiguities in the event that a child should require life saving treatment where consent must be given by a legal parent. This will ensure that transferring legal title continues to be a trackable process. More importantly, Horsey concludes that 'the intending couple and the surrogate would be recognised for the actual roles they play'.<sup>77</sup> This would ensure that the social reality of motherhood is reflected, dispelling hetero-normative ideals within the current legal framework which privilege gestational and genetic motherhood over intention.

#### **4.8 The Israeli Example**

To examine how surrogacy contracts should be regulated in England and Wales and determine the content and formalities behind surrogacy contracts, it is

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<sup>76</sup> n. 5 at 13

<sup>77</sup> *ibid*

important to look to lessons from other jurisdictions where surrogacy contracts are both legal and enforceable. The Israeli system is an example of such<sup>78</sup>. The Israeli example is utilised to support the argument presented in favour of contract law here. In Israel '[a] state-appointed approvals committee screens all surrogates and couples according to a centralised set of criteria, and all contracts are signed in the committee's presence.'<sup>79</sup> Intrafamilial surrogacy is prohibited, and 'is permitted only to citizens and permanent residents of Israel, preventing international surrogacy.'<sup>80</sup> Same-sex couples are prohibited from entering surrogacy contracts and the surrogate cannot be married.<sup>81</sup> The central issue here is that although surrogacy contracts indicate a liberal response to surrogacy, this is not entirely the case. This approach ensures that the well-being of the parties is fully-monitored prior to the conception of birth but places stringent conditions upon who may enter into an arrangement. The intending parents must be married or partnered, and the intending woman must not be able to carry a child to term. She must be able to provide evidence that she has undertaken IVF treatment or has convincing medical reasons to contract with a surrogate.'<sup>82</sup> These restrictive conditions indicate a step-back from the current developments in England and Wales. The UK position at present is far-more inclusive of non-normative same-sex couples for example who are able to acquire a parental order for surrogacy. Restrictions are not imposed upon who may enter into a surrogacy contract, nor is there a burden of proof placed upon the intending mother to establish her infertility. It is proposed here that the Israeli system of surrogacy regulation should be adopted in the UK but without the regulatory rules which govern surrogacy in this jurisdiction. As a whole, the Israeli system seems to be draconian for application in the UK as it prohibits same-sex parenting in the context of surrogacy and requires a legal partnership, but parts of this system are preferable.

The state-centralised approach to surrogacy screening should be adopted within the new Surrogacy Act. Additionally all surrogacy contracts should be

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<sup>78</sup>For a comprehensive summary of the legal background of surrogacy in Israel, see A. Benshushan, J. G. Schenker, 'Legitimising surrogacy in Israel' (1997) (12) (8) *Human Reproduction* 1832 - 1834

<sup>79</sup> E. Teman *Birthing a Mother: The surrogate body and the pregnant self* (University of California Press 2010)

<sup>80</sup> *ibid* at 13

<sup>81</sup> *ibid*

<sup>82</sup> n. 79 at 15 - 16

signed by the commissioning individual or party in the presence of an authority. The new Surrogacy Act should continue to be inclusive of same-sex couples and allow for intrafamilial surrogacy. It should be the role of the state to monitor surrogacy agreements, not to prescribe who can be involved or how the arrangement should be carried in order to preserve privacy in reproductive decision-making. In Israel,

‘couples submit a file to the approvals committee that includes documents attesting to their and the surrogate’s clean police records, a full medical history, and the results of recent medical tests showing that they are all healthy, disease-free and not substance abusers.’<sup>83</sup>

If adopted in England and Wales, screening would prohibit court intervention where the arrangement has failed for reasons of vulnerability on behalf of the surrogate, as in *Re N*<sup>84</sup> for example as Mrs N’s motives here may have been unearthed. Initial screening as part of the contractual process would enable women adopting various ‘mother’ roles within the arrangement to outline clearly how they perceive themselves in this role. The women involved would be given the time to discuss and agree upon how they identify themselves in the relation to the child born through surrogacy, effectively developing a legal relationship upon the experiences of women. This joins together the social realities of surrogacy in the form of the experiences of women with law. The purpose of the screening prior to contractual agreement would be to map the intentions of the parties, providing the court with full knowledge of the agreement in the event that the arrangement should fail and come before the courts again. It is unfortunate that a legal obligation for agencies or clinics to perform screening is not already in force. Of course, screening is not a fool-proof way to prohibit deceitful or exploitative surrogacy arrangements. It does however increase the legal profile of surrogacy arrangements, offers safeguards and provides an attractive alternative to the current unregulated framework.

In order for screening to be effective, it must be carried out by a monitored committee (similar to the Israeli approvals committee) who are experienced in

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<sup>83</sup> n. 79 at 15

<sup>84</sup> [2006] EWCA Civ 872

reproduction, law and ethics. The future of the HFEA as the central regulatory institution over reproductive issues in the UK is currently uncertain and will be disbanded shortly<sup>85</sup>. This presents the opportunity to develop smaller authorities and committees to deal with specific types of assisted reproduction and is particularly desirable in the context of surrogacy. Committees should include members of the medical and legal professions to ensure that a balanced assessment is carried out.

Additionally, one of the key issues with the Israeli regulatory framework is that it does not permit foreign surrogacy contracts. Due to difficulties in the UK concerning commercial surrogacy payments, a similar approach here would not be desirable. Recently in India, a legal framework is currently being mooted to incorporate foreign surrogacy arrangements in to domestic law. The Indian Assisted Reproductive Technologies Regulation Bill 2010 will legally recognise surrogacy arrangements and 'foreign commissioning individuals or couples must prove that surrogacy is permitted in their home country and that any resulting child will be permitted entry - and be recognised as the biological child of the commissioning individual or couple.'<sup>86</sup> This approach clearly responds to calls in the UK to ensure that the home states of the intending party do not leave children born through surrogacy in a stateless position. A legal approach reflecting the intentions of the Indian Bill adopted here in the UK will ensure that couples travelling abroad for surrogacy will not contravene UK law by entering in to a commercial surrogacy arrangement. But, this is often the reason intending parties travel abroad to engage with commercial surrogacy due to the difficult altruistic model in the UK which is unregulated. Introducing surrogacy contracts may reduce the demand for surrogacy overseas as surrogacy in the UK will be more regulated effectively and social attitudes improved.

To recap, lessons can be taken from overseas jurisdiction to guide the development of a new legal framework for surrogacy in the UK. Similar to the Israeli approach, contract law should be utilised to govern surrogacy but should not be restricted by, or involve excessive state-interference.

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<sup>85</sup> See, C. Dyer, 'New life for the HFEA?' (2011) (342) *British Medical Journal* 349

<sup>86</sup> N. Hyder, 'India debates new surrogacy laws' *BioNews* (7 February 2011) <[http://www.bionews.org.uk/page\\_88796.asp](http://www.bionews.org.uk/page_88796.asp)> accessed 9 February 2011

#### 4.9 Criticisms of Contract Law and Surrogacy

Jackson outlines the central criticisms against the introduction of surrogacy contracts. First successful and effective surrogacy contracts, protecting the interests of those involved, rests upon a consensual relationship between parties. A number of factors may be present which prohibit authentic consent, such as economic reward. It is argued that surrogates and commissioning parties are often in contrasting positions economically, with the commissioning couple often in a much stronger bargaining position<sup>87</sup>. However, the introduction of surrogacy contracts and their regulation would take the SAA 1985 as their starting point. Commercial surrogacy would continue to be strictly prohibited. In this sense, the altruistic model of surrogacy is preserved but is no longer relegated to the private sphere. It may be the case that undue influence may be exercised over the surrogate by the commissioning party, resulting in an unconscionable bargain where the surrogate may not be aware of her legal rights or feels coerced into the arrangement. However, this will not be the case for all arrangements. To deny the involvement of contract in surrogacy for this reason implies that the surrogate's decisions to engage with motherhood in this way are not her own. Further, Jackson argues that even where a contract may be oppressive, 'this does not necessarily represent an adequate justification for the general unenforceability of *all* surrogacy arrangements.'<sup>88</sup> In this instance, the courts should assume a role much similar to the role it currently occupies – the court would determine what would be in the best interests of the child due to the unenforceable nature of the surrogacy contract. However, for the majority, this would not be the case and the courts involvement retrospectively with surrogacy arrangements would be minimal. In this respect, surrogacy contracts would be introduced to improve the legal position of those entering into voluntary surrogacy contracts but does not impose legal obligations upon the surrogate or commissioning party if the terms of the contract are found to be invalid. Lee and Morgan observe that '[i]t is a classic characteristic of law makers and law givers that they do not, indeed, see the scene-

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<sup>87</sup> n. 46 at 310. See also R. Epstein, 'Surrogacy: The Case for Full Contractual Enforcement' (1995) 81 *Virginia Law Review* at 2328

<sup>88</sup> n. 46 at 310

as-a-whole.’<sup>89</sup> This is also the case here. To deny the introduction of contract law into the practice of surrogacy undermines the intentions of the majority of surrogates and commissioning parties to enter in to a legal relationship, triggering the parental order process. Fears concerning the exploitation of women through surrogacy contracts are only a small part of the bigger picture.

To summarise, it is proposed here that all surrogacy arrangements should be governed by a contract which is enforceable by law. Upon completion of the arrangement, the parental order process will be triggered automatically conferring legal rights and responsibility upon the intending party. The burden is upon the intending party to ensure that when travelling abroad surrogacy law in the UK is not contravened. Ensuring this will essentially be easier if the surrogacy contract is monitored in the UK as the intending party will have to enter in to a UK contract to be enforceable. For those choosing not to enter the surrogacy contractual process, they will not be protected by the safeguards offered to surrogacy arrangements through screening and damages for breach of contract. However, those who do not engage with the contractual process should not be prohibited from transferring legal status from the surrogate to the commissioning party. It may be that where there is conflict in this instance, the courts will resort to a best interests test not inclusive of the conception method as the arrangement will not be enforceable in law. However because the method of conception could not as relevant as it would in surrogacy contract disputes, this provides the incentive to ensure that surrogacy arrangements are contractual. To deny the transfer of parenthood from arrangements which are not regulated by contract however would not be in the best interests of the parties and most importantly, the child’s.

#### **4.10 Motherhood, Contract and Surrogacy**

In addition to lack of legal involvement, a primary failing of the current legal approach to surrogacy is that it fails to effectively recognise in law the various mother roles. This is particularly the case in relation to the surrogate (gestational mother) and the commissioning woman (intending mother). This section will assess how this can be improved through the enactment of a new Surrogacy Act,

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<sup>89</sup> R. Lee, D. Morgan (eds) *Birthrights: Law and Ethics at the Beginnings of Life* (Routledge 1990) at 6

improving parity between the 'mother' roles in law to reflect the social reality of motherhood. Contract law within surrogacy provides the opportunity to markedly change the law's response to mothers. The current hetero-normative structure of the law places the status of the surrogate as a gestational mother at the top of a hierarchical ladder of rights and responsibilities. The law should instead respond to motherhood with an equitable approach to the various mother roles, principally because assisted reproduction methods are increasingly commonplace and the societal understanding of motherhood has evolved with this. At present, the intending mother has no legal right or responsibilities in relation to the child. Surrogacy contracts would enable this to change. The surrogacy contract would ensure that the intending mother's interests in the well-being of the child are taken in to consideration because the contract will be enforceable in law, however what should happen if the surrogacy contract fails? The intending mother may be awarded damages, or the court may find it to be in the best interests of the child to reside with her. Is this approach correct in terms of providing equity to all 'mother' roles?

The main concern here is that to transfer legal title away from the surrogate as a result of the contract, the legal title of 'mother' will still be attached to the surrogate until birth. Although the contract will offer legal recognition to the intending mother, the surrogate will still be in a stronger legal position in statute should she change her mind due to common law misgivings concerning the role of 'natural' motherhood as discussed earlier in Chapter One and providing that she changes her mind before giving birth. The issue here is not that the surrogate is recognised as a mother; it is that the intending mother is not recognised when the child is conceived. Whilst surrogacy contracts go so far in terms of achieving this, are there any further alternatives to be considered? How might the law attempt to improve its recognition of various mother roles? One of the reasons why the law may find this troublesome is that the reality of practice places these women 'in a delicate position vis-à-vis one another in terms of control.'<sup>90</sup> Both women are reliant upon each other to become mothers in different capacities. The current legal approach heightens this as only one legal mother can be recognised at any

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<sup>90</sup> n. 79 at 5

time and ‘mother’ status must be transferred through proactive consensual legal action between women. It will be argued here that parenthood provisions in relation to surrogacy should be detached from the HFE Act and re-enacted with surrogacy specifically in mind. Rethinking the parenthood provisions will ensure that surrogacy law is focussed centrally on those specifically involved in the arrangement and may also offer alternative routes through which to regulate surrogacy.

#### 4. 11 Shared Motherhood

To improve legal recognition of social mothers, the parenthood provisions must be re-shaped to reflect the social reality of motherhood. At present, the parenthood provisions within the HFE Act reflect a hetero-normative interpretation of motherhood. But, as discussed in Chapter One, the social reality for many women as mothers is that motherhood cannot be defined by pregnancy alone. In the context of surrogacy, Teman found that surrogates often ‘engage in complex and cognitive and embodied efforts to manage their emotions, identities and relationships’ and did not view themselves as mothers in relation to the child they gave birth to.<sup>91</sup> As a result of this, the Israeli approach is focussed upon the intending mother and her engagement with motherhood and with the surrogate.<sup>92</sup> In surrogacy arrangements motherhood is ultimately a shared process. The social reality of motherhood in the context of surrogacy is thus different to the hetero-normative ideal. The default legal position in relation to the gestational mother should therefore be re-considered in the context of surrogacy. For example, it has been reported in the *Telegraph* newspaper that the five children of Barrie and Tony Drewitt-Barlow call ‘Barrie Dad and Tony Daddy and refer to all four women as Mum’<sup>93</sup> – all four women being either biological or gestational mother to one or more of the children. The children’s terminology indicates that in a social context, children (if aware) do not chose and view themselves as having one mother and one father if born through surrogacy. Whilst the case of Drewitt-Barlow children is rare as they have been well-informed about their conception and have featured

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<sup>91</sup> n. 79 at 294 -295

<sup>92</sup> *ibid* at 195

<sup>93</sup> *The Telegraph*, ‘Elton John baby: “Thanks to Zachary, gay surrogacy will become more acceptable’ (1 February 2011) <<http://www.telegraph.co.uk/health/8235149/Elton-John-baby-Thanks-to-Zacahary-gay-surrogacy-will-become-more-acceptable.html>> accessed 16 February 2011



heavily in the media, their terminology offers insight in to the way in which the law should respond to surrogacy.

Of course, differences over the social reality of motherhood through surrogacy will be present. The surrogate or intending mother may reject the idea of shared motherhood because in England and Wales, and Israel, the singular goal of surrogacy is to create only one mother,<sup>94</sup> at least who will act in a 'mothering' capacity. Whilst there may only be one social mother, denying motherhood as a shared experience undermines the actions of the surrogate and furthers arguments made by those who suggest surrogacy is a practice which uses women as a means to an end.<sup>95</sup> It is therefore important to shape law surrounding surrogacy based upon the social reality that surrogacy is a shared experience of motherhood, and each woman who adopts the role of 'mother' should be treated equally in law.

For the various 'mother' roles to be recognised in law, shared legal title may offer a solution to this problem. Legal title confers legal status and must be acquired by parents to act in a legal parental capacity. At present legal title can only be held by one mother at one time, unlike parental responsibility which can be acquired by more than one woman. Parental responsibility is a legal mechanism which facilitates social parenting. Parental responsibility may be acquired through various legal mechanisms such as parental orders, guardianship, or residence orders. Section 3 (1) of the Children Act 1989 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'. Legal title is different to responsibility and as Masson notes offers only limited rights such as 'inheritance rights, the right to apply to the court for any order concerning the child, and the right to be consulted if the child is looked after by a local authority'<sup>96</sup>. However these rights are enduring, and are recognised automatically in law for the gestational mother. It is clear then that legal title and parental responsibility are

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<sup>94</sup> n. 79 at 289

<sup>95</sup> n. 46 at 297

<sup>96</sup> J. Masson, 'Parenting by Being; Parenting by Doing – In Search of Principles for Founding Families' in J. R. Spencer, A. Du Bois-Pedain (eds) *Freedom and Responsibility in Reproductive Choice* (Hart Publishing 2006) at 131

two distinct concepts, each of which could be used to provide legal recognition for the various 'mother' roles involved in surrogacy.

First, as argued in Chapter Two it is important for the surrogate to be recognised in law, particularly when IVF treatment is used and the surrogate becomes a patient. Legal recognition could be conferred by automatic legal title for the surrogate *and* intending mother upon entering into a surrogacy arrangement. This would ensure that both the legal rights of the intending mother are protected during the pregnancy. If the surrogate no longer wishes to relinquish her title during pregnancy she would therefore be entitled to apply for parental responsibility. However, parental responsibility should be awarded (insofar as reasonably possible) prior to the birth of the child to sustain legal clarity and prevent disruption to the welfare of the child. If it is found that parental responsibility is not to be awarded to the surrogate, damages for breach of contract should be awarded to the surrogate and vice versa. This places each mother role in a position of equality, developing a level platform from which the courts will then be able to assess in the child's best interests who should also be awarded parental responsibility should conflict occur. The intending mother's parental responsibility is automatic unless challenged during the birth.

It should be noted that the relevance of legal title has been criticised. Andrew Bainham questions, [w]hy isn't parental responsibility enough in itself?'<sup>97</sup> Parental responsibility confers the practical rights in relation to parenting and begs the question as to why legal title is important. Bainham's criticisms of legal title suggest that the grandeur and power assigned to "full" legal title have overshadowed the importance of parental responsibility and the practical rights they confer. In the context of surrogacy, legal title is particularly important. At present, legal title confers automatic parental responsibility upon the surrogate – under the new Surrogacy Act this would now not happen. Detaching legal title from responsibility will thus allow both the surrogate and intending mother recognition in law without conferring parental responsibility until birth.

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<sup>97</sup> A. Bainham. 'Parentage, Parenthood and Parental Responsibility: Subtle, Elusive Yet Important Distinctions' in A. Bainham, S. Day Sclater, M. Richards (eds) *What is a parent? A socio-legal analysis* (Hart Publishing 1999) at 36

Currently, a parental order transferring legal status may only be applied for if there is a biological connection between a member of the commissioning party and the child. If the intending mother does not have this biological connection and has not used her own eggs, the intending social mother must apply for adoption and experience this long and arduous process to achieve legal 'mother' status. Her intentions to become a mother are not recognised in law from the outset, unlike her male/female partner whose intentions are recognised through his/her biological connection to the child. Biological distinctions between mothers and fathers under the new current regulatory scheme will not be made. A biological relationship with the child will not determine the award of legal status. Instead, intention (as mentioned earlier) will be used to determine who and should be recognised as a legal parent.

The central criticism of extending the dyadic family form to potentially include three mothers (if the commissioning party are a lesbian partnership) is that 'potential conflict would inevitably follow...or that a child with three parents [or four] might find the arrangement confusing or face stigma from peers' and perhaps why it was not given greater consideration by Parliament during recent reforms of the HFE Act<sup>98</sup>. However, McCandless and Sheldon observe that recognising more than two parents is being considered in other jurisdictions such as New Zealand where '[t]he New Zealand Law Commission has recommended changes to the law to permit a child to have three legal parents in certain reproductive contexts.'<sup>99</sup> One of the central difficulties with this however is that where legal title is shared, how is parental responsibility determined between the parties should conflict occur?

#### **4.12 Shared Responsibility**

Extending legal title ensures that the interests of all mother types are legally recognisable. However, what should happen when interests conflict and both legal mother wishes to assume parental responsibility prior to birth? Although these cases 'constitute a very small proportion of all cases'<sup>100</sup> failed surrogacy

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<sup>98</sup> n. 28 at 192

<sup>99</sup> n. 28 at 192

<sup>100</sup> n. 1 279

arrangements create difficult legal webs. At present there can only be one legal mother, however there can be more than one woman with parental responsibility (as is the case in the instance of step and foster mothers). Shared parental responsibility is not uncommon – could this be used as a solution where conflict between the parties occur and all wish to care for the child? Judicial decisions so far have indicated little preference in using shared responsibility as a way to respond to the specific way in which the child was conceived.<sup>101</sup> To what extent would shared responsibility address conflict between the parties whilst ensuring the best interests of the child are met?

One real life example of this - the case of *Re Evelyn*<sup>102</sup> - was the first litigated surrogacy case in Australia.<sup>103</sup> This case involved a surrogacy arrangement between two married couples, the S's and Q's. The S's agreed that Mrs S, fertilised with the sperm of Mr Q would carry a child which would then be cared for by the Q family. It was decided that contact should remain between the parties, 'in particular, between Mrs S and the child.'<sup>104</sup> Mrs S then decided that she no longer wished to be separated from the child, returning the child to her home. Both parties then began court proceedings claiming it would be in the child's best interest to reside with them. This case reached the High Court of Australia where it was decided that Evelyn should remain in the care of her gestational mother Mrs S and her husband. It was ordered by Jordan J that the two couples share the responsibility to care for Evelyn, with both parties participating in her long-term care as detailed by orders made by the court. Wallbank argues that the decision by the courts to centre focus up the long, and not short, term interests of the child displays 'profound wisdom'<sup>105</sup> in this decision. This places the interests of the child (beyond current circumstances) as the nucleus of the court's decision giving the court wide discretion to make assessment of the child's best interests. However, because of this, this decision is fact specific (and also presupposes the parents *can* provide long term) and cannot necessarily be construed as precedent

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<sup>101</sup> As in *Re P (Minors) (Wardship: Surrogacy)* [1987] 2 F.L.R 421; [1988] F.C.R 140; [1987] Fam. Law 414

<sup>102</sup> *Re Evelyn* No. B. R. 7321 of 1997 (unreported)

<sup>103</sup> M. Otłowski, 'Re Evelyn – Reflections on Australia's First Litigated Surrogacy Case' (1999) *Medical Law Review* 38-57

<sup>104</sup> *ibid* at 39

<sup>105</sup> n. 1 at 285

for the Australian courts. In spite of this, Wallbank maintains ‘that there may be very real accruing to a child in knowing and forming relationships with all parties to the surrogacy, including any other children involved, but leaving the matter to individual judicial interpretations is unsatisfactory’ which may be applied to the UK context.

Wallbank argues that there are clear advantages of shared parental responsibility. First, it may be in the child’s best interests to be aware of all parties involved in the creation and/or upbringing of the child. Wallbank notes that the welfare principle is ‘notoriously indeterminate’<sup>106</sup> and therefore requires re-evaluation which is inclusive of intention. Further, Wallbank comments that ‘[t]he diverse child sharing systems found throughout the world indicate that it may often-times be better to provide a broadened network of social, emotional and financial support.’<sup>107</sup> A failure to incorporate the possibility of more than one mother is therefore detrimental to the best interests test used to determine the upbringing of the child.

Ultimately, Wallbank’s argument suggests:

‘...by continuing to forward the traditional two-parent family as the paradigmatic form of children’s welfare and by denying the interested an input into the child’s life, we merely reify the social standing of child born through surrogacy as somehow deviant.’<sup>108</sup>

It is important therefore to consider different conceptions of the welfare test which incorporate different family structures, for example, those which utilise shared residence. This would reflect the social reality of surrogacy as a shared experience, particularly in the context of motherhood. Moving away from the dyadic family form as a structure which is best for the child, this prohibits reinforcing stereotypical ideas about non-normative surrogacy families as different and lesser to their hetero-normative counterparts.

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<sup>106</sup> *ibid* at 280

<sup>107</sup> *ibid* at 283

<sup>108</sup> *ibid* at 287

In contrast, Susan Boyd's recent work critically reflects upon the constraints of shared residence.<sup>109</sup> Boyd critiques and explores 'tensions between autonomy and the expectations of mother-caregivers, in the context of normative trends in post-separation law.'<sup>110</sup> Boyd suggests that autonomy of mother-caregivers is compromised as a result of 'socio-legal norms that increasingly prioritise significant involvement of fathers in children's lives.'<sup>111</sup> This is particularly problematic when shared parenting is enforced when there is no longer, or never has been a 'relationship-based motivation (such as love), for facilitating the child's relationship with the other parent.'<sup>112</sup> An example of this would be enforced shared parenting between a lesbian mothers and sperm donors.<sup>113</sup> This argument can also be applied to the surrogacy context. There will be (most often) no relationship-based motivation behind the surrogacy agreement. As a result of this, shared residence may constrain the choices of the surrogate regarding where she lived or work in order to accommodate shared residence and to take account of the wishes of other mothers and fathers with which she has no relationship.<sup>114</sup> On the other hand, Boyd notes that to emphasise women's issues in relation to motherhood is taboo.<sup>115</sup> She comments:

'As Diane Meyers has said: "Mothers are culturally represented as self-sacrificial, unconditionally loving, and totally identified with their children – the prototype of a gladly nonautonomous being.'<sup>116</sup>

To ignore the autonomy of the gestational mother within surrogacy would be to deny her choices to enter into the arrangement, regardless of whether the arrangement was successful. Boyd argues that shared residence between men and women provides fathers with greater recognition of fathers' rights and 'the

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<sup>109</sup> S. Boyd, 'Autonomy for Mothers? Relational Theory and Parenting Apart' (2010) *Feminist Legal Studies* 18, 137 - 158

<sup>110</sup> *ibid* at 137

<sup>111</sup> *ibid* at 139

<sup>112</sup> n. 109 at 139

<sup>113</sup> See, *Re D (Contact and Parental Responsibility: Lesbian Mother and Known Father) (No. 2)* [2006] EWHC 2 (Fam)

<sup>114</sup> n. 109 at 138

<sup>115</sup> *ibid* at 142

<sup>116</sup> D. Meyers, 'Gendered Work and Individual Autonomy' in Meyers D (ed), *Being Yourself: Essays on Identity, Action, and Social Life* (Lanham 2004) at 257 in n.109 at 142

centrality of female role in reproduction' is challenged as a consequence of this.<sup>117</sup> However, relating this specifically to the context of surrogacy, shared responsibility would be between various *female* roles in reproduction as well as their partners. The mother role which Boyd refers to is specifically the gestational role and does not incorporate ideas concerning the social and biological mothers and their equitable roles. Put simply, the context of surrogacy is so different to non-assisted families and motherhood is conceptualised differently by women who engage with the 'mother' roles individually.

Boyd's stance against shared parenting is founded upon relational theory, arguing that parental responsibility should be awarded based upon connection and established relationships with the child in favour of a 'focus on relational aspects of parenting.'<sup>118</sup> Surrogacy depicts a complex picture of various relationships between mother and child, each mother contributing to the creation and/or upbringing of the child. It follows from this that shared residence may provide a route through which to deal with surrogacy disputes as each mother role resembles a form of connection with the child. However, the surrogate often will not wish to create a relationship with the child similar to that of the intending mother. To assume the surrogate desires to do so reinforce gender stereotypical views that motherhood and womanhood are intrinsically linked. The objective here is to challenge such views.

The contractual model preserves the best interest test to determine parental responsibility where conflict should occur because issues arising at a later stage in the process may be curtailed due to screening and clear information regarding the legal process. Relationships with the surrogate in this instance will not be prohibited but will not be recognised legally after the award of a parental order. This approach most suitably reflects the social reality of surrogacy. Academic research into the relationship between surrogate and child after birth is limited. Blyth observed that contact between the surrogate and child was often rare due to reasons including 'the risk that the surrogate mother would be

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<sup>117</sup> n. 109 at 144

<sup>118</sup> n. 109 at 154

continually reminded of the child she had relinquished.’<sup>119</sup> Moreover even, if the surrogate and child sustain contact, this relationship would not necessarily require legal recognition as it would be unlikely that the surrogate would wish to make decisions about the child’s medical treatment, for example.

In summary, the various mother roles require greater recognition of law. This can be achieved through reformulation of the current parenthood provisions. Surrogate and intending social mother(s) should be assigned legal title as mothers until the child is born. The surrogate will retain the right to apply for parental responsibility if she contests the arrangement. This should be dealt with (insofar as possible) before the child is born in order to prevent any disruption to the welfare of the child and sustain legal clarity. When determining who should be assigned parental responsibility, the courts should not exclude shared responsibility as a possibility to ensure that each mother can engage with social mothering. Shared legal mechanisms are important within the new legal scheme as it challenges and breaks down the current patriarchal dyad that is represented in law. The practice of surrogacy and its new regulation would therefore challenge the current patriarchal legal structure which upholds a traditional construction of motherhood.

Legal recognition in surrogacy is important and the current legal approach presents further problems in this area, particularly in relation to the surrogate’s husband. The current legal framework appears to assign legal status not informed by intention, but by a prescribed hetero-normative structure. The surrogate is automatically assigned legal status which conflicts with social reality. Further, if the surrogate is married, her husband achieves automatic legal status as the father of the child born as a result of the arrangement. This problem will now be addressed in relation to the current law’s failing to recognise the various legal mother roles.

#### **4.13 The Hetero-Normative Structure of Legal Parentage**

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<sup>119</sup> E. Blyth, ‘Not a primrose path’: commissioning parents’ experiences of surrogacy arrangements in Britain’ (1995) (13) *Journal of Reproductive and Infant Psychology* at 190



Within the majority of surrogacy arrangements the commissioning male is the biological father, but he is not necessarily recognised as the *legal* father from the outset. Section 35 of the HFE Act 2008 amendments state that if at the time of reproductive treatment the surrogate is married, and 'the creation of the embryo carried by her was not brought about with the sperm of the other party to the marriage, then subject to section 38(2) – (4), the male party to the marriage is to be treated as the legal father unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs or to her artificial insemination.' Providing the surrogate's husband consents, the assignment of automatic status within this legal framework of surrogacy is somewhat confusing.

The surrogate's husband achieves full legal status although he does not demonstrate an intention to fulfil the role of a social parent. Further, if the surrogate is married, the biological father (who will usually be the commissioning father) is treated as a sperm donor. This means that the biological father cannot be recognised in law unless legal rights are conferred to the commissioning father. However the surrogate's husband will not acquire automatic parental responsibility. Pattinson points out that the husband 'can escape legal fatherhood by showing that he did not consent *and* is not the biological father (using DNA evidence)' as the common law presumption of paternity in marriage is rebuttal as preserved by the HFE Act 2008<sup>120</sup>. In spite of this, the husband's right to legal title remains troublesome in the context of surrogacy. This emphasises the reality of surrogacy as a practice unsupported by current legal regulation, and when it is support appears confused as it attempts to mirror the hetero-normative structure founded upon marriage and the two-parent dyadic which imitates heterosexual relationships.

However, it is clear to see how this confusion has arisen. The parental status of the surrogate's husband is preserved in order to ensure that the sperm donor does not receive legal recognition in a parental capacity when the reproductive method is IVF. Whilst this corresponds well with legal recognition of the intentions of those engaging with IVF, this does not correspond well with the practice of surrogacy. There is no recognisable connection (unlike gestation)

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<sup>120</sup> S. Pattinson, *Medical Law and Ethics* (2<sup>nd</sup> ed) (Sweet and Maxwell 2009) at 304

between the child and husband, biological or social, which begs the question as to why marital status dictates fatherhood? The preservation of traditional constructions of 'mother' and 'father' highlights a preference toward the hetero-normative family structure based upon marriage and causes great difficulty for those who develop a family outside of the traditional format. Douglas points out that within a legal context, '[w]e still refuse to face up to the reality of our acceptance of the importance of social parenthood'<sup>121</sup> and this continues to be the case as it evidenced by the surrogate's husband's status. The fatherhood provisions require radical reform and the legal status of the surrogate's husband should be expressly removed. The provisions highlight an urgent need for a new Surrogacy Act, supporting intention of the parties and wishes of those involved.

#### 4.14 Further Considerations

Under the current system, all legal title and responsibility of the surrogate is extinguished. However, if the biological mother or father is a donor (and not the surrogate or intending parents) she remains traceable to the child. The current legal position prescribes:

'[d]onors of eggs and sperm are simply deemed by law not to be legal parents, although their genetic offspring are now seen as having the right to know who they are since a policy change in 2005 curtailing donor anonymity after *R (on the application of Rose) v Secretary of State for Health*.'<sup>122</sup>

Section 31ZA of the HFE Act 2008 states that an individual conceived through treatment services or sperm donation (excluding donation of sperm by the male partner of the female in receipt of treatment services) may request information regarding their genetic heritage at the age of 16. Section 31ZA(4) states that if the person requesting information is under the age of 18 the information provided must be non-identifying. Post-18 years of age, identifying information may be supplied. The removal of donor anonymity adds a further caveat to the surrogacy debate. A child conceived via surrogacy will be able to access information

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<sup>121</sup> G. Douglas, 'The Intention to be a Parent and the Making of Mothers' (1994) (57) *Modern Law Review* at 641

<sup>122</sup> [2003] *Family Law* 19, n. 25 at 185

regarding their genetic mother or father, but not the surrogate. Although becoming a surrogate or egg donor signals intention not to be recognised in a social capacity as a mother, legal recognition of their role in the child's creation should be available. Wallbank notes that 'it may be likely that the child will suffer some distress to learning the furore surrounding her birth'<sup>123</sup>. In order to prevent this, the introduction of surrogacy contracts mean that the names of the parties involved will be preserved in a legal document. Like donor information, this should be available to the child. The onus should be upon surrogacy clinics and agencies to monitor this information. Currently little information is known about surrogacy families and preservation of such records will ensure that official statistics will be available, and further research may be done examining the impact of surrogacy on children.

Carl Lind and Tom Hewitt observe that the importance of biological parenthood may not subside. They suggest: 'Giving the rising interest in our genetic origins and our ancestry (probably for no better reason than that we are inquisitive beings and that science is able to enlighten us) the biological fact of parenthood...will, it is submitted, continue to have growing social currency.'<sup>124</sup> This argument can also be applied to surrogate births. The surrogate performs a key role in the birth of the child and there may be a rise in interest from her gestational offspring regarding their conception which should be addressed by law.

#### **4.15 Conclusion**

Gamble and Ghevaert comment that '[t]he amendments to the law introduced by the 2008 Act...represent an evolution of the existing legal framework, rather than a revolutionary re-think of fertility and parenthood law.'<sup>125</sup> This implies the government are refraining from dedicating sufficient time and research into the practice of surrogacy to provide regulation which caters for all parties involved. The legal regulation of surrogacy and motherhood broadly

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<sup>123</sup> n. 1 at 279

<sup>124</sup> C. Lind, T. Hewitt, 'Law and the complexities of parenting: parental status and parental function' (2009) 31 *Journal of Social Welfare and Family Law* at 405

<sup>125</sup> N. Gamble, L. Ghevaert, 'In Practice: The Human Fertilisation and Embryology Act 2008: Revolution or Evolution?' [2009] *Family Law* at 734

continues to impose hetero-normative essentialist upon those it seeks to regulate. As a result of this, surrogacy law must be reshaped accordingly.

In 1986, Andrea Stumpf argued that '[o]nly a holistic approach to surrogate motherhood arrangements can consistently reach the appropriate result'<sup>126</sup> and it is this reality that legislators and courts alike are failing to address. A holistic approach to surrogacy and motherhood is required and can only be achieved through redefining motherhood and reshaping the law. The two-parent dyadic structure should be extended, incorporating and recognising various mother roles outside of the hetero-normative ideal.

Prior to the enactment of the 2008 Act, Lord Darzi of Denham commented on the aims of the reform, stating that 'We have not tried to fix what is not broken, nor have we thrown the baby out with the bathwater'.<sup>127</sup> Difficult ethical and moral debate surrounding surrogacy should be reintroduced to the public and politicians alike in order to re-clarify the legal regulation of surrogacy and improve social awareness of the practice. If surrogacy regulation is to be effective, it must be developed upwards from the practice itself as a shared experience of motherhood - changing the legal bath water without upsetting the baby.

Effective surrogacy regulation will be achieved through enactment of a new Surrogacy Act which utilises intention to determine who is recognised as a legal parent. Intention will be the impetus behind enforceable contractual relationships that will be possible if ideas presented in this chapter are adopted. Contract law will guide the surrogacy arrangement with a view to improving legal involvement in the process of surrogacy and providing greater recognition to the various 'mother' roles. Greater recognition of the 'mother' roles will be achieved through automatic shared legal title for all mothers involved in the surrogacy process. This protects both the surrogate and the intending social mother(s) providing them with the legal right to apply for parental responsibility. This challenges the patriarchal dyadic structure of law currently enshrined within surrogacy legislation which permits the recognition of only one legal parent. If the surrogacy

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<sup>126</sup> A. Stumpf, 'Redefining Mother: A Legal Matrix for New Reproductive Technologies' (1986) *Yale Law Journal* at 192

<sup>127</sup> HL Hansard 19 Nov 2007 Column 665

<http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/71119-0003.htm>

arrangement is contested, shared parental responsibility should be viewed by the courts as a possible alternative to the current response which favours gestational parenthood as evidenced in case law discussed in Chapter Two. Shared parental responsibility and legal title reflect the social reality of motherhood in the context of motherhood as a shared experience. Each 'mother' role is equal in the context of surrogacy to the creation and upbringing of the child. Ultimately, this new holistic approach to surrogacy regulation reflects the complexities of motherhood within this context.

Munro argues that surrogacy ought to be 'evaluated by feminist theory in terms of its effects upon the power dynamics that perpetuate feminist concerns and that provoke the feminist aims highlighted at the outset'<sup>128</sup> and through challenging the hetero-normative ideals that are currently enshrined, it is hoped that feminist concerns about surrogacy and motherhood are lessened. Changing the murky bath water which surrounds the baby by virtue of a new Surrogacy Act provides greater legal recognition not only to non-normative mothers, but most importantly to the baby and its relationship with his/her mother(s).

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<sup>128</sup> n. 18, Munro at 25

## **5. CONCLUSIONS**

There may not be anything “new” about surrogacy as a social practice, but its relevance within society through its relationship with motherhood is a persistent feminist concern. What is “new” and most interesting about surrogacy is that it openly and obviously challenges gendered constructions of motherhood, maternity and ultimately women. Surrogacy thus can be used as a lens through which to assess the legal response to motherhood. In doing so, this thesis concludes that the current legal response to motherhood in the context of surrogacy presents a static hetero-normative idealisation of who mothers are and what they do. The current legal response to surrogacy fails to distinguish between the various ‘mother’ roles adequately and by doing so reinforces motherhood as a gendered concept founded upon an instinctive maternal bond. Concluding thoughts here will summarise the findings of this thesis broadly, before offering final thoughts regarding how the legal approach to surrogacy should develop.

### **5.1 Conflicting Constructions**

In Chapter One, the social construction of motherhood was outlined as a multi-faceted concept but one which is easily recognisable. The social construction of motherhood is changeable and how women identify themselves as mothers will be variable. Women engage with motherhood in various ways, through gestation, genetics and mothering. This reality should thus be reflected in legal regulation of motherhood. The legal regulation of motherhood recognises the multi-faceted nature of motherhood as law permits legal motherhood to be shared between various women through parental responsibility. However, in the context of assisted reproduction, this willingness to recognise various forms of ‘natural’ motherhood is compromised particularly in the context of surrogacy. Assisted reproduction methods openly distinguish the various types of motherhood and it is therefore troubling that the law fails to recognise and attach legal protection to these roles equally. Enshrined in the HFE Act 1990 (as amended by the HFE Act 2008) and in cases such as *Re P<sup>1</sup>* the gestational mother is *always* recognised as the legal mother, even though her intentions to reject social maternity (as in the

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<sup>1</sup> (*Minors*) (*Wardship: Surrogacy*) [1987] 2 F. L. R 421; [1988] F. C. R 140; [1987] Fam Law 414

context of surrogacy) are clear. This indicates that the social and legal constructions of motherhood are in tension. The problem here is not that legal constructions of motherhood fail to recognise the 'various' mothers roles because the transferral of motherhood is assisted through adoption or residence orders. Problems arise when the transferral of motherhood is pre-conceived and pre-conception. In the context of surrogacy, this will almost always be the case, but the current legal framework fails to recognise this. Recognising non-normative mothers in law is essential if law is to reflect the social reality of motherhood thus ensuring the autonomy of women.

The two-tier legal structure currently in place either regulates medically-assisted arrangements utilising IVF regulated by the HFE Act 1990 (as amended by the HFE Act 2008) or where surrogacy is carried out in the home, is left entirely unregulated. The initial response to surrogacy as detailed in the Warnock Report<sup>2</sup> was one of great hostility and this led to difficult beginnings for the legal regulation of surrogacy law. In spite of this, the opportunity for reform arose many years later during the review of the HFE Act (1990). Unfortunately, the legislative response to surrogacy was minimal. Actively refraining from legal interference, the altruistic model of surrogacy is preserved, but it is the model of surrogacy most at odds with the social reality of motherhood. The altruistic legal model of surrogacy does not acknowledge the intentions of the surrogate to reject her maternity as a legal and social mother. Instead, legal motherhood may be transferred after birth which creates a difficult legal picture when the child is born. Although it is clear who the child's legal mother is, this does not reflect the social situation and family arrangement. By declining to acknowledge the social reality of surrogate motherhood in the first instance, the traditional construction of 'mother' as a gestational carrier *and* social provider is entrenched. This is not purely symbolic either. The transferral of motherhood is an arduous process, made difficult by the restrictive parental order process. In summary, the legal regulation of surrogacy is troublesome as it shores up gendered and outdated constructions of mothers.

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<sup>2</sup> The Warnock Report, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cmnd. 9314, London, HMSO 1984)

## 5. 2 New Beginnings

Considering the systematic failings of current surrogacy regulation through the HFE Act 1990 (as amended by the HFE Act 2008) further engendering motherhood as a hetero-normative construct, the immediacy for legal reform is apparent. Whilst of course there will be no consensus on how surrogacy should be regulated - feminist or otherwise - potential solutions do exist. It is argued that a new Surrogacy Act is urgently required, offering a fresh perspective on a practice that is so different to, but regulated alongside, other assisted reproduction methods.

A new Surrogacy Act will quell the current tension between social and legal constructions of motherhood as it should incorporate intention as a determining factor of legal parentage. So far, surrogacy regulation has relied heavily upon gestational relationships to determine parentage – an approach which is clearly at odds with how motherhood is recognised socially. This was recognised in the case of *Re G* and lessons can be learnt from this case in terms of how motherhood should be perceived legally. Baroness Hale’s separation of ‘natural’ parent roles as gestation, genetic and social must be utilised, and coupled with intention in the context of surrogacy. This allows for women who engage with surrogacy in any of the ‘mother’ roles to self-identify as mothers based upon their intentions. Self-identity is fundamental in social constructions of motherhood and this should be translated in law.

Introduction of intention to determine parentage means that surrogacy contracts will no longer have to remain unregulated in law as legal regulation will reflect social reality. At present, legal regulation of surrogacy confines motherhood as hetero-normative through automatic legal status to a surrogate who does not wish to be recognised as a mother, socially or legally, ignoring her intentions. How the law might track the intentions of the surrogacy parties is by contractual enforcement of the agreement, as can be seen in other jurisdictions such as Israel. Concerns regarding the impact of contractual enforcement in the area of surrogacy should not be disregarded, but it is argued here that through re-envisioning the use of legal title and parental responsibility to reflect the shared experience of motherhood that is evident in surrogacy, criticisms of contractual involvement



with surrogacy can be addressed. Moreover, through improved regulation those who are entering into surrogacy arrangements will be able to make informed decisions as their legal position and responsibilities will be effectively communicated and monitored thereby reducing the possibility of future difficulties and problems regarding legal parentage. A new Surrogacy Act incorporating intention, shared legal title and greater consideration of the possibility of shared parental responsibility will lead to effective legal regulation of surrogacy, providing equal protection to the parties involved and ultimately protecting the best interest of the child as intentions to engage with social parenting are tracked and identifiable.

### **5. 3 Concluding Thoughts**

Surrogacy is abound with complex ethical dilemmas, and it is for the role of law to respond to this and facilitate the choices of those who chose surrogacy as their method of conception in the interests of the child and autonomy of individuals to make reproductive choices. Horsey observes that:

‘Because methods of creating children by ‘non-natural’ means or by those requiring medical intervention have greatly increased, and perhaps also because of increased popular exposure to assisted reproductive techniques, it has become necessary for us to rethink how parenthood is defined in such situations.’<sup>3</sup>

How parenthood is defined, as this thesis has argued, is essential to determine how the law does, and should, respond to assisted reproduction. A legislative rethink of the way in which motherhood in particular is defined in law is urgently required. At present, law and society are in tension regarding motherhood. As an example of non-normative motherhood, surrogacy is representative of contemporary motherhood which can take many forms. Conflict between social and legal constructions of motherhood serves only to impact upon the autonomy of women and the lives they lead as mothers. It has been over 20 years since the enactment of the SAA 1985 with relatively little legislative change

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<sup>3</sup> K. Horsey, ‘Challenging presumptions: legal parenthood and surrogacy arrangements’ (2010) *Child and Family Law Quarterly* at 452

or discussion since, particularly in relation to a legal framework which regulates *all* surrogacy arrangements. It is now time to rethink surrogacy regulation with a view to improving the autonomy of women and their legal experiences as mothers.

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