MATER SEMPER INCERTUS EST: WHO’S YOUR MUMMY?

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ABSTRACT
In English law, the legal term for father has been given a broad definition but the definition of mother remains rooted in biology with the Roman law principle *mater semper certa est* (the mother is always certain) remaining the norm. However, motherhood may be acquired through giving birth to a child, by donation of gametes or by caring and nurturing a child so that the identity of the mother is no longer certain particularly in the case of surrogacy arrangements. While the law in the UK may automatically recognise the parental status of a commissioning father in a traditional surrogacy arrangement, the parental status of the commissioning mother is not automatically recognised in either a traditional or a gestational surrogacy arrangement. Thus the maxim *mater est quam gestation demonstrat* (meaning the mother is demonstrated by gestation) is also not approached consistently in the legal interpretation of parentage or motherhood in surrogacy as against other assisted reproduction methods. This raises questions about the extent to which motherhood should be affected by the method of reproduction and whether the sociological and philosophical concept of motherhood should, in the case of surrogacy, give rise to a new principle of ‘*mater semper incertus est*’ (the mother is uncertain). This article will argue that the time has come to move away from a legal definition of ‘mother’ that is based on biology to one that recognises the different forms of motherhood.

KEYWORDS: Surrogacy, Epigenetics, Commissioning couples, Motherhood, Early parental orders, Legal and social parent

I. INTRODUCTION
Surrogacy has historical roots and has been prevalent in popular culture through film and literature, but still retains a social stigma in modern

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1 See the Babylonian Code of Hammurabi dating back to around 1772 BC, which regulated and controlled the practice of surrogacy and where the surrogate mother was expected to relinquish all parental rights. See also the Lipit—Ishtar Code of Mesopotamia that is thought to pre-date the Hammurabi Code by two centuries, which permitted a man whose wife had not borne him a child to use the services of a ‘Harlot’ for conception. See also reference in the Book of Genesis 16.1–16.16 of the surrogate birth of Ishmael who was carried by the maid Hagar for Abraham and his wife Sarai.

2 See films such as The Surrogacy Trap (Adrian Wills, 2013) and Baby Mama (Michael McCullers, 2008).

For those couples embarking on surrogacy, the journey is fraught with legal conundrums particularly in the area of parental rights. The legal position adopted in the UK is that the birth mother is the legal mother. In this article, I argue that this law is out dated and that there is room for the surrogate and commissioning parents to record their intention as to legal motherhood in writing. This should be used as a basis for granting early parental orders prior to the birth of the child similar to Californian pre-birth judgments. In section II, an argument is advanced that the law has not kept pace with societal attitudes to motherhood while being prepared to recognise the different forms of fatherhood and to update the definition accordingly. I consider the arguments for recognition of both the biological and non-biological commissioning mother’s status using the epigenetics arguments aired in the recent Irish High Court decision of M.R & Anor v An tArd Chlaraitheoir and Others [2013]. I also consider Baroness Hale’s categorisation of ‘natural parent’ from the case of Re G (Children) [2006]. In section III, the legal parenthood provisions of the Human Fertilisation and Embryology Act 2008 (‘the 2008 Act’) are discussed and Honneth’s theory of recognition used as a vehicle to argue that the term ‘mother’ is important to a woman’s sense of identity.

Section IV deals with the question of whether the current legal definition of mother should be displaced in surrogacy and I consider the situation in other jurisdictions. Section V discusses the practical effect of moving from a position of certainty to one of uncertainty in respect of the legal definition of mother. In section VI, consideration is given to how the welfare of the child principle might be addressed in any shift in the law of motherhood in the context of a surrogacy arrangement. In section VII, the law in California is considered and I argue that this might offer a model for future reform. I conclude that surrogacy requires a shift in the presumption of motherhood from a presumption based on maternity (giving birth) to one based on the ultimate care and nurture role (motherhood). This article is concerned with the rights of the commissioning mother in a surrogacy arrangement rather than the rights of egg donors generally.

II. FATHERHOOD VERSUS MOTHERHOOD

The law in England and Wales gives a generous definition of father that is not based solely on biology. For example, under the Human Fertilisation and Embryology Act 2008 (‘the 2008 Act’), the husband of a woman who acts as a surrogate will be treated as the father of the child even where he has not provided his sperm and therefore has

4 A study by AE Poote and OBA Van Akker, ‘British Women’s Attitudes to Surrogacy’ [2009] 24(1) Hum Rep 139 found that British women had a largely negative attitude to surrogacy. Surrogacy arrangements are also illegal in European countries such as Germany, France, Austria, Switzerland, and Italy.


6 Human Fertilisation and Embryology Act 2008 s 47 states that a woman who is an egg donor is not to be treated as the mother of the child simply by virtue of that donation.
no biological connection to the child. In addition, a man who consents to being treated as the father during assisted reproduction treatment of a woman will also be regarded as the father where the woman consents to this. Fatherhood is also acquired via marriage with the husband then entitled to be registered as the father on the child’s birth certificate. In addition, any man registered on the birth certificate of a child automatically acquires parental responsibility. A father’s legal status is therefore not dependent on biology hence the principle, mater semper incertus est (‘the father is uncertain’).

However, the legal definition of mother remains one based on biology and dependent on a woman carrying a child to birth (maternity).

Section 33 of the Human Fertilisation and Embryology Act 2008 defines mother as:

The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child.

It can therefore be regarded as an irrebuttable presumption. This therefore excludes women who have donated their ovum (and therefore have a biological connection to the child) but have not carried the child and also women who are not biologically connected to the child but are responsible for nurturing, caring, and raising the child.

In legislation, the terms ‘parent’, ‘mother’, and ‘father’ are often used interchangeably and are not clearly defined, examples include the Children Act 1989 which uses the terms ‘mother’ and ‘father’ without definition and gives only a limited definition of ‘parent’. The Registration of Births Deaths and Marriages Act 1953 also does not define any of the three terms. Even when one looks to the adoption legislation and Conventions, there are no clear definitions. For example, the European Convention on the Adoption of Children 1968 states that the term ‘father’ and ‘mother’ mean ‘the persons who are according to law the parents of the child’ but does not go on to give a broad definition. Both the Adoption and Children Act 2002 and the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect

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7 See Human Fertilisation and Embryology Act 2008 s 35.
8 See Human Fertilisation and Embryology Act 2008 s 37.
9 The common law presumption of legitimacy.
10 See the Registration of Births, Deaths and Marriages Act 1953 s 1(2)(a).
11 Adoption and Children Act 2002 s 111.
12 See Human Fertilisation and Embryology Act 2008 s 33.
13 Ibid.
14 See s 2, which refers to mother and father but does not define those terms. S 4ZA attempts to define parent but only in the context of s 42 and s 43 of the Human Fertilisation and Embryology Act 2008 and schedule 1 paragraph 16 defines parent but only in the context of a claim for financial relief but not in the context of other parts of the 1989 Act.
15 See Registration of Births, Deaths and Marriages Act 1953 s 1(2)(a), s 2(a), and s 10.
16 European Convention on the Adoption of Children 1968 Art 5 (5) as ratified by the UK on 21 December 1968 and came into force on 26 April 1968.
of Inter-country Adoption\textsuperscript{17} use the terms ‘parent’ and ‘mother’ and ‘father’ without definition.

If therefore the mother and father are regarded as the ‘parent’, one would at least expect a clear definition of parentage within our laws. There are many definitions of legal parentage, which can include those acquiring parentage through parental responsibility,\textsuperscript{18} adoption,\textsuperscript{19} and parental orders.\textsuperscript{20} Legal parentage is a status that can be acquired by the operation of the law, but various statutory provisions give different meanings to the term ‘parent’. For example, for the purposes of a financial relief application, the Children Act 1989 defines ‘parent’ as including any party to a marriage or civil partnership where the child concerned is the child of the family.\textsuperscript{21} However, the Education Act 1996 defines ‘parent’ more broadly as including any person who is not a parent of a child but has parental responsibility or care for the child.\textsuperscript{22} Under the 2008 Act, the same sex partner of a woman who receives assisted reproduction treatment will be regarded as the parent of a child\textsuperscript{23} when compared with the Immigration Rules 1994 where the definition includes natural parents, step-parents, and those with parental responsibility.\textsuperscript{24}

In the case of Re C (Minors) (Adoption: Residence Order) [1993],\textsuperscript{25} Butler-Sloss LJ stated that the term parent was not fixed and changes depending on the context in which it is used and that the natural and ordinary meaning of parent did not always include the natural parents (the mother and father). This case involved the question of the legal status of the applicant who was the father of a child that was freed for adoption. The court had to consider whether the applicant could still be regarded as a ‘parent’ within the meaning of section 8 of the Children Act 1989. Butler-Sloss LJ illustrated how the term could be given different meanings in society:

The term ‘parent’ must be given its natural and ordinary meaning. It does not follow, however, that that meaning will always include the natural parents. The natural and ordinary meaning of a word is not fixed but changes according to the context in which a word is used. Thus the meaning of ‘parent’ in a school prospectus will include a person with de facto parental responsibility even if not a natural parent, but exclude a natural parent who has no contact with the child. On the other hand, the meaning of ‘parent’ in a work on genetics will be the biological parents, including a father who has no more connection than the initial act of fertilisation.\textsuperscript{26}

\textsuperscript{17} The Hague Convention of 29 May 1993 on Protection of Children and Co-Operation in Respect of Inter-country Adoption Art 26 (1) refers to the recognition of the legal parent–child relationship between the children and the adopted parents and the termination of the legal relationship between the child and his or her mother or father but does not define the terms ‘parent’, ‘mother’, or ‘father’.

\textsuperscript{18} Children Act 1989 s 3.

\textsuperscript{19} Adoption and Children Act 2002 s 46 and s 47.


\textsuperscript{21} Children Act 1989 schedule 1 para 16.

\textsuperscript{22} Education Act 1996 s 576.

\textsuperscript{23} See Human Fertilisation and Embryology Act 2008 s 42 and s 43.

\textsuperscript{24} Immigration Rules 1994 (as amended) para 6.

\textsuperscript{25} Re C (Minors) (Adoption: Residence Order) also known as M v C and Calderdale Metropolitan Borough Council [1993] 1 FLR 505.

\textsuperscript{26} Re C (Minors) (Adoption: Residence Order) also known as M v C and Calderdale Metropolitan Borough Council [1993] 1 FLR 505 page 509.
Case law in England and Wales has recognised that parentage can be acquired both naturally and legally. In the case *TvB* [2010], a ‘legal parent’ has been described as either a biological parent or one recognised by operation of the law. ‘Natural parent’ was described by Baroness Hale in *Re G (Children)* [2006] as a status that could be acquired in three ways (1) by ‘genetic parenthood’ involving the provision of gametes, (2) by ‘gestational parenthood’ involving the conception of a child, and (3) by ‘social and psychological parenthood’ involving the care and nurture of a child. The use of the term ‘natural’ in this context is interesting because when applied to motherhood or fatherhood it is normally taken to denote a biological conception to the child and not Baroness Hale’s third category of ‘social and psychological parent’. In Baroness Hale’s definition, the natural parent encompasses both the social and biological parent.

A biological parent is included in the definition of a legal parent as seen by the provisions of the 2008 Act, yet in the case of surrogacy a commissioning mother with a biological connection to the child is not a legal parent and so must instead apply to the court for a parental order to recognise her status. Using Baroness Hale’s terminology, it might therefore be more appropriate to term such commissioning mothers as ‘bio-natural’ mothers/parents.

It is the third category of natural parent (the ‘social and psychological parent’) that is the more problematic in legal terms. This is because while society would recognise such a parent (as in Butler-Sloss LJ’s example of a school prospectus) the ‘social and psychological parent’ is not always recognised as the legal parent. This third category of the ‘natural parent’ one could argue may therefore be thought of as a category of ‘socio-natural mother/parent’ to distinguish its lack of automatic legal recognition. A parent can regard himself or herself as a ‘socio-natural’ parent without intervention of the court but will require court intervention to be regarded as a legal parent. It is the legal parentage status that confers rights to make decisions affecting the child in the face of a dispute and to be recognised by society as having those rights to take action on behalf of the child.

In UK law, a parent is not based on biology, the status of father is no longer based on biology but the status of the mother remains rooted in biology. The legal definition of the mother becomes particularly problematic in the area of surrogacy when there may be two women with a biological connection to the child and therefore two potential mothers.

Surrogacy has been defined as a prior arrangement made by one woman to carry a child for another woman (the commissioning mother) with a view to handing over the child on birth as well as relinquishing parental responsibility for the child. The surrogate may provide her own eggs (traditional surrogacy) or act as a host womb into which an embryo is implanted (gestational surrogacy). In a gestational surrogacy situation, the eggs may be provided by the commissioning mother or by a separate egg donor. In the UK, a legal framework for surrogacy was first given consideration in

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29 *Re G (Children)* [2006] UKHL 43 para 33.
30 See Surrogacy Arrangement Act 1985 s 1(2) and s 1(3).
1984\(^{31}\) and reviewed again in 1998\(^{32}\) and 2005.\(^{33}\) However, despite extensive examination of this area of law, no proposals emerged for the legal definition of parentage to be reconsidered in the context of surrogacy. The Hague Conference on Private International law recognised in 2012 the need to provide a uniform approach to legal parentage in private international law\(^{34}\) but equally that this might prove difficult to achieve given the different views taken by States as to rights on maternity.\(^{35}\)

As far back as 1984 The Warnock Committee\(^{36}\) were tasked with considering the legal, social, and ethical implications of the developments in human fertilisation including surrogacy. In paragraphs 6.8 and 7.6 of the Warnock report, the committee considered the position with regard to dual motherhood in surrogacy and felt that in the case of the use of egg donors (where the eggs are provided by someone other than the commissioning mother or the surrogate) they should be treated in the same way as sperm donors and have no rights over the resulting child. They recommended that the legal mother should remain the person carrying the child, thereby supporting the mother is certain principle. At paragraph 8.20, they briefly considered but dismissed the possibility of two mothers having a genetic connection to the child by the commissioning mother providing her ovum. This rejection was on the basis that the committee had recommended in 18.18 of their report that commercial surrogacy should be illegal and therefore they felt it unlikely that a situation would arise where the commissioning mother would provide her eggs because it would be illegal for clinicians to be involved in the treatment.\(^{37}\) The report recommended at 18.19 that private arrangements should remain legal; however, the committee did not consider the implications for the ‘socio-natural’ mother in a traditional or gestational surrogacy arrangement (where a separate egg donor is used) and there was no attempt to displace the *mater semper certa est* principle. This was, in my view, a missed opportunity for the committee to consider the full future implications of dual claims to motherhood. However, one must also bear in mind that this was the first attempt to consider prospective legislation in this complex area and at the time of the Warnock committee’s report surrogacy was yet to emerge as a new form of fertility treatment available in licensed clinics. In fact by 1996, attitudes to surrogacy had changed with the British Medical Association (BMA) supporting treatment in licensed clinics.\(^{38}\) The Brazier

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36 Above n 31.
Committee in 1998 were tasked primarily with considering the issue of ‘reasonable expenses’ as well as whether surrogacy arrangements should be regulated. They were not tasked with considering the issues of parentage within surrogacy.

It was not until the 2008 Act that radical changes were made to legal parentage in assisted reproduction. The changes are contained in Part 2 of the 2008 Act and led to a heated debate in both Houses of Parliament during the debate of the Bill itself. Part 2 of the 2008 Act recognises legal parentage in the case of single and same sex couples as well as heterosexual couples and controversially replaced the previous requirement by clinics to consider the ‘need for a father’ when deciding on treatment with the need for ‘supportive parents’. Baroness O’Cathain debating the Bill argued for the deletion of Part 2 saying:

Part 2 has the effect of redefining what it means to be a mother or a father. It is intended to create a separate category of parent for those who do not fit the description of either mother or father, thereby creating in law a family that could never exist in nature.

There is no doubt that the provisions of Part 2 are far reaching and are not only complex but appear contradictory in places. For example, automatic legal parentage can be acquired by deceased partners who can acquire automatic parentage status as long as the assisted reproduction treatment (other than surrogacy) was started before their death and consent forms were also in place. The deceased second parent may have a biological connection under section 40 of the 2008 Act as the husband but may not under section 46, which relates to female same sex couples. Under section 46 of the 2008 Act, legal parentage can be acquired automatically after death by the second same sex female where her partner received treatment before her death and the necessary consent forms were signed. Yet in some circumstances, a second same sex female who remains alive will not acquire legal parentage status without the intervention of the court. This is true in the case of same sex female couples who are not in a civil partnership and use a private sperm donor without the assistance of a licensed clinic as well as same sex female couples who conceived before 6 April 2009.

In practical terms, it is arguable that the 2008 Act also provides a route to possible dual motherhood for female same sex couples in assisted reproduction (other than surrogacy) but bars dual motherhood in the case of surrogacy. McCandless and Sheldon argue that section 42 is an example of an attempt to reserve a status for the second female that is close to the means by which men obtain fatherhood. Therefore, the method of reproduction can in the case of female same sex couples

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41 See Human Fertilisation and Embryology Act 2008 s 40 and s 46.
42 This is the date when the new laws on the parentage status of same sex female couples conceiving through a licensed clinic came into effect.
44 Ibid page 193.
determine whether or not they automatically acquire recognition as the mother. This is because where a same sex female couple in a civil partnership use assisted reproduction that does not involve a surrogate then section 42 of the 2008 Act recognises the second same sex female partner as the gender neutral parent as long as they are in a civil partnership and the birth took place after 6 April 2009. If the couple are not in a civil partnership then under section 43 the second female partner can still become the second parent as long as both women consent to this before treatment in a licensed clinic. One could argue that this is dual motherhood in all but name although the law shies away from labelling it as such. These sections still require one of the women to have carried the child but importantly the second female partner will be regarded as the parent automatically and her status is not dependent on biology.

For female same sex couples (regardless of their civil partnership status) who require the use of a surrogate to carry the embryo then section 33 of the 2008 Act still applies and the surrogate is the legal mother. An application must then be made by the commissioning couple for an adoption order or parental order (if one of the mothers has a genetic connection to the child, this could be achieved by the use of her own ovum). For those female same sex couples unable to use their own ova, then the surrogate mother would be regarded as the legal mother but an application could not be made for a parental order as section 54 of the 2008 Act requires that at least one of the applicants has a genetic connection to the child. They would therefore have to apply for an adoption order. The mothers would be what I have termed ‘socio-natural parents’. This would apply equally to a male same sex couple who use both a sperm donor and a surrogate and therefore have no genetic connection to the child. The 2008 Act was therefore a further missed opportunity to consider changes to the legal definition of mother to include commissioning mothers to a surrogacy arrangement within the definition of parentage. In addition, the question of whether the law should recognise two mothers in a surrogacy arrangement was not fully discussed during the passage of the 2008 Act. McCandless and Sheldon conducted semi-structured interviews with officials from the Department of Health responsible for overseeing the drafting of the 2008 Act. The interviews revealed that the Department of Health initially considered the issue of two mothers in a surrogacy arrangement in the early stages of the reform process but dismissed the idea as too controversial and emotive and feared it would delay the passing of the Act.

The perceived injustice of the mother is certain principle in a surrogacy arrangement was highlighted in the Irish case of M.R & Anor v An tArd Chlaraitheoir and Others [2013], which illustrates the complexities of genetics in determining

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45 Although the law treats the second mother as the gender-neutral parent, the practical effect of s 42 and s 43 is that the child has two mothers.
46 See the Human Fertilisation and Embryology Act 2008 s 43 and s 44 and the case of AB v CD [2013] EWHC 1418 where failure to sign the consent forms before treatment began led to a declaration under s 55A of the Family Law Act 1986 that the second female parent was not the legal parent.
47 Human Fertilisation and Embryology Act 2008 s 54(1)(b).
49 n 47, page 191.
50 M.R & Anor v An tArd Chlaraitheoir and Others [2013] IEHC 91.
parenthood. This case involved a familial surrogacy arrangement with the sister of the commissioning mother acting as the surrogate mother. The dispute the court was asked to resolve was not around the surrogacy arrangement itself but on the issue of the right of the commissioning couple to be registered as the parents on the child’s birth certificate.

The High Court of Ireland heard from both an expert geneticist and a genetics lecturer on the issue of who could be considered the mother where one woman carries a child but the other woman provides her ovum (eggs). The evidence of both experts confirmed that the DNA structure of the embryo would come from the mother providing her ovum but that the surrogate mother could still affect the foetal development through a process known as epigenetics since the womb of the surrogate could operate to turn some of the child’s genes on and off. The surrogate mother was also able to affect the foetus’s immune system through the transfer of antibodies from the surrogate mother to the foetus via the Placenta (‘microchimerism’). However, more importantly, it was accepted by the medical experts in this case that, ‘the person who looks after the child after birth also has epigenetic effects on the child’.51 This is because the epigenetic effects on the child during pregnancy could be reversed post-natally due to experiences and environment that the child is exposed to. Epigenetics theory centres on the development stages of an embryo up to adulthood and examines how non-genetic influences such as gravity, temperature, education, and social environment affect development. Neglect and abuse in early childhood have been linked to making children more susceptible to certain diseases and illnesses such as heart disease and depression,52 and drug abuse.53 Evolutionary Development Psychologists such as Bjorklund argue that non-genetic maternal effects can be transmitted from mother to offspring. Bjorklund uses findings from studies of chimpanzees (the nearest mammal to humans in development) to support claims that the maternal environment has an effect on a child’s phenotype (physical or biochemical characteristics) causing molecular changes in the structure of DNA which in turn causes genes to be activated or de-activated. Each foetus contains the full quantity of genes necessary for development and the cytoplasmic environment of the mother’s ovum begins the development stage, which is continued when the baby is born and exposed to its physical and social environment. This in turn triggers further development. Thus the importance of providing ovum (‘bio-natural mother’) as well as being a child’s carer (the ‘socio-natural mother’) can be recognised when determining the issue of motherhood. Epigenetics therefore provides a powerful argument for the recognition of both the biological and non-biological mother.

As the commissioning mother had a biological connection to the child in this case, the High Court of Ireland, rejected the epigenetics arguments in favour of pure and simple DNA testing as determining ‘the presence or absence of inheritable

51 ibid page 3, para 9.
52 See studies by SV Batten and others, ‘Childhood Maltreatment as a Risk Factor for Adult Cardiovascular Disease and Depression’ [2004] 65 J Clin Psychiatry 249.
characteristics for the purposes of biology. The court accepted that the commissioning mother had a biological connection to the child and could therefore be registered on the birth certificate. This avoided the need to make distinctions between ‘natural’ and ‘legal parent’ by simply applying DNA to the issue. The Irish State has announced its intention to appeal this decision to the Supreme Court.

Ireland, unlike England, has no clear laws governing surrogacy, although the Commission for Assisted Reproduction in 2005 recommended, ‘the child born through surrogacy should be presumed to be that of the commissioning couple’.

On 22 February 2012, the Irish Government published for the first time guidelines on parentage and immigration. The surrogate is regarded as the legal mother (even if another woman’s ovum is used) whether or not the child is born from her egg. This disregards the recommendation of the Commission on legal motherhood. The father will have to establish he is the genetic father of the child and apply to the courts for a declaration of parentage as well as an application to be the guardian of the child.

Ireland has taken a cautious approach to regulating surrogacy in these guidelines, whereas Mr Justice Abbott in the case of M.R v Anor case was prepared to take a much more ambitious approach in the recognition of motherhood by accepting that motherhood could be acquired through genetics and biology and that this biological connection should be recognised. The case of M.R. v Anor is also important because it explored the possibility of a rebuttable presumption of motherhood with the use of blood tests. At present in the UK, paternity can be established using DNA tests but motherhood cannot be established in this way. In the UK, the biological and non-biological commissioning mother is not automatically recognised as either a mother or a parent.

III. WHAT’S IN A NAME?

Ordinarily in family law, there are good reasons why the mater semper certa est principle should prevail. For example, if one considers the case of Marcyx v Belgium (1979) 2 EHRR 330 failure to apply this principle caused an injustice to the birth mother. In this case, the applicant an unmarried mother challenged Article 319 of the Belgium Civil Code that did not apply the mater semper certa est principle to unmarried mothers and instead required them to either voluntarily recognise their own child or start legal proceedings to adopt the child. Until such time, the child was not regarded as part of the mother’s family. The European Court of Human Rights held that Belgium’s different treatment of legitimate and illegitimate children violated both Articles 8 and 14 of the Convention because the differing treatment lacked ‘objective and reasonable justification’.

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56 Independent.ie reported on 26 July 2013 <www.independent.ie/irish-news> accessed 26th July 2013. The appeal is listed for January 2014. However, the Family Relations and Children Bill 2013 currently being debated in the Irish Parliament would, if passed, enable the courts to transfer parentage to a commissioning mother with a genetic connection to the child.
58 But see the Family Relations and Children Bill 2013 which would enable the courts to transfer parentage to a commissioning mother with a genetic connection to the child if passed.
In other countries in Europe, the irrebuttable presumption of motherhood remains within gestational surrogacy and has not moved to a rebuttable presumption. For example in Germany (where surrogacy practices are illegal), there is an equivalent irrebuttable presumption of motherhood in their Civil Code, although the commissioning mother can apply to adopt the child in certain circumstances. Similarly Austria has an irrebuttable presumption of motherhood. In the case of S.H v Austria (2000), the Grand Chamber of the European Court of Human Rights overturned a previous ruling in the Chamber that Article 8 (right to respect for private and family life) and Article 14 (right not to be discriminated against) had been violated in the case of two couples seeking in vitro treatment using donated sperm and ova. The Grand Chamber held that there had been no violation as Austria was seeking to protect its civil law principle that the identity of the mother is always certain and that Austria should be allowed a margin of appreciation because of its need to reconcile societal views and attitudes with the changing pace of medicine. The Grand Chamber recognised that by allowing couples to use their own sperm or ova during in vitro fertilisation Austria was taking a cautious but realistic step in reconciling medicine and ethics.

So why should it matter if the UK adopts a position of certainty for motherhood yet a position of uncertainty for fatherhood? Well the answer lies in both medical and social science. If the theory of epigenetics is accepted, then a mother can influence the development of a child by contributing DNA (through the ovum), by carrying the child in the womb or by the maternal environment. In terms of social science, the answer lies in the importance of identity and self-worth to the individual namely the commissioning mother.

Some sociologists, philosophers, and professionals would argue that the status of parent is not dependent on a biological connection to the child and that parentage based solely on the ability to love and nurture a child and to provide the correct environment for the child’s development and growth are as equally important as having a biological connection to the child. Goldstein, Solnit, Goldstein, and Freud have argued that while a biological parent will have a psychological attachment to a child based on a sense of accomplishment or self-worth, for the child the attachment is based on day-to-day care. Therefore a parent who adopts the role of carer can still form a psychological attachment to the child.

According to Brighouse and Swift, a non-biological parent who does not give birth still has a role to play within the family. Their role involves the same acts of love, commitment, and selflessness in raising a child as those demanded of a mother who

60 See Civil Code Burgerliches Gesetzbuch (BGB) 1571 Mutterschaft.
61 S.H v Austria – 57813/00.
62 See for example H Lafollette’s controversial views that parenting should be licensed as an activity in H Lafollette, ‘Licensing Parents’ [1980] 9 Phil & Pub Aff 182.
65 Ibid.
gives birth to the child. Brighouse and Swift argue that in addition to the normal fiduciary role, parents also have additional roles which make their position unique. Firstly the dependency role, this is in respect of the child’s dependency on the parent in that the child is subject to the decisions and choices of the parent. Secondly, the exit role where parents have the power to exit the child–parent relationship at any time in a way that a child does not. Thirdly, the intimacy role where the parent receives unconditional love from a child and fourthly the moral role where the parent is responsible for the well being and development of the child. These roles do not depend on biology and together make up what Brighouse and Swift have termed ‘the uniqueness of the parent’.

The law has grappled with whether legal parentage should take precedence over natural parentage or whether the court should exercise a discretion as to which type of parentage to recognise according to the circumstances of the case and the welfare of the child. In cases such as Re M (Child Support Act: Parentage) [1997] and T v B [2010], the court specifically rejected the recognition of the natural parent in favour of the legal parent definition. In the case of Re M [1997], the court rejected arguments by the Child Support Agency that a father could become a legal father by estoppel simply by virtue of consenting to assisted reproduction. In the case of T v B [2010] involving an application for financial relief for a child following the breakdown of a female same sex relationship, Mr Justice Moylan accepted that the respondent was a natural parent but decided that the provisions under schedule 1 paragraph 16 of the Children Act 1989 could only apply to a legal parent (biological parents and those who are parents by operation of the law). This could not in his view be a ‘discretionary welfare decision’ but had to be a status based on law.

While a discretionary approach may not be a suitable approach, surrogacy is a unique situation that requires a unique approach to motherhood and parentage because a child will have more than one mother. While a commissioning mother can apply for a parental order, she must wait until after the birth of the child and then a further six weeks to enable the surrogate mother a ‘cooling-off’ period to withdraw her consent to transfer of parentage. She must then formally apply for a parental order within six months of the birth of the child and this is done jointly with her husband/partner. This process can itself take months because of the need for the commissioning parents to be assessed by a Parental Court Reporter from the Children and Family Court Advisory and Support Service (Cafcass). Cafcass has an important role to play in ensuring that the commissioning couple are able to provide a stable home environment for the child in the same way that assessment by social services of the adoptive parents is necessary in adoption proceedings. Within the period between the birth of the child and the grant of a Parental order, the surrogate is responsible for registering the child’s birth and consenting to any medical treatment. Recent research

67 Ibid.
71 In this case, the assisted reproduction took place before the Human Fertilisation Acts 1990 and 2008.
72 Human Fertilisation and Embryology Act 2008 s 54(3).
73 Human Fertilisation and Embryology Act s 54(2).
by the Centre for Family Research, University of Cambridge\textsuperscript{74} revealed some discontent by surrogates at having to register their names on the birth certificate initially as well as the period of time taken for the grant of a Parental order. This could be avoided if the courts were able to recognise the legal parentage or motherhood status of the commissioning mother prior to the birth of the child.

Recognition as a parent is important not only for the social status of the parent but also for the identity of the child. There are practical legal issues to navigate in raising a child which depend on recognition of parentage such as admission into the UK for the child based on the parent’s nationality, the right to approve medical procedures for the child, enrolment of the child into school, the right to bring and defend legal proceedings on behalf of the child, and succession rights of the child to the parent’s estate on intestacy. A commissioning mother is unable to acquire those rights until the courts have made a parental order after the birth of a child.

Social acceptance as a mother one could argue is important from a practical point of view for the ‘socio-natural parent’s identity’ as much as that of the ‘bio-natural parent’. However, it is also important for the child’s own identity to have the status of the child’s parent recognised socially and legally. The question of the importance of the child–mother relationship to the identity of the child has been legally recognised for sometime. More recently in the case of \textit{A, A v P, P, B} [2011], Mrs Justice Theis DBE recognised that the concept of identity included the need for the relationship between parent and child to be recognised.\textsuperscript{75} Article 8 of the UN Convention on the Rights of the Child also provides that States will:

\begin{quote}
Undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference.\textsuperscript{76}
\end{quote}

Those ‘family relations’ should arguably include the relationship not only between a child and a biological parent but also between a child and the socio-natural parent. In the UK, there is of course the child’s right to make an application for declaration of parentage under the Family Law Act 1986\textsuperscript{77} but this, like parental orders must happen post-birth. While the Convention makes special provisions for refugee, disabled and adopted children there is no reference to children born through assisted reproduction who might face disputes as to parentage. The failure of the Convention to address assisted reproduction, in particular in the area of surrogacy and the long-term effects, this may have on a child in terms of the right to know their birth mother perhaps reflects how quickly medicine has advanced since the Convention was ratified in 1989.\textsuperscript{78} Indeed the issue of the law not keeping pace with advances in science was also highlighted recently in the English case of \textit{CD v ST}\textsuperscript{79} which was referred to the

\begin{thebibliography}{79}
\bibitem{74} S Imrie and V Jadva, ‘Surrogacy Law: A Call for Change?’ Bionews 716 (5 August 2013).
\bibitem{75} \textit{A, A v P, P, B} [2011] EWHC 1738 para 28.
\bibitem{76} UN Convention on the Rights of the Child 1989 Art 8.
\bibitem{77} Family Law Act 1986 s SSA.
\bibitem{78} The British Medical Council only accepted that surrogacy should be permitted practice in licensed clinics in 1996, see above n 37.
\bibitem{79} \textit{CD v ST} Case C-167/12.
\end{thebibliography}
Court of Justice of the European Union for a preliminary ruling on the interpretation of EU Directives. Advocate General Kokott noted that the EU Legislature had only taken biological motherhood into account when drafting the Pregnant Workers Directive\(^80\) and had not considered surrogacy as a practice. Advocate General Kokott ruled that, as the objective of protection of maternity leave was to ensure that the development of the mother–child relationship was not hindered that this should extend to the protection of the relationship between the commissioning mother and the child. She ruled that entitlement to maternity leave should extend to the commissioning mother who should share such leave with the surrogate mother. The commissioning mother in this case was a non-biological mother.

As far as the identity of the mother is concerned, recognition theorists have accepted the importance and impact of recognition on an individual’s quality of life for many years.\(^81\) It is argued that the label of ‘mother’ is important to a woman’s sense of identity and therefore the legal definition of mother should not be based on a biological definition but should recognise the social meaning of motherhood.

Honneth\(^82\) draws on Hegel’s struggle for recognition theory,\(^83\) which argues that laws are recognised through a step-by-step process that involves a struggle for recognition. Honneth argues that recognition is essential to self-realisation and self-worth and that there are three forms of interaction connected to recognition and these are through firstly, the need for physical and emotional love from our relationships with family and ‘significant others’. Secondly our demand for rights (particularly equal rights) as a measure of our worth against others and thirdly the recognition of our own personality traits and personal difference necessary for our self-esteem. The latter is what might be regarded as the recognition of our own uniqueness as a person (our ‘solidarity’). Honneth considers the struggle of recognition in the context of a child’s struggle\(^84\) to free themselves from their mother’s control to assert their independence.

If one were to consider Honneth’s theory in the context of legal recognition of the commissioning mother, one might surmise that the commissioning mother requires physical and emotional love from her child who must recognise her as the mother. The demand for equal rights comes in the form of applications to the court for recognition of parental status, British citizenship application for the child, registration of

\(^{80}\) Council Directive 92/85/EEC.


\(^{84}\) Honneth draws on Hegel’s ‘affectional relationship’ theory between parent and child and Winnicott’s ‘relative dependence’ theory of the relationship between mother and child.
parentage on the child’s birth certificate, and even more political struggles for recognition of the same rights and benefits accorded to surrogate mother such as maternity pay and leave.\(^{85}\) It is the third stage, the uniqueness of the person that is arguably the more complex and often criticised\(^{86}\) aspect of the three stages because as well as the mother relying on her own internal recognition it also requires some shared external recognition (‘intersubjectivity’) of her motherhood. This shared external recognition is based on the mother’s place in society, which allows her to express her own uniqueness. Society recognises the legal parent rather than the natural parent (for example, hospitals and schools would act on the instructions of a birth mother rather than a commissioning mother who does not have a court order) and while the commissioning mother may recognise her own motherhood status often societal recognition is needed for her to fully make decisions and take actions relating to the child.

**IV. DISPLACEMENT OF THE LEGAL PARENT**

A woman with a biological connection to the child who does not give birth is at the same disadvantage as a woman with no biological connection to the child in that the law does not recognise her immediate entitlement to be a mother. A commissioning father who has a biological connection to the child can, however, be placed in a better position in terms of automatic recognition of his legal fatherhood status (if the surrogate is unmarried). One could therefore argue that in surrogacy law, sperm donation is given greater significance than egg donation in denoting parentage because a commissioning father who donates his sperm to an unmarried surrogate can acquire automatic recognition of his legal fatherhood status. This then raises the issue of potential discrimination between the sexes in terms of denoting legal parentage.

However, one has to also consider that commissioning fathers who donate sperm to a married surrogate cannot automatically displace the recognition of the surrogate’s husband as the legal father, a parental order is needed to do this. This is therefore in line with the requirement that a commissioning mother must also apply to the court to displace the legal recognition of the surrogate’s motherhood status. One could therefore argue that the law operates in a consistent way to prevent the displacement of a legal parent by a natural parent without court intervention. If this argument were followed, then there would appear to be no perceived sex discrimination in the way the surrogacy laws treat legal parentage between commissioning fathers and mothers.

If this same argument is applied in relation to the operation of section 42 and section 43 of the 2008 Act which recognises gender neutral parentage in the case of

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85 See the case of C-D and S-T [2011] ET- 2505033/11 which was referred to the Court of Justice of the European Union. The court ruled that maternity leave should be shared between both the commissioning mother and the surrogate mother with a minimum of two weeks leave each. The change in government policy to allow commissioning mothers to be entitled to adoption pay and leave from 2015 is set out in the Children and Families Bill 032 2013-14 s 94 currently going through the House of Lords and the government’s commitment to changing the law was first set out in HM Government’s consultation on the modern workplaces: Modern Workplaces Government Response on Flexible Parental Leave, page 7 see <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/m/12-1267-modern-workplaces-response-flexible-parental-leave.pdf> accessed 20 July 2013.

86 See for example Nancy Fraser’s criticisms of Honneth’s stages of recognition in N Fraser, ‘Rethinking Recognition’ [2000] 3 New Left Rev 107.
female same sex couples (where one of them receives assisted reproduction treatment), then again there is no displacement of the legal parent (male or female). Instead two parents are achieved. This then raises the question of whether the two parent model should be the norm and whether a model can be put in place for surrogacy that recognises dual parenthood in relation to the rights of both the commissioning mother and the surrogate. Wallbank advocates a position whereby child sharing by two mothers should become the legal and societal norm in surrogacy arrangements when the court is considering legal disputes in surrogacy, adoption, and donor insemination so that it is not approached as a choice between two mothers. Wallbank suggests this would best serve the welfare principle of the child. Jackson similarly argues that there is no reason why we cannot depart from the two parent model particularly in assisted reproduction situations and that it is wrong for the law to maintain a position of ‘parental exclusivity’ particularly as the granting of parental responsibility to others who are not biologically connected to the child is an example of where the importance of social parenting is recognised. However, Jackson also accepts that even if we were to move to a model where more than two parents were recognised, the law would still need to recognise the ‘principal parents’ for the purposes of residence and child support. The difficulty with arguments of child sharing by two mothers or more than two parents is that in the case of surrogacy, like adoption, there will be a proportion of parents who do not wish to maintain contact with the birth mother. Also in the case of inter-country surrogacy, there would be practical difficulties with child sharing where the birth mother resides in another country. Child sharing by two mothers is workable in the context of a same sex female couple (who have used a sperm donor) simply because they are living in the same household, there is an intention to share child rearing. However, as can be seen by cases such as Re G (Children) [2006] and T v B [2010] disputes about same sex parentage are still reaching the courts. However, it is also accepted that there may be circumstances where the commissioning parents want to maintain contact with the surrogate mother particularly if she has a biological connection to the child and she has children who will be related to the child and for this reason the courts should not adopt a one mother rule. However, whether the parties in this situation would want to move to a child sharing model or merely a position whereby they remain in contact with letters and photographs being passed to the child must remain, in my view, a matter for the parties themselves. The mechanism already exists to bring any disputes before the courts. However, in terms of a legal definition of motherhood, I agree that in moving to a rebuttable presumption, there is scope to widen the section 33 definition in the case of surrogacy to include (a) the birth mother and (b) the intended mother in a

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88 The welfare of the child principle now applies to applications for a parental order as a result of the Human Fertilisation and Embryology (Parental orders) Regulations 2010 s 2.
90 Above n 29.
91 Above n 27.
92 Human Fertilisation and Embryology Act 2008 s 33.
surrogacy arrangement (both biological and non-biological). The decision as to who becomes the principal parent is then determined in the grant of an early parental order in the commissioning mother’s favour, which operates to terminate the motherhood status of the surrogate mother. However, the section 54 parental order procedure should also be used for applications by the surrogate mother for the grant of contact rights or parental responsibility depending on the wishes of the parties as evidenced in a Memorandum of Understanding (this is discussed in section VII).

Legal recognition of motherhood in surrogacy should be based on Baroness Hale’s term ‘natural parent’ it is argued because it would achieve fairness in a situation where the parties have agreed that the commissioning mother should be the ultimate mother. This utilitarian approach would maximise fairness to the commissioning mother while still protecting the rights of the birth mother. Where the parties have agreed that the commissioning mother should be the ultimate mother, this should be reflected in the legal parentage status acquired by raising a rebuttable presumption in favour of the commissioning mother. Horsey93 explores the concept of intention in surrogacy agreements and argues that intention should be used as a pre-birth stage determinant of parentage in surrogacy cases. She argues for a presumption in favour of the commissioning mother as the legal parent without the need for court intervention on the basis that notional intention is capable of amounting to an enforceable promise and that it should be for the surrogate mother to make any challenges as to parenthood. However, as I will later argue, court intervention and parental orders remain necessary because the birth mother’s rights should not be overlooked because of the psychological ties that can be formed with the child during birth. In addition issues of autonomy that may arise, for example in decisions to abort the foetus, will require court determination. The court also has a role to play in ensuring that the intention has been freely given as well as ensuring that the surrogacy arrangement has not contravened the provisions of the Surrogacy Arrangements Act 1985.

Intention is, however, a good basis for arguing the presumption of motherhood should be reversed so that it is drawn in favour of the commissioning mother. However, this reversed presumption should remain rebuttable. While the intention of the parties should be given due consideration, the court needs to consider other factors such as the welfare of the child and therefore the courts should continue to oversee such arrangements. I do not argue that intention should be a basis for creating contractual obligations, merely as evidence when the court is considering applications for an early parental order. The intention of parties is evidenced by their consent to enter into a surrogacy arrangement and one could argue this is analogous to the consent provisions required under sections 40, 42, 43, and 46 of the 2008 Act in relation to other assisted reproduction treatments. The only difference is that surrogacy will not always arise as a result of treatment in a licensed clinic.

The motherhood status of the commissioning mother could be protected by one of two solutions, firstly an amendment to section 33 of the 2008 Act to include a commissioning mother within the legal definition of mother. It should then be possible for the commissioning mother to make an application for a parental order prior to

birth with a mechanism for this to be contested in the courts by the surrogate mother. This approach does not disadvantage the surrogate mother because at present, even though she is recognised as the legal mother, should she wish to keep the child following birth this dispute would still need to be determined by the court. This I have argued would provide the optimum fairness to the commissioning mother in situations where she was always intended to be the legal mother. The second alternative would be for the present legal definition to remain the same but simply for section 54 of the 2008 Act to be amended to allow for early parental orders. This would at least ensure that any delays in the commissioning mother acquiring legal recognition of her status would be minimised. These changes would also benefit male same sex couples in surrogacy by giving them the legal right to apply for an early parental order to enable them to make the day-to-day decisions affecting the child at a much earlier stage. In addition, an early parental order would also assist hospitals with the question of who has the right of access to the baby following birth.

The reversal of the presumption of motherhood operates successfully in other countries. In the Ukraine where surrogacy is legal, the motherhood rights of the commissioning mother are recognised from the moment of conception in the case of gestational surrogacy (although not traditional surrogacy) and the names of the commissioning couple will appear on the child’s birth certificate as the parents and no court order is necessary for a declaration of parentage and the consent of the surrogate mother is not required. However, to draw the presumption of motherhood in favour of the commissioning mother at the point of conception without intervention of the courts presents difficulties in terms of autonomy for the surrogate mother over her own body when issues of an abortion for medical reasons arise. However, as discussed in section V, these difficulties can be overcome by careful consideration of the stage of the pregnancy that an early parental order can be made.

Outside Europe, States such as California also favour a law based on the presumption of parentage lying with the commissioning couple. The case of Johnson v Calvert [1993] laid down important guidelines in respect of surrogacy and particularly limits on the surrogate mother reneging on the arrangement. In this case, the Californian Supreme Court considered an appeal by the surrogate mother from a decision in the Court of Appeal that the commissioning mother who had provided her ovum was the legal mother. The Supreme Court held that the law recognised both the genetic mother and the mother giving birth and that when the two coincide the legal mother would be the genetic mother who intends to raise the child. The Supreme Court therefore found in favour of the commissioning mother and commissioning father.

94 See cases such as Re C (a minor) Ward Surrogacy [1985] Fam Law 191 (the baby cotton case), Re Baby M 537 A.2d 1227, 109 N.J. 396 (N.J. 02/03/1988) and Johnson v Calvert 5 Cal.4th 84, 851 P.2d 776. Whilst the court found in favour of the surrogate mother in the case of Re P (minors)(wardship: surrogacy) 1987 2 FLR 421, this was because the child had lived with the surrogate mother for some time.


In California, any surrogacy agreement has to be made before a surrogate is impregnated, usually through IVF. Couples must then get a ‘pre-birth judgment’.98 This allows the names of the intended parents to be placed on the birth certificate. The law focuses on the intention of the parties rather than biology and therefore a biological mother is given the same rights as a non-biological mother. In the case of Buzzanca v Buzzanca [1998],99 the Californian Appeal Court went further on the issue of parentage and biology by declaring that where a surrogate receives donated eggs and donated sperm and the gametes are not those of the commissioning couple, the commissioning couple will still be regarded as the legal parents (thereby recognising the ‘socio-natural’ parent).

V. MOVING FROM CERTAINTY TO UNCERTAINTY
There are of course many valid arguments to support retaining a legal principle that the birth mother should be recognised as the legal mother and retaining the certainty principle. One of those arguments is that it prevents exploitation of women being used merely for reproductive purposes and avoids commodification of the human body. This is a valid argument but ignores the intention of the parties and the fact that surrogacy like other forms of donation such as organ donation is sometimes seen as an act of generosity. The fact that commercial surrogacy remains illegal in this country is arguably a sufficient preventative measure against exploitation. The Brazier Report recommended an introduction of a new statutory provision defining in broad terms the ‘reasonable expenses’ that could be paid to a surrogate with the commissioning couple being required to provide evidence of expenses paid. The government did not take this recommendation forward and it has been left to the courts to retrospectively authorise payments at different levels for the welfare of the child.100 By defining what ‘reasonable expenses’ mean it would be possible for the courts to identify when a surrogacy arrangement might be regarded as a commercial arrangement and therefore an illegal act requiring refusal of applications for a parental order. In addition, section 2 of the Surrogacy Arrangements Act 1985 prohibits surrogacy agencies from profiting from a surrogacy arrangement. The court could act as a Sentinel for commercial surrogacy to ensure that cases involving exploitation of the surrogate do not lead to recognition of legal parentage in the commissioning couple’s favour.

Israel has a system whereby gestational surrogacy is legal but only with the approval of a seven member special committee comprising clinicians, lawyers, clergymen, and social workers who then control expenses and insurance payments to the surrogate for her pregnancy expenses.101 Although it is not suggested that the UK should adopt the same system, there remains a need for the courts to police surrogacy arrangements while commercial surrogacy remains illegal in the UK.

100 See Human Fertilisation and Embryology Act 2008 s 54 (8) as implemented in cases such as X and Y (Foreign Surrogacy) [2008] EWHC 3030; Re S (Parental Order) [2009] EWHC 2977; Re L (Commercial Surrogacy Agreement Parental Order) [2011] EWHC 921; Re X and Y (Parental Order: Retrospective Authorisation of Payments) [2011] EWHC 3147; D and L (Surrogacy) [2012] EWHC 2631; J v G [2013] All ER (D) 36; Re P-M (Parental Order: Payments to Surrogacy Agency) [2013] EWHC 23280.
Another argument against removing the *mater semper certa est* principle is that it would not be in the best interests of the child to have multiple parents and therefore multiple mothers. A child could potentially have six parents if all forms of parentage were recognised: the surrogate mother, her husband, a sperm donor (who is not the commissioning father), an egg donor (who is not the commissioning mother), the commissioning mother, and the commissioning father. This is a compelling argument, but it is not sought to argue in this article that the child rearing should be shared. The issue is whether the commissioning mother should be allowed to assert her rights of motherhood very early in the surrogacy arrangement rather than waiting until after the birth of the child.

By allowing the commissioning mother to assert her rights over the unborn child, this does raise issues of autonomy in relation to the surrogate’s body and her right to choose to abort the foetus regardless of the intentions of the parties to the surrogacy arrangement. The surrogate mother’s right to abortion could become problematic if the court has already recognised the commissioning mother’s motherhood status via an early parental order. Under the Abortion Act 1967, the legal termination period of a pregnancy is up to 24 weeks. Currently, any disputes between the parties as to whether or not the foetus could be aborted would have to be dealt with by the courts first establishing parentage as hospitals and clinics would act on the wishes of the surrogate mother as long as the criteria under section 1 of the Abortion Act 1967 is met. Surrogacy agreements are not enforceable and therefore it would be difficult under English law to overcome the personal autonomy of the surrogate mother. An early parental order could therefore have undesirable consequences if granted on or before the 24-week period. Therefore, the timing of early parental orders must be given careful consideration.

Allowing court intervention at an early stage raises the possibility that the surrogate mother may change her mind about handing over the child but may be powerless to refuse if a court order has been made transferring her legal parentage status before the birth of the child. It is important that as currently exists in law the surrogate mother should be given a post-birth ‘cooling-off period’ to assess whether she wishes to change her mind and keep the child. As surrogacy is not enforceable, the cooling-off period is perhaps the strongest argument against bringing forward court intervention. However, in the case of gestational surrogacy where the commissioning mother provides her ovum one could argue that it is very unlikely that the court would award the surrogate mother custody of the child if she were to change her mind after the cooling-off period. This is because the commissioning mother also has a biological connection to the child and therefore it is arguable there are less risks associated with early court intervention in this situation. However, in the case of a commissioning mother with no biological connection to the child, it is accepted that these risks are greater. A solution might be for the court to make an interim order in all such cases at the pre-birth stage, which would still enable a cooling-off period, with the surrogate mother returning to court to oppose a final order after the birth if she were to change her mind. This cooling-off period could remain at the present six weeks from birth.

102 Abortion Act 1967 s 1 as amended by the Human Fertilisation and Embryology Act 1990 s 37.
103 Human Fertilisation and Embryology Act 2008 s 54 (7).
An interim order would enable the commissioning mother to register the birth of the child.

An argument against according a non-biological mother the same status and rights as a birth mother might be that a non-biological mother could have a psychological detachment to the child. Olga Van Den Akker conducted research into the views of commissioning mothers as to whether a genetic link to the child was important. The pragmatic view of the women who had no genetic connection was that they wanted to form a family in anyway permissible within their capabilities. This did not signal a detachment from the child. She found that of those commissioning mothers using donated ova only thirty-one per cent thought that a genetic link was important. This was, however, only a small study and there is no doubt larger studies are needed on this issue. However, the position of a commissioning mother in terms of attachment to the child is no different to that of a mother who adopts a child.

In the case of surrogacy, there is an assumption a child’s welfare will somehow suffer by not knowing its birth mother hence the need to accord the birth mother a higher status as parent. However, until 2004 in England and Wales, sperm donor fathers were permitted to remain anonymous. The right of the child to know its legal parents is undeniable but allowing the commissioning mother to be nominated as the legal mother need not interfere with the donor-conceived child’s right to know their origins. The Nuffield Council on Bioethics in their recent report came strongly in support of leaving the decision to disclose information relating to the donation of sperm, eggs, or embryos used in fertility treatment to the parents and donors and that this should remain a private decision with no interference from the State. It would be wrong, however, to leave donor conceived children with less rights than adopted children in relation to knowing their origins and the Hague Conference on Private International Law have indicated that any future Convention on international surrogacy should include the child’s right to know their identity. This could be addressed by incorporating a surrogacy section into the Adoption Contact Register. Currently, the regulatory body the Human Fertilisation and Embryology Authority (HFEA) maintain a Register of Information, which enables donor conceived children to request non-identifying information about their donor and any siblings related to them and those of 18 years of age can request identifying information about related siblings. The register could be extended to include private surrogacy rather than just surrogacy involving treatment in a licensed clinic. Blyth, Frith, Jones, and Speirs have suggested that birth certificates could play a role in providing donor-conceived

105 As noted in Department of Health’s Review for Health Ministers of Current Arrangements for Payments and Regulation (‘the Brazier Report’) (White Paper Cm 4068, 1998) 4.4.
106 The anonymity for sperm donors was removed by the Human Fertilisation and Embryology (disclosure of Donor Information) Regulations 2004, which came into effect on 14 June 2004.
children with identifying information needed to identify donors by linking the HFEA’s Register of Information with the General Records Office to create a Donor Transparency Register.

If one were to apply Beauchamp and Childress’s four principles of biomedical ethics in an attempt to solve the ethical issue of who should be considered the mother, then I would argue that the balance would tip in favour of the commissioning mother. The principlism approach recognises that in health care, parties should be treated in accordance with the four principles of (1) respect for autonomy, (2) non-maleficence, (3) beneficence, and (4) justice. Respect for autonomy would involve recognising that the parties to a surrogacy arrangement have the capacity to act and do so intending to honour the arrangement and understanding the issues involved. By recognising that the surrogate’s rights should be protected by not making the surrogacy arrangement enforceable and allowing the surrogate mother to challenge decisions of motherhood following the making of an interim parental order, this ensures that no harm or injury is done to the surrogate. By enabling the commissioning mother’s motherhood status to be recognised at the pre-birth stage offers benefits to her in terms of identity and self-worth. The final aspect of fairness through justice is achieved by ensuring that court intervention remains a necessary feature of any changes to the presumption of motherhood.

VI. WELFARE OF THE CHILD

In applications for a Parental order, the court must apply the welfare of the child principle under section 1 (2) of the Adoption and Children Act 2002. This requires the court to give paramount consideration to the child’s welfare throughout his/her life. In doing so, the court will order a Parental Order Reporter from Cafcass to consider the suitability of the commissioning parents to be parents and care for the child. The welfare principle under the 2002 Act is slightly different to that found in section 1 (1) of the Children Act 1989 which states that ‘the child’s welfare shall be the court’s paramount consideration’ but makes no reference to considering this throughout the child’s life. Both Acts have a welfare checklist, but the 1989 Act has been criticised for focusing attention solely on the rights of the child without any consideration for the rights of the adults involved in the child’s upbringing. This is corrected to an extent by the 2002 Act where the welfare checklist under section 14 (4)(f)(iii) requires the court to consider ‘the wishes and feelings of any of the child’s relatives, or of any such person regarding the child’. Section 1 (8)(b) clarifies that the term ‘relative’ includes ‘the child’s mother and father’ (although again these terms are not defined). It is argued that section 1(8)(b) should be widely defined to include the wishes and feelings of the commissioning mother and father.

The child already exists when an adoption arrangement is entered into and so it is right its welfare should take precedence, but in the case of surrogacy the child is not born at the time of the surrogacy arrangement and it is arguable therefore that the

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110 See T Beauchamp and J Childress, Principles of Biomedical Ethics (OUP, USA 2013).
111 As required under the Human Fertilisation and Embryology (Parental orders) Regulations 2010 s 2.
child’s rights could be combined with that of the parent so that the future child–
parent relationship becomes the court’s primary concern when considering early
parental orders.

Section 13 (5) of the Human Fertilisation and Embryology Act 1990 as amended
by section 14 (2)(b) of the 2008 Act allows clinicians to consider the welfare of the
child before it is born by considering whether treatment should be offered to its pro-
spective parents. Emily Jackson argues that section 13 (5) is meaningless because it
extends the welfare principle to decisions taken pre-birth by pre-judging the fitness of
a person receiving assisted treatment to be a suitable parent.113 However, Parliament
considered that it was important to enact this section and rather than remove it in the
2008 Act the words ‘need for a father’ where replaced by ‘need for supportive
parents’. This provision is, I would argue, important because it recognises the need to
consider who will be ultimately raising the child thereby recognising the importance
of the ‘socio-natural parent’. In addition, it demonstrates that decisions can be made
about the welfare of the child before its birth and taking into account the fitness of
the parent. Jackson argues that it is wrong to pre-judge the ability of the commission-
ing couple to be good parents before the child is born and that the welfare of the
child should not be used to make judgments about who should receive fertility treat-
ment. Natural parents may only be subject to scrutiny of their parenting abilities once
they have attempted to care for a child and been found wanting. Whether section 13
(5) moves us closer to a world of licensing parents as envisaged by Hugh Lafollette114
is beyond the parameters of this article. However, section 13 (5) is useful to provide
an example of where the welfare of the child principle is used before a child is born. If
an early parental order application were feasible and could take place before the child
was born section 13 (5), although criticised, provides a model for the court to con-
side both the welfare of the child and the rights of the parents at an earlier stage.

The need for recognition and identity on the part of the commissioning mother
should be regarded as an important consideration by the courts in determining parent-
age. The child–parent relationship is entwined and together they make up the nuclear
family. Many States protect the concept of the family in their Civil Codes, Conventions,
or legislation. The rights and privacy of the family are considered important rights
worth protecting. For example, the family is placed under the protection of the State in
the German Constitution.115 In Ireland, the Constitution further states:

The State, therefore, guarantees to protect the family in its constitution and
authority, as the necessary basis of social order and as indispensable to the
welfare of the Nation and the State.116

Whereas in England, the family laws recognise that the family is private and recog-
nises Article 8 of the European Convention on Human Rights 1950117 but that the
protection of the child is the role of the State.

114 Above n 62.
115 Art 6, 1 Grunesetz der Bundesrepublik Deutschland.
116 Art 41 (1)(2) of the Irish Constitution 1937.
117 See the operation of Art 8 as incorporated into s 1 and Schedule 1 of the Human Rights Act 1998.
The United Nations’ Convention of the Rights of the Child\textsuperscript{118} states that the best interests of the child\textsuperscript{119} should prevail in all actions concerning children.\textsuperscript{120} However, it also goes on to state that in doing so account should be taken of ‘the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her’. The case of HS (Algeria) v Secretary of State for the Home Department [2011]\textsuperscript{121} confirmed that due consideration should be given by the courts in England and Wales to this Convention. If that is the case, the rights of the commissioning mother in terms of legal parentage is, I would argue, an important right and duty to take into account.

The importance of the family as a unit means that the welfare principle in surrogacy cases arguably should stretch to taking into account the commissioning parent’s care and nurture role which will extend throughout the child’s life and recognise that the welfare of the child and the welfare of its mother on the issue of parentage are combined. Brighouse and Swift\textsuperscript{122} argue that granting parental rights does not have to mean denying the child’s interests or welfare. In their view, the interests of the parent and child are intertwined and while parents might have their own interests to serve, parenting instinctively involves putting the child’s interests first.

\textbf{VII. THE CALIFORNIAN MODEL}

At 8.12 of the Brazier Report,\textsuperscript{123} the Committee recommended that parties to a surrogacy agreement should be encouraged to enter into a Memorandum of Understanding\textsuperscript{124} dealing with issues such as pregnancy arrangements, the future welfare of the child, contact, and what the child should be told about its origins. The committee did not explicitly suggest that the Memorandum of Understanding should be used to indicate legal parentage, but I argue in this section that this Memorandum of Understanding could provide a solution to the early recognition of the commissioning mother’s status. By arguing that the legal definition of motherhood should move from a position of certainty to a position of uncertainty, I am suggesting that in the case of surrogacy the definition should be widened to include not only the birth mother but also the woman who is intended to be the mother as evidenced in writing between the parties to the surrogacy arrangement. Where a Memorandum of Understanding exists between the parties, then at the point of an application for an early parental order the presumption of motherhood should be drawn in favour of the commissioning mother. The Brazier committee stressed that the Memorandum of Understanding should be non-contractual. As surrogacy contracts are currently unenforceable in the

\begin{footnotes}
\footnote{118}{United Nations Convention of the Rights of the Child 1989.}
\footnote{119}{The words ‘paramount consideration’ were originally used in the working text (1980 E/CN.4/1349) but were not adopted—see judgment of Lady Clark of Carlton in HS (Algeria) v Secretary of State for the Home Department (2009) CSOH 124 para 19.}
\footnote{120}{Above n 118 Art 3.}
\footnote{121}{HS (Algeria) v Secretary of State for the Home Department (2009) CSOH 124 and [2010] CSIH 97.}
\footnote{122}{Above n 66.}
\footnote{123}{Above n 39.}
\footnote{124}{Above n 39, 8.12–8.14.}
\end{footnotes}
UK, the Memorandum of Understanding would serve as evidence of the intention of the parties rather than as a contract.

California offers a model for the recognition of the motherhood of the commissioning mother at an early stage. California has swept away discrimination in surrogacy and legal parentage by amending the California Family Code, which came into effect on 1 January 2013. Under Californian law 7650 of the Family Code provides that:

Any interested person may bring an action to determine the existence or non-existence of a mother–child relationship.

The surrogate and the commissioning couple may enter into a written surrogacy agreement known as ‘assisted reproduction agreements’. This enables the commissioning couple to obtain a pre-birth judgment. This is usually from the fourth to the seventh month of the surrogate’s pregnancy. However, for reasons outlined earlier, because of the legal period for termination of pregnancies in England and Wales, any pre-birth parental order would have to be after the six month of pregnancy.

Section 7960 of the Code defines an intended parent as:

An individual, married or unmarried who manifests the intent to be legally bound as the parent of the child resulting from assisted reproduction.

This definition therefore includes both the biological and non-biological parent.

Under the Californian Family Code, surrogacy agreements must be notarised and will be valid if they meet a set criteria. The assisted reproduction agreement is valid and cannot be revoked without an order of the court. Separate lawyers must represent both sides to a surrogacy arrangement. The court is then able to establish the intended parents as the legal parents but the court still requires ‘sufficient proof entitling the parties to the relief sought’ and so to that extent the notarised agreements are not automatically enforceable.

The UK model need not involve notarised ‘assisted reproduction agreements’ which could, as I have indicated, be replaced with a Memorandum of Understanding. The requirement that such agreements should be drawn up by counsellors in the same way that a Memorandum of Understanding is drawn up by divorcing couples in mediation would offer an opportunity for all parties to a surrogacy arrangement to be offered counselling. The courts could then consider such a Memorandum of

125 Surrogacy Arrangements Act 1985 s 1A.
128 Above n 126.
129 Ibid.
130 Ibid.
131 Ibid.
132 At present counselling is only required under the Human Fertilisation and Embryology Act for couples undergoing treatment in a licensed clinic.
Understanding as part of an application for an early parental order. The proposed Memorandum of Understanding would not be an enforceable document and would still require approval of the courts and the court could and should seek the consent of all parties to the making of an early parental order. This would simply require an amendment to current UK legislation on parental orders to allow an application to be made before the birth of the child. This would then enable the commissioning couple to register the birth of the child directly without the need for re-registration. This would also offer an opportunity for Parliament to consider whether the criteria relating to those who can apply for a parental order should change or remain the same.

Given my arguments that a social parent should be accorded the same rights as a biological parent, a commissioning mother with no biological connection to the child should also be entitled to apply for an early parental order. The welfare of the child will still be safeguarded in that the court must still ensure that the surrogate has given her voluntary informed consent and that it would be appropriate for the child to be raised by the commissioning couple. A cooling off period could be built into the process through an interim order being granted before the final order. The role of the court remains important. Theresa Glennon argues that the US approach to assisted reproduction has developed what she has termed a ‘market-based individual approach’ to defining autonomy where all involved individuals including clinicians and lawyers would be responsible for defining approaches to reproduction including the protection of the child’s interests. She compares this to the UK ‘communitarian approach’ to defining autonomy, which relies on society to collectively develop a definition and regulation of autonomy within a defined structure. Certainly, California relies on a system that gives autonomy to the parties to a surrogate arrangement to reach agreement and record that agreement. In the UK, the court oversees any agreement. The introduction of a Memorandum of Understanding would not move the UK out of its present communitarian approach to autonomy as the courts would still be the guardians and final arbiters of whether the surrogacy arrangement as agreed should prevail.

There are of course issues relating to potential exploitation of surrogates especially in an inter-country surrogacy arrangement. There are also issues about psychological risks to the surrogate as well as the child on being separated and these issues need to be given careful consideration in drafting any legislation. The court can continue to treat inter-country surrogacy with particular care and scrutiny and Mr Justice Hedley recognised in the case of Re IJ (A Child) [2011] that inter-country surrogacy applications remain complex and should continue to be heard in the High Court rather than the lower courts.

VIII. CONCLUSION
In surrogacy, it is arguable that the best way to ameliorate the position of the commissioning mother and provide an equitable situation for both the birth mother and the non-birth mother is to change the legal definition of motherhood. There needs to be

a shift away from status based on giving birth (maternity) to status based on care giving (motherhood). M.R and Anor\textsuperscript{135} illustrates how a mother’s influence on a child is not based purely on genetics. The emerging science of epigenetics provides a sound basis for widening the current definition of mother in the field of surrogacy. There is no doubt that the scattered legislation on surrogacy needs to be consolidated into a central Surrogacy Act that rethinks the current position on commercial surrogacy and legal parentage. However, minor adjustments can be made to the present legal framework to achieve a utilitarian approach to this complex area of law.

A change to the current presumption of motherhood could be achieved by early recognition of the commissioning mother’s motherhood status before the birth of the child similar to the model adopted in California or by changing the legal definition of motherhood in surrogacy specific legislation. This would achieve fairness in according surrogacy similar treatment in law to same sex female couples receiving other fertility treatment in a licensed clinic. Both Honneth’s theory of ‘recognition as a unique person’\textsuperscript{136} and Brighouse and Swift’s ‘uniqueness of parenthood’\textsuperscript{137} provide strong arguments for a legal definition that accords with an individual’s sense of worth rather than one based on biology.

In this article, I have suggested that the surrogate mother’s rights need not be eroded by recognition of the motherhood rights of the commissioning couple pre-birth.

To continue to provide a generous legal definition of fatherhood and parenthood while maintaining a restricted definition of motherhood causes unfairness in the area of surrogacy given that the parties have already indicated their intentions with regard to the issue of the ultimate parent. This utilitarian rather than deontological approach to motherhood (within the confines of surrogacy) would ensure the welfare of both mother and child and also preserve the future child–mother relationship while still providing an opportunity for a surrogate mother to challenge legal status through the courts. Primary legislation amending the definition of mother for surrogacy cases or legislation that permits early parental order applications to be made would go some way to correcting the mismatch between the law on legal parentage, social reality, and scientific advancement. The use of Memorandum’s of Understanding to record the intention of the parties on the question of parentage will also assist the courts in making pre-birth parental orders.

While the Roman law principle of ‘mater semper certa est’ would be displaced within surrogacy by adopting either of these models, it is clear that advances in medicine have already displaced the principle yet the law has not caught up with the changing nature of motherhood while acknowledging the need to keep the definition of fatherhood and parenthood up to date.

\textsuperscript{135} Above n 50.
\textsuperscript{136} Above n 66.
\textsuperscript{137} Above n 82.