

# **Lady Hale at the Morgan Centre Conference, held at the LSE**

## **New Families and the Welfare of Children**

**20 June 2013**

My theme will be that there is no shortage of concern for the welfare of children in the rules of both national and international law; but that these are applied very randomly to the new families with whom we are concerned in this conference; and even when they are applied, we still seem confused, both about the balance between the rights of parents and would-be parents and the welfare of the children affected, about who should be seen as a parent, and about what is indeed best for the children.

### **1. Relevant rules**

National and international law are full of rules about the best interests of children. Most obvious to us is section 1 of the Children Act 1989, which makes the welfare of the child the paramount consideration in any court proceedings about his care and upbringing. Section 1(2) of the Adoption and Children Act 2002 goes further and makes the welfare of the child *throughout his life* the paramount consideration of both the court and the adoption agency in adoption proceedings.

Article 3.1 of the United Nations Convention on the Rights of the Child goes further still in one direction, because it requires that the best interests of the child shall be 'a primary consideration' in *all actions concerning children*, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. But it goes less far in another direction, because 'a primary' is not the same as 'the primary', still less 'the paramount', although the European Court of Human Rights

appears a little impatient of such niceties (see *Neulinger and Shuruk v Switzerland* (2012) 54 EHRR 31). Article 3.1 has not been directly transposed into UK law, but section 11 of the Children Act 2004 imposes a duty on a range of public services to discharge their functions having regard to the need to safeguard and promote the welfare of children. This includes local authorities, health service bodies, the police and probation services, youth offending teams, prisons and secure training centres. The same duty has since been imposed upon the asylum and immigration authorities (by section 55 of the Borders, Citizenship and Immigration Act 2009). It does not include most of central government and other public bodies such as the Human Fertilisation and Embryology Authority.

Long before that, however, the Human Fertilisation and Embryology Act 1990 made it a condition of any licence to provide treatment services regulated under the Act that a woman must not be provided with those services unless account has been taken of the welfare of any child who may be born as a result of the treatment and of any other child who may be affected by the birth (section 13(5)). In its original form this expressly included the need of the prospective child for a father, but now this has been replaced by the need for 'supportive parenting'.

Even so, there are some competing norms, including the way in which the right to respect for private and family life, guaranteed by article 8 of the European Convention on Human Rights, has been interpreted in Strasbourg. Remember the case of *Dickson v United Kingdom* (2008) 46 EHRR 927? A convicted murderer met his wife while they were both serving sentences of imprisonment. His wife had since been released and they applied to the Home Office for facilities for artificial insemination. The husband's earliest date of release was in 2009, when he would be only 37 but she would be 51, so they would be unlikely to be able to have a child together without this facility. The Home

Office refused the request, as their policy was only to grant it in exceptional circumstances. The Strasbourg court held that the policy was too restrictive and thus that the couple's human rights had been infringed.

The court did say that it was prepared 'to accept as legitimate . . . that the authorities, when developing and applying the policy, should concern themselves, as a matter of principle, with the welfare of any child . . . However, that cannot go so far as to prevent parents who so wish from attempting to conceive a child in circumstances like those of the present case, especially as the second applicant was at liberty and could have taken care of any child conceived until such time as her husband was released.' (Para 76) I do wonder what they would have said if he had been a convicted child murderer or paedophile? What would they think of Judge Goldsack who recently said that we should take away the children of criminals and other undesirables at birth? Perhaps they would say that it is not the function of the state in a modern western democracy to limit the right to beget and to bear children to people of whom the state approves - in effect to grant licences to those who wish to have children. But if so, that raises the question of whether it is ever acceptable for the state to exercise such a power, even when special assistance is required?

## **2. What sort of new families?**

I suspect that the sort of new families with which we are mostly concerned today do not include heterosexual couples who want to have a child together, even though they need help to do so.

Obviously we are concerned with families consisting of same sex couples and their children, particularly where the couple have had children together using donor insemination or surrogacy, rather than reconstituted themselves as a step-family with children from a previous hetero-sexual relationship; also, with families consisting of opposite sex couples constituted with children conceived using donor insemination, IVF, surrogacy, where one or both gametes come from someone other than social parents.

In each of these cases, the genetic parentage of the child does not wholly coincide with her social or psychological parentage. Clearly this presents extra challenges for those of us who care more about the interests of the child concerned than about the wishes of the parents. But the welfare principle is only very selectively, and some would say arbitrarily, applicable to these cases.

## **3. Selective application of welfare principle**

Thus, for example, we now have a complicated set of rules, which began in the 1990 Act but have been replaced by the 2008 Act, defining the legal parentage of these children.

So the carrying mother is always the mother, irrespective of whether she is also the genetic mother, and wherever she was in the world when the child was born (HFEA 2008, section 3). This rule was enacted to create certainty, but I think that it rule may also

be justified as the one most likely to be in the best interests of the child she carries. But I am not so sure about the next rule. This makes the mother's husband automatically the father of a child born using donor sperm or an embryo created with donor sperm, wherever in the world the child was born, unless it can be shown that he did not consent to the insemination (section 35). And it gets even more problematic with the provision which deems an unmarried partner to be the father, originally if they were being 'treated together' and now if they both notify the clinic that he is to be the father (section 37). But this only applies if the child is born as a result of licensed treatment in the UK.

Then there are the new rules which resulted from the determination of Mrs Diane Blood to have her husband's children after his death. Now if a man consents to the post mortem use of his sperm, or of an embryo created with his sperm, he will be treated as the father of the child *for the purpose of birth registration in the UK* if the woman so decides within 42 days after the child is born, again wherever in the world that takes place (section 39). In that case, of course, genetic and legal parentage co-incide so the law is only catching up (for a limited purpose) with the possibility of more than nine months' delay between the provision of the gametes and the birth of the child. But the new rules go further and allow a husband or unmarried partner to consent to becoming the father (for this purpose) of a post mortem child resulting from an embryo created while he was alive using another person's sperm; the husband rule applies wherever the embryo was created but the unmarried partner rule only applies to embryos created in UK licensed clinics (section 40).

Finally, of course, there are now equivalent rules providing for the mother's civil partner to become the other parent (section 42) and for an unmarried lesbian partner whom they both agree shall be the other parent (sections 43, 44)). There are also equivalent post

mortem rules for children born of embryos created while the couple were in a civil partnership or where the deceased woman consented to being treated as the other parent for birth registration purposes (section 46). In fact these are rules of which I thoroughly approve and only wish that they had been in force when my daughter and her civil partner had their children. They have the effect in the UK of excluding the provider of the sperm from being the legal father of the child. Indeed, all the UK rules are designed to secure that the child has at most two legal parents.

We cannot be so confident that the rules will always have this effect. Other countries' laws may be very different, raising the possibility that the child's parents in one country will not be regarded as the child's parents in another. But the point is that these are rules which interfere with the normal rules of genetic parentage automatically and without any consideration of the welfare of the child concerned. Of course, as we shall see, there may be even more problems for the child if the rules do not apply, as they do not to the do-it-yourself treatment of unmarried couples, so that the child's legal parentage is different from the social. As I pointed out in *Re G (Children) (Residence: Same Sex Partner)* [2006] UKHL 43, [2006] 1 WLR 2305, 'To be a legal parent of a child gives a person legal standing to bring and defend proceedings about the child and makes the child a member of that person's family, but it does not necessarily tell us much about the importance of that person to the child's welfare' (p 2316).

At least if the child is produced using the services of a licensed clinic, that clinic has to have regard to the welfare of the child. This applies, not only to the way in which the child is produced – using safe procedures which do not put the child's health and safety at unacceptable risk – but also to the future upbringing of the child. Clinics are supposed to assess whether there is a risk of significant harm or neglect to that child or any other

child. They should take a medical and social history from each partner and her partner. They should consider factors such as previous convictions relating to harming children, child protection measures, violence or serious discord in the family which are likely to cause a risk of significant harm or neglect; and circumstances such as mental or physical conditions, drug or alcohol abuse, heritable medical conditions, which are likely to lead to an inability to care for the child throughout childhood or are seriously impairing the case of any existing child. It is presumed that all prospective parents will be supportive parents, in the sense of being committed to the health, well being and development of the child, but if the clinic has any concern about whether this exists, they are advised to take account of wider family and social networks within which the child will be raised. They should refuse treatment if they conclude that a child is likely to be at risk of significant harm or neglect or they cannot obtain enough information to conclude that there is no significant risk (HFEA Code of Practice, chapter 8).

On the face of it, this guidance has not changed much since the first Code which we produced in 1990, but the presumption that parenting will be supportive changes the tone. The first Code was very controversial. It was thought that the provision had been put into the Act to prevent lesbian mothers obtaining treatment, but that is not what it says, and in any event many might think it better for the resulting child for them to seek safe licensed treatment rather than to resort to DIY. But the provision is of general application. Surely there must be some obligation not to provide children for child abusers and paedophiles, to say nothing of those who are unable to look after them? But some say that the situation should not be compared with adoption, because adoption is providing a new family for an existing child, whereas this is concerned with children who would not otherwise be born at all. To what extent can it ever be said that it is better for

such a child never to have been born? But the analogy with adoption is much closer in the case of donated embryos where many would say that human life already exists.

On top of that, it is also a condition of any treatment licence that a woman must not be provided with treatment services unless she and any man or woman who is being treated with her have been given a suitable opportunity to receive proper counseling about the implications and provided with the proper information (1990 Act, s 13(6), (6A)). The Act now specifically provides that the information given must cover the importance of informing any resulting child at an early age that the child results from the gametes of a person who is not the parent and suitable methods of telling the child about this (s 13(6C)).

But of course there is nothing to prevent people pursuing do-it-yourself donor insemination and surrogacy. There is a perception that DIY donor insemination is on the increase, owing to the shortage of clinic donors (whether because of the banning of payment or the possibility of tracing or for other reasons). We do nothing to regulate the so-called 'introduction' websites, where men advertise their services in terms like these (for which I am grateful to Professor Emily Jackson):

'I am a 34 married man wishing to act as a sperm donor. Unfortunately my wife cannot conceive and scared I would not pass on my genes I had an affair with a married woman who was looking to get pregnant. I must admit that I enjoyed this process and have since done it twice more. I am well educated (to master's degree level) and have been told I am good looking. I am fit and healthy and do not have any history of serious illness within my family. I would be happy to travel to meet, even for a coffee at first.'

(<http://www.co-parents.net>)



We also do nothing to regulate do-it-yourself surrogacy arrangements, whether used by married or unmarried opposite sex couples, by civil partnered or unpartnered same sex couples, or by a single man such as Ian Mucklejohn, whose story was featured in The Times recently (13 June 2013). Commercial agencies are banned here, but otherwise there is nothing to stop people making their own arrangements, despite all the pitfalls for the child. Nor is there anything to stop people going abroad to do so. They may have trouble bringing the child back into the country, but the Borders Agency may take the view that if the child has a British parent and is a British citizen, they cannot refuse her entry. Once they are here, the court may have little alternative but to grant the commissioning parents a parental order (under section 54 of the 2008 Act), even if it was a commercial arrangement or the court has serious reservations about the welfare of the child. Single people cannot apply for parental orders, so Mr Mucklejohn would have to apply to adopt if he wanted to regularize the legal position.

Of course things are quite different if there are disputes between the adults about who should be looking after the child, or about who should have contact with the child. Then the child's welfare is the paramount consideration and elaborate inquiries may be made in order to help the court to choose between the alternatives on offer.

#### **4. Paramountcy and the rights of parents**

In *Re G*, the House of Lords intended to make it clear that the welfare of the child is indeed the paramount consideration (see p 2315). This means that it 'rules upon or determines the course to be followed' (as Lord MacDermott famously put it in *J v C* [1970] AC 668, at 711). There is no question of a parental right. As the Law Commission

had explained, ‘the welfare test itself is well able to encompass any special contribution which natural parents can make to the emotional needs of their child’ (Working Paper No 96, para 6.22). This happened to be a dispute between lesbian parents. The Supreme Court had, however, to reinforce this message in the later case of *Re B (Residence: Biological Parent)* [2009] UKSC 5, [2009] 1 WLR 2496, a dispute between the father and the maternal grandmother. Lord Kerr, giving the judgment of the court, had to explain that Lord Nicholls in *Re G* had not been intending to cast doubt upon the primacy of the child’s welfare when he said that ‘a child should not be removed from the primary care of his or her biological parents without compelling reason’. As Lord Kerr put it, ‘All consideration of the importance of parenthood in private law disputes about residence must be firmly rooted in an examination of what is in the child’s best interests. This is the paramount consideration. It is only as a contributor to the child’s welfare that parenthood assumes any significance’ (para 37).

But what do we mean by ‘natural’ parents? In *Re G* I went on to suggest that there were at least three ways in which a person might become a natural parent of a child, each of which might be very significant for the child’s welfare, depending on the circumstances: the first was genetic parentage, which could bring a special sense of love and commitment from the parent which would benefit of the child, as well as the knowledge of origins and lineage important to developing a sense of self, and possibly the love and commitment of the wider family. The second was gestational parenthood, conceiving and bearing the child which brings with it a very special relationship between mother and child. And the third was social and psychological parenthood, the relationship which develops through the child demanding and the parent providing for the child’s needs.

In that case, there was one lesbian partner who combined all three – genetic, gestational and psychological – and another who was neither a genetic nor a gestational parent but was undoubtedly a psychological parent. I wish now that I had referred to them both as mothers, rather than to one as the mother and the other as the other parent. But I was very anxious to produce an opinion with which all the other members of the appellate committee could agree, which they did. I also think it a fair criticism of my opinion that it appeared to attach too much weight to the carrying mother's role – almost as if the three types of parenthood could outweigh the one. Another criticism is that we said that we were applying normal principles in a novel context.

Alison Diduck, in her feminist judgment in the case, considered the 'unusual' context to be a crucial importance, as this family could not be compared directly with more 'usual' contexts. The House had to achieve equality without assimilation (see R Hunter, C McGlynn, E Rackley, *Feminist Judgments: From Theory to Practice*, 2010, chapter 6). In order to promote the acceptance of the children's family as a legitimate and loving family, it was important to recognize rather than remain blind to the climate in which same sex parents raise their children. Lesbian co-parenthood was like no other kind of parenthood. Hetero-sexual parenthood, step-parenthood and even single parenthood were 'infused with gendered meaning which lesbian co-parenthood struggles to fit'. While she agreed with me on the law, she disagreed with me on the weight to be given to the genetic link. Both parties were the children's parents; the biological link, while relevant, was of less importance than the care they had given and were able to give to the children in the future. The other parent's role could not fit within the biology or the gendered roles of mother or father – she was not a mother or a father – and especially vulnerable as a result. But Baroness Diduck agreed that the children should not have been removed from their mother, as they had lived with her all their lives and they were

thriving in her care, and she now accepted her share of responsibility for maintaining their relationship with their other parent (unfortunately that acceptance proved all too short-lived, as the later litigation showed: *Re G (Children) (Residence and Contact)* [2012] EWCA Civ 1434, [2013] 1 FLR 1323).

I happen to agree with all of that – except possibly that I see no reason why lesbian parents should not both regard themselves as mothers or gay parents both regard themselves as fathers. That may be more productive of giving them equal treatment than calling one the mother or the father and the other the other parent. My grandchildren call their parents Mama and Mama Ella (mummy and other mummy) and that seems to suit them all. But it also seems clear from the facts of *Re G* and other reported cases that if a relationship between lesbian parents, or indeed between hetero-sexual parents, breaks down the ‘birth’ parent may have great difficulty in recognizing the continued importance of the psychological parent who is not also a genetic parent in the children’s lives. It seems that they may attach more importance to genetic and gestational parenthood than the law now does. And if they do so, it is all too easy for the other mother to be air-brushed from the family story – children will always be asked about or interested in who their father was but where is the language to ask about their other mother? This makes it all the more important for the law to recognize and reinforce the importance of the other parent in the children’s lives.

Indeed, the law may still be a little ambivalent – in *Re A (Joint Residence: Parental Responsibility)* [2008] EWCA Civ 867, [2008] 2 FLR 1593, the Court of Appeal, while approving of a joint residence order in favour of a psychological father who turned out not to be the genetic father, strongly disapproved the trial judge’s insistence that he be referred to as the ‘father’. As the whole basis of the order was that the child regarded him

as his father and derived benefit from their relationship, it seems odd that the court was not prepared to recognize the social reality in the terms of its order (although there may have been an element of consolation for the mother, who was appealing the joint residence order).

An intriguing feature of *Re G* is that the children were born before the introduction of civil partnership in 2005 or the new rules on parenthood brought in by the 2008 Act. What would have been the effect of those rules? The children were conceived as a result of anonymous donation in a clinic abroad. If their parents had been in a civil partnership, they would both have become the legal parents of the child. If they were not in a civil partnership, they could still both have become parents if the children had been the result of licensed treatment here and they had filled in the necessary forms. Would this have made any difference? It clearly would have made a difference in the case of *T v B* [2010] EWHC 1444 (Fam). This was about whether the other mother was a ‘parent’ for the purpose of ordering her to make financial provision for the child under schedule 1 to the Children Act 1989. Moylan J held that, although she was a social and psychological parent and indeed had parental responsibility under a shared residence order, she was not a ‘parent’ for this purpose. But had the parentage rules applied, she surely would have been.

But would it have made any difference to the approach of the courts in *Re G* and cases like it? If we’re logical about the paramountcy of the child’s welfare, the enhanced legal status should not make a difference, but it may have an impact upon how everyone feels about the situation, which could in turn have an impact upon the child. In another *Re G (A Child)* [2013] EWHC 134 (Fam), [2013] HRLR 16, two men had provided sperm to two women in civil partnerships. This meant that the partners were automatically the

parents of the children born after the 2008 Act and the men were not, so they could only apply for contact with the court's permission. Mr Justice Baker granted them that permission. The policy behind the 2008 Act acknowledged that alternative family forms without fathers were sufficient to meet a child's needs and to put lesbian couples and their children in exactly the same legal position as other types of parent and children. Nevertheless this did not prohibit the court from granting permission to a biological father to apply for court orders. And in these cases the most important factor was the 'connection' which each applicant was allowed by the respondents to form with the child: the mothers had chosen friends to provide the sperm and had allowed them to have regular and frequent contact in the early days. This was enough to give rise to 'family life' within the meaning of article 8.

This decision did not of course mean that the men would succeed in gaining contact orders. But, if the approach of the courts to these cases before the 2008 Act changed the parentage rules is anything to go by, it is not unlikely that they will.

## **5. What if there are more than two parents?**

There have been several reported cases concerning children born to lesbian couples who have used sperm from someone who is known to them and the courts have clearly found it difficult to know how to approach these.

In the earliest, *Re D (Contact and Parental Responsibility: Lesbian Mothers and Known Father)* [2006] EWHC 2 (Fam), [2006] 1 FCR 556, a lesbian couple, Ms A and Ms C, decided that they would like to have a child together. Wanting the child to have a father figure, they advertised for a man who would be interested in fathering a child. Mr B replied and

the child was conceived following sexual intercourse between him and Ms A. As Mrs Justice Black commented, ‘the arrangement presented more practical and emotional challenges than any of the adults had anticipated. They had not explored the ramifications of the plan sufficiently in advance’ (para 3). Mr B expected to fulfill something like a father’s role after divorce whereas the couple wanted him to complement their primary care ‘by being a real father but by doing so through no more than relatively infrequent visits and benign and loving interest’ (para 5). The first round of litigation between them in 2001 resulted in a shared residence order for the couple, so that Ms C could have parental responsibility for the child. That is now relatively straightforward and indeed was suggested by Mr B. It also resulted in an order for limited monthly contact between the child and Mr B despite the couple’s fear that this would disrupt their lives. In fact things had worked out better than they expected. The second round of litigation in 2006 resulted in a shared residence order in Mr B’s favour so that he too could have parental responsibility for the child, but he promised not to interfere in the child’s education or health care without the couple’s permission.

The judge acknowledged the concerns of Dr Sturge about the potential threat to the stability of the immediate family because of ‘interference’ from Mr B and also the impact upon society’s perception of the family if he were to become more visible in the child’s life. She had earlier acknowledged the vulnerability of Ms C – who had wondered whether in future she might become an embarrassment to the children, so that it would be better if she were to bow out of their lives – and commented ‘The fact that this sort of thought has gone through her head shows how important it is to reinforce her position in the family both within it and in relation to society in general which is inclined to side-line her’ (para 64).

Nevertheless, she thought parental responsibility appropriate for Mr B because his behaviour had fallen far short of that which had led the courts to refuse parental responsibility to ordinary unmarried fathers and ‘Perhaps most importantly of all, I am considerably influenced by the reality that Mr B *is* [the child’s] father. Whatever new designs human beings have for the structure of their families, that aspect of nature cannot be overcome’ (para 89). She hoped that in future society would accept these ‘alternative arrangements’ more readily so that there would be less impulse to hide or marginalize a child’s father.

On the other hand, Mr Justice Hedley, in two later cases, has stressed that these cases should not necessarily be judged according to stereotypes based on traditional family models. In *Re B (Role of Biological Father)* [2007] EWHC 1952 (Fam), [2008] 1 FLR 1015, lesbian civil partners had used the sperm of the brother of the one who did not bear the child. The judge considered it strongly in the child’s interests that he should know that his uncle was also his father and maintain some kind of relationship with him. But he declined to make a parental responsibility order in favour of the father, saying that the case was different from the conventional case of an unmarried father. It was accepted that the couple should comprise the nuclear family and although the father expressed no desire to undermine that it would be perceived by them as a direct threat to their autonomy as a family unit (para 26). But limited contact was necessary to recognize the father’s ‘unique biological position’ which otherwise the couple would not do. The purpose was not to allow the development of a relationship which would amount to parental, but to keep the door open for the child ‘to picture him as someone significant but not ordinarily important in his life’ (para 29).



In the second case, which came in two stages – *MA v RS (Contact: Parenting Roles)* [2011] EWHC 2455 (Fam), [2012] 1 FLR 1056, and *Re P and L (Contact)* [2011] EWHC 3431 (Fam) – the mothers were civil partners and had made a parental responsibility agreement in relation to the children who had been born by IVF by agreement between a long-standing lesbian couple and a long-standing gay couple. Everything had gone well until the children were around 7 and 4, the children having regular contact with the male couple, who also joined them for part of the family holiday. Then things deteriorated to the point where the older child was refusing to see them. The father had been given parental responsibility by court order made shortly before the case came before Mr Justice Hedley. The judge commented that the case was ‘a vivid illustration of just how wrong these arrangements can go’. There was a need for precise agreement as to the roles that each is to play before any attempt is made to achieve a pregnancy. It was all too easy for biological fathers to see themselves in the same position as in separated parent cases in heterosexual arrangements, when this arrangement was and was always intended to be quite different (para 9).

So he went to develop the concept of ‘principal and secondary parenting’ The case was not equivalent to a separated parents situation because there was a clear agreement that the mothers would provide two-parent care for the children and the role of the other mother as one of the two principal parents needed to be affirmed and respected (para 16). The parenting role of the gay couple, though secondary, was to fulfill three purposes – to give a clear sense of identity to the children in due course, to provide the male component of parenting, and a more general role of benign involvement. When the case came back he returned to the concepts of principal and secondary parents: ‘The only safe course is to resist the almost overwhelming temptation to use established conventional models but rather to recognize that a distinct concept of parenting and parental roles is

made necessary by the sort of (by no means unusual) arrangement to parent decided upon in this case' (para 5). So while forcing contact upon the older child would do nothing but reinforce the hostility, monthly staying contact with the younger child would reflect the proper role of the men in her life.

However, in *A v B* [2012] 1 WLR 3456, Lord Justice Thorpe rejected the concept of principal and secondary parents or indeed any supposed general rule that the role of the father should be a subsidiary one. Once again it was a long-standing lesbian couple who had a child using the sperm of a long-standing gay friend. The unusual feature was that to create the illusion of a conventional family for her religious family the mother and father had married, so the father automatically had parental responsibility. However, Lord Justice Thorpe would rank the father and the two mothers in the context of care. The mothers were the primary carers and the father was only on the threshold of providing secondary care. But the judge had been wrong to rule out the possibility of staying contact between father and child in the future. As I read Lady Justice Black's judgment, she was sympathetic to Mr Justice Hedley's view that conventional models would not work and a distinct concept of parenting and parental roles was necessary. But she concluded that generalized guidance was not possible. Every case was fact specific and the immutable principle is that the child's welfare is the court's paramount consideration. However, she went on to say that the parties' pre-conception intentions were relevant but could never be determinative (para 44) and also that the label 'donor' in cases like these might give the unfortunate impression that the father was giving his child away. Yet for most of us 'donor' is a good word: it connotes an act of generosity – of giving something away without hope or expectation of personal gain – in this case the gift of life to a child who would not otherwise be born. Anonymous donors are expected

to be altruistic and I am not sure why known donors should not also be expected to be so.

It may be instructive to compare these cases with the court's approach when surrogacy arrangements break down. In UK law, the carrying mother is always the legal mother, her husband (if she has one) will be the legal father and the surrogacy arrangement is unenforceable. But if she is unmarried and the commissioning father supplied the sperm he can apply as of right for a residence order and in any event he can apply for permission to apply for a residence order. The approach of the High Court has been to ask itself 'in which home the child was most likely to achieve her fullest potential as a human?' In *Re P (Surrogacy: Residence)* [2008] 1 FLR 177, Mr Justice Coleridge ordered that a child of 18 months who had lived all his life with the surrogate mother and her husband should live with the commissioning parents, but he also ordered that he should have contact with the mother and her husband. The surrogates had never intended to abide by the agreement and had set out to deceive both the commissioning parents and the court, but this was only relevant to their credibility and suitability for the parental role. He did not think that they would sustain contact with the father and his wife. In *Re TT (Surrogacy)* [2011] EWHC 33 (Fam), [2011] 2 FLR 392, on the other hand, Mr Justice Baker adopted the same test but resolved it in favour of the surrogate mother. She had entered into the surrogacy arrangement in good faith and only later changed her mind. It did not indicate a lack of commitment to the child who was thriving in her care. She was committed to ongoing contact with the commissioning couple, whereas the judge was alarmed by their lack of insight into the importance of the child's relationship with the mother.

While I have some concern that the test adopted in these cases is likely to favour the commissioning parents over the mother, the more so the more vulnerable the mother is, they do look like a more-or-less conventional application of ordinary welfare principles. While it would be wrong for me to express a concluded view on the difference of opinion between Mr Justice Hedley and Lord Justice Thorpe, in case the matter ever comes our way, I do think that the surrogacy cases lend themselves to the application of ordinary welfare principles more easily than the lesbian parent cases do.

But there is also a completely different view – which is that all these cases should be determined, not by the present interests of the child, but by the pre-conception intentions and commitments to care. This is to a large extent recognized in the rules governing parentage after gamete donation but not in the rules governing surrogacy. Kirsty Horsey argues that ‘neither the gestational claim nor an argument based upon the genetic link present a clear reason why either should be championed when determining parenthood of a child born from surrogacy or assisted conception. Intending parents in surrogacy and assisted conception have a claim to parenthood which is stronger and less flawed than the claim of either the genetically related contributor(s) or of the gestational mother’ (‘Challenging presumptions: legal parenthood and surrogacy arrangements’ (2010) 22 CFLQ 449, at 474).

But as things stand at present, the interesting question for the courts is how far, if at all, the rules on legal parentage should be regarded as determinative or whether if disputes arise they should continue to be governed by the messy and uncertain concept of the best interests of the child.