

This is an Accepted Manuscript of a book chapter published by Routledge/CRC Press in Same-Sex Relationships, Law and Social Change on 31st January 2020, available online:
<https://www.routledge.com/Same-Sex-Relationships-Law-and-Social-Change-1st-Edition/Hamilton-Noto-La-Diega/p/book/9780367076092>

SAME-SEX RELATIONSHIPS AND THE CHILD LAW PERSPECTIVES: ANOTHER CHILD PROTECTION CONCERN OR SIMPLY A NEW WAY OF CREATING THE MODERN FAMILY?

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Abstract

This chapter examines benefits and challenges of today's scope for atypical family formations provided by social acceptance of both same-sex relationships and human assisted reproduction (HAR), which now give same-sex parents genetically related children alongside the social connections possible through formal or informal adoption.

Documenting formal legal changes, whether statutory or through reported cases,⁶² is straightforward, unlike pinpointing the impact of acceptance of social change, identified by Maine⁶³ as always the precursor of reform rather than a consequence. How then to identify such acceptance as a driver of norms, which in turn potentially generate reform? In developed societies this is invariably through the arts: literature,⁶⁴ journalism, drama, music and other media, nowadays probably films, television and radio - favoured contemporary media appear to be largely electronic.

It often surprises that English law had no formal adoption before 1926,⁶⁵ thus all supposed 'adoptions' in Victorian novels, where a parent of either sex had no genetic children, were merely social relationships, despite a limited concept of guardianship. Today's changes are especially striking compared with the relatively recent nuclear family (based on the long established model of two opposite sex parents and their natural or adopted children) which *was* 'the family'. The pace of change has also been so swift, despite initial resistance to dropping traditions, that the perception of the now multi-faceted family has itself been overtaken by newer perspectives than those begun in 2002-4 by recognition of trans

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⁶² For example in the Gender Recognition Act 2004, or *Goodwin v UK* (2002) No 28759/95 (11 July 2002).

⁶³ Frederick Maine, *Ancient Law*, Murray 1961, republished Murray 1906.

⁶⁴ For example, the novels of Charles Dicken focusing on social injustice (*Oliver Twist*, *David Copperfield*, *A Christmas Carol*) and the deficiencies of the legal process before the Judicature Acts 1873-5 (*Bleak House*); and of the abolitionist Harriet Beecher Stowe (*Uncle Tom's Cabin*).

⁶⁵ Adoption Act 1926.

persons for all purposes, same-sex relationships⁶⁶, HAR , ⁶⁷same-sex marriage⁶⁸ and now the intersex debate⁶⁹.

Sadly these radical changes of perspective have themselves impacted on the crucial role of surrogacy in assisting male same-sex couples to have genetically related progeny.

Introduction

It is unfortunate that, at the very point where it appears that the lengthy historical background to the normative acceptance of same-sex relationships has taken a positive turn, there should arise an unexpected obstacle to full acceptance of the new family format whereby same sex partners can now found their own families of genetically related children.

The problem seems to have been created by the fluidity of gender created by a new perception of an 'intersex', or third - 'X' - gender, in cases where individuals claim that they recognise themselves as belonging to neither one established gender nor the other.

In other words it appears that English law(having finally been proactive in recognising both full conversion in trans cases for all purposes and full recognition of same-sex and opposite sex relationships in both civil partnerships ⁷⁰ and marriage) has had to accept that the full equality English law provides has now stalled in cross border contexts; and that r English law can do nothing about international impacts on intersex persons of English or Welsh origin (although the UK does itself recognise the practical 'X' solution for our own passport purposes). This adverse impact is because some jurisdictions recognise only the traditional binary 'M' and 'F', although it seems to be accepted in most western jurisdiction that the current 'younger' (18-24 year old) generation 'swings both ways' : indeed in a recent YouGov poll 43% describe themselves as 'sexually fluid' – neither straight nor gay. This group includes Hollywood's 'most prominent bi-sexual', film director Desire Akhavan, creator of a new sitcom *The Bisexual*,aired on Channel 4 in late 2018.⁷¹

Coupled with the lack of an international surrogacy regime, recognising the consequent parent-child relationship which parental orders under current English law⁷² bestow, this means that some same-sex partners still do not have true equality if they leave our own jurisdiction despite their status at home. Nevertheless some other jurisdictions, for example India, have been proactive in ensuring that surrogacy tourism does not impact adversely on either the resulting child or on the surrogateThe impact of concerns about originally unanticipated and undesirable side effects of surrogacy has not been softened by the fact

⁶⁶ Civil Partnership Act 2004.

⁶⁷ Human Assisted Reproduction Act 2008 (which has amended, extended and improved the earlier 1990 Act)

⁶⁸ Marriage (Same-Sex Couples) Act 2013

⁶⁹ The *Coman* case.

⁷⁰ Civil Partnerships, Marriages and Deaths etc Registration Act 2019. s 2

⁷¹ *The Times*, Magazine, 6 October 2018.

⁷² Human Fertilisation and Embryology Act 2008 s 54.

that positive development for same sex relationships have arisen concurrently with a major national and international initiative to curb both paedophile child abuse and international trafficking, for which surrogacy is often a perfect pathway for those who are intent on its abuse.

Unfortunately, owing to insufficient surrogates in England and Wales, inter alia no doubt because surrogates can only be paid expenses in our jurisdiction, 'surrogacy tourism' has inevitably afforded such trafficking opportunities, also no doubt as, despite UN efforts, there is no worldwide common law or practice governing surrogacy. Thus those seeking such facilities in less regulated jurisdictions will inevitably cross borders to a location which permits them the most freedoms.

While there is no essential connection between same-sex relationships and parentage and an escalation in such abuse, nevertheless inevitably child protection concerns arise. This may in turn be because of the relatively new intersex potential which is seen as a likely facilitator for paedophile access to children for such abuse, unlike in previously clearly defined 'M' and 'F' distinctions, which in practice can matter to other M/F segregated users in many contexts, ranging from passports to a wide variety of unisex facilities.

This sadly masks the equally important fact that surrogacy is essential to a relationship, whether same- or opposite-sex, in which the partners cannot reproduce naturally so as to create a stable family unit, complete with parental responsibility, gender neutral parenting and welfare paramountcy; which is precisely the sort of stable family unit which governments regularly concede is the backbone of society. Have we thus only made progress that brings an element of retrogression? A look at the past is encouraging though not entirely conclusive.

Historical and recent past It is not long since, in the 1990s and the first decade of the 21st century, families were still apparently formed of two opposite sex parents with 2.4 children, a dog and a Volvo: which for a short time seemed to be what same sex parents aspired to in searching for successful mainstreaming of the atypical family formats which are now firmly part of English family law.⁷³ It would therefore be useful to look first at the historical background, in which to set in context the drivers for change and the subsequent developments which have led to the intersex debate and the challenges faced by same same-sex parents, including in relation to surrogacy.

By 2010, some thirty years after courts doubted the advisability of allowing children to live in lesbian households, such as in the 1991 case of *B v B Minors (Custody, Care and Control)*,⁷⁴ the same sex model was so successful that film director Lisa Chodolenko risked making her (eventually award winning) family comedy *The Kids Are All Right*, starring Julianne Moore

⁷³ Inclusive TV 'sitcoms' did their best to help by showing same-sex relationships as a normative family form but only after the child boundary' of 9pm.

⁷⁴ [1991] FLR 402, [1991] Fam Law 174, see further below.

and Annette Bening, whose characters typified the lesbian IVF parents with sperm donor father of their teenage children which was often the model of the time. This was a film which then won both an Oscar nomination and a Golden Globe for Best Film, thus probably constituting a stronger argument for the normativity of atypical families than any other contribution from the arts since the distinguished children's writer, Jeanette Winterson, was first published in 1985.⁷⁵ Sadly, though it may have generated some thoughtful acceptance by the broader intelligentsia, it gained little approval from the gay community in general and lesbians in particular, who decided it was far from 'All Right', despite positive reviews in *The Guardian*,⁷⁶ which commended the 'warm and witty' account of 'the post-modern family', but which did not stop *The Independent's* Arts Writer presenting the counter view that all the prize winning film mainstreamed was straight fantasies about lesbians.

Unfortunately, however, such mainstreaming integration is still not the case in many other jurisdictions, a situation clearly creating problems for contemporary border crossing families routinely seeking regular employment and established residence - as well as holidays and other short term stays - outside the United Kingdom. Such families are thus finding that English and Welsh Child Law is one of the most progressively inclusive, while foreign provision may not be nearly as generously inclusive as they have at home.

Thus our home jurisdiction's provision compares very favourably with that of only three decades ago when English and Welsh judiciary used to be wary of even allowing children to live in gay families because of concern that, at that stage, this was so unusual and outside the mainstream that judges worried about embarrassment for such a child. As a result it was thought that the child was likely, from its atypical gay parented family, to be identified by other children as sufficiently different that bullying at school could be inevitable. For example, the case already mentioned in this context, *B v B (Minors) (Custody, Care and Control)*⁷⁷ generated a lengthy court room debate about whether it would be 'safe' for a young child to live with his lesbian mother following a divorce, despite the fact that since he was so young this would otherwise be the obvious place for him. However owing to the judge's fear that he would be noticeably 'different' at school, coming from a lesbian home, and thus be picked on by children from straight homes this generated a substantial discussion, fortunately then resolved by the consultant psychiatrist in the case, who thought that in fact this disposal would pose no real risk owing to the continuing influence of the father who had a heterosexual partner whom he hoped to marry. Thus it was accepted that that would be sufficient to counteract any adverse effects, especially as the judge noted that the mother was 'not a militant lesbian' and could provide continuous child care, while the father would have had to use a childminder. Perhaps this bullying fear was

⁷⁵ *Oranges Are Not the Only Fruit*, Pandora Press, her first, semi-autobiographical, novel about a teenage girl rebelling against the then conventional values, later adapted for TV. Her later novels continue to explore gender polarities and sexual identities. She was herself adopted.

⁷⁶ 128 October 2010 and 30 October 2010.

⁷⁷ n13.

not unreasonable, owing to anecdotal reports of continued contemporary bullying even today of trans people in some overseas common law jurisdictions⁷⁸ where such atypical family members have not yet become sufficiently integrated.

Indeed it seems that neither Europe in general, nor the EU in particular, has achieved such a high standard of inclusiveness for post-modern family formats as in England and Wales. Despite the fact that in the 2018 *Coman* case⁷⁹ the CJEU required EU states to recognise same-sex marriage from other jurisdictions, even where a state does not recognise same-sex marriage domestically, this has been described as only a 'small step', since it does not extend to registered partners. Moreover, while the decision is naturally welcomed, it seems that its effect on LGBT relationships is not yet fully assessed, so that border crossing for same-sex relationships is not yet uniform by any means. This is a pity as these diverse continental legal systems within Europe have between them contributed so much towards the development of English Law since Lord Denning's memorable comment on how EU influences would be likely to work after our accession to the then EEC, ⁸⁰which he saw as 'an incoming tide'...which 'flows into the estuaries and up the rivers. It cannot be held back...'. ⁸¹

Considering the role of the European Court of Human Rights (the ECtHR) in developing English family Law, and the Convention on Human Rights and Fundamental Freedoms (ECHR) which its decisions enforce, the fact that English Law is now actually ahead in comparison with such continental resources is surprising, since the obvious initial practical watershed was as recent as the case of *Goodwin v UK* (2002)⁸². This case only then finally ended years of argument about the extent of the UK's margin of appreciation in relation to our traditional treatment of the right to marry which, despite EU equality and diversity principles, we had obstinately insisted was reserved only to those opposite sex couples whose biological sex had been irrevocably determined at birth by each individual's chromosomes. This was clearly a tight restriction which had (since *Corbett v Corbett*⁸³) prolonged prevention of their marriage of many successfully trans people in their new gender.

Thus *Goodwin* definitively opened the gates to plurality in family relationships in English Law, since the Court famously declared that the margin of appreciation held by individual states is *not* available to reduce Convention rights 'so as to impair the very essence of the right', though also criticising the UK for not progressing further and sooner on this issue and for failing to take action on the Report of the Interdepartmental Working Group on Transsexual people, 2000. It is therefore disappointing that nothing has been done to prevent member states placing strict requirements on the conditions for recognition of the

⁷⁸ Reported by visiting English practitioners in the Caribbean islands.

⁷⁹ C673/16 *Coman and Others v Romania*, CJEU Grand Chamber, 24 July 2018.

⁸⁰ The precursor of the EU at the time the UK joined the then European market.

⁸¹ *Bulmer v Bollinger* [1974] 1226 at 1231.

⁸² (2002) No. 28957/95 (11 July 2002).

⁸³ [1970] 2 WLR 1306, [1970] 2 ALL ER 33.

new gender. The move across Europe towards the self-declaration model has led to many further challenges before the ECtHR in this issue.

It is also disappointing to find that there are still practical family membership problems in cross border movement in Europe, especially since the UK specifically addressed this perceived problem in relation to English Law, following the case of *Wilkinson v Kitzinger (No 2*⁸⁴) (in 2006) by passing the Marriage (Same-Sex Couples) Act 2013. However, persistence of such border problems on the continent has not been for want of effort in Europe. Following this review of historical progress it will be convenient to consider drivers for social change and to move on to further currently troubling issues such as transpersons and surrogacy.

Fast forward from the *Goodwin* watershed

Surprising as it is that there has not been a successful initiative to develop a common European Standard to create an EU wide definition of, for example, 'what makes a *de jure* family' - as other state level and federal differences have been harmonised in other large territories with a federal jurisdiction. For example Australia, which has always had a practical approach to social norms and early exhibited a spirit of leadership in developing the mothercountry's common law to meet contemporary social demands. Indeed, it was the first of the Commonwealth former colonies to recognise the atypical nature of unmarried families in coining the phrase 'de facto' in relation to cohabiting couples, who are also referred to as 'de factos'⁸⁵.

Nevertheless it took them time to legislate and same-sex marriage was not legal until December 2017.⁸⁶ It seems there was some opposition and mixed feelings about same sex relationships which temporarily stood in the way, although this was also anticipated in England and Wales (especially in deeply traditional 'chapel' congregations in Wales) in connection with the Marriage (Same-Sex Couples) Act 2013. Nevertheless the eventual disappearance of threatened opposition (rife in the media at the time) to the 2013 Act in England and Wales seems

⁸⁴ [2006] EWHC 2022 (Fam), [2007] 1 FLR 295.

⁸⁵ 'de facto' relationships are defined in s 4AA of the Family Law Act 1975, although this was an amendment to the federal statute which had its origins in the New South Wales De Facto Relationships Act 1984.

⁸⁶ Marriage (Amendment, Definition and Religious Freedoms) Act 2017.

to confirm that such initial opposition evaporated, and the same seems eventually to have happened in Australia..

Curiously there seems to have been little opposition to same-sex marriage in the Republic of Ireland which is, of course, not part of the UK (and such legislation is progress indeed In this formerly staunchly Catholic jurisdiction, although the result of the referendum of 22 May 2015, following which a date was set for implementation, showed substantial support for the reform) .

Law reform of this sort can be slow. This is because such reform does not stop with its initial legislative action, since it is necessary to examine all the possible consequential amendments required, which may include formerly core principles of the law of marriage, which in turn owed their existence to the formerly 'heteronormative underpinnings of marriage': for example, in England and Wales, consummation had already had to be taken out of the Civil Partnership Act 2004 and the Marriage (Same-Sex Couples) Act 2013, and neither permits 'adultery' to be a basis, respectively, of dissolution or divorce.

The USA has had a similar experience to Australia, where reform was expected to be quick, but it took a blanket Supreme Court ruling that all states must recognise marriages in other states within the union, *and* that all states must issue marriage licenses permitting same-sex marriages, and thus firmly to retreat from the previous position where permitting such marriages could be decided at state level,⁸⁷ but which initially some regional judges were not entirely happy with.

However, in practice this would seem to be the way forward internationally, where young families of spouses, partners and children regularly cross borders in pursuit of work or pleasure, and this consideration was certainly a driver in passing the Marriage (Same-Sex Couples) Act 2013 in England and Wales, following the case of *Wilkinson v Kitzinger*⁸⁸ which highlighted the contemporary practical problems⁸⁹. The Appellants in this case were two women, married in Canada where same-sex marriage was available, but who then

⁸⁷ *Obergefell v Hodges* 576 US, 135 S.Ct 2584, 26 June 2015.

⁸⁸ [2006] EWHC 2022 (Fam).

⁸⁹ See the judgment of Sir Mark Potter P in this case.

happened to come to England and were surprised to find their marriage was only a civil partnership in England and Wales. However the point appears immediately to have been grasped at government level that that it would be a different case for a young migratory couple with children following employment or recreation. In that context the problem would naturally be more practically acute, causing extensive practical problems in contemporary bureaucracy, whether in relation to social welfare benefits or practical parenting, including in such everyday contexts as in giving consents for the various minors' activities and medical care that now require formal consents before a child can do anything much but simply go to school.

The impact of social change more generally in Family Law

There may be parallels between acceptance of same –sex relationships generally and public opinion's change of view on No Fault Divorce (with 2019 legislation in process, following the failed *Owens v Owens*⁹⁰ divorce). *Owens* regenerated the No Fault Divorce debate, a concept virtually unanimously rejected at the last attempt to introduce it in 1996⁹¹. At the same time the existing Facts on which a Divorce is currently still granted under the Matrimonial Causes Act 1973 could be repealed and adultery also removed from the Act, as well as the other contentious Fact of behaviour sufficiently unreasonable for the petitioner to continue to be expected to live with the respondent. Adultery is already thought to be inappropriate in an era of equal marriage⁹² and it seems that public responses to surveys and opinion polls have suggested that the ordinary person would probably now not mind if England and Wales had a No Fault Divorce system as exists in many other jurisdictions.

Certainly, the original practical justification for the concepts of consummation and adultery, currently retained in the 1973 Act, no longer exists except in a tiny minority of cases since the need for them is rare in modern times⁹³. It is no longer necessary even for peers to have doubts about their heirs' legitimacy as there is now reliable DNA testing which is already often used under the Child Support Acts and is also clearly available for determining parentage in other contexts, such as by trustees of settlements who must pay the correct beneficiaries as set out in the trust deed. Succession to a British peerage or title of honour

⁹⁰ [2018] UKSC 41.

⁹¹ Family Law Act 1996 Part II, which received the Royal Assent but the operative Part of the Act implementing No Fault Divorce was never implemented since it was said that the associated research indicated such hostility on the part of the public to divorce on any basis unless there was fault of some sort that that Part of the Act was finally repealed by the last Labour Government in 2001 (and it had previously been announced that the No Fault provisions would never be implemented in their original form).

⁹² And was only retained in the 1969 Divorce Reform Act and the consolidated legislation in 1973, because some members of the public still thought it wrong to commit adultery, despite the Law Commission having recommended at the time that it was usually considered a symptom, rather than a cause, of marriage breakdown.

⁹³ Only in succession to a peerage, which can still not be succeeded to by an adopted or child born outside lawful wedlock and legitimate succession must be proved to the satisfaction of the College of Arms which governs all aspects of peerages.

may still not be achieved by an adopted son or daughter⁹⁴, even though the requirement for male primogeniture is no longer essential in the case of peerages which at the time of grant were bestowed already enabled to descend by special remainder through the female line or to another family member such as a brother, perhaps because it was clear there was already no male heir. There were probably reasons not relevant here for no importation of Roman Law's sophisticated adoption system into English Law until the Adoption and Children Act 2002 was amended following the Civil Partnership and Marriage (Same-Sex Couples) Acts. Adoption would not have fitted the traditions of English life which subsisted up to the sexual revolution of the 1960s, although the Romans had specifically made such adoptions work when their families were otherwise childless.

Transperson and Other Contemporary Family Formats and Identities

Thus while families are creating their own shapes and functions on the ground, there is now emerging some literature on the subject which suggests that some sort of formal frameworks are desirable to reflect the developments of original terms into less revolutionary and more evolutionary concepts which can now be extracted from what has gone before in preceding periods, but which have since apparently settled well into an contemporary mode capable of embracing post-modern social norms.

Scherpe's contribution to this debate, 'Breaking the Existing Paradigm of Parent and Child Relationships'⁹⁵, emphasises that 'We need a Family Law for families' —addressing reform from a radical starting point as we 'cannot amend law based on a 2 parent paradigm, which depends on individual societal and legal contexts'.

Perhaps, however, not entirely starting with a blank sheet of paper, since sharing family law experience, from both other common law and civil law jurisdictions, can be extremely valuable, including taking relevant experience from all disciplines working in Family Justice. This is especially so as there already exist a number of contemporary initiatives which bring together such wider experience, rather than just lawyers' resources, so as to enable the worldwide family law community to draw on such sources for mutual benefit.

However, whatever the position in Europe and the EU, there is much in English Law that already works to support evolving contemporary family formats, but also inevitably some new and unclear areas which require articulating (for example, intersex identity, which can now apparently blur the same- and opposite-sex identity of family members, and also multiple parenthood in human assisted reproduction), neither of which are arguably yet sufficiently thought out so as to be included in stage 1 of any further likely reforms.

⁹⁴ Adoption Act 1926, Adoption and Children Act 2002.

⁹⁵ In Gillian Douglas, Mervyn Murch and Victoria Stephens, (eds) *Essays in Honour of Nigel Lowe: International Perspectives on Child and Family Law*, Intersentia, 2018,

Of these the intersex debate is arguably the most urgent, but also the most complex. This is because, owing to the *Re Elan Cane* decision in the High Court⁹⁶, where the court found that this intensely practical issue – which requires everyone, with rare cultural exceptions, to identify on identity documents used around the world with one of the binary identities, i.e. male or female - did not constitute a breach of the claimant’s human rights, regardless of her strongly felt emotional reasons for not wishing to have a gendered identity. Such a clear practical impact is obviously one of the most important drivers of social change in recognising the way in which family formats are themselves changing because of the contemporary changes in the identities of family members. Nevertheless it was also held that *if* the gender entry required *was* a breach of her human rights, the Passport Office’s reasons for not being able at the present time to issue a passport without such identification were a proportionate response to the government’s need for gendered identity. However the decision also noted that this should not continue indefinitely, since the Passport Office staff appear to have told the High Court that their processes will not allow a passport to be issued if the ‘M’ and ‘F’ sections on the application form are not completed, and that they are not at present in a position to make changes to address this, but that there is an investigation in process which needs to be completed first.

In fact some jurisdictions, e.g. Australia, New Zealand and Malta, have (it seems quite happily) already agreed to use the non-binary category ‘X’ on their passports, a solution which could be adopted in the UK (although that would not go far enough for Christie Elan Cane) and it seems that Germany has also already decided that the use of the ‘X’ category is unconstitutional, since the German constitution requires all German citizens to be described in a positive manner, which it seems the anonymous ‘X’ category is considered in Germany not to do.

In the meantime it seems that there is a lobby for a more detailed genetic designation of a child’s parentage than is afforded by the present processes under the Births and Deaths Registration Act 1953, and the Human Fertilisation and Embryology Act (HFEA) 2008, even though they currently combine, and have since that 2008 Act, to allow for the contemporary inclusion of two same-sex parents and, where in the case of two women being the child’s parents, and both with parental responsibility⁹⁷, the omission of any father on the birth record.⁹⁸

This seems curious because ‘the father’ was formerly a category of parent historically so revered in English Law that courts still will not, pursuant to the Children Act 1989 s 13(1), normally countenance the removal of his family name from that of children whom he has fathered, without very sound benefit supporting the change. Nevertheless this is often convincingly advocated on the part of (usually) the applicant carer mother, who is,

⁹⁶ *R (Christie Elan Cane) v Secretary of State for the Home Department* [2018] EWHC 1530 (Admin)

⁹⁷ HFEA 2008, ss 43 and 44.

⁹⁸ HFEA 2008, s45 ‘...no man is to be treated as the father’.

however, usually still routinely suspected of wanting to make this change only to airbrush him out of her post-relationship life which the courts usually resist.

Similarly, in the case of two men having been enabled to have genetic children - though this was not as common or as publicised before Elton John and David Furnish had their sons, Elijah and Zachary-it seems there is the same lobby for a full genetic record⁹⁹ although it may be queried whether this will now assume the same importance owing to the fact that a man with a womb has since actually given birth, not only once but now three times¹⁰⁰. This was Thomas Beattie, aged 38 at the time of the first birth, an American female to male transperson who became pregnant after living as a man with his male partner in the North of England for 5 years, whereupon he gave birth first to a girl in 2011, and then the following year to a boy, after taking female hormones to reverse the effects of his female to male sex change treatments. It seems he has since had a third child and is correctly referred to as a 'male mother' in accordance with HFEA 2008, s 33, since he is the person who has given birth to the children.

The Impact of the Marriage (Same-Sex Couples) Act 2013

However, it seems that the real catalyst for a settled normative impact on same-sex relationships in English law, and their new family format with genetically related children, has been the 2013 Act which has finally enabled same-sex parents to *marry*. There was actually a lobby for this from the 1980s, when Martin Bowley QC pressed for marriage for gays, *and* for gay men to be on the Bench, for which Lord Hailsham, as Lord Chancellor, was however unwilling at that time. Moreover, although Lord Mackay, as Lord Chancellor in 1991, apparently agreed to gay appointments in the higher courts, the current Master of the Rolls, Sir Terence Etherton, is the first openly gay senior appointment.

This sudden progress from civil partnership to marriage may in fact have been a surprise: when research was conducted into whether the LGBT community really wanted to convert its civil partnerships into full marriage, the results indicated mostly contentment with their existing status. They did not want to upgrade to marriage: there thus appeared a real possibility not only of the threatened disturbances promised by those opposing the statute, but also that there would be no demand for the marriages it would permit. However clearly these results were no more accurate than election day early returns from polling stations, as the civil partnerships and same-sex marriage statistics in the 18 months following the enactment of the Act: far from there being no demand for same-sex marriages, many new same sex marriages were conducted once this was possible, but as soon as s9 was brought into force in March 2014 (enabling conversion of existing civil partnerships marriage)15,000

⁹⁹ See , 21 December 2014.

¹⁰⁰ See , 28 July 2011. .

more same-sex marriages were contracted and their numbers snowballed dramatically, at the same time giving the marriage statistics a lift.¹⁰¹

The Likely Drivers for This Marked Degree of Social Change from Civil Partnership to Same-Sex Marriage

A first prompt might have been the Elton John-David Furnish conversion of their civil partnership to marriage, actioned as soon as it was possible in March 2014 despite the Birmingham poll: they had to convert, if minded to do so, as they were already in a civil partnership, and would have had to dissolve the earlier civil partnership in order to marry in 2013 before s9 conversion was possible. It should be remembered that while they live in California, this couple is British and they have a significant UK following. A second was possibly the lack of pre-supposed adverse reaction to the 2013 Act, expected from the combined religious lobby, but not least from the traditional churches who were vehemently against reform, whereas *nothing* of this expected opposition materialised, still less disruption. It seems that by 2013 the wider public as well as the adverse pressure groups were 'over' the shock of the abandonment of the principles of *Hyde v Hyde* (1866)¹⁰², especially as the 2013 Act was presented as an equality statute. None of the predicted violent opposition therefore happened, and, by 2014 and after, same-sex partners were apparently simply settling into marriage and building a family to support their new normative status as married couples.

It would therefore seem that English Law had in this instance already managed to place the crucial social and legal change in the right order before the Act reached the statute book, thus recognising the optimum point on the ascending curve of 'social change' as well as on the intersecting graph of 'legal change', as identified by Maine one of the forefathers of the modern sociology of Law and a leading figure of the English and German schools of historical jurisprudence. While Maine had set out this theory of the relationship between law and social change in his classic text, *Ancient Law*¹⁰³ in the mid 19th century, this remains an influential work in more than the academic field of law in society, which had long before 2013 identified changes in *status* and *social custom* in early societies as always *preceding* changes in *the law*, and it seems in modern times (when fundamental changes in our social lifestyles have been recently so radical) that we would be well advised to note such anthropological principles which provide powerful support for the legal reforms introduced.

Thus did the LGBT community achieve statistically unremarkable families and without any revolutionary or disruptive element.

¹⁰¹ 275,000 opposite-sex marriages in 2015, a fall of 3%, + 118,000 divorces but 15,000 same-sex marriages in 2014-15.

¹⁰² [1866] 1 LR PD 130, and Lord Penzance's definition of 'one man and one woman'.

¹⁰³ N2 above.

Was there perhaps a third prompt? –if so was this the simple passage of time from the Civil Partnership Act 2004 to the 2013 Act? This seems to have been solicitor Duncan Ranton’s theory when he examined the likely underlying reason for the comparatively sudden upgrade from civil partnership in 2004 to marriage in 2013,¹⁰⁴ questioning the reason for the government’s compromise before their then ‘grasping the nettle’ in 2012-13, followed by the LGBT community’s enthusiastic adoption of their newly permitted married status. This theory of the right moment for the impact of social change in family law to find its mature moment¹⁰⁵ is not new and is also identified in mainstream historical jurisprudence, to which 19th century school, developed in Germany, Maine belonged.

There might also have been a further prompt from the growth of surrogacy following the HFEA 2008, in which new detail emerged in relation to the birth of Elton John’s second son who happened to be born in the year of the 2013 Act - this family inevitably thus focussed attention on LGBT interests, prompting the media to reveal that both boys had the same surrogate mother who was also a good friend, remaining in touch with the family. Whether or not this was truly a happy IVF family as presented, the boys and their parentage clearly generated regular LGBT publicity, drip-feeding that the couple had entered into a civil partnership in 2005 as soon as the 2004 Act came into force, adding children as soon as the 2008 Act provided the obvious normative pathway by updating the original HFEA 1990 to take account of developments in same-sex partnerships afforded by the Civil Partnership Act 2004, and finally marrying when that status was also available.

Since surrogacy is clearly essential for male same-sex genetically related families some escalation of the numbers of partnerships availing themselves of this pathway to the normative family may be expected. Indeed, further reforms may be expected to reflect changes in circumstances if the escalation continues. This is not least as there is likely to be a shortage of surrogates leading to cross border surrogacies with all the problems of competing English and overseas provisions in disparate legal systems, which have already been experienced in adoption, which prior to the 1990 HFEA was the only way forward for couples unable to conceive their children naturally¹⁰⁶.

Male Same-Sex Families and Surrogacy

However while surrogacy is essential for male same sex genetically related families, unfortunately it also still has some perception problems, not least for the male same-sex

¹⁰⁴ See Family Law Newswatch 28 June 2013.

¹⁰⁵ See Frances Burton, ‘Waiting for rights-driven evolution in law reform: the impact of social change in family law reform’ IBA Family Committee Newsletter 2013, Vol 6 No 1, pp 15-19, <https://www.iba.org/>

¹⁰⁶ See the Department for Education’s publication *A Guide to Inter-Country Adoption for UK Residents, 2011*; N Cantwell, *Best Interests of the Child in Intercountry Adoption*, innocent Insight, Florence, UNICEF Office of Research.

partners concerned. It was an unfortunate coincidence that the growth of surrogacy around the HFEA 2008 coincided with both the Yew Tree paedophilia and child pornography investigations which were nationwide in the UK, and with muddled recollections of the historical gay parenting residence order cases when older judges thought lesbian partners needed male influence from somewhere for 'balance'.¹⁰⁷ Since then surrogacy appears to be on the cusp of a change of identity following some activity in 2018 under the auspices of Sir James Munby, the outgoing President of the Family Court, who took the opportunity of time available after his retirement to attend the Progress Educational Trust's one day conference on 5 December 2018, which discussed the likely changes that may be needed in surrogacy in the next 10 years. This raised questions not only about its regulation – currently a significant concern, as its use is inevitably likely to escalate in step with acceptance of same-sex marriage, but also (in view of its strict regulation in the UK) with the likelihood of escalating links with overseas provision, about the threat to its role in the creation of modern families. This is posed by the potential for links with the obvious adverse publicity attracted by commercial exploitation and human trafficking, which (although entirely valid humanitarian issues of great importance) appear to obscure the equally fundamental issues: (i) surrogacy is an innovative channel through which a new family unit may be created, particularly for same-sex spouses desirous of genetically related children; (ii) if there is to be reform of the law to address the concerns mentioned, this should be approached through the holistic field of family formation.

In fact, while more widespread use of surrogacy may seem worryingly 'Brave New World' as in Aldous Huxley's 1930s novel which anticipated developments in reproductive technology, as well as other developments such as sleep-learning and psychological manipulation, neither of which has remained entirely fictional,¹⁰⁸ and even adoption was once seen as a debateable solution to childlessness, since that too was once a legislative creation outside the 'natural' norm.

Like adoption in its time, surrogacy now needs to be viewed from the point of view of its role in contributing to family normativity. Thus its role should perhaps be facilitated by only essential regulation, rather than being heavily regulated from the perspective that it is likely to be only another opportunity for exploitation. Practitioners in India early highlighted this, since their concerns were both for (i) the risk of exploitation of poor Indian women as surrogates and (ii) the future welfare of the child who could originally be taken out of India to an unknown destination where perhaps the welfare of children was not paramount, indeed its welfare possibly not monitored by the social services provided for the purpose in most Western jurisdictions and the child even being abandoned if the commissioning couple split, or tired of their child. In the context of the Indian government not taking legislation forward with much despatch to address the international dimension in surrogacy, some Indian lawyers then took the lead in such practical terms as could be effected without

¹⁰⁷ n2.

¹⁰⁸ Published 1932.

waiting for such legislation, by achieving immigration controls so that it is no longer possible to engage in a surrogacy project in India on a tourist visa. Thus neither the surrogacy agreement nor removal of the resulting child can now take place without control of the entry of the commissioning parents or their exit with the child¹⁰⁹.

In Australia Felicity Gerry QC¹¹⁰ and Hon Anthony Graham QC¹¹¹ have been engaged in research on one of the main strands of this topic, which is their specialist interest, namely human trafficking¹¹² against which responsible states are ever vigilant. This is not the only source of concerns about this downside of the international dimension, since apart from India's early identifying potential problems, the international organisations which regularly meet to confer at conferences also followed this up.

The stage therefore now appears to have been reached at which the question must be asked: what precisely is the place of surrogacy in the context of Family Law: is it

- only a species of refined Human Assisted Reproduction ('HAR') requiring close regulation in the paramount interest of the welfare of the resulting child? (welfare being a key principle of Child Law in most advanced jurisdictions), or

- simply another normative channel through which the modern family is now created, a function which must be acknowledged, alongside same-sex marriage, full gender recognition of transpersons and committed cohabitation?

Child Protection Issues

English law originally approached surrogacy through child protection and the key core principle of English Child Law, namely the paramount welfare of the child, which had its origins in the Guardianship of Minors Act 1925, s 1, although that original legislative provision took much longer to have real effect in the 1990s development of a separate corpus of Child Law within family law. At that time HAR was all about creating genetic families for the historic opposite sex married couples who, if childless, were not content with adoption, which was still seen as second best, since (outside family adoptions) it usually lacked any link to the adopting couple. Since that date successive governments have spelled out the importance of the family as the 'fundamental building block of society'¹¹³, and HAR (which has meanwhile developed extensively) means that *all* otherwise childless couples that can afford it, whether same-sex or opposite-sex, can now build a family with

¹⁰⁹ Further information on the Indian immigration law concerned can be obtained from Malhotra & Malhotra, Attorneys, Chandigarh, India, Anglo-Indian local members of the International Academy of Family Lawyers (IAFL).

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¹¹¹ Former Australian Family Judge.

¹¹² See www.felicitygerryqc.com.

¹¹³ See *per* Lord Mackay of Clashfern, Joseph Jackson Memorial Lecture, 1989. (1989) 139 NLJ 505.

genetic children. Indeed, the affordability issue appears already to be being addressed, since it seems that many large corporations are offering fertility and gender reassignment benefits, along with standard medical insurance, as part of their employees' remuneration packages¹¹⁴.

The historical background of the legal treatment of HAR technologies in England and Wales is not, in fact, extensive or complex, now depending on the HFEA 2008 as amended. Previously regulation dated only from around 30 years ago following the Warnock Report¹¹⁵ which was itself, without much warning, generated by advances in medical science which had made possible the first 'test tube' conceptions, inevitably inaugurating an era of increasing complexity in 'in vitro fertilisation', ('IVF').

This was immediately followed by the 'Baby Cotton' case¹¹⁶, presenting the court with the first actual surrogacy for which the judiciary was completely unprepared, as there was no specific legislation, which then soon followed and has since been refined as time and experience permitted. Following the HFEA 2008 the High Court began ratifying international surrogacy cases, in 2010 same-sex and unmarried couples were added to the statutory scheme, and nationality law amended to allow surrogate children born overseas to become British automatically on the making of the s 54 parental order granted to the commissioning parents.

In 2016, following the case of *Re Z*¹¹⁷ it was decided that the Act must be amended to include single parents, so as to be compatible with Article 8 of the Human Rights Act 1998 (HRA 1998) incorporating the ECHR although it has taken two drafts of the Bill to achieve this, and in 2019 the amending statute is still not complete.

However, judging by the Sir James Munby's continuing interest and comments following his retirement in 2018, further updating can be expected to address potential change still yet to be realised. On the occasion of the Personal Support Unit's seminar at the Law Society on Friday 19 October 2018 he took the opportunity to spell this out, remarking 'every concept of what 'family' is, every concept of what a parent-child relationship is, is very much back in the melting pot for change'. He included the now obvious fact that the cut off point for women to conceive naturally no longer applies, since this now occurs in their 40s and 50s so that 'the judiciary will endorse a parental order for women of that age', on which he added that 'age should not stand in the way of having a family, and the menopause does not prevent women from having children by IVF or surrogacy'.

¹¹⁴ For example, such global employers as Bank of America, Chanel, Google, Goldman Sachs, Spotify and Starbucks. Goldman Sachs have had IVF benefits since 2008.

¹¹⁵ *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, Chairman Dame Mary Warnock DBE, Department of Health, Cmnd 9314, 1984, reprinted by HMSO London, 1988.

¹¹⁶ *Re C (A Minor)(Wardship:Surrogacy)* [1965] FLR 846.

¹¹⁷ [2016] EQFC 34.

He appeared also not to rule out developments which have previously kept commercial surrogacy out of English Law, although permitted in other jurisdictions. Commenting positively on American systems in particularly in California (suggesting that we may in future have both pre- and post-birth orders) he added that 'once we become more familiar with these changes and developments' we become more accepting, suggesting that we should 'give serious consideration to abolishing the restrictions on commercial surrogacy' to include more than 'reasonable expenses' for the surrogate to carry the child, currently interpreted restrictively in English Law to mean expenses alone) but a much wider interpretation was adopted in California over 40 years ago. Confirming that he would welcome a move away from 'prohibition regulation', including opening up of family structures to 'introduce into the law of surrogacy a provision enabling the court to dispense with the need for the surrogate's consent if the child's welfare so requires', thus mirroring an existing provision in adoption law (and ensuring that no child is left stateless as the result of a surrogacy arrangement).¹¹⁸

Interestingly, there was also discussion of a proposed new birth certificate, recognising the surrogate born child as that of the commissioning intended parents, thus moving towards one of the key USA principles to which Sir James Munby refers.¹¹⁹

Conclusion

It is obvious why Sir James Munby favours modernising amendment to the HAR legislation. There are several legal philosophical aspects of surrogacy and IVF to be considered, alongside the HFEA 2008 s 54 procedural parental order which is the mechanism for transferring parental responsibility for the child from the surrogate to the commissioning parents, whether an opposite or same- sex couple, whether related to the child or not, and which in turn depends on whether the surrogacy is 'partial'¹²⁰ or 'full'¹²¹.

The 2008 Act generates most confusion about the legal philosophical infrastructure for surrogacy and IVF. The Act approaches not surrogacy in this respect, but meaningful parenting when a woman receives IVF treatment in a licensed clinic and has no partner or husband treated as the father, by sections 35 or 42. Under sections 36 and 43 she may choose any man – or woman – to become a social father (or in the case of a woman, a second parent) provided the 'agreed parenthood conditions'

¹¹⁸ Friday 19 October 2018, 'The Future of the Family Division', Personal Support Unit Seminar, at the Law Society's Hall, Chancery Lane.

¹¹⁹ Ibid. In addition to facilitating responsible commercial surrogacy it seems the California experience has inspired English law interest in their enabling rather than prohibiting approach to regulation, and to formally including the commissioning parents on the child's birth certificate, which would radically change our concept of the surrogate's right to be recorded as the mother through having given birth.

¹²⁰ If the surrogate used her own egg with sperm from one or both of the commissioning male same-sex partners.

¹²¹ Sometimes called 'host' surrogacy which involves implantation of an embryo, to which either, both or neither of the commissioning parents has contributed.

–sections 37 or 44 – are accepted. This process is used by single women or unmarried female partners to set up their own customised family unit, appearing sentimentally to hark back to the 19th century social parenting which had neither genetic nor legal basis, save that in 2008 Parliament legislated to permit the concept in the 21st century, regardless of whether the woman receiving treatment had any close relationship, let alone biological tie, with the proposed ‘social’ parent: this was much criticised in the media¹²².

However compared to this social parenting provision, surrogacy clearly has much stronger potential for creating stable families for child rearing in a nurturing environment: it can uniquely utilise the genetic link particularly prized in a committed same-sex male relationship. However surrogacy *is* only one of many contemporary ways of building family units, while stable families are a core requirement of society. Surrogacy reform should thus evidence the same equality and family friendly basis as same-sex marriage, which is clearly the latest driver for existing surrogacy escalation, which motivated India in its visa regulation initiative.

Biography

Frances began to read Law at St Anne's College Oxford before transferring to the University of London for her first degree, to which she has added a Masters Degree in Employment Law and Industrial Relations from Leicester University, a Masters Degree in Education from the School of Education of the Open University and a PhD from LJMU on the basis of a comparative study of Cohabitants' Rights in both common law and civil law jurisdictions. She was initially called to the Bar by Middle Temple (from which she received a Harmsworth Major Exhibition) and then proceeded *ad eundem* to Lincoln's Inn, where she is a member of leading Chancery Chambers at 10 Old Square, and now practising from there as a Mediator and Family Law Arbitrator, MCI Arb.

Frances' research interests are mainly in Family Law and Property, but also in the English Legal System, Legal Method and Skills, Access to Justice, and particularly Dispute Resolution. She has published widely in these fields, including textbooks, articles in academic journals and professional publications, conference papers and professional newsletters, in hard copy and on line

¹²² ‘Who’s the IVF Daddy? - Anyone you care to name?’ *Sunday Times*, 1 March 2009.