

# TOO MANY MOTHERS? SURROGACY, KINSHIP AND THE WELFARE OF THE CHILD

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## I. INTRODUCTION

The latter years of the 1990s and the early part of 2000 heralded a renewed public interest in surrogacy as a practice due to a number of cases reported by the media which highlighted some of its more problematic aspects. At the same time, the current legislative framework that governs surrogacy was placed under scrutiny and was found lacking and in need of review. The relevant law will be outlined in part II of the article. One of the cases which arguably prompted the latest review of surrogacy law involved Karen Roche and a competition between at least three sets of potential ‘parents’ but in the main concentrated upon the women involved in staking a claim to the child.<sup>1</sup> This case, along with others, influenced the government’s review of the legislation and the cases’ impact on that process will be discussed in part III. However, despite the media attention that such problematic cases attract, it is only in a very small number of cases that the surrogacy arrangement fails. And part III will also critically evaluate the government’s review of surrogacy law, which is now commonly known as the Brazier Report.<sup>2</sup> It will argue that undue attention is paid to ensuring that effective measures are in place to regulate the circumstances that exist between the adult parties to the surrogacy arrangement. Part III will also suggest that the intense focus on the adults involved occurs at the expense of due consideration of the welfare of the child in one very significant way, *i.e.* of the child having knowledge of her mode of conception and the gestating woman. A critical evaluation of the way law and society responds to informing children of their genetic background is undertaken in part VIII.

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<sup>1</sup> See further C. Dyer, ‘Surrogate Mother Refuses to Give Up Baby’ (1997) 314 B.M.J. 250 and D. Kennedy, ‘Minister Hints at Change in the Law’ (1997) *The Times*, 16 May.

<sup>2</sup> M. Brazier, A. Campbell and S. Golombok, *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation*, (Cmnd. 4068) 1998 at paras. 1.6–1.13.

In parts IV and V I argue for a reformulation of social and legal constructs of the biological and social relations arising from surrogacy. My argument draws upon discourses that propound the idea that the child's welfare might be best served by having contact with all those with an interest in her. The article suggests that in cases involving surrogacy (and implicitly) other forms of reproductive technologies, specific reference must be made to the need for children to have knowledge of their birth origins and where possible their wider kinship network. It also posits in parts VI and VII, drawing upon the Australian decision of *Re Evelyn*,<sup>3</sup> that there is no need to decide cases based on the either/or approach where all things are equal. The article contends that the law should move away from a system whereby one mother is chosen over another, towards one whereby child sharing becomes the norm. It also advocates the development of conceptions of families based upon a broader understanding of kinship networks.

## II. THE CURRENT LAW

Currently, under English Law, the woman who gives birth to a child is the legal mother, whether or not she is genetically related to the child.<sup>4</sup> The commissioning woman never automatically acquires legal responsibility for a child born through the surrogacy arrangement. Rather, if the commissioning couple want to be treated as the child's legal parents they have the two options of adoption or applying for a parental order under section 30 of the Human Fertilisation and Embryology Act 1990. The section 30 order bypasses some of the more onerous aspects of the adoption process.<sup>5</sup> In deciding whether to make a section 30 order, the court is directed to 'have regard to all the circumstances, first consideration being given to the need to safeguard and promote the welfare of the child'.<sup>6</sup> The regulations governing parental orders stipulate that the child's interests are made the 'first' but not the paramount consideration and the standard is therefore lower than that of the paramountcy principle of section 1 of the Children Act 1989. To date the UK case law has adopted a model that decides between the gestational woman and her

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<sup>3</sup> *Re Evelyn* (1997) No. B.R. 7321 (unreported). Detail obtained from M. Otlowski, 'Re Evelyn: Reflections on Australia's First Litigated Surrogacy Case' (1999) Med. L. Rev. 38.

<sup>4</sup> Human Fertilisation and Embryology Act 1990 section 27(1).

<sup>5</sup> However, there are a number of limits placed upon the applicants: they must be married to each other; at least one of them must be genetically related to the child; conception should not have occurred through intercourse; the child must be living with the applicants; the gestating woman and the child's legal father (usually her husband) must have consented to the order; and the court must be satisfied that no money or benefit, other than expenses has been paid.

<sup>6</sup> Parental Orders (Human Fertilisation and Embryology) Regulations 1994, (S.I. No. 2767) schedule 1(1)(a).

husband and the commissioning parents. And in the majority of cases, courts merely rubber-stamp the wishes of the parties involved in surrogacy arrangements. This has led to two eminent commentators to suggest that the judicial approach stems more from the '*fait accompli*' nature of the proceedings rather than from a basic empathy with the practice of surrogacy.<sup>7</sup> It will be argued that the time is ripe for a more radical reform of the legal and societal approach to surrogacy which moves away from the formulation that forces a choice between two competing sets of parents. The argument draws upon social and legal discourses that stress the importance of the resulting child having at least some knowledge of her means of conception and at most an ongoing relationship with the woman who gestated her. These discourses emphasise the potential significance for the child's welfare of the various social and biological connections that arise through the practice of surrogacy. The article will argue that these factors should be borne in mind by any future law reform and in the practice of surrogacy itself.

### III. THE BRAZIER REPORT

#### A. *The Contextual Background*

The Report outlines several influential events that led to the review.<sup>8</sup> The first of these pertains to the growing acceptance by the medical profession of surrogacy as an 'acceptable option of the last resort'.<sup>9</sup> Though in the same publication the BMA stressed that 'the interests of the potential child must be paramount and the risks to the surrogate must be kept to a minimum'.<sup>10</sup> As mentioned above, the media also played a role in prompting the review of surrogacy law. The Report outlined a number of cases reported by the media generally, and newspapers in particular, that influenced the government's decision to reconsider the existing framework. Whilst no explicit reference is made, one of the cases cited in the Report, probably pertains to that of Karen Roche which concerned the very public breakdown of the relationships between the adults involved in the surrogacy arrangement. The Report states: 'What should have been a private arrangement took on the appearance of a public spectacle and cast doubt on the ability of the current arrangements to meet society's concerns about such cases.'<sup>11</sup> The potential for commercial

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<sup>7</sup> J.K. Mason and A. McCall Smith, *Law and Medical Ethics* (5th edn.) (Butterworths 1999).

<sup>8</sup> *Supra*, n. 2 at paras. 1.6–1.13.

<sup>9</sup> *Supra* at para. 1.6 citing: *Changing Conceptions of Motherhood: The Practice of Surrogacy in Britain* (BMA 1996).

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

surrogacy being imported into the UK jurisdiction was also highlighted in the reporting of a visit to the UK by the director of a US commercial agency to recruit commissioning couples who wished to undertake surrogacy arrangements through his agency in the US. According to the Report it was stated that the likely charge to the commissioning couple might be £30,000. Another story included a case in the US in which a couple arranged for a woman to carry their dead daughter's fertilised eggs to enable them to become grandparents. Finally, the Report cited two UK cases where a mother carried a child to term for her daughter and another where the daughter carried a child to term for her mother.<sup>12</sup> All these events lead to the idea that surrogacy arrangements were becoming more frequent with varying degrees of success. It is in these problematic cases that concerns are expressed about the welfare of the child. However, the Report also outlines that only in a very small proportion of cases does the surrogate refuse to hand over the child (estimated at 4–5 per cent of surrogacy arrangements).<sup>13</sup> Despite the inordinate amount of publicity these cases attract, they are very much in the minority. Given that the majority of surrogacy cases proceed without problem it seems more apposite that the legal focus should be on ensuring that the welfare of children be provided for in these circumstances.

### *B. Brazier's Remit*

It is with the above context in mind that the Report outlines the principal concerns about surrogacy law:

Does existing law and practice adequately safeguard the welfare of the child? (ii) does, and indeed should, existing law and practice protect the interests of the surrogate, her family and the commissioning couple? While there is unanimous agreement that the law must protect children, there was lively debate about how far if at all the state should intervene to limit the choices of the adult parties to surrogacy: and (iii) is payment to the surrogate for her services acceptable? Do payments contravene ethical values and may payments add to the risk of surrogacy?<sup>14</sup>

These are the questions said to underpin the Report and its recommendations. However, it is my suggestion that not all these questions are given equal attention by the Report. There is one matter of crucial importance that is neglected by the Report. Despite the primary question referring to the welfare of the child and there being 'unanimous agree-

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<sup>12</sup> *Ibid.*

<sup>13</sup> *Supra* at para. 3.38.

<sup>14</sup> *Supra* at para. 4.6.

ment that the law must protect children',<sup>15</sup> scant regard is paid to one crucial aspect of the welfare of children in the final recommendations, that of the child's interest in knowing her mode of conception, her genetic origins and the identity of the gestating woman. In the general discussion in the Report, reference is made to the welfare of the child in relation to the effect on the child of unsuccessful surrogacy arrangements and learning of protracted custody battles at a later age.<sup>16</sup> The Report does briefly discuss at the pre-recommendation stage 'the risks to the child, including psychological trauma and commodification; the limits of procreative rights; and the moral character of the surrogacy relationship.'<sup>17</sup> The Report notes the potential damage to the child through treating her as a commodity to be bought and sold.<sup>18</sup> However, though some mention is made of potential of risk of psychological trauma to the child, there is little development of this theme at the Report's recommendation stage. Chapter 8, which deals with the draft Code of Practice, suggests that the welfare of the child must be of paramount concern to all the parties to the arrangement.<sup>19</sup> However, as noted by Freeman, there is no consistency of approach to the welfare of the child in the Report.<sup>20</sup> In chapter 8 the paramountcy principle is adopted<sup>21</sup> but in other parts of the Report, the welfare of the child must be given the 'highest priority'.<sup>22</sup> As shrewdly observed by Freeman, these are different standards and from his analysis it does appear that he is correct in the view that the Report intends to accord the child the latter standard, given the centrality of the interests of other parties.<sup>23</sup>

In relation to the potential for risks to the child, including psychological trauma, there is nothing new in the Report's recommendations to suggest that the potential for damage to those children involved (including the surrogate's children) is taken altogether seriously. My intention here is to centralise the discussion of the welfare of the child and focus upon the potential for risks to the child, including psychological trauma, as it is here that the biggest gap lies in the Report's recommendations.<sup>24</sup> As Michael Freeman urges, we need to consider

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<sup>15</sup> *Ibid.*

<sup>16</sup> *Supra* at para. 3.38.

<sup>17</sup> *Supra* at para. 4.22.

<sup>18</sup> *Supra* at para. 5. 11.

<sup>19</sup> *Supra* at para. 8.3.

<sup>20</sup> M.D.A. Freeman, 'Does Surrogacy Have a Future After *Brazier*?' (1999) 7 Med. L. Rev. 1.

<sup>21</sup> As *per* Children Act 1989 section 1.

<sup>22</sup> *Supra*, n. 20 at 13 citing n. 2 at paras. 4.46 and 4.50.

<sup>23</sup> *Ibid.*

<sup>24</sup> There is much to be heeded from Freeman's article 'The New Birth Right? Identity and the Child of the Reproductive Revolution' (1996) 4 *International Journal of Children's Rights* 273 which focuses on some of the issues I discuss herein, though in a more general context.

'the effect of surrogacy on the institution of childhood'<sup>25</sup> and it is with this in mind that I proceed.

#### IV. SURROGACY AND THE WELFARE OF THE CHILD<sup>26</sup>

The Report makes recommendations in three main areas: 'payments to surrogates; the regulation of surrogacy; and new legislation to replace the 1985 Act and section 30 of the 1990 Act, tightening up the provision of these Acts and providing for a new Code of Practice.'<sup>27</sup> However, the Report contains no radical changes to securing the child's welfare (outside the more stringent attempts to protect children from commodification by attempting to ensure that children are not treated as property to be exchanged in the market). The Report attempts to avoid the commercialisation of surrogacy by tightly defining legitimate expenses that might be paid to the gestating woman. It pays lip service to other aspects of the child's welfare by dedicating a mere two-and-a-half pages of its seventy three to a discussion of the social and psychological issues arising from surrogacy and pertaining to that issue. In the Report it is outlined that:

Families created by surrogacy differ from the traditional family in two important ways. (1) The gestational mother and the social mother are not the same. Although this is also true of adoption, surrogacy differs from adoption in that the pregnancy was created with the deliberate intention of the surrogate mother handing over the child to the commissioning couple. (2) In the case of partial surrogacy, the child is genetically unrelated to the commissioning mother, and where a donated embryo is used, the child is genetically unrelated to both commissioning parents.<sup>28</sup>

Arising from the issues outlined by the Report, are a number of significant social and psychological issues that the Report fails to reconsider in any substantive way. Important questions arise from the fact that there are two women involved in the surrogacy arrangement that have a potential claim to legal responsibility for the child. Law is faced with resolving this issue if the arrangement breaks down. However, even when the surrogacy is successful the resulting child may, and perhaps should, be confronted with that knowledge at some time in the future. In the case of partial surrogacy the child has the possibility of two mothers *i.e.* the gestational woman and the commissioning woman, but in IVF

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<sup>25</sup> *Supra*, n. 20 at 71-3.

<sup>26</sup> Subheading from *supra*, n. 2 at para. 4.8.

<sup>27</sup> *Supra*, n. 2 at 71-3.

<sup>28</sup> *Supra*, n. 2 at para. 4.8.

surrogacy where a donated egg is used, three women will have contributed to the child's existence. The central question pertaining to the social and psychological issues is who is to be treated as the mother by law and society? This question will be addressed in the next section.

## V. THE SOCIAL AND PSYCHOLOGICAL ISSUES

### A. *Who is Mother?*

The first point to be made is that, in surrogacy, the woman who gestates the child is not the same as the woman (the social mother) who raises the child.<sup>29</sup> It is noted in the Report that the difference between adoption and surrogacy is that the child is created with the intention to hand her over to the commissioning couple. Despite the Report's findings that opposition to surrogacy is no longer couched in terms of third party intervention into the marriage relationship,<sup>30</sup> the significance of that third party to the ensuing child and, indeed, to the future wellbeing of 'the family' is regarded to be considerable. The Report refers to the gestating woman as 'mother' and framing the woman in this way leads to the question as to whether, under surrogacy arrangements, the woman responsible for the gestation is treated as a 'mother' for practical purposes after the child is born. As seen above, the current law on surrogacy treats the issue as one of deciding between the commissioning woman and the gestational woman and, on this, the law is unequivocal. Section 27(1) of the Human Fertilisation and Embryology Act 1990 (hereafter HFEA) provides:

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

However, the commissioning couple can apply for a parental order with the consent of the surrogate if all conditions are satisfied. This renders the commissioning woman 'mother' and relinquishes the carrying woman of all responsibility. To all intents and purposes in the vast majority of cases, when all goes smoothly, the law proceeds by legitimising the wishes of the adult parties and decides the question as to who is mother on that basis. It is clear that the current legal framework operates on the fundamental assumption that children should have only one mother and utilises an either/or approach. This has also, traditionally, been the legal

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<sup>29</sup> It is not accurate to say that the gestating woman fails to perform a social role in carrying a child for a couple unable to have children without assistance. I use the distinction to describe the separate functions performed by the two women. See further, L.M. Purdy, *Reproducing Persons: Issues in Feminist Bioethics* (Cornell University Press 1996).

<sup>30</sup> *Supra*, n. 2 at para. 4.5.

approach to adoption, though there has been much debate about the utility of moving towards an open adoption system where children retain contact with their parents.<sup>31</sup> The Report reveals the lack of systematic information about the long-term psychological consequences for children born as a result of a surrogacy arrangement and has to rely on data collected on adopted children and those conceived by assisted reproduction. It acknowledges that so far as children conceived by surrogacy can be compared to adopted children (noting that the former are created with the deliberate intention of surrender), adopted children tend to show a greater incidence of emotional and behavioural problems than their non-adopted counterparts. The Report claims that psychological problems are likelier to occur when parenting is poor, and where the parents are not open about the adoption. It also maintains that research to date on pre-adolescent children born as a result of assisted reproduction shows that the quality of parenting is good and that children function well. Because surrogacy sometimes uses IVF, and children born through surrogacy often lack a genetic link with the commissioning mother, the Report states that these findings can be extrapolated to families created through surrogacy.<sup>32</sup> The extrapolation from the findings of research on adoption and assisted reproduction to surrogacy might lead us to be optimistic that children born through surrogacy are unlikely to suffer if the quality of parenting is good and there is openness and honesty about the genetic history and method of conception. Yet, mysteriously there is nothing in law or the Report's recommendations to secure openness.

The Report suggests that the extrapolation of data from these two areas onto surrogacy is fundamentally flawed for two significant reasons. First, children resulting from surrogacy are born with the sole aim that they will go to other parents. The Report acknowledges a potentiality for psychological damage that might stem from the awareness of this specific purpose. Second, the Report also points to the current lack of knowledge of the potential impact on the child of having 'two mothers . . . on his or her social, emotional and identity development through childhood and into adult life, particularly in families where the surrogate mother is also the genetic mother of the child' and where there is contact.<sup>33</sup> There appear to be two major assumptions in the Report

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<sup>31</sup> See for example the latest White Paper, *Adoption: A New Approach* <<http://www.official-documents.co.uk>>, C. Barton, 'Adoption: The Prime Minister's Review' [2000] Fam. Law 731, M. Ryburn, 'Welfare and Justice in Post-Adoption Contact' [1997] Fam. Law 28, C. Bridge, 'Changing the Nature of Adoption: Law Reform in England and New Zealand' (1996) 16 *Legal Studies* 81.

<sup>32</sup> *Supra*, n. 2 at para. 4.10.

<sup>33</sup> *Supra*, n. 2 at para. 4.11.

that children will learn of their genetic and/or biological origins and that the child will have 'two mothers'. However, the Report makes no attempt to ensure that children are told of their birth origins. Nor does it suggest any change of the system currently embraced by English Law, which forces a choice between the 'two mothers' and proceeds on the basis that there will only be one mother and not two. These are the Report's main concerns as to the child's future wellbeing. First, the significance to the child's welfare of knowing that s/he has been born with the intention of being surrendered to another couple. Second, that there may be some psychological damage to the child on learning that, or, in cases where contact with the woman who gestated the child, in having two mothers. Thirdly, given the Report's use of research on adopted children which maintains openness to be beneficial to children's welfare, there is an embedded assumption that children will benefit from knowledge of their birth origins. I will address each of these concerns in turn.

### *B. The Code of Practice*

Cases such as the one involving Karen Roche hit the media headlines when the woman gestating the child refuses to carry out the agreement to give over the child. As already noted, these cases constitute a very small proportion of all cases. In these circumstances it may be likely that the child will suffer some distress as to learning of the furore surrounding her birth. On the issue of being conceived specifically with the intention to give the child to another woman who will raise the child, I do not see why the intention, where payments are limited, is worse to that in adoption. We do not yet know how children will react to being born with the intention of being raised by others, but if the practice is responded to in a more positive way than has been the case, and is dealt with in an open, honest and sensitive way, it is likely that the potential for damage can be minimised.<sup>34</sup> As Purdy reminds us, the act of bearing children is itself of social value, and even in cases where money is paid for a service, we do not ostracise the providers for not having the right motive.<sup>35</sup> And in the vast majority of cases the child is handed over to the commissioning couple as agreed. In these cases, the carrying woman may either be written out of the child's future and the traditional nuclear

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<sup>34</sup> See further studies on open adoption *supra*, n. 31 and also R. Cook, S. Golombok, A. Bish and C. Murray, 'Keeping Secrets: A Study of Parental Attitudes Toward Talking About Donor Insemination' (1995) *American Journal of Orthopsychiatry* 286.

<sup>35</sup> *Supra*, n. 29 at 193. See also J. Van Dyck, *Manufacturing Babies and Public Consent: Debating the New Reproductive Technologies* (Macmillan 1995).

family simulated, or contact with the carrying woman might take place. In practical terms, where there is no dispute, the law merely sanctions the adults' decision. In some cases the woman who gestated the child will have no further contact. The arrangements over whether future contact with the woman who gestated the child would take place would be left to the adult parties to decide. In support of this the Report does put forward a draft Code of Practice. The draft Code outlines what it terms 'a memorandum of understanding' designed to define and clarify the parties' expectations. The memorandum is intended to record the arrangements to secure the child's welfare, including the issue over contact between surrogate and child and/or what the child should be told about her origins.<sup>36</sup>

But this does not go far enough as good practice guidelines, *i.e.* a Code of Practice, do not have the same legal standing as statute and fail to make the same stamp on public consciousness as primary legislation. It is also unclear as to what legal standing these memoranda would have, if any. Later, the Report states that the Code must emphasise the non-contractual nature of any memorandum while explaining the importance of all parties 'setting out as clearly as possible their expectations of each other'.<sup>37</sup> If the memorandum has no contractual standing then how is it likely to be used in practice? Though a breach of the Code may lead to clinics offering surrogacy arrangements having their licence revoked. Presumably, the courts would use the memorandum when making the parental order? It is unclear however, as to the extent to which it would be relied upon by the court when reaching a decision. Moreover, if the court were to pay considerable attention to it, then to what extent would a failure of any aspect affect the surrogacy if the arrangement breaks down? The language used in the Report suggests that the memorandum would be a document that merely records the arrangements between the adult parties about the child. But to what extent does it serve the interests of the child, for example, is the child entitled to see the document at some later time? How would the child react to the outlined arrangements, perhaps when they include contact and the woman who carried the child had not maintained contact or the commissioning parents had later refused contact?

Additionally, the draft Code is vague, using the catch-all phrase 'the welfare of the child.' As many have outlined, the welfare principle is a notoriously indeterminate concept. King is instructive here as he argues that the welfare principle simply provides the symbolic function of legitimising court decisions, rather than prescribing a particular action

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<sup>36</sup> *Supra*, n. 2 at para. 8.12.

<sup>37</sup> *Supra*, n. 2 at para. 8.14.

and providing an outcome in an individual case.<sup>38</sup> Rather, he claims the principle is utilised to form sets of 'harder-edged notions that can appear to offer a foundation for consistent decision making'.<sup>39</sup> Though I am arguing for a centralisation of the child's welfare in discussions about law reform my point is that the welfare principle alone cannot ensure that children's interests in knowing of their birth origins and/or woman who gestated them are provided for. In cases involving surrogacy and other forms of reproductive technologies, specific reference must be made within the umbrella welfare principle, to the basic need for children to have knowledge of their birth origins and where possible their wider kinship network.<sup>40</sup> The potential risks to the child are spelt out in the Report in terms of the possibility of psychological damage on learning of the mode of conception, birth and of having two mothers. It would have been much more beneficial for children if those risks had been directly and explicitly addressed for reform purposes. For example, by at least ensuring that there are provisions made for facilitating children's knowledge of their birth origins and at most by facilitating a relationship with the gestational woman. As Freeman has noted, the emphasis in the draft Code on contact is with the 'surrogate and the child' and not the 'child and the surrogate'.<sup>41</sup> This reflects the complex balancing act between the rights and interests of the adult parties and the interests of the child. My view is that the child's interests are subsumed by those of the adults and that the Report neglects to consider in full the potential risks it outlines.

### C. *One Mother or Two?*

My position is that the reflection upon the damage that might ensue to the child through having 'two mothers' is over-emphasised, as, perhaps, is the impact of being born specifically to be given away to another. My reasoning rests on whether it is accurate to describe the woman who gestates the child as *the* mother or rather as *one* mother? Clearly, English

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<sup>38</sup> M. King, 'Playing the Symbols: Custody and the Law Commission' [1987] Fam. Law 186, cited in Davis and Pearce, 'On the Trail of the Welfare Principle' [1999] Fam. Law 144.

<sup>39</sup> *Supra*.

<sup>40</sup> In disputed cases this might be accommodated in the welfare checklist of section 1(3) of the Children Act 1989 where the child's age, sex, background and any characteristics of his which the court considers relevant must be considered. There is little evidence in the UK case law on surrogacy to suggest that this factor has been considered to any significant extent. See for example, *A v. C* (1985) 8 Fam. Law 170; *Re C (A Minor)* [1985] F.L.R. 846; *Re P (Minors)* [1987] 2 F.L.R. 421; *Re W (Minors) (Surrogacy)* [1991] 1 F.L.R. 385. However, the majority of cases will not come before the court, thus making it crucial to provide statutory measures to ensure the child has the relevant information.

<sup>41</sup> *Supra*, n. 20 at 15.

and Welsh law has seen fit to protect the woman who carries all the risks associated with pregnancy, even in cases where a donated embryo is used.<sup>42</sup> English and Welsh law secures her maternity against the commissioning couple by donning her the title of *the* mother, unless to leave the child with her was not in the child's best interests. I would say that the protection offered to the carrying woman is laudable as it recognises the risks she takes through pregnancy.<sup>43</sup> I would agree with Morgan that it is useful to retain the rule that a woman who gives birth to a child is to be treated as the child's mother for all purposes.<sup>44</sup> However, in mainstream cases, the maternity of the child is switched to the woman who commissioned the surrogacy and rather than focus disproportionately upon the small minority or handful of problem cases, it is equally important to ensure that the legal position governing the majority is adequate.

Currently then, the law ensures that there is only one legally recognised mother when all goes well. The social rearing of the child may well follow that legal pattern. The question may then be raised as to how relevant it is to talk of the child having two mothers? It could be argued that the gestating woman makes an essential contribution to the child's existence but that is not necessarily equal to being a mother. The distinction between maternity (reflecting the birthing role) and motherhood (reflecting the social rearing role) is useful. The way one understands motherhood as a social institution will colour the way one feels able to decide upon who is 'mother'. Morgan has questioned the naming of the woman carrying the child as surrogate instead of the commissioning mother.<sup>45</sup> He describes this as an example of 'the use and elision of language to appear to make one set of circumstances appear more natural, thereby less objectionable, therefore commanding support among right-thinking people'.<sup>46</sup> His argument is that the woman who gives birth to the child is '*the* mother', and not the surrogate.<sup>47</sup> When the child is also genetically related to her, by insisting on emphasising the importance of the genetic link between child and donor, biologically and genetically deterministic notions of human psychological development are relied upon. This emphasis and reliance has been frequently

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<sup>42</sup> See further M. Brazier, 'Regulating the Reproduction Business?' (1999) 7 Med. L. Rev. 166.

<sup>43</sup> There are of course risks involved to all parties to surrogacy and these have been adequately covered by many worthy commentators. See further *ibid.* at 180–1 and J.K. Mason and A. McCall Smith, *supra*, n. 7.

<sup>44</sup> D. Morgan, 'Surrogacy: An Introductory Essay' in D. Morgan and R. Lee (eds.), *Birthrights: Law and Ethics at the Beginning of Life* (Routledge 1989) at 55–84. The rule derives from *Amphill Peerage* [1977] A.C. 547.

<sup>45</sup> *Supra* at 56–60.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

questioned and, in particular, with regard to the position of women against biological fathers.<sup>48</sup>

In those cases where the woman who gestated the child continues to have contact with the child throughout her life, is the relationship between the two of them regarded by all involved parties as one of mother/child? This is a question that is difficult to answer given the current state of knowledge about surrogacy arrangements and the area is ripe for research. If those persons involved in surrogate arrangements do consider the carrying woman/child dyad as a mother/child relationship, then why is that considered to be a potential problem as anticipated by the Report? Multiple parenthood abounds in contemporary society through fostering, open adoption and step-parenting and in the best case scenario, without causing undue harm and distress to children. Perhaps the way forward with surrogacy law is to provide a model that recognises and institutes that all the parties involved (including the child) have a potential interest in the child's welfare and that there should be no need to decide cases based on the either/or approach. Rather, the law might move away from a system whereby one mother is chosen over another, towards one whereby child sharing becomes the norm. As Kandel has noted:

The child's best interests standard does not compel a choice between the two women. The diverse child sharing systems found throughout the world indicate that it may often-times be better to provide a broadened network of social, emotional and financial support and a range of options, role models and opportunities. Child sharing is no more risky way to raise children than is the discrete nuclear family.<sup>49</sup>

Kandel's analysis challenges the fundamental assumption made by law and contemporary US society that a child should only have one mother. Kandel's essay is pertinent to the possible problem identified by the Report of the effect on the social, emotional and identity development of the child who has contact with her birth mother. It is likely, given children's adaptability to new situations, especially when parenting is of a good standard, that the child is unlikely to experience significant difficulty on learning of the mode of conception and birth and/or the

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<sup>48</sup> See, for example, C. Smart, "There is of course the Distinction Dictated by Nature": Law and the Problem of Paternity' in M. Stanworth (ed.), *Reproductive Technologies: Gender, Motherhood and Medicine* (Polity Press 1987) at 98–117; and J. Zipper and S. Sevenhuijsen in the same collection 'Surrogacy: Feminist Notions of Motherhood Reconsidered' at 118–38.

<sup>49</sup> R.F. Kandel, 'Which Came First: The Mother or the Egg? A Kinship Solution to Gestational Surrogacy' (1994) 47 *Rutgers Law Review* 165.

gestational woman. However, with regard to the social aspect of the child's life, (though I am not sure that it is possible to separate these categories in the way that the Report does), it might be negatively impacted upon if having more than one mother is socially and legally constructed as fundamentally bad. Given the vast variations in the way that families are now organised, is it still legitimate to constitute the one mother/one father and children as the paradigm for legal decisions? Much more benefit for children could be derived from the social and legal recognition that there are more ways of being a family than this.

#### VI. THE CASE OF *RE EVELYN*<sup>50</sup>

The Australian case of *Re Evelyn* recognises the benefit to the child of having knowledge of and contact with all parties to the arrangement. The brief facts of the case were that 'Evelyn' was born as a result of a surrogacy arrangement between two couples who had been close friends for many years. The arrangement is described as 'entirely altruistically motivated' and had been initiated by the woman who gestated the child and who was also biologically related to her.<sup>51</sup> It was originally intended that close contact would be maintained between the two families, but frictions developed because the woman responsible for gestation became frustrated by what was perceived as inadequate communication. She was also struggling with her decision to relinquish the child. It was her decision to seek to have Evelyn returned to her. The commissioning couple refused to give up Evelyn and a dispute over residence arose. At the time of the trial Evelyn was one-year-old and had been mainly residing with the commissioning couple.

The argument on behalf of the biological 'mother' was that she should be with 'her natural mother and that such a placement would provide her with a sense of completeness and would have the benefit of enabling her to be raised with her biological siblings'.<sup>52</sup> The commissioning couple argued that it was in Evelyn's best interests to stay with them and their adopted son and that they would provide a 'settled, secure and familiar environment'.<sup>53</sup> They also argued that the move would be traumatic to her. Both couples sought residence orders or alternatively, orders for frequent contact. The court of first instance came to a decision, later upheld by the High Court of Australia that the child should be handed over to the gestational mother and her husband.<sup>54</sup> There are two main

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<sup>50</sup> *Supra*, n. 3.

<sup>51</sup> All facts are derived from M. Otłowski, *supra*, n. 3 at 38–9.

<sup>52</sup> *Supra* at 40.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Supra* at 43.

factors in the decision that are relevant to this article: first, the court ordered that responsibility for Evelyn's 'long term care, welfare and development' be shared between the two couples;<sup>55</sup> second, it stated there was no 'presumption in favour of a biological parent' and that though the first instance judge did give the biological mother preference, it had been done by evaluating the personal qualities of all the parties, their parenting capacities and the expert evidence.<sup>56</sup> This point on the biological nexus will be considered in the next section. As under English Law, the dispute was determined in accordance with the paramountcy principle.<sup>57</sup> Jordan J. construed the essential question to be:

. . . a determination of what are the short-term and long-term implications for Evelyn in the placement options available to the Court and what is the optimum environment in which to raise the child, given the complexity of the issues confronting her.<sup>58</sup>

He was satisfied that both couples could provide Evelyn with 'the very highest standard of care'.<sup>59</sup> As Otlowski states, because of the broad discretion when exercising jurisdiction in respect of children, the decision in one case, based on a specific set of circumstances, does not set down a precedent which would bind subsequent courts.<sup>60</sup> In other words, the case does not establish a legal precedent that in surrogacy cases that break down, both parties will be entitled to have contact with the child. But is there not some profound wisdom in this decision which recognises the complexity of the issues involved which might impact on the child's future wellbeing both in the short and long-term? It is my view that there may be very real benefit accruing to a child in knowing and forming relationships with all parties to the surrogacy, including any other children involved, but leaving the matter to individual judicial interpretations is unsatisfactory.<sup>61</sup>

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<sup>55</sup> Jordan J. had ordered that the commissioning couple have contact with Evelyn at all such reasonable times as may be agreed by the parties. Failing agreement the court would make detailed orders for contact. Cited *ibid*.

<sup>56</sup> *Ibid*.

<sup>57</sup> Under Australian Law contained in section 65E of the Family Law Act 1975 (Cth.) as amended by the Family Law Reform Act 1995 (Cth.). Section 65E states that: 'In deciding whether to make a parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.' The term parenting order includes residence and contact orders as per s. 64B. Cited in Otlowski, *supra*, n. 3 at 44.

<sup>58</sup> Cited in Otlowski, *supra*, n. 3 at 41.

<sup>59</sup> *Supra*, n. 3 at 41.

<sup>60</sup> *Supra*, n. 3 at 46.

<sup>61</sup> See further, J. Mason and R. McCall Smith, *supra*, n. 7 at 81.

## VII. WHO IS TO BE PARENT?

Given that the UK government found the time ripe for review, it might well have considered challenging the basic assumption that parental responsibility should reside with one set of parents. Although it is clear that the majority of cases are undertaken without a problem, it is with these cases that important questions about the child's long term welfare are in the main, neglected. The issues that arose in *Re Evelyn* remain very pertinent to children born through successful surrogacy arrangements. For example, the children are likely to be raised by the commissioning couple with restricted or no contact with the woman who carried the child. In most cases in English Law, the parentage is transferred from the surrogate (and where relevant, her husband or partner) to the commissioning couple by the parental order. However, if the arrangement fails, the woman who gestates the child and her husband/partner retain legal parentage because of the existence of presumptions of parentage that exist in English Law.<sup>62</sup> Whilst this solution prevents prolonged disputes as to parentage, it also treats the commissioning biological male (and/or female) as mere gamete donors. It could be argued that this is the proper status for the commissioning parents, especially if you adopt the same view as Morgan that the carrying woman is *the* mother.

However, I prefer to see all the parties involved as providing an essential role in the child's conception and birth as they all, at the time of conception at least, had the intention to create a child with a specific aim in mind. Where the commissioning male's sperm is used in the surrogacy he (along with the others) intends also to father the child in a legal and social sense. The current legislation is prohibitive of this and by adopting the either/or approach it reinforces the ideology inherent in much of family law and social policy that children's best interests are served by being raised in the traditional two-parent family. This may provide the key to understanding the statutory and judicial approach.<sup>63</sup> But by treating the commissioning couple as donor(s) rather than intending parents, are the interests of children best protected? If we look to the case law on parental contact we see that when the paramountcy principle is applied in making the contact order<sup>64</sup> there is an overriding presumption that the child's welfare is best secured from her having continued contact with the biological parent. This may be the case even when the father has been violent to the mother or her children. The contact order is an order

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<sup>62</sup> Human Fertilisation and Embryology Act 1990 section 28.

<sup>63</sup> See, for example, *A v. C* (1985) 8 Fam. Law 170; *Re C (A Minor)* [1985] F.L.R. 846; *Re P (Minors)* [1987] 2 F.L.R. 421.

<sup>64</sup> Children Act 1989 section 8.

that requires the person with whom a child resides to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other.<sup>65</sup> Whilst it is generally accepted that contact with parents is a fundamental right of the child, there has been a continuing controversy as to whether contact may also legitimately be regarded as a right of parents.<sup>66</sup> The judicial support for continued contact with the biological parent is apparent in the judgement of Latey J. in the case of *Re H*<sup>67</sup> which concerned male violence. He states:

. . . where the parents have separated and one has the care of the child, access by the other often results in some upset in the child. Those upsets are usually minor and superficial. They are heavily outweighed by the long term advantages to the child of keeping in touch with the parent concerned . . .<sup>68</sup>

And in the case of *Re P*<sup>69</sup> which also involved established male violence, and threats to kill the children, when reaching the decision to allow direct contact, Wall J. highlighted that:

It is almost always in the interests of a child whose parents are separated that he or she should have contact with the parent with whom the child is not living.<sup>70</sup>

I have previously been critical of this overriding presumption in cases that involve conjugal violence, but I would not dispute the value to the child of having knowledge of and contact with all interested parties, whether biological or otherwise, all things being well.<sup>71</sup>

The Report outlines the potential impact of having ‘two mothers’ upon the child’s social, emotional and identity development through childhood and into adult life. It is my view that by continuing to forward the traditional two-parent family as the paradigmatic form for children’s welfare and by denying the interested parties an input into the child’s life, we merely reify the social standing of children born through surrogacy as somehow deviant. It may well be the time to institute into surrogacy law and social practice the idea that children can and should have knowledge of and contact with all interested parties whether we call them ‘mother’ ‘father’ or some other appropriate epithet.

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<sup>65</sup> Children Act 1989 section 8(1).

<sup>66</sup> A. McCall Smith and A. Sutherland (eds.), *Family Rights* (Edinburgh University Press 1990).

<sup>67</sup> *Re H (Minors) (Access)* [1992] 1 F.L.R. 148.

<sup>68</sup> *Ibid.* para G, 158.

<sup>69</sup> *Re P (Contact) (Supervision)* [1996] 2 F.L.R. 314.

<sup>70</sup> *Ibid.*, para. F, 328.

<sup>71</sup> See further, J. Wallbank, *Challenging Motherhood(s)* (Longman 2001).

In *Re Evelyn* it was considered that whilst legal parentage created some prima facie rights and obligations it was not decisive in terms of where the child should reside: 'indeed to suggest otherwise would be contrary to the "paramourcy principle"'.<sup>72</sup> In rejecting the argument of the gestational woman that her and her husband's status as legal parents placed them in an insurmountable position Jordan J. stated:

. . . I cannot be satisfied that it is in Evelyn's best interests to proceed with some artificial exercise which ignores or diminishes the significance of an agreed fact, that is, that Mr Q is the child's father...<sup>73</sup>

Here Jordan alludes to the biological fact of fatherhood. Earlier in the statement he refers to the 'legal fiction' of the legal presumptions of parentage of which he refuses to be bound in his decision. Rather he reads the provisions on parentage as being subject to the paramourcy principle and makes his decision on that basis.<sup>74</sup> In dismissing the claim that the gestational woman and her partner's legal position is unassailable he paves the way for ordering that both sets of parents have parental responsibility for the child and as much contact as is reasonable and as is practicable. In so doing, he is condemnatory of the legislative framework that renders the father as a donor and denies his 'paternal rights'.<sup>75</sup> My concern is not so much with the fathers' paternal rights as with the child's interest in knowing all interested parties to the surrogacy.<sup>76</sup> I am more interested in positing an alternative approach to thinking about the child's welfare, one that is not based upon the imperative that biological ties are prioritised by an either/or approach which privileges the traditional family, but upon a broader understanding of kinship and the merits thereof. When considering the welfare of the child the discussion is framed always in the context of 'the family' reflecting the idea that the child's welfare is inextricable from the general well-being of 'the family'. This has been recognised as particularly pertinent to the issue of openness about the child's genetic and birth history. There is an embedded assumption in the Report that children will benefit from knowledge of their birth origins. Despite this postulate there are no

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<sup>72</sup> *Supra*, n.3 at 54.

<sup>73</sup> *Ibid.* at 23.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Supra* at 33.

<sup>76</sup> Under English law a father's right to contact is currently so potent that the courts are reluctant to reject it even in cases of extreme violence. For further discussion on the problems associated with the assertion of fathers' rights see: R. Collier, *Masculinity, Law and the Family* (Routledge 1995); C. Smart and S. Sevenhuijsen (eds.), *Child Custody and the Politics of Gender* (Routledge 1989); J. Wallbank, *supra*, n. 71.

proposals for reform to ensure that children are given at least some knowledge as to this. This is the matter to which I now turn

#### VIII. KNOWLEDGE AS TO GENETIC IDENTITY AND MEANS OF BIRTH

In the fifth section I argued for a legal and social reconceptualisation of the biological and social relations arising from surrogacy, based on the idea that the child's welfare might be best served by having contact with all those with an interest in her. I also suggest that there should be no need to decide cases based on the either/or approach where all things are equal. Rather, the law should move away from a system whereby one mother is chosen over another, towards one whereby child sharing becomes the norm. If law and society were pushed towards developing conceptions of families based upon a broader understanding of kinship networks, then the problem of openness could also be addressed. As it is, the current legal framework and the Brazier Report have little to offer by means of providing children with information about their mode of conception and/or the gestating woman. This is particularly surprising given that the Report and the significant debates make a common analogy with adoption where openness is seen as crucial to the child's welfare. This might be explained by law and society's insistence on the either/or approach that insists on identifying *the* mother. And that insistence stems from the hegemony of the private nuclear family which properly has *one* mother and *one* father. The law currently proceeds on this basis and also on the premise that the welfare of 'the family' is inextricably linked to the welfare of the child.

One of the Report's authors, Golombok has acknowledged the importance of considering the whole family when considering the issue of secrecy versus openness. This line is taken as a result of her research on children born as a result of donor insemination. She claims in relation to the secrecy of sperm donors that 'it is insufficient to consider only the welfare of the child: a satisfactory outcome for the child is dependent upon its parents, and thus the welfare of the entire family should be the primary concern'.<sup>77</sup> Whilst this is a laudable approach, it is also important that the child's welfare does not merely become subsumed by the needs and interests of the wider family. And it has been argued that the current legal framework that protects the anonymity of sperm donors, serves the purpose of passing off the social parents and the child as the traditional nuclear family.<sup>78</sup> It was argued by the Warnock Committee preceding the implementation of the HFEA 1990 and medical

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<sup>77</sup> R. Cook, S. Golombok, A. Bish and C. Murray, *supra*, n. 34 at 286.

<sup>78</sup> C. Smart, *supra*, n. 76 at 114.

commentators, that problems might arise from the child knowing the donor because of 'conflicting emotional ties' between the *families*.<sup>79</sup> But this potential conflict might only result from the entrenchment of the traditional nuclear family as the norm. As Haimes has argued, it appears that anonymity can be regarded as a form of:

... damage limitation, by those who wish both to accept gamete donation and to resolve some of the problems it represents to notions of the 'ordinary family'. It helps to preserve as many as possible of the conventional features of the family by setting a barrier around the unit.<sup>80</sup>

Under current legal arrangements governing donor insemination, the child is perceived as having a closer and more important association to her social family. In effect, the donor's relationship is reduced to one of providing a particular status for the child, of being a child produced through reproductive technology. There is, in no real sense, any idea of the child having a relationship with her sperm donor and the law institutes this through an anonymous system. It is clear that there is some inconsistency in the policy and practice on anonymity and Code of Practice provisions which state the child's need to know her origins.<sup>81</sup> On the one hand, as already discussed, anonymity passes off the social parents and the child as the traditional nuclear family. On the other hand, psychological and medical discourses state that it is better for the child to know of her origins. However, there have been persuasive arguments for reforming the policy on disclosure based on the idea that children have a right to know their genetic progenitor and I will return to this shortly.<sup>82</sup>

The law does accept that there is a benefit to the child of knowing the origins of birth in both the contexts of insemination by donor and adoption. With regards to donor insemination, the only information to which children (when adults) may be made privy is confirmation of their means of conception. The Human Fertilisation and Embryology Authority is required to keep a register of information relating to the provision of 'treatment services' for any identifiable individual, the keeping or use of

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<sup>79</sup> *Report of the Inquiry into Human Fertilisation and Embryology* (Cmnd. 9314 1984); R. Snowden, G.D. Mitchell and E. Snowden, *Artificial Reproduction* (George Allen & Unwin 1983) at 103.

<sup>80</sup> E. Haimes 'Recreating the Family? Policy Considerations Relating to the "New" Reproductive Technologies' in M. McNeil; I. Varcoe and S. Yearley (eds.), *The New Reproductive Technologies* (Macmillan 1990) at 154, 169.

<sup>81</sup> Human Fertilisation and Embryology Authority Code of Practice 1998, para. 4.40.

<sup>82</sup> See for example, the eloquent piece of S. Wilson, 'Identity, Genealogy and the Social Family: The Case of Donor Insemination' (1997) 11 *International Journal of Law, Policy and the Family* 270.

the gametes of any identifiable individual or of an embryo taken from any identifiable woman, or if it shows that any identifiable individual was, or may have been, born in consequence of 'treatment services'.<sup>83</sup> The HFEA 1990 makes it a legal duty for the Authority to tell adults (aged sixteen and above) *who ask*, whether they were born as a result of treatment using donated gametes.<sup>84</sup> Disclosure of this information is seen to be important to the child's welfare. This is evidenced through the Code of Practice provisions which state that prospective parents should be aware of a child's need to know about her origins.<sup>85</sup> Again, the provision to ensure that children born through donor insemination are limited, and information will only be provided to those who know of their means of conception and seek knowledge of the background information.

In the context of adoption, the adopted child has the right to a package of information about her background.<sup>86</sup> However, as Bridge has noted, whilst removing secrecy from adoption does provide a form of 'openness', 'open' adoption itself is a more complex concept.<sup>87</sup> It is, after all, a full legal adoption with all the benefits of the total transfer concept (and it is recommended that this be retained)<sup>88</sup> without sacrificing any beneficial social ties'.<sup>89</sup> Bridge notes that full parental responsibility is transferred to the adoptive parents. As such, the birth parents' rights are limited and the emphasis will be upon the child's welfare and the paramountcy principle when decisions about contact are made. It is likely that the integrity of the whole adoptive family will be central to discussions as to the child's welfare. Here, the law of adoption still sees that the decision should be made between one or other set of parents, but it does at least recognise that in some cases, continued contact with birth families may be desirable after the adoption order is made.<sup>90</sup> Bridge is clear in her support for openness in adoption. The HFEA provisions recognise the child's need to know of her biological origins and case law

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<sup>83</sup> Human Fertilisation and Embryology Act 1990 sections 31(1) and (2). The names of the children are not collected.

<sup>84</sup> Human Fertilisation and Embryology Act 1990 sections 31.

<sup>85</sup> *Supra*, n. 81, para. 3.17(a).

<sup>86</sup> *Review of Adoption Law 'Report to Ministers of an Interdepartmental Working Group* (1992) Department of Health and Welsh Office, Recommendation 26 at 5. Further recommendations are concerned with a legislative framework which underlies the child's right to know of the adoption (R 25) and a duty on agencies to give birth parents a chance to participate in decisions about the child's future (R 27). All references obtained from C. Bridge 'Changing the nature of adoption: law reform in England and New Zealand' (1996) 16 *Legal Studies* 81.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Supra*, n. 86. The Review Recommendation 1 at 3.

<sup>89</sup> C. Bridge, *supra*, n. 86 at 92.

<sup>90</sup> *Re C (A Minor) (Adoption Order: Conditions)* [1989] A.C. 1.

developments stress the importance of continued contact with the biological parent. These influential discourses are perhaps influenced by research that suggests that everyone has a need to understand or at minimum have some knowledge of their identity, history or origins.<sup>91</sup> However, even though more information may be given to the child, adoption law still reflects the '1960s presumption of the primacy and privacy of the adoptive family, while at the same time endorsing the giving of more information to the child'.<sup>92</sup>

Both the current law on surrogacy and the Report conclude that the woman who gestates the child takes on much more significance than the commissioning parents whether or not she is also the genetic parent. Further, her existence is seen as potentially problematic for the child's welfare. Whilst in legal and social discourse the sperm donor is only ever referred to as donor and not father, the gestating woman is frequently referred to as a 'mother'. Moreover, she is regarded as a mother with the potential to disrupt the wellbeing of the child and the future functioning of 'the family'. So despite the claims made in the Report about the importance of third party intervention diminishing in debates about surrogacy, the influence of the third party is still considered to be potentially significant both to the child and to the overall wellbeing of 'the family'. It is easy to see that the role of the gestating woman is greater than that of the sperm donor as she also assumes the risks that attach to pregnancy. One could therefore argue that a closer analogy is to be made between the gestational woman and the woman who surrenders her child for adoption and that welfare provisions should be made for the child to be, at least made privy to knowledge about her. However, my argument goes further than this and suggests that a new norm of child sharing be instituted both legally and socially, in relation to surrogacy, adoption and donor insemination.

## IX. CONCLUSIONS

It appears that in the contexts of insemination by donor and adoption, which both implicate third parties, the law has recognised (at least to some limited extent) the psychological benefits that accrue to children from having knowledge as to the means of and/or the contributor to

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<sup>91</sup> See further C. Walby and B. Symons, 'Who Am I? Identity, Adoption and Human Fertilisation: Discussion Series no. 12' (British Agencies for Adoption and Fostering 1990) in B. Hoggett *et al.*, *The Family, Law and Society* (4th edn.) (Butterworths 1996). Also E. Blyth, 'Assisted Reproduction: What's in it for the Children?' (1990) 4 *Children and Society* 167; S. Wilson, *supra*, n. 82, and Freeman, *supra*, n. 24. On adoption see N. Bruce 'The Importance of Genetic Knowledge' (1990) 4 *Children and Society* 183.

<sup>92</sup> A. Diduck and F. Kaganas, *Family Law, Gender and the State* (Hart Publishing 1999) at 123.

their creation. However, this is not the case regarding surrogacy, despite the Report outlining that at adolescence, issues of identity become salient for children,<sup>93</sup> and that in adoption, openness is seen as beneficial to the child's psychological wellbeing,<sup>94</sup> there are no proposals to guarantee that children born as a result of surrogacy are made privy to such knowledge. In this article I have suggested a number of reasons the law in relation to surrogacy has offered little guarantee that children will be told of their birth origins and I have argued thus far, that these reasons hinge on the hegemony of the traditional private nuclear family. It is clear from the current law and the Report's proposed reforms that surrogacy is here to stay. The Report's recommendations, for the main, pay undue attention to ensuring that effective measures are in place to regulate the arrangements between the adult parties. I have argued that this occurs at the expense of due consideration of the welfare of the child in one very significant way, *i.e.* the interests of children in having access to knowledge of their genetic identity or mode of conception and birth, including knowledge of the surrogate.

My own proposal as to the way forward with surrogacy law is for it to recognise and institute that all the parties involved (including the child) have a potential interest in the child's welfare, and that there should be no need to decide cases based on the either/or approach. The paramountcy principle is not inimical to child sharing, rather, it is the entrenchment of the ideology that children's interests are best served by the private nuclear family that continues to proscribe alternative ways of being a family. And it is this hegemonic view of 'the family' that prevents a radical reform of aspects of the laws on surrogacy and denies children the right to knowledge. The case of *Re Evelyn* offers another way of approaching surrogacy and some important lessons could be learned from the decision in that responsibility should be shared between both sets of parents. It is a sensitive decision which rejects the either/or approach and is based on a more sophisticated understanding of kinship networks. It is a decision that rests not upon the prioritisation of biological motherhood and that one form of becoming a parent has more significance than another, but, rather, upon the view that the child's welfare is best served by all interested parties. However, as Kandel has noted, the active involvement of multiple parents in the child's upbringing is not necessarily easy to put into practice.<sup>95</sup> If law was to insist upon, at least, identifying knowledge of the gestating woman and, at most, instituting the norm and practice of child sharing, then this might restrict the practice by discouraging women from putting themselves forward

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<sup>93</sup> *Supra*, n. 2 at para. 4.10.

<sup>94</sup> *Supra*, n. 2 at para. 4.9.

<sup>95</sup> *Supra*, n. 49 at 233.

for surrogacy. But is this necessarily a bad thing? As Kandel acknowledges:

Surrogacy is not an assembly line for producing androids; it is the collaborative creation of a human being. At its best, gestational surrogacy is an altruistic intimate expression of love: bearing a child for people in need who cannot otherwise be genetic parents . . . At its worst, gestational surrogacy is a crass exploitation of female plumbing for financial gain. The good ought to be encouraged and the bad discouraged. Genetic parents need to be aware that they are collaborating with a woman not with a womb.<sup>96</sup>

It is perhaps time for reform to focus on the overwhelming majority of arrangements that are completed without problem. Research is urgently needed into how those cases affect the children born as a result of surrogacy and the extent to which openness about the mode of conception and birth is practised. The government might have been wiser to sponsor such research before conducting the review of surrogacy law. Additionally, it is important to discover the extent to which the gestational woman has ongoing contact with the child and how this contact is perceived and negotiated by all the interested parties, including the gestational woman's children (where relevant). We need to centralise the welfare of the child in these cases rather than subordinate it to the adults involved and ensure that the welfare principle encompasses a thorough consideration of the basic need for children to have knowledge of their birth origins and where possible their wider kinship network. Commissioning parents do need to be made aware that surrogacy involves a collaboration with a woman, *i.e.* a person and not just the exploitation of the womb. But all the parties involved, the law and society should also be made to see that having and raising children is a community responsibility and that children and adults may well benefit from extending kinship networks beyond the private nuclear family.

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<sup>96</sup> *Ibid.*

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