I Insiders and outsiders: Is there a space for the gay ‘father’ in the era of the hetero-normative lesbian family?

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Abstract

Donor insemination is frequently used by lesbians in order to have their own families. Choices have to be made about conception and empirical research tells us that under the previous framework of the Human Fertilisation and Embryology Act 1990 these decisions rest on a number of issues such as the prospective lesbian parents’ views on the perceived interests of the child in knowing their donor as a child, the risks of challenge from the sperm donor to the integrity of the lesbian family and the desire to contest the hetero-normative model of the legally sanctioned two-parent nuclear family and to have the children raised in what might be conceptualised as a Plus Two family. These decisions have also been influenced by discourses about the (il)legitimacy of the lesbian parent family and that when disputes arise between donor/father and lesbian parents it has been that perception about how wider society negatively views the lesbian family which is a source of concern for lesbian families and the judiciary.

This article engages with a number of issues raised by self-insemination. It examines how the new provisions of the Human Fertilisation and Embryology Act 2008 allocate parental status by drawing upon what I have called a hetero-normative continuum. It considers the impact of the new provisions on how known gay male donors/fathers may come to be located as either inside or outside the family and stresses the need for prospective ‘parents’, policy and law makers to be alert to the debates about gender, sexuality and power in light of the hetero-normalisation of the lesbian family.
A. Introduction

For many years now donor insemination has been used by lesbians in order to have their own families. In that eventuality, choices have to be made about whether or not to go down the licensed treatment route or to use informal self-insemination techniques and then whether to use heterosexual or gay donors. Empirical research tells us that under the previous framework of the Human Fertilisation and Embryology Act 1990 the decisions about whether to go down the formal or informal route and to use a gay rather than heterosexual donor rested on a number of issues such as the prospective lesbian parents’ views on the perceived interests of the child in knowing their donor as a child, the risks of challenge from the sperm donor to the integrity of the lesbian family and the desire to contest the hetero-normative model of the legally sanctioned two-parent nuclear family and to have the children raised in what might be conceptualised as a Plus Two family.¹

These decisions have also been influenced by discourses about the (il)legitimacy of the lesbian parent family and that when disputes arise between donor/father and lesbian parents it has been that perception about how wider society negatively views the lesbian family which is a source of concern for lesbian families and the judiciary.

This article engages with a number of issues where lesbian parents elect self-insemination by a known donor. It examines how the new provisions of the Human Fertilisation and Embryology Act 2008 (hereafter the 2008 Act) allocate parental status by drawing upon what I have called a hetero-normative continuum. The aim is to consider the impact of the new provisions on how known gay male donors/fathers may come to be located as either inside or outside the family when lesbians renounce civil partnership and formal licensed treatment in favour of the informal route to family relationships.

It will be argued that the new law renders Plus Two families strange, attempts to homogenise through an equality-based approach-whilst at the same time quashing difference and attempting to forestall Plus Two family forms. The approach that is taken poses challenges for those seeking to usurp the dominance of the two-parent family and stresses the need for prospective ‘parents’, policy and law makers to be alert to the debates about gender, sexuality and power in light of the hetero-normalisation of the lesbian family. It will be argued that those seeking to eschew the call to law and formality may encounter a rather different response than under the previous law. Additionally, it will draw upon empirical research into lesbian parents’ conception choices in order to reveal how lesbian parents and gay men deliberately embark on joint parenting projects, despite the acknowledged difficulties.

When they do pre-conception negotiations will take place as to the level of involvement intended for the donor/father. Post-birth, the relationships between the lesbian parents and

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2 On the problems with equality I am influenced by Alison Diduck [2007] “‘If only we can find the appropriate terms to use the issue will be solved’: Law, identity and parenthood’ Child and Family Law Quarterly 458.
the father can break down, and a steady number of cases are now appearing. In those cases where the children are still young the pre-conception intentions may be difficult to ascertain and courts have tended to assess the account they prefer. Decisions about the award of parental responsibility to the biological father will rest on child welfare. It will be shown, by looking at the case law to date, that in these cases in the name of the best interests of the child, the approach has been to insulate the lesbian nuclear family from the perceived threat of the gay donor.

However, in circumstances where a donor/father (and sometimes his partner) can show a loving relationship with the child the courts have gone some way towards facilitating it, albeit by situating donor/father outside the boundaries of ‘normal’ family life. My point is to encourage reflection upon the terms under which lesbians and gay men enter into informal arrangements about having children. If disputes arise early on in the child’s life the donor/father will face difficulties in establishing family life and he may find himself positioned firmly outside the family. It will be shown that although there are clearly benefits for the lesbian nuclear family, there are questions about how gay donors/fathers come to law and whether they enjoy the same privileged position as heterosexual fathers in respect of the family. It is therefore important to keep the issues of sexuality, gender and power at the forefront in terms of both the pre-conception negotiations about the role for the donor and in respect of legal decision-making.

Finally, the article will hypothesise as to what impact the existence of the formal framework may have on the court’s attitudes to those who choose to renounce the formalities of the new legal framework. In light of the availability of a fairly liberal framework facilitating the lesbian co-parent to be recognised as a child’s legal parent,
will those who eschew law, civil partnership and formal treatment be approached as if they had intended to raise the child as part of a Plus Two parenting project? Given the opportunity provided by the 2008 Act to expel the father from the nuclear family (in a legal sense at least) will the choice of a known donor and self-insemination be regarded as in and of itself evidence of a Plus Two family? Of course, at this point any conclusions can only be based on conjecture and it remains to be seen. However, this article will suggest that perhaps there are potential benefits for the child of being part of a Plus Two family, and wider social and political gains from lesbian parents and gay men working together to challenge the dominance of the two-parent nuclear family. To make my case the article will consist of four main parts.

Firstly, I will outline the statutory framework of the 2008 Act and the parenting provisions through a framework which is sensitive to the problems shored up by the assimilationist strategy which allows lesbian families to be treated by law as equivalent to heterosexual two-parent families. Although much of the previous discussion on the 2008 Act has already dealt with the meaning and significance of the continued promotion of the two-parent model, my aim here is to expand upon that thesis by developing the idea of a hetero-normative continuum. It will also be suggested that the new legislative strategy gives over the sense that all that is really needed is more law and more

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permissive formal institutions to allow lesbian parents to join the hetero-normative parenting club.

In that light, it is therefore necessary to interrogate how those choosing to refuse the invitation to join the now much less exclusive club, are likely to be approached in future disputes. The second part will therefore contextualise the disputed case law by looking at some of the relevant findings of the empirical research on what has influenced lesbian parents’ decisions to self-inseminate using a known donor. Thirdly, I will examine some of the disputed case law to date and elucidate some of the issues that are currently raised and may come to have increasing significance in light of the reforms, in respect of gender, sexuality and power. Finally, I will suggest that in future cases where assimilation to formality either through status or formal treatment is eschewed, the legal position of those involved remains uncertain. Moreover, that there is also a need for all those interested in ‘queer’ politics, gender and sexuality to retain a critical and reflective position on how assimilationist laws and legal constructions of gender and sexuality might impact upon how sperm donors/fathers/parents come to be positioned as either inside or outside the family.

**B. The HFEA parenting provisions and the hetero-normative continuum**

The parenthood provisions and the new section 14(2)(b) need for supportive parenting are concerned with regulating parenthood within prescribed parameters. Under sections 42-43 of the 2008 Act the non-biological lesbian civil partner may be recognised as the child’s legal parent provided that the biological mother conceives via ‘artificial insemination’ (whether or not obtained in a clinical setting).
For lesbian civil partners, provided the mother conceives by artificial insemination rather than by sexual intercourse, both women can be recognised as the child’s legal parents, whether or not the insemination occurs in a clinical context, thus permitting for civil partners to use a known donor without the donor being legally recognised as the parent. Civil partnership therefore confers legal parental responsibility on the social parent in much the same way that marriage does for heterosexual couples. As Julie McCandless and Sally Sheldon have made clear the provisions of the HFEA 2008 therefore retain a ‘hierarchical structure’ whereby civil partners in addition to husbands are given “‘first shot’” at parental status.4

Additionally, the insistence on artificial insemination as opposed to sexual intercourse maps onto the same-sex couples’ relationship moral concerns about potentially adulterous conduct which continues to be central to the divorce law relating to heterosexual couples and reveals a significant amount about the lasting emphasis placed on sexual intercourse to the status-based provisions of marriage and civil partnership as the equivalent. It is also somewhat inappropriate and unreal in terms of empirical reality because it fails to acknowledge that sexual intercourse may for some prospective parents, regardless of sexuality, be approached merely as a means to an end.5 However, it is not beyond the realms of possibility that a sperm donor or co-parent may seek to claim or avoid parental

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4 Supra n. 3 at 188

responsibility on the basis that pregnancy resulted from sexual intercourse rather than insemination so the method of conception might become important.\(^6\)

What is clear is that civil partnership status operates as marital status—with the non-carrying partner being presumed to be the child’s parent. In other words, the commitment read off from civil partnership also stands as a signifier of the intention to parent and is deeply conformist and conservative and firmly rooted in the historical traditions associated with marriage as the ideal institution for raising children. The retention of marriage and the inclusion of civil partnership as privileged institution is a means of encouraging prospective parents to sign up. Civil partnership offers the fairly compelling incentive of being able to choose either licensed or unlicensed treatment, known or unknown donors without the threat of challenge from that donor for parental status. As Lisa Glennon has argued in a different context; ‘These are ultimately questions of accessibility as prevailing norms are not disturbed but either simply extended, or modified to apply, to alternative family structures’.\(^7\) Civil partnership is relevant to those same-sex parents who have experienced stigmatisation as a result of their sexuality as it may be seen as a convenient and effective means of legitimating their relationships.

However, by equating civil partnership with marriage the dominance of the two-parent family is retained, reiterated and stabilised. Michele Grigolo sees equality as demanding non-heterosexuals to move from what has historically been seen as the negative side of

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\(^6\) Though of course, proof may be difficult. *T v B* [2010] EWHC 1444 (Fam) is a case involving a lesbian co-parent of a child conceived in a licensed clinic who successfully avoided child support responsibility by arguing that she was not the child’s legal parent. Although, the legal problem has now been resolved by the 2008 Act the case demonstrates that some parents may seek loopholes to avoid financial liabilities.

the heterosexuality/homosexuality dichotomy to the positive side. In this context the positive side of heterosexuality would include for example, stable, lasting, committed relationships as against those which are on the other hand constructed as unstable, transient and uncommitted ones.\(^8\) This incorporates a shift towards a family structured in terms of cohabitation, monogamy and eventual procreation.

It is my suggestion that to encourage the shift a hetero-normative continuum of family and kinship is produced by the provisions of the 2008 Act with marriage and civil partnership at one end of the pole and unlicensed, unregulated and potentially unconventional Plus Two families at the other end. Somewhere in between is the lesbian couple who chooses not to marry but seeks licensed treatment rather than opting for self-insemination. The 2008 Act retains the previous distinction between formalised and informal relationships but consonant with the provisions for heterosexuals, enables those not in civil partnerships to access licensed treatment.

The parenting provisions for non-civil partnered lesbian couples are dealt with separately, and the non-carrying parent may be treated as the legal parent of the child providing that the ‘agreed female parenthood’ conditions are met.\(^9\) For both non-civil partners to be recognised as legal parents, treatment must be offered by a licensed clinician.\(^10\) Therefore, the non-civil partnered co-parent will also be legally recognised if treatment is provided at a licensed clinic and the mutual agreement of both parties that the second


\(^9\) As per s 44 of the HFEA 2008

\(^10\) Section 42-43 of the HFEA 2008
woman will be the parent is ongoing. 11 Section 45 of the Act permits the donor to be written out of the picture. New consent forms are designed to ensure that there is no ambiguity about consent and are detailed and contract-like. 12 In effect, those seeking licensed treatment are treated in much the same way as unmarried heterosexual couples. Legal parenthood is therefore either conferred as a result of status or by a contract-like arrangement, which are both well-entrenched legal devices.

By taking the liberal approach to civil partnership which confers parental status in a formal and informal setting where pregnancy is achieved ‘artificially’, same-sex couples are encouraged to join the preferential end of the hetero-normative continuum. At the same time they become self-regulating and forestall potentially messy disputes. In effect, the same-sex family and women’s reproductive power become firmly harnessed to the heterosexual two-parent tradition. 13 Caroline Jones has argued recently that there are key possibilities arising from reproductive technologies which are explicitly excluded from the legal provisions. Amongst these is the possibility of three or more parents being legally recognised as such concurrently. Her thesis is very useful for flagging up how it is just as important to reflect on what the law does not do along with what it does. Caroline describes these possibilities as ‘Beyond the Legal Imagination’. 14 I would argue instead, that it is precisely because of the law makers’ wild imaginings about the possibilities of

11 See further ss 43 and 44.

12 See further http://www.hfea.gov.uk for the updated consent forms

13 See further J. Wallbank (2010) ‘Channelling the messiness of diverse family lives: resisting the calls to order and de-centring the hetero-normative family’ Journal of Social Welfare and Family Law Vol. 32 No. 4 353-368

multiple parents and the confusion and disorder potentially created for the law that guides the decision to encourage lesbians down one of the formal routes. Indeed, when considering reform of the parenthood provisions the Department of Health had considered the possibility of a child having three legal parents but that the HFEA was not regarded as the correct forum for bringing about such ‘wide-ranging reform of fundamental family law principles’ changes so ‘far reaching and controversial…’.  

However, there are cases pre-existing the introduction of the hetero-normative provisions which have arisen as a result of informal sperm donation where known donors have sought to be recognised as the child’s parent and to have parental responsibility. It is possible that these cases impacted upon the parenting provisions of the 2008 Act and the decision to adopt a rather liberal yet hetero-normative approach in order to forestall some of the problems which had previously arisen. It would make for an interesting empirical research project to look at the effect of the new provisions on would-be lesbian parents’ decisions about formalising their relationships and/or whether to seek treatment at a licensed clinic. At this point however, it is relevant to consider the empirical research which looks at lesbian parents’ reasons for using self-insemination by known donors in order to reflect on what impact the 2008 Act might have on future disputes.

C. Factors influencing the ‘choice’ of a known donor

As outlined above, empirical research reveals how under the previous legal framework conception choices will have rested on a number of issues such as the prospective lesbian parents’ views on the perceived interests of the child in knowing their donor as a child,

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15 McCandless and Sheldon supra n. 3 at 191.
the risks of challenge from the sperm donor and the desire to contest the hetero-normative model of the two-parent family. Under-scoring these factors is a discourse about the (il)legitimacy of the lesbian parent family. Kathryn Almack’s research bears this out.\(^\text{16}\) Kathryn outlines how lesbian parents are faced with socio-legal discourses which coalesce around ‘the needs of children with a focus on potentially detrimental outcomes for children living….outside the heterosexual nuclear family’.\(^\text{17}\) These factors will affect, to a greater or lesser extent, lesbian parents’ decisions about the mode of conception and in her study 13 from 20 couples decided to use a known donor.\(^\text{18}\)

Although, the law provides for civil partners to self-inseminate without the donor gaining parental responsibility and for others to seek licensed treatment, prospective parents choosing self-insemination may be obliged to record the donor as the father on the birth certificate and he will attain parental responsibility as a result.\(^\text{19}\) The liberal yet hetero-normative provisions arguably attempt to discourage informal arrangements. However, it is not unlikely that lesbians will continue to seek self-insemination outside the legislative framework for political reasons and to order their familial relationships according to their own values, albeit affected by prevalent discourses about child welfare and the need for a father. Research has revealed that lesbians may decide to choose a gay man as a donor.


\(^{\text{17}}\) Ibid at p. 6.

\(^{\text{18}}\) Ibid at p. 9

\(^{\text{19}}\) As per section 4(1)(a) of the Children Act 1989. Section 56 of the Welfare Reform Act 2009 inserts section 2A to the Births and Deaths Registration Act 1953 making it mandatory for the parents to jointly register the birth of a child.
because of the view that they are likely to have political understanding and support lesbians choosing to be parents.\textsuperscript{20}

When a known donor is used (whether heterosexual or gay) and some level of contact is agreed, Almack found that the degree varied widely from occasional indirect contact to regular staying contact.\textsuperscript{21} However, not all donors were regarded as fathers with some of the participants describing the donor as a family friend or an ‘Uncle’. The donors who had the most involvement were gay and were called ‘Daddy’ by the children though none of the lesbian parents viewed them as co-parents.\textsuperscript{22}

Two earlier studies also show how the negotiated role for the donor can vary considerably. In Dunne’s study of 37 lesbian parents 40\% of donors had regular contact. In Haimes and Weiner’s smaller study of 10 interviews with eight individuals and two couples, contact varied between none (because of anonymity) to regular contact, though none had co-parenting arrangements.\textsuperscript{23} Leanne Smith’s research showed the percentage to be higher than in Haimes and Weiner’s research, though the degree of involvement was variable.\textsuperscript{24} One of the findings of particular note was that her lesbian parent participants appeared likely to facilitate the relationship between the child and the genetic father despite the potential complications involved.\textsuperscript{25} Haimes and Weiner’s study specifically

\textsuperscript{20} Supra n. 16 at p. 17.

\textsuperscript{21} Ibid

\textsuperscript{22} Ibid.

\textsuperscript{23} Supra n. 1.

\textsuperscript{24} Reported in supra n. 1.

\textsuperscript{25} Ibid.
focused on the reasons for wanting to tell the child something of their genetic origins. These included that ‘people do have a desire to know where they come from’, that ‘where you come from was a way of understanding the past: the need to know who the other half was’. Participants in all the studies demonstrated an awareness of discourses about the significance of biology for the child and also of the public debates about the child’s need for a father. It is clear from the empirical research that prospective parents are frequently deeply influenced by the range of socio-legal discourses on the best interests of the child.

Many previous debates about reproductive technologies have involved a consideration of their significance for heterosexual men as fathers and in relation to their position in families. However, lesbian parents frequently ask gay men to embark on collaborative parenting to challenge the sexual family and subvert the dominance enjoyed by heterosexual men in that domain. Gillian Dunne’s research in 1999 suggested that gay men were becoming more interested in fatherhood and the use of gay male donors may involve complex and ongoing negotiations as to what role they will play in respect of the child. Gay donors, like lesbian parents face similar prejudices in respect of suitability for parenthood and therefore it is important to keep sexuality and gender to the fore of any case law analysis.

D. Cases ‘outside the ordinary run of parental disputes’

(a) the child’s best interests.

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26 Supra n. 1 at 490.

27 R v E and F(Female Parents: Known Father) [2010] EWHC 417 (Fam) at para 3
The empirical research illustrates the wide variations in contact arrangements between donors/fathers and children. Many of the studies focus on the perspectives of the lesbian co-parents in constituting and negotiating the degree of involvement. However, as the majority of the cases to date show, when the relationship between the donor and the co-parents breaks down their accounts of what was intended and what has been done by the donor/father, can be very different and sometimes diametrically opposed. Disputes can lead to donors/fathers seeking to formalise their position by applying for parental responsibility. The cases reported to date share commonalities, for example they all involved lesbian partners achieving shared parenthood by using the sperm of known gay men. In all the cases the men had different expectations of the role they would play from those of the lesbian co-parents and all the men sought parental responsibility.

The outcomes in the first three cases were also very similar although in Re D the High Court granted a much-attenuated form of parental responsibility to recognise the donor’s status as the biological father whilst protecting the sanctity of the lesbian nuclear family. In Re B the court granted a contact order providing infrequent contact (around four times per year) rather than manipulate parental responsibility to deal with the child’s need to understand the role of his biological father. A similar route was taken in R v E and F, refusing the application for parental responsibility but approving a more generous amount

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28 As per section 3(1) of the Children Act 1989. The case law to be discussed is Re D (contact and parental responsibility: lesbian mothers and known father [2006] EWHC 2 (Fam); Re B (Role of Biological Father) [2008] 1 FLR 1015; R v E and F(Female Parents: Known Father) [2010] EWHC 417 (Fam) and T v T [2010] EWCA Civ 1366. It is not my purpose here to problematise the concept of parental responsibility. Rather, my interest is in questioning the significance of gender, power and sexuality to these disputes.
of contact not exceeding 50 days per year which amounted to considerably less contact than enjoyed previously.

All the cases were constructed as unusual, novel or outside the ordinary run of cases, in part due to the use of reproductive technologies but also because more than two adults were involved. Despite the flexibility inherent in the welfare principle, until the latest decision, a fairly consistent approach had been adopted to protect the integrity of the lesbian family in order to promote the child’s best interests.\(^29\) It has been reiterated by the judiciary that: disputes between Plus Two families are extra-ordinary.

In a recent case Bennett J stated:

outside the ordinary run of parental disputes… it was particularly important to recognise that parental responsibility applications remained subject to the overriding provisions of s 1 of the 1989 Act. It would not be in the child’s best interests to grant the father parental responsibility when the father was asserting that the four adults and the child comprised one family….Granting the father parental responsibility in this situation would generate conflict with the female parents, and distress them, without giving the father any practical advantage.\(^30\)

It may be argued that it is precisely because the importance of biological fathers to children has become so integral to the welfare principle in the more usual run of cases, that Bennett J feels compelled to flag this up. Moreover, the fact the father was claiming that the four adults consisting of himself the lesbian co-parents and his male partner

\(^29\) T V T [2010] EWCA Civ 1366

\(^30\) R v E and F(Female Parents: Known Father) [2010] EWHC 417 (Fam) at para 3
constituted one family served to render the dispute even more unusual than others and as such parental responsibility would not be in the child’s interests.

There is evidence in this case of a fairly high level of involvement of the father and his partner. Relationships between the two sets of ‘parents’ had previously been extremely amicable and the father been regularly involved in the child’s life despite living in the US. The child expert involved in the case stated that the child who was aged seven regarded the lesbian co-parents as his parents although ‘he was aware of and loved the father’.31 The donor/father claimed that he had co-parented the child from birth though this was disputed by the lesbian parents. He tried to equate the dispute with those involving separated heterosexual parents constituting the four adults as one family. The relationship between the lesbian parents and the biological father and his partner broke down when the father physically chastised the child.32

Until the relationship between the adults broke down the relationship between the child and the gay couple proceeded well with the father and child developing ‘a very loving relationship’.33 It is interesting therefore that given the emphasis placed on ascertaining the child’s best interests which were ascertainable by looking at the seven years of the child’s life that the court looked at the pre-conception intentions of the parties as to how the child would be parented. It was found that the two biological progenitors had been keen to become a father and mother but that it was not the case that the four adults and the child were intended to be one family. Rather, the court found that the child’s parents

31 Ibid headnote

32 Ibid.

33 Ibid at para 42
were to be the lesbian couple with the biological father having an important role ‘beyond merely identifying him as Daniel’s father’.\textsuperscript{34} At this point I would like to make some observations about the significance of gender, sexuality and power in the debates as to how sperm donors/fathers/parents come to be positioned as either inside or outside the family.

(b) Gender, Sexuality and Power

The court did not accept the father’s analogy of a heterosexual parenting dispute. Instead it preferred the view that the lesbian parents and the child constituted the nuclear family. To some extent this approach can be lauded for the way it legitimises lesbian families and much of the writing, (including my own) both before and after the 2008 Act, has viewed legal recognition of the lesbian family as a progressive development. Given that there was considerable post-birth evidence of the good relationship between the father and child the usefulness of looking at the pre-birth intentions of the parties might be questioned. In other words, if the decision to award parental responsibility and the rights arising from it, is governed solely by the welfare principle then the pre-birth intention has no relevance whatsoever to child welfare. However, where disputes arise early in the child’s life before donors/fathers have a chance to develop caring relationships, these intentions may become very significant.

In stark contrast, in the context of heterosexual fathers and parental responsibility, a good number of those fathers may or may not intend to parent their children pre-birth but regardless of their intentions, it is now the legally entrenched position that parental

\textsuperscript{34} Ibid at para 48.
Responsibility flows from the act of fathering a child, rather than from the intention to parent. It suggests therefore, that there is more going on here. As outlined above, the courts have been keen to insulate the socially vulnerable lesbian family and denying biological fathers parental responsibility has been a means to do this. By ruling out substantive parental responsibility for gay fathers courts have reiterated the benefits of the hetero-normative model for the child which was later repeated in the 2008 Act. The unusual, outside the ordinary run of cases are brought into the more easily recognised and acceptable two parent form which is constructed as better meeting child welfare. As a result, gay donors/fathers are located somewhere on the periphery or firmly outside the immediate family.

In *Re D* the court had previously adopted a different approach by awarding the father a very restricted form of parental responsibility despite the fact that the lesbian co-parents had agreed that he should be regarded as the child’s father and that he should have contact. The award of limited parental responsibility is regarded as some kind of magic bullet in terms of satisfying the father’s request. Given the ‘novel’ context of the case the court drew upon medical expert knowledge which highlighted that it was the quality of the contact and the arising concrete relationships that were rather more significant to the child’s welfare than the award of the restricted form of parental responsibility which would have no impact on child welfare. Unlike Bennett J in *R v E & F* Black J (as she then was) stated:
Perhaps most importantly of all, I am considerably influenced by the reality that Mr B is D’s father. Whatever new designs human beings have for the structure of their families, that aspect of nature cannot be overcome.\textsuperscript{35}

Biological or natural fatherhood as it is conceived here is seen as having an intrinsic value for the child in and of itself and Black J used parental responsibility to confer mere paternal status rather than a combination of status and the social role and is reflective of the value attributed to biological fatherhood.\textsuperscript{36} The pared down version of parental responsibility is also being used to satisfy the biological father’s desire for legal recognition and provide him with ‘a stamp of approval’.\textsuperscript{37} As Julie McCandless has observed the ‘creative’ use of parental responsibility reflects the inadequacy of legal terminology ‘where parenthood increasingly occurs outside the confines of the traditional nuclear family’.\textsuperscript{38} Although \textit{Re D} is a lower court decision it is one that strives to reconcile both the child’s and father’s interest in biological fatherhood whilst ultimately protecting the lesbian nuclear family.

In this case the biological father’s interfering conduct was seen to be highly disruptive to the lesbian nuclear family and the couple contested his application for parental

\textsuperscript{35} \textit{Ibid} at para 89

\textsuperscript{36} It is not the first time that it has been used as a means of recognising mere status. See for example \textit{Re S (Parental Responsibility)} [1995] 2 FLR 648 and F. Kaganas (1996) ‘Responsible or feckless fathers? Re S (Parental Responsibility)’ \textit{Child and Family Law Quarterly} Vol 8 No 2 pp. 165-173.


responsibility. The co-parents were very happy for Mr B to be recognised as the child’s biological father and for him to have regular contact. Their disagreement arose over the order for parental responsibility because of the way they believed it recognised him as a third ‘parent’. They regarded themselves as the parents and there was never any intention for Mr B to be so regarded which was accepted by the court. It is clear that parental responsibility has become somewhat of a contested terrain between lesbian parents and gay donors/fathers even though as a legal concept it is somewhat diminished.

The facts of Re B are remarkably similar to those of Re D. The biological father who was the lesbian co-parent’s brother sought a parental responsibility order which the co-parents opposed. Hedley J accepted that the father had fulfilled the Re H criteria for parental responsibility but that he ‘would undoubtedly seek to exercise’ parental responsibility and use it to forcefully advance his views. ‘CV and S would feel assailed and undermined in their status as parents’. ‘The inevitable resulting conflict would bode ill for BA’ and the overriding consideration for the court is the paramountcy principle. Although Hedley J noted the option for the court of making an order for parental responsibility with conditions attached to it he saw no value in this as it would raise false hopes for the biological father leading to frustration and ‘fuel all the fears of CV and S leading to conflict’ despite the fact that the father had agreed not to interfere’ and accepting that the nuclear family comprised lesbian parents and the child. Hedley J recognised that the

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39 Re D supra n. 28 at paras 21-22


41 Re B supra n. 28 at 1023 referring to section 1 of the Children Act 1989

42 Ibid
father would be disappointed and that the lesbian parents would find it difficult to facilitate contact. He was convinced however that all three adults had the attributes to make the very limited contact work and that it was the best option for the child.

In *Re B* Hedley J ordered just four contact sessions per year in order that the child be made to understand the father’s ‘dual role: as uncle and biological father’…‘so that without artificiality he can picture TJ as someone significant but not ordinarily important in his life yet someone with whom…he can explore the implications of the kind man who enabled him to be and he can ask questions to satisfy his own natural curiosity’. Again as with the last case the perceived threat posed by the father to the integrity of the already vulnerable lesbian family and therefore the child, was noted. In this case it proved fatal to the father’s application. However, in *Re B* the donor’s position as a biological father and his significance for the child is diluted. In *Re D* Black J pays homage to the force of nature which cannot be overcome. In *Re B* Hedley J plays down the significance of the biological father by describing him as a person without ordinary importance for the child but as someone who facilitated his birth. Hedley J takes a rather minimalist approach to the significance of biological parenthood for child welfare and gives priority to the lesbian nuclear family as a whole. It also protects the co-parent’s social role.

In all these disputes there is a palpable desire to insulate the lesbian families from the ‘threat’ of the biological father because of the discrimination suffered by them in wider society. The courts are striving to respond to the idea that child welfare is enhanced by having (at the very minimum) some knowledge of their biological father. However, they

43 *Re B* supra n. 28 paras. 28-29 at 1023
are also attempting to deal with the perceived conflict between the lesbian nuclear family and the biological gay father’s attempts for legal recognition. Questions are raised about gender, sexuality and power within (and without) the family in respect of how the lesbian family as against the gay father are situated in respect of the social and legal construction of family life.

This case law emerges at a time when lesbian parents’ donor conceived families are just beginning to receive the same legal recognition as is afforded to heterosexual couples. It is therefore perhaps not at all surprising that lesbian parents have felt vulnerable when biological fathers have sought parental responsibility. Research to date has revealed how lesbian parents have striven to be recognised socially and also have had to work harder at protecting their children’s welfare due to the perception of wider negative social attitudes.

Lesbian parents reach their conception decisions in light of and sometimes despite social and legal discourses about the importance of the biological father for the child. Their pre-conception decision-making will likely include a great deal of discussion about the intended role for the donor. However, it also shows that lesbian parents frequently make the distinction between being a father and a parent and that they fear the impact of the father having parental responsibility and him being visible and available as such to the

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integrity of their nuclear family. The case law has responded to these fears and the substantive law has been amended in order to provide legitimacy for their families.

However, for some, Plus Two arrangements may have also been shaped by a political desire to escape the hetero-normative framework and to parent in atypical ways. It is therefore important to reflect on whether gay biological fathers are situated in the same privileged position in respect of their children as heterosexual fathers. There is evidence that lesbian parents see gay men as rather less of a threat to the stability of the family than heterosexual fathers, though as Almack has stated this might be shifting as more gay men express interest in involved parenthood. 45 Lesbian parents may well be influenced here by debates about the importance of heterosexual biological fathers for children as many of the discourses about fathers and children take place in the context of heterosexual parenting and the perceived risks for the child of not having a (heterosexual) male role model.

Alison Diduck suggests that on the one hand, the use of a known donor who takes up some kind of father role appears to challenge the nuclear family, on the other hand it ‘reinforces the heterosexual and patriarchal model of the family that requires a father or father figure and undermines the idea that women can parent alone’. 46 However, where the father is a gay man who perhaps has a partner, the Plus Two parenting arrangement does present a challenge to the heterosexual and patriarchal model of family life which is based on the heterosexual and sexed norm of the two-parent family.

45 K. Almack ibid at p. 13

The protection of the lesbian two-parent family supports rather than challenges that norm and it also reinforces the ‘dichotomy within which the “other” is defined’. The ‘other’ in this context is the Plus Two family. As Michele Grigolo has argued ‘the more a relationship or a family differentiates itself from the traditional sexual and biological requirements of “the” family based on marriage, the less likely recognition becomes’. The lesbian nuclear family is approached sympathetically precisely because it can establish itself as belonging to the positive side of the hetero-normative continuum. The biological gay father is often firmly located at the negative end of that continuum when disputes arise and he can be constructed as an unwanted and disruptive source of conflict and intrusion.

All the disputes can be characterised as high conflict and it is not too difficult to imagine how lesbian parents who have been historically very disadvantaged in respect of their children come to feel vulnerable at any attempt to challenge their authority. However, for some time the lesbian and gay communities have been at the forefront of reshaping family life since Kath Weston coined the phrase ‘families of choice’, electing to define their experiences of kinship relationships defined by and for their specifically lesbian and gay subject positions. There is a sense within these communities that the Plus Two parenting project is a re-imagining and reshaping of family life with a shared political aim of decentring the traditional two parent family. Gay men do not share the same

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47 M. Grigolo supra n. 8 at p. 1025

48 Ibid at p. 1040

privileged position in respect of family life that heterosexual men have. In some countries gay donors are banned from providing sperm to fertility clinics.\textsuperscript{50}

Although all same-sex relationships have made ground in respect of achieving equality of treatment in respect of gaining access to institutions which broadly mimic those already privileged in society, when relationships are constructed as too far away from the right side of the hetero-normative continuum their legitimacy may be cast in doubt. When there is conflict between Plus Two parents an easy option for the law is to contain the dispute by protecting the more familiar, more entrenched and more accepted two-parent family. The approach taken in the cases discussed above may be contrast to high conflict disputes between heterosexual two parent families. Courts will go to extreme lengths to facilitate a meaningful relationship between the child and the father, even where the father has no biological link to the child and the father’s behaviour is extremely controlling.\textsuperscript{51} Where resident parents continue to refuse to allow contact between the child and the non-resident parent, the courts have taken a punitive approach by transferring residence or by making a shared residence order.\textsuperscript{52}

\begin{footnotes}

\item[51] See for example, Re A (A Child: Joint Residence/Parental Responsibility) [2008] EWCA Civ 867 regarding the social father of a child aged six who was given parental responsibility as a result of the making of a joint residence order. The mother appealed because of the father’s dominating and controlling behaviour which involved him electronically monitoring the conduct of the mother with the child by CCTV.

\item[52] See further J. Wallbank. ‘Getting Tough on Mothers: Regulating Contact and Residence’ (2007) Feminist Legal Studies 15 189-222.
\end{footnotes}
Clearly, the two contexts can be differentiated on the basis that the lesbian/gay donor/father disputes involve a surfeit of homosexual parents (according to the hetero-normative ideal) and the latter situation a deficit of heterosexual ones. The convenient strategy in the first is to narrow down the number of adults with parental responsibility and in the second to strive to provide the child with the ideal. I am not suggesting that all high conflict disputes between Plus Two parents should result in the father having parental responsibility, just as I would not argue that resident parents should be forced to allow contact where they have concerns about the impact on child welfare. My point is rather, that a commitment to raise children in Plus Two families and to decentre the nuclear family requires hard work, not just on the part of the courts when faced with these disputes but also from parents who have embarked on that course.

E. Conclusions and what of the future?

To some extent the courts should be applauded for their efforts to respond sensitively and progressively in recognising that a child’s best interests are intricately bound up with those of her lesbian parents. However, given that prospective lesbian parents have the hetero-normative provisions of the 2008 Act available to them and as their families become increasingly accepted by society, questions are raised as to how those relinquishing the formalities of law might be dealt with in the years to come.

The new provisions ‘reinforce the traditional hetero familial ideal of two parents; the equality imposed upon lesbian partners…imposes heterosexual norms upon them’.53 The 2008 Act like the HFEA 1990 before it is designed to show preference for the nuclear

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53 A Diduck supra n. 43 a comment the author attributes to Sarah Beresford at p. ?
family providing a ‘strong moral statement of the importance of the nuclear family and the imperative that each child should have one (and only one) father and mother’.\textsuperscript{54} When prospective parents choose to operate outside the formal framework and locate themselves at the very end (and constructed as the worst side) of the hetero-normative continuum, it may be that pre-conception discussions will figure more highly and courts be swayed towards awarding parental responsibility where it looks like the decision to have a child is a Plus Two family project. Questions might be raised about whether this would be such a negative development.

Although the issues of gender, sexuality, and power will form part of the contextual background and may or may not be overtly dealt with, there is no doubt that they are important and relevant considerations. Under the provisions of the 2008 Act, lesbian co-parents can achieve parental status fairly readily, albeit by embracing the hetero-normative and homogenised model of family. It might therefore be possible in future cases for the courts to read off from the rejection of the formal measures that the arrangement is a Plus Two parenting project. The courts may more readily see the sperm donor as a parent and reach decisions on that basis. When the Welfare Reform Act 2009 and its new rules on birth registration are enacted, the informal sperm donor will need to be registered as the father.\textsuperscript{55} At that point he will have parental responsibility. In these cases, the disputes may then come to concern the application of the lesbian co-parents to restrict the father’s exercise of these responsibilities which places the emphasis on the lesbian couple to start proceedings.


\textsuperscript{55} Section 56 of the Welfare Reform Act 2009 inserts section 2A to the Births and Deaths Registration Act 1953 making it mandatory for parents to jointly register the birth of a child
A recent case exemplifies some of the issues which might arise. *T v T*\textsuperscript{56} is an appeal concerning two children, a boy aged ten and a girl aged seven. The lesbian civilly-partnered co-parents appealed against a shared residence order in favour of the biological gay father with existing parental responsibility.

The order contained a schedule of the times when the children would be with each of them. The regular pattern was for the children to spend every other weekend with the father and his male partner, staying from Friday after school until late afternoon on Sunday or until the start of school on Monday. During the intervening weeks, when the children had not been with the father for the preceding weekend, they would stay overnight on the Monday night with him. In the holidays, they were to spend more protracted periods with the father. Counsel for the lesbian co-parents calculated that the order provided for the children to live with the father for a total of 152 days per year, of which 110 occasions were to be overnight.\textsuperscript{57}

Both sets of adult relationships were said to be ‘stable and of longstanding’.\textsuperscript{58} The two couples had met when the father advertised that he would like to become a father and the lesbian co-parents responded. The children had lived primarily with the lesbian co-parents but the father had parental responsibility for both children and had been a presence in their lives since birth. Unfortunately, relationships between the parties deteriorated and proceedings in court were eventually started.

\textsuperscript{56} [2010] EWCA Civ 1366

\textsuperscript{57} All facts *ibid* at paras 1-3.

\textsuperscript{58} *Ibid.*
The lesbian parents argued that the Recorder had failed to examine the pre-conception intentions of the parties that they would be the children's primary parents, albeit with the father having some involvement by means of contact, and that he had acquired parental responsibility only because they felt unable to resist his bullying and domination and that these factors should have been taken into account in his approach to the question of residence and parental responsibility.\(^{59}\)

Black LJ found that in some cases, it may be relevant to make findings about the intentions of the parties when they embarked upon parenthood but this was not such a case because of the role the father had assumed over ten years and that the children had very loving relationships with all the adults. Contact started from birth and was relatively regular, developing to include overnight stays apart from a hiatus between October 2008 and May 2009. In a very enlightened statement Black LJ states:

> The adults may be very concerned about issues of status such as who could and should be classed as “the parents” but those matters are not likely to be of particular concern to the children. The Recorder found that “they know who their parents are, they know the role that L (the lesbian co-parent) plays in their lives, and validation or labelling is an issue for or, more accurately, between the parents and adults, not the children.” Whatever the initial intentions of the parties when the children were conceived, things had moved on with time and the Recorder's orders had to

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\(^{59}\) *Ibid* at paras 10-11.
accommodate the position as it actually was rather than the position that the adults wanted or had originally planned. 60

This case along with R v E and F came before the courts some years after the Plus Two parenting project had begun. It was therefore possible for the gay donors/fathers to show how they had developed relationships with their children. As such, Black LJ is able to draw on a bank of evidence about how the role the donor/father had actually provided during the children’s lives. In some of the earlier cases the disputes had arisen quite early on in the children’s lives and the donors/fathers were unable to show established family life. 61 These cases have to date been met with resistance in order to protect the two parent family from interference and conflict. Although contact has been used to facilitate the child knowing her biological father, it is sometimes a negligible or reduced amount which will forestall the development of meaningful relationships.

The new parenting provisions promote the two-parent model of child-rearing and actively discourage the formation of more radical parenting arrangements involving three or more adults which may incorporate one or two father figures. Whether or not there is a place for the gay biological father in the family may come to depend on the willingness of lesbians to continue to reject the dominance of the two-parent family tradition and also to reject the call to law. When conflicts arise, whether or not the gay father is treated as part of the family will depend on the court’s interpretation of the use of self-insemination and a known donor in light of the accounts provided by the lesbian parents and the fathers.

60 Ibid at para 13 Parenthesis added.

61 As per Article 8 of the ECHR.
The lesbian and gay communities have been at the vanguard of challenging heteronormative models of the family and parenting differently has been a shared and political enterprise. It is undeniable that there are risks involved in multiple parenting projects. However, the issues of gender, sexuality and power shift, evolve and transmute according to the prevailing socio-political context. Lesbian parents’ families are gaining social and legal recognition and politically, it is important not to subject gay male fathers to the same kind of marginalisation that lesbian mothers have suffered. Clearly, there are difficult issues to confront. Plus Two parenting arrangements can present a greater set of challenges than those experienced by the nuclear family in making those relationships work for children. However, there may be great benefits to children from making them work. They have a whole set of committed adults interested in securing their welfare. For academics and practitioners interested in subverting the dominance of the heteronormative family, the potential of Plus Two families is obvious.

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62 An extreme example is Re Patrick (2002) 28 Fam LR 579 as discussed by D. Dempsey supra n 1 and A. Diduck supra n. 3 which resulted in the biological mother killing herself and Patrick.