


RESEARCH ARTICLE

The incoherent role of the child's identity in the construction and allocation of legal parenthood

Alan Brown^{1*}  and Katherine Wade^{2†}

¹University of Glasgow, Glasgow, UK and ²University of Leicester, Leicester, UK

*Corresponding Author e-mail: alan.brown.2@glasgow.ac.uk

(Accepted 4 April 2022)

Abstract

This paper explores the relationship between the concept of the 'identity of the child' and legal parenthood. It examines the role of identity in the determination of legal parenthood in three contexts: (a) parental orders after surrogacy arrangements; (b) disputed paternity cases; and (c) the statutory rules in cases involving gamete donation. This paper argues that the concept of 'identity' plays an inconsistent role in the attribution of legal parenthood, because the concept lacks substantive content within judicial reasoning and the statutory framework. The understanding of identity, and the role it plays, appears to change in these different contexts to serve the different purposes that the law is trying to achieve. The reason for this inconsistency is that, despite the utilisation of the language of the 'child's identity', legal parenthood remains adult-centric and premised upon replicating the binary, two-parent model of the nuclear family. We argue that instead of appealing to this incoherent concept of 'identity', the courts should explicitly engage with different types of parenthood and acknowledge the importance of each for both children and parents. Such an approach would result in more truly child-centred reasoning and serve to diminish the predominance of the binary, two-parent model.

Keywords: family law; legal parenthood; identity of the child; parental orders; paternity testing; gamete donation

Introduction

The concept of the 'identity of the child' has become increasingly significant within judicial reasoning in England and Wales regarding the determination and attribution of legal parenthood. This is particularly evident from cases regarding parental orders after surrogacy arrangements,¹ but this influence is clear from judicial language across various contexts. In *M v W*,² Theis J commented that 'a person's identity is a fundamental part of who they are. An integral part of that identity can include who that

[†]An earlier version of this paper was presented in the Family Law Subject Section at the Society of Legal Scholars Annual Conference at Durham University in September 2021; we are grateful to the attendees for their comments. We would also like to thank Dr Lynsey Mitchell and the anonymous reviewers for their helpful comments on earlier drafts. Any errors that remain are our own.

¹It is also evident in cases concerning paperwork errors in fertility clinics, a full exploration of which is outside the scope of this paper. See *Re A (Human Fertilisation and Embryology Act 2008: Assisted Reproduction: Parent)* [2015] EWHC 2602 (Fam), [2016] 1 WLR 1325; *Re L (A Child) (Human Fertilisation and Embryology: Declaration of Non-parentage)* [2016] EWHC 2266 (Fam), [2016] 4 WLR 147 and *Re P (Legal Parenthood: Written Consent)* [2017] EWHC 2532 (Fam), [2017] 4 WLR 183. See further T Callus 'What's the point of parenthood? The agreed parenthood provisions under the HFE Act 2008 and inconsistency with intention' (2019) 41(4) *Journal of Social Welfare and Family Law* 389.

²[2019] EWHC 648 (Fam), [2019] Fam 414. This case involved a fertility clinic error in the context of a same-sex female couple who subsequently separated.

© The Author(s), 2022. Published by Cambridge University Press on behalf of The Society of Legal Scholars. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (<http://creativecommons.org/licenses/by/4.0/>), which permits unrestricted re-use, distribution and reproduction, provided the original article is properly cited.

person's parents are'.³ Subsequently, in *Z v X (Declaration of Parentage)*,⁴ she observed that '[t]he importance of recognising the status of a child's legal parentage reaches far beyond the strict application of the law. As has been made clear it has emotional, psychological and social significance, as well as being at the core of the child's identity'.⁵ Given the growing significance of the concept of the identity of the child within judicial reasoning, this paper explores the role of this concept in the determination of legal parenthood in different contexts. It is argued that the concept of identity appears to lack consistent substantive content⁶ and is being granted different levels of significance in these different contexts; this acts to obscure the ultimate basis upon which determinations of legal parenthood are being made.

In order to explore the role of the 'identity of the child' in the attribution of legal parenthood, this paper will begin by briefly considering the concept of identity, providing some of the potential normative content of the concept. The paper will then examine the concept of identity within the wider legal regime, focusing upon the United Nations Convention on the Rights of the Child (UNCRC) and the European Convention on Human Rights (ECHR). Subsequently, the paper will explore the relationship between identity and legal parenthood in English law in the following contexts: (1) the granting of parental orders after surrogacy arrangements under section 54 and section 54A of the Human Fertilisation and Embryology Act 2008 (the 2008 Act); (2) the judicial approach in cases of disputed paternity under section 55A of the Family Law Act 1986 (the 1986 Act); and (3) the statutory rules for attributing parenthood in circumstances involving gamete donation in sections 33–48 of the 2008 Act. This paper argues that different understandings and constructions of identity are evident across these three contexts, and that varying degrees of significance are being granted to the identity of the child in the determination of legal parenthood depending on the context. This shows that, rather than providing an overarching normative underpinning for legal parenthood, the concept of identity is being used by the law to provide support for the outcomes that the law is seeking to achieve in each context. Thus, it is argued that an underdeveloped concept of identity is being invoked by the judiciary, who are focused on assigning parental status to those to whom they consider it is most appropriate to assign such status.

Ultimately, despite the apparently child-centric invocations of the language of 'the child's identity', we argue that the attribution and determination of legal parenthood remains fundamentally adult-centric and continues to be premised upon privileging and replicating the binary, two-parent model of the traditional, nuclear family.⁷ Therefore, to conclude, we will argue that instead of appealing to an ill-defined concept of identity, Parliament, policymakers and the courts should focus upon attempting to explain *why* it is important that legal parenthood is assigned in a certain way.

1. The concept of 'identity'

The concept of identity being considered in this paper is 'personal identity'.⁸ Olsen explains this concept as follows:

³Ibid, per Theis J, at [64].

⁴[2020] EWFC 67. This case considered whether the Human Fertilisation and Embryology Act 2008's 'parenthood provisions' displaced the common law presumptions regarding paternity in cases involving assisted reproduction, or whether those presumptions still applied if the factual circumstances were not covered by the Act.

⁵Ibid, per Theis J, at [35].

⁶This paper accepts that identity is a complex social, ethical and philosophical phenomenon. Therefore, inconsistency and incoherence are not inherently problematic. However, we argue that if the concept is being utilised as a basis for determinations of legal parenthood, then that inconsistency and uncertainty needs to be properly acknowledged rather than obscured.

⁷See A Brown *What is the Family of Law? The Influence of the Nuclear Family* (Oxford: Hart Publishing, 2019) pp 107–131, J McCandless and S Sheldon 'The Human Fertilisation and Embryology Act (2008) and the tenacity of the sexual family form' (2010) 73(2) *Modern Law Review* 175 and J Millbank 'The limits of functional family: lesbian mother litigation in the era of the eternal biological family' (2008) 22(2) *International Journal of Law, Policy and the Family* 149.

⁸There is major philosophical debate regarding the concepts of numerical identity (a metaphysical question about how we can refer to one and the same entity) and qualitative identity (things with the same qualitative identity share the same properties). See A Wrigley et al 'Mitochondrial replacement: ethics and identity' (2015) 29(9) *Bioethics* 631. There is also debate relating to questions of personhood (what characteristics does an entity need to be a person?) and the persistence question (what does it take for a person to persist from one time to another?) See J Locke 'Of identity and diversity' in *Essay*

To most people, the phrase ‘personal identity’ suggests what we might call one’s individual identity. Your identity in this sense consists roughly of those attributes that make you unique as an individual and different from others. Or is it the way you see or define yourself, which may be different from the way you really are.⁹

Writing on personal identity, Eekelaar distinguishes between ‘individual identity’ and ‘communal identity’. Individual identity, he argues, relates to a self-perception in which a person’s personal characteristics are seen as central and self-defining.¹⁰ Such a concept is internally driven, while being influenced by external factors, and is often seen as synonymous with ‘personality’.¹¹ Communal identity refers to an individual’s identification with social networks external to themselves; the congruence of communal features with others, such as nationality, race and religious belief, is the most important part of communal identity.¹² Another prominent perspective on identity in the social sciences is that of ‘narrative identity’.¹³ For psychologists McAdams and McLean, narrative identity is about individuals constructing an ‘integrated life story’. They argue:

Narrative identity reconstructs the autobiographical past and imagines the future in such a way as to provide a person’s life with some degree of unity, purpose, and meaning. Thus, a person’s life story synthesizes episodic memories with envisioned goals, creating a coherent account of identity in time. Through narrative identity, people convey to themselves and to others who they are now, how they came to be, and where they think their lives may be going in the future.¹⁴

This form of identity is dynamic, changing over a person’s lifetime as a person has new experiences and understandings.¹⁵ Nonetheless, constructing such a life story can also ‘provide a coherent sense of unity and purpose over time’.¹⁶ Narrative identity is also understood as deeply socially embedded, as it is recognised that political, social, and cultural structures interact with personal biography to create ‘a meaningful subjectivity’.¹⁷

One other account of identity which is important in this context is that of ‘genetic identity’, which links identity to genetic ties. For some, due to the importance of genetic ties to a person’s identity, children should not only know who their genetic progenitors are, but should also be able to maintain close relationships with them. For example, Velleman has argued that part of being human is learning how to relate to one’s bodily self and that genetically related people are in the best position to help people to understand who they are, since they have the same genetic makeup.¹⁸ Moreover, for Velleman and others, parental responsibility is linked to genetics and is, therefore, not transferable.

Concerning Human Understanding Book II, Chapter XXVII (1964) reprinted in J Perry *Personal Identity* (Berkeley: University of California Press, 1975) pp 33–52.

⁹E Olson ‘Narrative identity’ in S Stich and T Warfield (eds) *The Blackwell Guide to Philosophy of the Mind* (Blackwell, 2003) p 352.

¹⁰J Eekelaar ‘Family law and identity’ (2018) 38(4) *Oxford Journal of Legal Studies* 822 at 825. Sometimes these characteristics are seen as innate: see J Marshall *Personal Freedom Through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights* (Leiden: Martinus Nijhoff, 2009) p 91.

¹¹Eekelaar, *ibid*, at 824, citing E Erikson *Identity: Youth and Crisis* (Norton, 1968).

¹²*Ibid*, at 825.

¹³*Ibid*. Eekelaar equates individual identity with narrative identity.

¹⁴D McAdams and K McLean ‘Narrative identity’ (2013) 22(3) *Current Directions in Psychological Science* 233 at 233.

¹⁵M Pasupathi and J Adler ‘Narrative, identity, and the life story: structural and process approaches’ in JF Rauthmann (ed) *The Handbook of Personality Dynamics and Processes* (London: Academic Press, 2021) p 388. See also J Leech-Scully ‘A mitochondrial story: mitochondrial replacement, identity and narrative’ (2017) 31(1) *Bioethics* 37 at 42.

¹⁶Pasupathi and Adler, *ibid*, p 389.

¹⁷Leech-Scully, *above n 15*, at 42.

¹⁸J Velleman ‘Persons in prospect: II. The gift of life’ (2008) 36 *Philosophy and Public Affairs* 245, cited by J Appleby and A Karnein ‘On the moral importance of genetic ties in families’ in T Freeman et al (eds) *Relatedness in Assisted Reproduction: Families, Origins and Identities* (Cambridge: Cambridge University Press, 2014) pp 86–87.

However, these arguments have been criticised, with Appleby and Karnein noting how empirical evidence does not support the suggestion that children need to be raised by genetic parents to allow for human flourishing.¹⁹ Moreover, Marshall has argued that linking identity with biological parentage is problematic because it suggests that there is a ‘human core’ or essence which must be accessed.²⁰ Such an approach, she argues, can lead to fixing and constraining autonomy, as the more powerful seek to persuade individuals of what their ‘true self’ or ‘inner essence’ is.²¹ An alternative conceptualisation of genetic identity is based on the argument that it is important for a person’s psychological wellbeing to have *knowledge* of their genetic progenitors.²² Such an approach would suggest that personal identity is ‘defective or incomplete’ without such knowledge.²³ It has been argued that such an approach underlined the move towards policies of open adoption and non-anonymous gamete donation.²⁴ However, others have argued that such developments can be justified on the basis of the alternative conceptualisation of ‘narrative identity’, as outlined above, since such policies can also reflect the fact that individuals may seek out their donor’s motives and desires, rather than assuming that their desire to find out information about their genetic progenitors stems from an incomplete sense of identity.²⁵

Alongside such developments, the concept of the ‘identity of the child’ has gained increased prominence within the law. In particular, developments have emerged based upon the UNCRC and ECHR.²⁶ Therefore, before considering how the identity of the child is conceptualised in the context of legal parenthood, the next section will examine how the concept has developed in these international human rights instruments, with a focus on identity rights of the child.

2. The child’s right to identity

The UNCRC contains two articles relevant to children’s identity. The first is Article 7, which provides: ‘[t]he child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for his or her parents’. Parents are not defined in the UNCRC nor by the Committee on the Rights of the Child (CRC). Thus, there is no model of parenthood which is explicitly identified as being important to a child’s identity. However, the Committee has adopted a broad interpretation of ‘family’, to include ‘biological, adoptive or foster parents, or members of the extended family or community’.²⁷ The second is Article 8, which provides: ‘States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name, and family relations as recognized by law without unlawful interference’. The wording ‘without unlawful interference’ represented a political

¹⁹Appleby and Karnein, *ibid*, p 87, citing empirical literature from 2001–2009. More recent studies show similar results: see S Golombok ‘Parenting in new family forms’ (2017) 15 *Current Opinion in Psychology* 76, and S Imrie and S Golombok ‘Impact of new family forms on parenting and child development’ (2020) *Annual Review of Developmental Psychology* 2.

²⁰Marshall, above n 10, pp 204–205.

²¹Other problems relate to the difficulties in determining what the ‘true self’ includes or excludes and that a search for the ‘true self’ can lead to frustration or a sense of non-achievement: see Marshall, above n 10, pp 99–100.

²²S Wilson ‘Identity, genealogy and the social family: the case of donor insemination’ (1997) 11(2) *International Journal of Law, Policy and the Family* 270 at 271.

²³M Richards ‘A British history of collaborative reproduction and the rise of the genetic connection’ in Freeman et al, above n 18, p 37.

²⁴For an exploration of this argument regarding donor conception, see K O’Donovan ‘What shall we tell the children? Reflections on children’s perspectives and the reproduction revolution’ in R Lee and D Morgan (eds) *Birthrights: Law and Ethics at the Beginning of Life* (London: Routledge, 1989).

²⁵See Wilson, above n 22, and Richards, above n 23, pp 36–39.

²⁶See further S Choudhry and J Herring *European Human Rights and Family Law* (Oxford: Hart Publishing, 2010) and J Fortin *Children’s Rights and the Developing Law* (Cambridge: Cambridge University Press, 3rd edn, 2009).

²⁷Committee on the Rights of the Child, General Comment No 14 (2013) On the Right of the Child to have his or her Best Interests taken as a Primary Consideration (Art 3, para 1), (CRC/C/GC/14) at para 59.

compromise, since several countries indicated the potential conflict with laws concerning secret adoption and anonymous gamete donation.²⁸

The CRC has since given some guidance on the protection of identity in these contexts. For example, Concluding Observations have suggested that it is important that children *have access* to information about biological parents. In relation to adoption, in 2012 the Committee recommended that Azerbaijan ‘ensure that children are informed about the fact of their adoption and have access to such information at the appropriate age and level of development’.²⁹ The idea that it is considered in a child’s best interests to *know* who their biological parents are is also apparent from the CRC’s comments. In Concluding Observations to Switzerland on the law on gamete donation, the Committee stated:

The Committee notes that, according to ... the law on Medically Assisted Procreation, a child can be informed of the identity of his/her father only if he/she has a legitimate interest and is concerned at the meaning of ‘legitimate interest’ in that regard ... the Committee, recommends that the State Party ensure, as far as possible, respect for the child’s right to know his or her parents’ identities.³⁰

The use of the words ‘father’ and ‘parents’ when referring to gamete donors reflects a geneticised understanding of parenthood,³¹ where those who donate genetic material are referred to in terms associated with parenthood as opposed to the terminology of ‘donors’. However, the Committee does not endorse the suggestion that children should be ‘cared for’ by genetic parents.³² Nonetheless, the idea that it is in a child’s best interests to ‘know’ their biological parents is closer to a conception of identity as ‘genetic identity’ than an approach which considers it important for identity formation that a person has the choice to *access* information about their origins, which can be argued to be reflective of ‘narrative identity’.

The ECtHR has recognised the importance of personal identity as a ‘vital interest’ protected under Article 8 ECHR. In *Jaggi v Switzerland*,³³ the court stated that ‘persons seeking to establish the identity of their ascendants have a vital interest, protected by the Convention, in receiving the information necessary to uncover the truth about an important aspect of their personal identity’.³⁴ In *Mikulic v Croatia*,³⁵ which concerned a child applicant, it was held that there had been a violation of the applicant’s private life under Article 8 because the delays in the Croatian system of paternity testing left her in a ‘state of prolonged uncertainty as to her personal identity’.³⁶ From this, it is clear that information about genetic progenitors is seen as important to a person’s identity, as an aspect of private life under

²⁸S Besson ‘Enforcing the child’s right to know her origins: contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights’ (2007) 21(2) *International Journal of Law, Policy and the Family* 137 at 143.

²⁹See D Lyons ‘Domestic implementation of the donor-conceived child’s right to identity in light of the requirements of the UN Convention on the Rights of the Child’ (2018) 32(1) *International Journal of Law, Policy and the Family* 1 at 8, citing Committee on the Rights of the Child (2012a) Concluding Observations: Azerbaijan, CRC/C/AZE/CO/3-4. Lyons (at 4) notes that the Committee has repeatedly expressed concerns regarding adoption regimes which protect the anonymity of biological parents. See Committee on the Rights of the Child (2005) Concluding Observations: Russian Federation CRC/C/RUS/CO/3 and Committee on the Rights of the Child (2006) Concluding Observations: Uzbekistan CRC/C/UZB/CO/2. From this, Lyons notes that the same position is taken on anonymous births, which is permitted in some countries, see eg Committee on the Rights of the Child (2005) Concluding Observations: Luxembourg CRC/C/15/Add 250.

³⁰See Lyons, *ibid*, at 11 citing Committee on the Rights of the Child (2002a) Concluding Observations: Switzerland, CRC/C/15/Add 182, paras 28–29.

³¹See Velleman, above n 18.

³²Lyons, above n 29, at 5.

³³Application No 58757/00, 13 July 2006. This case concerned the right of an adult to obtain a post-mortem DNA sampling of a man who he thought was his biological father.

³⁴*Ibid*, at [38].

³⁵Application No 53176/99, 7 February 2002.

³⁶*Ibid*, at [66].

Article 8.³⁷ Marshall argues that this reflects an approach based on genetic identity, an approach which suggests that an individual's sense of identity may be confused in the absence of knowledge of one's genetic or biological parents.³⁸ As noted above, she contends that this is problematic as it can result in fixing and constraining autonomy.³⁹ The English case of *Rose v Secretary of State for Health*⁴⁰ appears to adopt a similar approach. This involved a judicial review of the refusal by the Secretary of State to make non-identifying information about donors available to donor-conceived individuals, and to establish a voluntary contact register. In the judgment, Scott Baker J stated that information about one's gamete donor 'goes to the very heart of [a person's] identity, and to their make-up as people'.⁴¹

However, it is also arguable that these cases recognise the importance which these applicants themselves attribute to the information they seek, rather than suggesting that a person's identity is always incomplete without such information. After all, these cases concern individuals who are actively searching for information which they deem to be important for their own identity.⁴² For example, in *Rose* it was noted that the importance of genetic information 'will vary from individual to individual' and for some, including one of the applicants, the information may be of 'massive importance'.⁴³ Indeed, the applicant, gave a detailed account of the distress and lack of closure she experienced due to her inability to identify her genetic father, stating:

I feel that these genetic connections are very important to me, socially, emotionally, medically, and even spiritually. I believe it to be no exaggeration that non-identifying information will assist me in forming a fuller sense of self or identity and answer questions that I have been asking for a long time.⁴⁴

Therefore, a plausible alternative interpretation of the above jurisprudence is that a conception of 'narrative identity' underpins the judgments. The courts are concerned with the individual applicant's search for information that *they* deem to be important for *their* identity formation. In support of this interpretation, the case law from the ECtHR contains the idea that personal identity is linked to an individual's *personality*, which reflects a narrative account. In *Mikulić*, it was stated that information about one's genetic origins is important to an individual because of its 'formative implications for his or her personality',⁴⁵ and further stated that, '[r]espect for "private life" must also comprise to a certain degree the right to establish relationships with other human beings'.⁴⁶ The importance of being able to establish relationships with others arguably reflects 'communal identity', in that individuals can find congruence between their own characteristics and those of others, but also 'narrative identity', in the sense that one's personal biography is shaped by social and cultural structures.

³⁷Recent inter-country surrogacy cases place significant importance on genetic links. In *Menesson v France*, Application No 65192/11, 26 June 2014 and *Labassee v France* (Application No 65941/11) (unreported) 26 June 2014, it was held that the private life of children born through surrogacy under Art 8 had been breached. Their identity had been undermined because France had refused to recognise the parent-child relationship between them and their biological father. However, in *Paradiso and Campanelli v Italy*, Application No 25358/12, 24 January 2017, where no such genetic link existed, no such finding was made, illustrating the importance of genetics to the identity of the child under Art.8.

³⁸Marshall, above n 10, p 127, citing D Feldman *Civil Liberties and Human Rights in England and Wales* (Oxford: Oxford University Press, 2nd edn, 2002) p 745.

³⁹Marshall, above n 10, p 205.

⁴⁰[2002] EWHC 1593 (Admin), [2002] 3 FCR 731.

⁴¹*Ibid*, at [21].

⁴²See *Jaggi*, above n 33, at [40] where it is stated: 'the applicant has shown a genuine interest in ascertaining his father's identity, since he has tried throughout his life to obtain conclusive information on the subject. Such conduct implies mental and psychological suffering, even if this has not been medically attested', and see *Rose*, above n 40, at [7] for a full exploration of the applicant's reasons for her search for information. In *Mikulić*, the reasons for the search for information by the applicant's mother are not clearly stated.

⁴³*Rose*, above n 40, at [47].

⁴⁴*Ibid*, at [7].

⁴⁵*Mikulić*, above n 35, at [54], citing *Gaskin v the United Kingdom*, judgment of 7 July 1989, Series A no 160, p 16, § 39.

⁴⁶*Ibid*, at [53], citing *Niemietz v Germany*, (1992) Series A no 251-B.

With these conceptual and legal contexts established, the paper will now consider the role played by the ‘identity of the child’ in various circumstances concerning legal parenthood within domestic law.

3. Identity and legal parenthood

This section considers the role of the concept of ‘identity of the child’ in the determination of legal parenthood in the following contexts: (a) applications for parental orders after surrogacy arrangements; (b) applications for declarations of parentage in cases involving disputed paternity; and (c) the legislative scheme for parenthood in circumstances involving gamete donation. This comparison allows for an exploration of the extent to which there is a consistent understanding of the concept of ‘identity’ and whether the concept is performing the same role in these different contexts.

However, before this, it is crucial to note that, as Diduck has observed, ‘[l]egal parenthood is first of all a legal construct’.⁴⁷ This may seem a self-evident point, but the constructed nature of legal parenthood is fundamentally important to the arguments below, because when the law assigns legal parenthood this does not necessarily involve the declaration of ‘natural’ or ‘objective’ facts,⁴⁸ but instead requires the law to make choices between competing claims for legal parenthood, each of which will possess some underlying moral value. The construction of legal parenthood is also driven by a binary, two-parent model. As Jackson has argued, ‘the law’s principal stumbling block’ in this context is ‘its assumption that a child can have only two legal parents: one mother and one father’,⁴⁹ which results in choices being required between potential ‘parents’, rather than the law being capable of accommodating multiple parental claims within the status of legal parenthood.⁵⁰ Such choices are particularly acute in circumstances involving assisted reproduction, where there are likely to be various potential claimants to parenthood based on genetic, gestational, social, psychological and intentional ties. These choices are inevitably based on explicit or implicit normative judgments, with certain claims to parenthood preferred to others. Thus, the determination of legal parenthood shows which elements of parenthood are valued and privileged by the law, and this privileging is particularly evident when these elements are possessed by different people, as in the contexts discussed in this section.

(a) Parental order cases

The concept of ‘identity’ has been central to the judicial interpretation of section 54 of the 2008 Act, which provides the criteria for granting ‘parental orders’.⁵¹ These are post-birth orders that transfer legal parenthood from the surrogate⁵² to the intended parents after a surrogacy arrangement.⁵³ A

⁴⁷A Diduck ‘If only we can find the appropriate terms to use the issue will be solved: law, identity and parenthood’ (2007) 19(4) *Child and Family Law Quarterly* 458 at 462.

⁴⁸See further L Smith ‘Is three a crowd? Lesbian mothers’ perspectives on parental status in law’ (2006) 18(2) *Child and Family Law Quarterly* 231 and L Smith ‘Tangling the web of legal parenthood: legal responses to the use of known donors in lesbian parenting arrangements’ (2013) 33(3) *Legal Studies* 355.

⁴⁹E Jackson ‘What is a parent?’ in A Diduck and K O’Donovan (eds) *Feminist Perspectives on Family Law* (Abingdon: Routledge-Cavendish, 2006) p 59.

⁵⁰See further J Wallbank and C Dietz ‘Lesbian mothers, fathers and other animals: is the political personal in multiple parent families?’ (2013) 25(4) *Child and Family Law Quarterly* 451.

⁵¹For detailed analysis of the judicial approach to the s 54 conditions, see C Fenton-Glynn ‘The regulation and recognition of surrogacy under English law: an overview of the case-law’ (2015) 27(1) *Child and Family Law Quarterly* 83 and K Horsey ‘Fraying at the edges: UK surrogacy law in 2015’ (2016) 24(4) *Medical Law Review* 608. Full consideration of these arguments is outside the scope of this paper, which instead considers the role of ‘identity’ within these judgments.

⁵²And potentially her husband or male civil partner, if the Human Fertilisation and Embryology Act 2008, s 35 applies, or her wife or female civil partner, if s 42 applies.

⁵³The regulation of surrogacy is subject to a joint law reform project of the Law Commission of England and Wales and the Scottish Law Commission. See Joint Consultation Paper ‘Building families through surrogacy: a new law’ (Law Com Consultation Paper No 244, Scot Law Com Discussion Paper No 167, June 2019). The final report is expected in Spring 2023: <https://www.lawcom.gov.uk/project/surrogacy/>.

'liberal' and 'creative'⁵⁴ interpretation of section 54 has resulted in parental orders being granted in the vast majority of reported decisions, even where the statutory conditions do not appear to have been met.⁵⁵ The role of identity is illustrated by the language of the judgments which have permissively interpreted the section 54 conditions. Three of the most significant such judgments are considered in turn. First, in *A v P (Surrogacy: Parental Order: Death of Applicant)*,⁵⁶ Theis J noted, '[t]he concept of identity includes the legal recognition of relationships between children and parents',⁵⁷ before commenting '[t]his case is fundamentally about identity rights and recognition of a relationship which is central to the child, but cannot be developed by any other route'.⁵⁸ This shows the importance the judiciary attach to the concept of identity in cases involving parental orders, but does not provide detail of the substantive content of the concept.⁵⁹ Nonetheless, this judgment is fundamentally important within the section 54 jurisprudence, because it introduced the concept of 'identity' as a key part of judicial reasoning, which was built upon in subsequent judgments.

The second important case in this context is *Re X (A Child) (Parental Order: Time Limit)*.⁶⁰ When granting a parental order in circumstances that did not appear permitted by the statutory language,⁶¹ Sir James Munby P referred extensively to Theis J's judgment in *A v P*, before commenting that: '[s]ection 54 goes to the most fundamental aspects of status and, transcending even status, to the very identity of the child as a human being: who he is and who his parents are. It is central to his being, whether as an individual or as a member of his family'.⁶² In the next sentence, the President more simply stated, 'this case is fundamentally about X's identity and his relationship with the commissioning parents'.⁶³ From this, the centrality of the identity of the child to the decision is apparent, but unlike in *A v P*, this judgment provides some explanation of the judicial understanding of the child's 'identity'. In these statements, the President emphasised elements of the child's identity that represent both 'individual identity' ('who he is' and 'central to his being ... as an individual') and 'communal identity' ('who his parents are', 'as a member of his family' and 'his relationship with the commissioning parents').

The third important judgment is that of Russell J in *Re A (A Child)*,⁶⁴ which also reflects the focus on identity and provides further insights into the judicial understanding of the concept, stating, 'only parental orders will fully recognise the children's identity as the Applicants' natural children, rather than giving them the wholly artificial and, in their case, inappropriate status of adopted

⁵⁴M Welstead 'Surrogacy: one more nail in the coffin' (2014) 44 (Nov) Fam Law 1637.

⁵⁵See *Re AB (Surrogacy: Consent)* [2016] EWHC 2643 (Fam), [2017] 2 FLR 217 for a rare example of a reported decision where a parental order was not granted, due to the refusal of the surrogate (and her husband) to consent to the making of the order as required by s 54(6).

⁵⁶[2011] EWHC 1738 (Fam), [2012] 2 FLR 145. This case considered whether the court could 'read down', under Human Rights Act 1998, s 3(1), the conditions in s 54(4), that 'the child's home must be with the applicants', and s 54(5), that: 'At the time of the making of the order both the applicants must have attained the age of 18', where the intended father had died between the application being made and the court considering the application. Issues regarding the posthumous use of genetic material and legal parenthood have arisen under the 1990 and 2008 Acts in other contexts: see eg *R v Human Fertilisation and Embryology Authority, ex p Blood* [1997] 2 WLR 806 and *Blood and Tarbuck v Secretary of State for Health* (unreported 28 February 2003), which ultimately resulted in the Human Fertilisation and Embryology (Deceased Fathers) Act 2003. The 'identity' of the child is not explicitly considered in these cases.

⁵⁷*A v P*, *ibid*, at [28].

⁵⁸*Ibid*, at [30].

⁵⁹See *J v G (Parental Orders)* [2013] EWHC 1432 (Fam), [2014] 1 FLR 297 at [26].

⁶⁰[2014] EWHC 3135 (Fam), [2015] 1 FLR 349.

⁶¹This case concerned the 'six-month time limit' for applications in s 54(3); the parental order was granted for a child over two years old. See further A Brown 'Two means two, but must does not mean must: an analysis of recent decisions on the conditions for parental orders in surrogacy' (2018) 30(1) Child and Family Law Quarterly 23.

⁶²*Re X (A Child) (Parental Order: Time Limit)* [2014] EWHC 3135 (Fam), [2015] 1 FLR 349 at [54].

⁶³*Ibid*.

⁶⁴[2015] EWHC 911 (Fam), [2016] 2 FLR 530. This judgment considered s 54(3) and parental orders were granted for children aged 5 and 8.

children'.⁶⁵ The judgment expands upon why adoption orders were considered an 'inappropriate' solution⁶⁶ in the context of surrogacy,⁶⁷ noting:

Parental orders will provide them with a registration and documentation which designates a 'whole of life' identity as members of the Applicants' family ... In contraposition adoption certificates imply a change of family and wrongly suggest that the children have had a disrupted rather than continuously secure identity within their family, the only family they have ever known.⁶⁸

The judicial reference to the 'natural' relationship between parents and children and the stark contrast drawn between parental orders⁶⁹ and adoption orders⁷⁰ suggests that the interpretative approach adopted in these cases, as Brown has previously noted, 'is being justified on the basis that parental orders are the only option which appropriately recognise the identity of the child'.⁷¹

Furthermore, the language of the judgment suggests both an understanding of 'communal identity', given the focus upon the child's membership of the intended parents' family, and of 'narrative identity', through the emphasis on the lifelong and 'continuous' nature of identity. Here, the focus is on the child's narrative identity – their own ability to form a coherent life story.⁷² To that end, Russell J commented on the evidence of the commissioning mother, stating: 'G told me that the children had their story and that to make adoption orders would alter it, adding what she called a "sub-section"'.⁷³ The judgment also notes the views of the children, with the older child, aged 8, expressing a clear preference for a parental order being made, because he perceived some stigma attaching to adoption and felt that, unlike a friend who was adopted, he is 'the biological child of his parent and that both parents arranged to have him "made"'.⁷⁴

It is also apparent that genetics and intention both play a role in the conception of identity in this context. The judgment clearly distinguishes between adoption orders and parental orders, and connects the identity of the child born through surrogacy with 'natural' parenthood, which appears to be understood as inherently including genetic paternity.⁷⁵ In *Re A* it was stated: '[t]here is no

⁶⁵Ibid, at [61].

⁶⁶In *Re X (A Child) (Parental Order: Time Limit)* [2014] EWHC 3135 (Fam), [2015] 1 FLR 349, Sir James Munby P, at [7], similarly noted: 'Adoption is not an attractive solution given the commissioning father's existing biological relationship with X'.

⁶⁷For a critique of this distinction between parental orders and adoption orders, see K Norrie 'English and Scottish adoption orders and British parental orders after surrogacy: welfare, competence and judicial legislation' (2017) 29(2) *Child and Family Law Quarterly* 93.

⁶⁸*Re A (A Child)* [2015] EWHC 911 (Fam), [2016] 2 FLR 530 at [64].

⁶⁹When parental orders were first introduced, by s 30 of the Human Fertilisation and Embryology Act 1990, this was in response to comments made by Michael Jopling MP concerning constituents of his who had entered into a surrogacy arrangement and who strongly objected to the requirement that they adopt the resulting children. The speech is notable for emphasising the significance of the genetic connection between the intended parents and the children, and for recounting the colourful response of the intended parents to the suggestion of adopting the children: 'Certainly not, they are our children. It is like buying one's own possessions back'. See *Hansard* HC Deb, vol 170, cols 944–945, 2 April 1990.

⁷⁰See *B v C (Surrogacy: Adoption)* [2015] EWFC 17, [2015] 1 FLR 1392 for a rare example of an adoption order being granted after a surrogacy arrangement since parental orders were introduced. However, this case had highly unusual facts, with the surrogate being the mother of the intended parent. More significantly, the case involved a single intended parent and occurred prior to the insertion of s 54A into the 2008 Act. Therefore, a parental order was not an available option for the intended parent.

⁷¹Brown, above n 61, at 30.

⁷²See *Re A (A Child)* [2015] EWHC 911 (Fam), [2016] 2 FLR 530 at [64]. In addition, see [13], where the following evidence is quoted from the father: 'Applying an ill-fitting and inaccurate legal solution such as an adoption order has the potential to undermine A and B's sense of identity. Both children are fully aware, in an age-appropriate manner, of how they came into the world ... However, the children feel very secure and display high esteem derived from being A and B'.

⁷³Ibid, at [13].

⁷⁴Ibid, at [11].

⁷⁵Reflecting Baroness Hale's description of 'natural parenthood' as involving: 'genetic', 'gestational' and 'social and psychological' parenthood in *Re G (Children) (Residence: Same-Sex Partner)* [2006] UKHL 43, [2006] 2 FLR 629 at [33]–[35].

doubt in this case that as far as these children are concerned their identity has already been formed as the biological children of their father and the commissioning of their conception and birth involving their mother'.⁷⁶ Thus, while there is a genetic underpinning to the concept of the identity of the child born through surrogacy, this understanding of identity also encompasses social and intentional elements relating to the role played by the intended mother in the conception of the children. It is worth noting that this understanding of identity reflects the statutory framework for parental orders, which requires that: 'the gametes of at least one of the applicants were used to bring about the creation of the embryo'.⁷⁷ Consequently, a parental order cannot be granted unless there is a genetic link with one of the intended parents.⁷⁸

We also note that, as Brown has previously argued, "identity" is being conflated in the judgments with recognition within a two-parent, nuclear family, which is what a parental order provides to the child and the intended parents'.⁷⁹ The centrality of the two-parent, nuclear family to parental orders is illustrated by their history. First, when parental orders were initially enacted, by section 30 of the Human Fertilisation and Embryology Act 1990 (the 1990 Act), they were available only to married couples. Secondly, when eligibility was expanded by the 2008 Act, this only included other couples,⁸⁰ which represented a conscious policy choice of the then government.⁸¹ Thirdly, the hold of the nuclear family is still evident when it comes to single applicants. In contrast to the framework enacted by the 2008 Act, single applicants can now apply for parental orders. This was as a result of a remedial order⁸² in response to the declaration of incompatibility⁸³ issued by Sir James Munby P in *Re Z (A Child) (Surrogate Father: Parental Order) (No 2)*.⁸⁴ To be eligible to apply for a parental order single applicants must have a genetic connection with the child,⁸⁵ whereas for couples, only one applicant requires a genetic connection.⁸⁶ This illustrates the continuing privileging of the couple within a 'nuclear family' in the legal framework, because a single applicant who cannot provide genetic material cannot apply for a parental order. However, if such an individual were part of a couple, they could become parents through a parental order.⁸⁷ In this way, their intentional parenthood would combine with their partner's genetic parenthood, meaning that only a parental order would be seen by the judiciary as the appropriate mechanism to recognise the couple as the 'natural parents' of the children. Therefore, while the legal position does allow for parental order applicants who fall outside the two-parent nuclear family, we argue that the process that led to this framework, as well as the current position for single applicants who cannot provide genetic material, reflects the continuing influence of the binary, two-parent model and the nuclear family on the legal framework in parental order cases.

⁷⁶*Re A (A Child)* [2015] EWHC 911 (Fam), [2016] 2 FLR 530 at [63].

⁷⁷Human Fertilisation and Embryology Act 2008, s 54(1)(b).

⁷⁸This requirement for a genetic link with one of the intended parents was considered by the Joint Consultation Paper, above n 53, paras 12.35–12.66; it was proposed that the existing requirement be replaced by a system which allows for 'double donation' in limited circumstances of 'medical necessity'.

⁷⁹Brown, above n 61, at 29.

⁸⁰Section 54(2) providing the following 'applicants': (a) 'husband and wife'; (b) 'civil partners'; and (c) 'two persons who are living as partners in an enduring family relationship'.

⁸¹During parliamentary debates on the 2008 Act, in response to a backbench amendment allowing for single applicants, the Minister of State, Dawn Primarolo MP, responded: 'Surrogacy, however, involves agreeing to hand over a child even before conception. The Government are still of the view that the magnitude of that means that it is best dealt with by a couple': Public Bill Committee Debate, House of Commons, col 249, 12 June 2008.

⁸²The Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018, SI 2018/1413, inserted s 54A into the 2008 Act in relation to single applicants.

⁸³Human Rights Act 1998, s 4(2).

⁸⁴*Re Z (A Child) (Surrogate Father: Parental Order) (No 2)* [2016] EWHC 1191 (Fam), [2017] Fam. 25.

⁸⁵2008 Act, s 54A(1)(b).

⁸⁶*Ibid.*, s 54(1)(b).

⁸⁷There may be circumstances where, for medical reasons, it is difficult or impossible for a single applicant to provide genetic material, which are less likely to arise for a couple where only one member needs to provide genetic material.

With that said, in subsequent cases considering the section 54 conditions the ‘identity of the child’ is now a significant recurring feature of judicial reasoning.⁸⁸ These cases specifically include (sometimes extensive) quotations from *A v P*, *Re X* and *Re A*, showing the importance of these three judgments. The concept of identity at issue is one of both individual and communal identity, and there are also references to the ‘life-long’ nature of identity formation, which indicates a narrative understanding. In addition, genetic identity clearly plays a role in parental orders; a genetic link with one of the applicants is required in order for parental orders to be seen as the ‘natural’ and ‘appropriate’ order to make, with a lack of such a link meaning that intending parents would have to apply for adoption. Overall, we argue that the judgments in the parental order cases suggest that reflecting the ‘identity’ of the child is crucial to the determination of legal parenthood.

(b) Disputed paternity cases

In cases considering applications for ‘declarations of parentage’ under section 55A of the 1986 Act, which typically involve a putative father claiming that he is the child’s genetic father where there is an existing legal and/or social father,⁸⁹ there has been less explicit reference to the concept of ‘identity’ than in parental order cases. However, there are some limited examples of the language of identity being used. Twenty years ago in *Re T (Paternity: Ordering Blood Tests)*,⁹⁰ Bodey J observed: ‘I am entirely satisfied that in evaluating and balancing the various rights of the adult parties and T under Article 8, the weightiest emerges clearly as being that of T, namely that he should have the possibility of knowing, perhaps with certainty, his true roots and identity’.⁹¹ More recently, the relevance of identity was acknowledged by Peter Jackson J (as he then was) in *Re R (Parental Responsibility)*,⁹² who stated ‘[t]his situation throws up a number of inescapable issues about George’s identity’,⁹³ and by MacDonald J in *MS v RS (Paternity)*,⁹⁴ who commented:

The identification of the child’s parentage is a fundamental aspect of the child’s identity and will engage the child’s right to identity under Articles 7 and 8 of the United Nations Convention on the Rights of the Child and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁹⁵

These statements illustrate that there has been explicit consideration of the identity of the child in judicial reasoning concerning disputed paternity, and also show that when ‘identity’ is referred to, the focus is upon the role of genetic paternity, as shown by the references to ‘true roots’ and ‘parentage’.

However, in many other disputed paternity cases the judicial language is instead focused upon the conceptual idea of determining ‘truth’ and any consideration of identity is implicit. This linguistic focus on ‘truth’ is seen in the historical ‘blood test’ cases,⁹⁶ and continues to underpin the more

⁸⁸See eg *Re X (Parental Order: Death of Intended Parent Prior to Birth)* [2020] EWFC 39, [2020] 2 FLR 1326, per Theis J, at [94]; *Re A (A Child) (Surrogacy: s 54 Criteria)* [2020] EWHC 1426 (Fam), [2021] 1 FLR 357, per Keehan J, at [61]; *Re Z (Parental Order: Child’s Home)* [2021] EHWK 29 (Fam); and *Re N (A Child)* [2019] EWFC 21, [2019] Fam 407.

⁸⁹Due to the common law presumption of fatherhood that arises from marriage to the mother, see Lord Simon in the *Amphill Peerage Case* [1977] AC 547 at 577, or the statutory presumption upon registration on the birth certificate where the parents are unmarried, see Family Law Reform Act 1987, s 24 and Births and Deaths Registration Act 1953, s 10.

⁹⁰*Re T (Paternity: Ordering Blood Tests)* [2001] 2 FLR 1190.

⁹¹*Ibid*, at [61].

⁹²*Re R (Parental Responsibility)* [2011] EWHC 1535 (Fam), [2011] 2 FLR 1132.

⁹³*Ibid*, at [3].

⁹⁴*MS v RS (Paternity)* [2020] EWFC 30, [2021] Fam. 1.

⁹⁵*Ibid*, at [40].

⁹⁶See eg *B v B* [1968] P 466, where Lord Denning MR, at 474, commented: ‘The object of the court always is to find out the truth’, and *S v S* [1972] AC 24, where Lord Hodson, at 57, similarly noted: ‘The interests of justice in the abstract are best served by the ascertainment of the truth’. See further *Re L (An Infant)* [1967] 3 WLR 1645.

contemporary cases involving DNA testing.⁹⁷ For example, in *Re H (A Minor) (Blood Test: Parental Rights)*⁹⁸ Ward LJ stated that: '[s]cience has now advanced. The whole truth can now be known'.⁹⁹ In *Re H and A (Children) (Paternity: Blood Test)*,¹⁰⁰ Thorpe LJ stated that 'that the interests of justice are best served by the ascertainment of the truth'.¹⁰¹ Hedley J followed this approach in *Re D (A Child) (Paternity)*,¹⁰² stating that 'the general approach is that it is best for everyone for the truth about a disputed paternity to be known'.¹⁰³ In these statements, 'truth' is clearly associated with determining genetic paternity and Bainham has noted that, 'English law has enthusiastically embraced the principle of biological truth'.¹⁰⁴ The association of 'truth' with the genetic connection is presented in the judgments as uncontested and Sheldon has described these cases as involving a 'geneticisation' of fatherhood, noting that the courts are 'increasingly willing to recognise the genetic father, even where this might pose risks to the stability of a social family unit and a challenge to the role played by another man within it'.¹⁰⁵ Indeed, the case law has shown that genetics is understood as important for children's identity, even where the children do not perceive this to be the case themselves. In *MS v RS*,¹⁰⁶ Gillick-competent children did not want to know the identity of their genetic father. MacDonald J held that '... the question of paternity, now that it is out there, cannot be put off forever and that ... ultimately, it would be better for the children to know the answer than not to know'.¹⁰⁷ Even though the children were not required to undergo testing,¹⁰⁸ this judgment shows the strong hold of genetic paternity in the evaluation of the welfare of the child.¹⁰⁹

From these cases we can derive several conclusions about the role and understanding of the concept of 'identity' in the context of these disputed paternity cases. First, whether the judicial language refers to 'truth' or 'identity', both concepts appear to involve the privileging of genetic paternity. This privileging occurs even where there are existing legal and social parents, which represents a notable distinction with the understanding of identity in the parental order cases and the legislative regime for gamete donation, considered below, where intention and social parenting are central to judicial and legal understandings of identity. Secondly, the more limited consideration of the meaning of identity in disputed paternity cases suggests that the concept is perceived by judges as being more self-evident in this context. The implicit assumption is that the genetic connection between father and child forms a fundamental aspect of the child's identity, and that knowledge of that connection will be beneficial to

⁹⁷See eg *Re F (Paternity: Jurisdiction)* [2007] EWCA Civ 873, [2008] 1 FLR 225 and *AB v CD* [2019] EWHC 1695 (Fam), [2019] 3 FCR 313.

⁹⁸*Re H (A Minor) (Blood Test: Parental Rights)* [1997] Fam 89.

⁹⁹*Ibid*, at 103.

¹⁰⁰*Re H and A (Children) (Paternity: Blood Test)* [2002] EWCA Civ 383, [2002] 1 FLR 1145.

¹⁰¹*Ibid*, at [29].

¹⁰²*Re D (A Child) (Paternity)* [2006] EWHC 3545 (Fam), [2007] 2 FLR 26.

¹⁰³*Ibid*, at 31.

¹⁰⁴A Bainham 'Arguments about parentage' (2008) 67(2) Cambridge Law Journal 322 at 327. See also S Beresford 'Get over your (legal) "self": a brief history of lesbians, motherhood and the law' (2008) 30(2) Journal of Social Welfare and Family Law 95 at 95 and K O'Donovan 'A right to know one's parentage' (1988) 2(1) International Journal of Law and the Family 27 at 29, who argues that identity has been tied up with 'nature' and the 'blood line' in Western societies.

¹⁰⁵S Sheldon 'From "absent objects of blame" to "fathers who want to take responsibility": reforming birth registration law' (2009) 31(4) Journal of Social Welfare and Family Law 373 at 381.

¹⁰⁶*MS v RS (Paternity)* [2020] EWFC 30, [2021] Fam 1.

¹⁰⁷*Ibid*, at [100].

¹⁰⁸See *L v P (Paternity Test: Child's Objection)* [2011] EWHC 3399 (Fam), [2013] 1 FLR 578 for a rare decision where an application for genetic testing of a child was refused on the basis of the objections of a Gillick-competent 15-year-old.

¹⁰⁹MacDonald J directed the mother, father and putative father to provide DNA samples, and for the results be delivered to CAFACASS to be retained on the children's file in sealed envelopes. The children were also directed to provide samples, but that order was stayed without limit of time and with liberty to restore to the court. MacDonald J stated that the children should not be forced to provide samples, but that his view, that it is better for them to know the identity of their genetic father, should be communicated to them.

the child.¹¹⁰ Third, it is also notable that these disputes exist in a highly gendered context, as Diduck has previously argued:

... disputed parentage was traditionally, and still is, virtually always about disputed paternity and so the 'universal principles' about a child's need to know his or her *identity* developed from responses to questions about a child's *paternity*. Adopting the gender-neutral language of identity or origins simply masks the importance thus attributed to knowledge of paternal lineage.¹¹¹

This emphasis on genetic truth does not extend to female parenthood,¹¹² because of the underlying assumptions regarding the different gendered contributions made to parenthood.¹¹³

In sum, even though the judicial understanding of identity appears different from the parental order cases, in the disputed paternity cases the concept of the 'identity of the child' similarly provides normative support for the desired judicial outcome, which in the latter context is the facilitation of the determination of genetic paternity. Therefore, different elements of parenthood are being privileged within the understanding of identity in the disputed paternity cases than are privileged within the understanding of identity in the parental order cases. Clearly, the underlying factual circumstances of these cases, involving 'natural' reproduction rather than medically assisted reproduction and surrogacy arrangements, are very different from those of the parental order cases. However, these factual differences do not justify this apparent complete conceptual disunity regarding either the role or the substantive content the concept of 'identity'.¹¹⁴ While these different contexts raise different aspects of a child's identity, unless these different aspects are more clearly explained by the judiciary, recourse to an undefined concept of the 'identity of the child' does not provide the normative power for the allocation of parenthood that the judiciary implies it does.

(c) Gamete donation

The status provisions in sections 33–48 of the 2008 Act¹¹⁵ set out the rules for the attribution of legal parenthood in the case of assisted reproductive treatment regulated under the 1990 and 2008 Acts. Under these rules, the gestational mother is always the legal mother.¹¹⁶ The person who will be the legal father or second 'parent' depends on the relationship they have with the legal mother. A man married to or in a civil partnership with the mother will be the father, unless he did not consent to the treatment.¹¹⁷ Similarly, a woman married to, or in a civil partnership with, the mother will be the second 'parent', unless she did not consent to the treatment.¹¹⁸ A man who is not in a registered relationship with the mother is the legal father if the 'agreed fatherhood conditions' are met.¹¹⁹ This

¹¹⁰J Fortin 'Children's right to know their origins – too far, too fast?' (2009) 21(3) Child and Family Law Quarterly 336, has criticised the approach in these cases and the association between the child's genetic identity and the benefits of an ongoing relationship with biological fathers.

¹¹¹Diduck, above n 47, at 468.

¹¹²See *Re G (Children) (Shared Residence Order: Biological Non-Birth Mother)* [2014] EWCA Civ 336, [2014] 2 FLR 897, for consideration of the role of a 'female parent' with a genetic connection who was not a legal parent.

¹¹³See further K Everett and L Yeatman 'Are some parents more natural than others?' (2010) 22(3) Child and Family Law Quarterly 290 and L Yeatman 'Lesbian co-parents: still not real mothers' (2013) 43(Dec) Fam Law 1581.

¹¹⁴See T Callus 'First "designer babies", now a la carte parents' (2008) 38(Feb) Fam Law 143, for a critique of the distinctions between legal parenthood in 'natural' reproduction and the 2008 Act's legislative scheme for assisted reproduction.

¹¹⁵These provisions replaced the 'status provisions' in ss 27–30 of the 1990 Act, thereby including same-sex female couples and changing the statutory language for the attribution of parenthood outside of registered relationships.

¹¹⁶2008 Act, s 33(1).

¹¹⁷*Ibid*, s 35. See Civil Partnership (Opposite-Sex Couples) Regulations 2019, SI 2019/1458, for the regulation of mixed sex civil partnerships.

¹¹⁸*Ibid*, s 42. This provision marked the first time two women could be the legal parents of a child from birth. However, the Act does not allow for two legal mothers. See J McCandless and S Sheldon 'Genetically challenged: the determination of legal parenthood in assisted reproduction' in Freeman et al, above n 18, pp 62–63.

¹¹⁹*Ibid*, s 36 and s 37.

means that the man must give notice that he consents to being treated as the father of the child; the mother must give similar notice.¹²⁰ Similarly, a woman who is not in a registered relationship with the mother is the second ‘parent’ if the equivalent ‘agreed female parenthood conditions’ are met.¹²¹ Therefore, gestation and intention form the basis of legal parenthood in the 2008 Act. Legal motherhood is determined by gestation and the legal parenthood of a father or second parent is recognised through intention; they must consent to either the treatment,¹²² or consent to becoming a legal parent.¹²³ As well as this distinction regarding what is being consented to, the relationship a person has with the mother has an impact on how their intention is evidenced. Those in legally registered relationships do not have to provide notice of consent, because consent is presumed due to the relationship, while those who are not in a registered relationship with the mother must provide this ‘active’ consent.

The original status provisions in the 1990 Act marked the first time that legal parenthood allocated at birth was separated from genetic parenthood with no possibility of subsequent recourse to genetic connections to displace this.¹²⁴ The provisions were seen as a ‘... shift away from the otherwise predominantly genetic view of parenthood’.¹²⁵ Even though the 1990 Act marked the separation of parenthood from genetics, the model of parenthood that was being introduced was not the subject of sustained parliamentary debate.¹²⁶ Similarly, McCandless and Sheldon have noted that there was a lack of a focus on the model of family underpinning the status provisions in the development of the 2008 Act, stating ‘... those involved in the reform project tended to rely on common sense assumptions about the family, which were subject to little sustained scrutiny or critical evaluation’.¹²⁷ Therefore, the disjunction of genetic paternity from legal fatherhood and the creation of legal parenthood from birth for two women occurred without significant consideration of the implications of these changes on the wider understanding and construction of legal parenthood.

Indeed, the main debate regarding the identity of the child did not focus on the model of parenthood which underpinned the legislation, but instead on the issue of offspring’s access to information about their donor.¹²⁸ In this regard, an amendment to the 1990 Act was considered which would have involved the discrete annotation of birth certificates to indicate the use of donor conception,¹²⁹ which would enable individuals to ‘discover at the appropriate time further information about their genetic parentage’.¹³⁰ In parliamentary debates, it was stated: ‘[t]he need to know one’s roots is a very

¹²⁰The man and woman must also not be within the prohibited degrees of relationship: *ibid*, s 37(1)(e).

¹²¹*Ibid*, s 43 and s 44.

¹²²*Ibid*, s 35 and s 42.

¹²³*Ibid*, s 36 and s 37, s 43 and s 44.

¹²⁴As the subsection above on the ‘Disputed paternity cases’ illustrates, while the presumptions in cases of ‘natural reproduction’ may deem a man who is not the genetic father the legal father at birth, these presumptions can be rebutted by evidence (usually DNA evidence) proving genetic paternity.

¹²⁵Richards, above n 23, p 65.

¹²⁶Concerns were raised in parliamentary debates around the possibility of children not having a ‘father’ in the case of single individuals and same sex couples, but these debates were not explicitly linked to identity of the child. See *eg Hansard HC Deb*, vol 174, col 1022, 20 June 1990, *Hansard HL Deb*, vol 515, col 1482, 13 March 1990, *Hansard HL Deb*, vol 697, col 26, 10 December 2007 and *Hansard HL Deb*, vol 704, col 1635, 29 October 2008. See also *Hansard HC Deb*, vol 475, 12 May 2008, for debates around the removal of the reference to the child’s ‘need for a father’ in the 1990 Act, s 13(5) as a condition for treatment, which was replaced with the words ‘need for supportive parenting’ in the 2008 Act.

¹²⁷McCandless and Sheldon, above n 7, at 182–183.

¹²⁸See *eg Hansard HC Deb*, vol 174, cols 987–1018, 20 June 1990.

¹²⁹Amendment 126 to cl 26 of the 1990 Act proposed marking the birth certificate to identify the status of the mother and Amendment 129 to cl 26 would have marked the birth certificate regarding the ‘true status of the father’. See *Hansard HL Deb*, vol 515, cols 1308–130, 13 February 1990.

¹³⁰See *Hansard HL Deb*, vol 515, col 1311, 13 February 1990. See also ‘Report of the Committee of Inquiry into Human Fertilisation and Embryology’ (the Warnock Report) (Department of Health and Social Security, July 1984), available at <https://www.hfea.gov.uk/media/2608/warnock-report-of-the-committee-of-inquiry-into-human-fertilisation-and-embryology-1984.pdf>, para 4.25. It was recommended that if parents wished they could have ‘by donation’ placed after the name of the non-genetic parent if gamete donation was used, but access to identifying information was not recommended, para 4.21.

fundamental one, and it is a question of a person's sense of identity, a lack of which could even lead to mental instability'.¹³¹ Notwithstanding such concerns, this amendment was not adopted, and a policy of donor anonymity was introduced.¹³² It has been argued that this policy of anonymity was based on concerns that the social father could be negatively affected due to his lack of genetic connection (in the case of sperm donation), that it could cause confusion for children, and that donation carried implications of unfaithfulness or adultery.¹³³ Such concerns show the historical potency of the genetic connection within the social construction of parenthood.¹³⁴ The policy of anonymity can be seen as seeking to keep intact the idea of the genetically-linked nuclear family.¹³⁵ It can also be argued that more recent developments reflect a similar approach. In 2004, the law was changed to permit those born through gamete donation to access non-identifying information¹³⁶ about donors at age 16, and identifying information¹³⁷ at age 18.¹³⁸ However, this information can only be availed of if individuals are aware that they are born through donor conception. This legal framework seeks to ensure that a lack of genetic link between parents and children can be concealed.¹³⁹ Since the law facilitates parents to maintain the illusion of parenthood based on genetic ties, when it does not, in fact, exist, this arguably shows the importance placed on genetic links between parents and children.¹⁴⁰ It should also be noted that the current legal framework is not concerned with access to information about genetic origins for *children*, since identifying information about donors is not available until people turn 18.¹⁴¹

The regulation of legal parenthood in circumstances involving gamete donation further illustrates the incoherent role that identity plays in the allocation of legal parenthood. Regarding the legal construction of parenthood in the context of paternity testing, for example, genetic links appear *constitutive* of children's identity. As illustrated above, such an approach to parenthood has led to declarations of paternity being made even where it could disrupt the social family.¹⁴² In contrast, in the context of

¹³¹Lady Saltoun of Abernethy, *Hansard* HL Deb, vol 515, col 1310, 13 February 1990.

¹³²For a full exploration of this debate and possible models for birth certificate reform, see E Blyth et al 'The role of birth certificates in relation to access to biographical and genetic history in donor conception' (2009) 17(2) *International Journal of Children's Rights* 207.

¹³³R Cook 'Donating parenthood: perspectives on parenthood from surrogacy and gamete donation' in A Bainham et al (eds) *What is a Parent? A Socio-Legal Analysis* (Oxford: Hart Publishing, 1999) p 131 and pp 134–135, citing H Ragoné *Surrogate Motherhood. Conception in the Heart* (Oxford: Westview Press, 1994). For a comprehensive account of the historical development of the regulation of donor conception, see R Richards 'The development of governance and regulation of donor conception in the UK' in S Golombok et al (eds) *Regulating Reproductive Donation* (Cambridge: Cambridge University Press, 2016) pp 14–36.

¹³⁴Richards notes that anonymity served to protect donor interests, in order to protect them from obligations that historically flowed from genetic parenthood: Richards, above n 23, p 65. See further, the Warnock Report, above n 130, at para 4.10.

¹³⁵This ties in with the arguments that the overall statutory framework was heavily influenced by the binary, two-parent model of the traditional, nuclear family. See eg S Sheldon 'Fragmenting fatherhood: the regulation of reproductive technologies' (2005) 68(4) *Modern Law Review* 523 at 541, R Fenton et al 'Finally fit for purpose? The Human Fertilization and Embryology Act 2008' (2010) 32(3) *Journal of Social Welfare and Family Law* 275 at 279 and Brown, above n 61, at 37.

¹³⁶Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004, SI 2004/1511, reg 2(2).

¹³⁷*Ibid*, reg 2(3): the following information about the donor must be retained: full name, date of birth, appearance and last known address.

¹³⁸See further Richards, above n 23, p 37.

¹³⁹In contrast, a mandatory system of disclosure can be modelled on a narrative form of identity, whereby individuals are told of the nature of their birth and given the choice to pursue disclosure of origin information in line with the importance they attach to such information. See K Wade 'Reconceptualising the interest in knowing one's origins: a case for mandatory disclosure' (2020) 28(4) *Medical Law Review* 731.

¹⁴⁰This is also reflected in the use of donor matching to seek to ensure physical resemblance between parents and children. See N Hudson and L Culley 'Infertility, gamete donation and relatedness in British South Asian communities' in Freeman et al, above n 18, pp 237–240.

¹⁴¹See Wade, above n 139, at 746–748.

¹⁴²See the discussion of *MS v RS (Paternity)* [2020] EWFC 30, [2021] Fam 1 above in the 'Disputed paternity cases' subsection.

gamete donation, the law on parenthood became divorced from genetics with the introduction of the 1990 Act without sustained debate about the model of parenthood underpinning the Act and subsequently there have been slow developments to recognise the potential importance of genetic information for offspring's identity. If genetic links were truly constitutive of identity, as the paternity testing cases appear to suggest, then one might expect to have seen more debate around the acceptability of parenthood being separated from genetic links in the context of gamete donation, and, in addition, donor anonymity would arguably have been seen as unacceptable. The legal approach in this context, therefore, also indicates that there is no coherent concept of identity from which the rules attributing legal parenthood flow; rather, the concept is invoked to provide a veneer of normative support for decisions as to who the parents should be in the different legal contexts.

With that said, the paper will now briefly set out why the above lack of coherence is problematic and the reasons why it should be addressed, as well as offering some tentative and general suggestions as to how the judiciary, policymakers and Parliament could approach the determination and attribution of legal parenthood in a way that could result in less incoherence around the concept of identity.

4. Towards explicit recognition of the importance of different forms of parenthood

We have argued that the concept of 'identity' does not play a consistent role in the determination of legal parenthood across different contexts. However, this is not to say that we disagree with the various forms of parenthood that are recognised. In this paper, it is not our aim to criticise the separation of genetic connections from legal parenthood and the legal frameworks which have developed to accommodate intentional models of parenthood and diverse family forms in assisted reproduction and surrogacy. Rather, we argue that while these developments are welcome, the reliance on the concept of 'identity' as a normative justificatory underpinning for the determination of legal parenthood raises problems. First, legal parenthood is a legal construct¹⁴³ and, therefore, the foundations for its attribution and determination should be clear. Lack of clarity around a concept which appears to be invoked in order to provide normative force for judicial decisions regarding legal parenthood is unhelpful for future cases. Secondly, the current approach can lead to judgments which appear to be child-centred due to references to the 'identity of the child'. However, if the meaning of this concept is not clear there is an increased likelihood that decisions may *actually* be shaped by the interests of the adults involved. As noted, the meaning of the 'identity of the child' appears to be taken as self-evident in the above contexts and also appears to change without explanation across these legal contexts. However, a more truly child-centric approach would identify the relevant interests of the child and how these interests are protected by the attribution of legal parenthood in a particular way. Thirdly, we argue that addressing the current incoherence in the law is necessary because the current utilisation of an underdeveloped concept of 'identity' perpetuates the predominance of a geneticised understanding of paternity and of the binary, two-parent model of the nuclear family in legal discourse, without explicitly acknowledging that predominance. This is because, under the current legal framework, the invocation of the concept of the 'identity' of the child can fail to illustrate why different models of parenthood are considered to be important in their own right.¹⁴⁴ We argue that the continuing privileging of this family form is problematic and should be addressed by policy makers and the judiciary in order to ensure that the law reflects social developments which have resulted in a diverse range of family forms and parenthood models.

In our view, there are two general approaches that could be taken to seek to address this problem. First, both the judiciary and Parliament could be more explicit about the meaning of identity in each

¹⁴³Diduck, above n 47, at 462.

¹⁴⁴See K Horsey 'Challenging presumptions: legal parenthood and surrogacy arrangements' (2010) 22(4) Child and Family Law Quarterly 449, who argues that intentional parenthood should form the basis of the allocation of legal parenthood in surrogacy arrangements. This would allow for legal parenthood to be assigned to the intended parents pre-birth based upon their intention, thereby recognising the importance of their causative role in the birth of the child, for without their actions and motivations, no child would exist.

of the different contexts – they could state and discuss whether communal or individual identity is at issue, and whether this takes on a narrative and/or genetic meaning. However, there are problems with such an approach. As noted, ‘identity’ is a complex, subjective concept, with many different aspects that are shaped by cultural and societal forces, making it a difficult concept for either Parliament or the judiciary to define. Indeed, given the recognition of a subjective narrative understanding of identity formation, it is also questionable whether Parliament or the judiciary *should* seek to define such a concept in the determination of legal parenthood.

The second approach that could be taken would be for the judiciary, policymakers and Parliament to explicitly engage with the variety of parenthood models which are being legally recognised, and to set out the basis on which this recognition is grounded. In the case of judicial decision-making, instead of overreliance upon references to the child’s ‘identity’ to provide the appearance of a normative justification for decisions regarding legal parenthood, the justification could be based upon a more truly holistic analysis of the welfare of the child. Rather than the judicial invocation of identity as the apparent ‘reason’ why parenthood should be attributed in a certain way, judicial decisions could engage with the different reasons why legal parenthood should be attributed to particular individuals in different circumstances based upon a consideration of the various aspects of the child’s welfare. This could include how elements such as caregiving, intention and the genetic connections of the parents relate to the welfare of the child.¹⁴⁵ The child’s identity – whether it be based on intentional,¹⁴⁶ genetic or gestational links to parents – would most likely be part of such consideration but would not necessarily be the dominant and determinative factor within the understanding of their welfare and the allocation and determination of legal parenthood, as ‘identity’ appears to have become in the parental order cases. Such an alternative approach could potentially help to address the problems with the current approach by providing more coherent reasons for the allocation and determination of legal parenthood. Moreover, such an approach would recognise that the concept of ‘identity’ is multi-faceted, as it does not fix the concept of identity to any particular attributes of the parents, whether it be gestation, or genetics, or intention. This approach would be intended to give greater flexibility to judges to move away from the binary, two-parent model of the traditional, nuclear family where appropriate and to adapt to new developments in family formation.¹⁴⁷

Conclusion

We have argued that the concept of the ‘identity of the child’ has become increasingly prominent within judicial language regarding the determination of legal parenthood, with this prominence

¹⁴⁵To be clear, such an approach would not be about individual families having to justify their non-traditional forms and structures, but rather would explicitly acknowledge the actual basis upon which judgments are made.

¹⁴⁶The Law Commissions’ Joint Consultation Paper, above n 53, proposes the ‘new pathway’ to parenthood for some surrogacy arrangements in chapter 8. This ‘new pathway’ would result in legal parenthood from birth for intended parents. These proposals, if ultimately implemented, would reduce the divergence between eligible surrogacy arrangements and cases involving gamete donation under the 2008 Act, because intentional parenthood would be central to the attribution of legal parenthood in both contexts. However, the role of genetics would remain significantly different, as a genetic connection with one of the parents would be a requirement to access the ‘new pathway’ (subject to the potential exception in cases of ‘medical necessity’), whereas the 2008 Act explicitly privileges intentional parenthood over genetic parenthood.

¹⁴⁷Issues regarding the determination of legal parenthood and recognising the ‘identity’ of the child are clearly relevant in circumstances involving collaborative co-parenting and trans parenthood, although as yet these issues have not been subject to the same judicial consideration. See eg P Bremner ‘Collaborative co-parenting and heteronormativity: recognising the interests of gay fathers’ (2017) 29(4) Child and Family Law Quarterly 293 for consideration of cases involving collaborative co-parenting in multiple parent families. See *R (McConnell and YY) v Registrar General for England and Wales* [2020] EWCA Civ 559, [2020] 3 WLR 683 and A Brown ‘Trans parenthood and the meaning of “mother”, “father” and “parent”—*R (McConnell and YY) v Registrar General for England and Wales* [2020] EWCA Civ 559’ (2021) 29(1) Medical Law Review 157 regarding the legal approach to trans parenting and birth registration. However, full consideration of the role of ‘identity’ in these contexts is outside the scope of this paper.

being particularly evident in the parental order judgments.¹⁴⁸ However, we argued that consideration of other contexts, such as applications for declarations of parentage and the legislative scheme governing parenthood in cases involving gamete donation in the Human Fertilisation and Embryology Act 2008, shows that the concept of ‘identity of the child’ does not play a consistent role, nor is it given a consistent level of significance in the determination of legal parenthood. Relatedly, it does not appear that there is a consistent understanding of the substantive content of the concept of ‘identity’ itself within the law. However, we do not criticise the various legal frameworks which have developed to accommodate diverse models of parenthood. The capacity of the legal regime to respond dynamically to advances in reproductive technologies and to developments in family forms remains an ideal worth promoting. Rather, we argue that the concept of ‘identity’ is being invoked in an incoherent way. In particular, it is being used to imply that there is a normative coherence to the allocation and determination of legal parenthood across all contexts, whereas the reality is a piecemeal and pragmatic response to medical developments and changes in family forms, which continue to be underpinned by the binary, two-parent model of the traditional, nuclear family. We suggest that a preferable approach would be for either Parliament or the judiciary to articulate why a particular approach to parenthood promotes the welfare of the child, which will inevitably include aspects of their identity. We argue that a clearer articulation of the underlying basis upon which choices are being made in the construction of legal parenthood could lead to a more truly child-centred approach, which seeks to explicitly acknowledge the different relationships and attributes that underpin legal parenthood in the context of evolving family forms.

¹⁴⁸See eg *A v P (Surrogacy: Parental Order: Death of Applicant)* [2011] EWHC 1738 (Fam), [2012] 2 FLR 145; *Re X (A Child) (Parental Order: Time Limit)* [2014] EWHC 3135 (Fam), [2015] 1 FLR 349; and *Re A (A Child)* [2015] EWHC 911 (Fam), [2016] 2 FLR 530.